[2019] UKFTT 0242 (TC)

TC07088

Appeal number: 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 – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ATHOLL HOUSE PRODUCTIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MR DUNCAN MCBRIDE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 11 and 12 March 2019

Ms Rebecca Murray, instructed by Carter Backer Winter LLP, for the Appellant

Ms Elisabeth Roxburgh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to an appeal by the Appellant against:

(a) determinations of 24 October 2017 in respect of income tax payable by way of Pay As You Earn ("PAYE") under the Income Tax (PAYE) Regulations 2003 (2003/2682) (the "PAYE Regulations") (the "Determinations"); and

(b) a decision notice of the same date in respect of Class 1 National Insurance Contributions ("NI") payable under Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 (the "SSCTFA") (the "Notice").

2. Each of the Determinations and the Notice were made on the basis that 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.

3. Each of the Determinations and the Notice originally applied to four tax years of assessment – namely, the tax years of assessment ending 5 April 2014, 5 April 2015, 5 April 2016 and 5 April 2017. However, in their skeleton argument of 22 February 2019, the Respondents indicated that they no longer wished to oppose the appeal of the Appellant to the extent that the appeal related to the first two of those tax years of assessment. Accordingly, the amounts of PAYE and NI which remain in issue between the parties are as follows:

Tax year of assessment ending	PAYE	NI
5 April 2016	£43,636.60	£22,744.57
5 April 2017	£37,514.00	£20,546.41

4. There is no dispute between the parties in relation to the amounts set out in the above table, assuming that IR35 did apply to the Appellant in relation to the tax years of assessment in question. Similarly, there is no dispute between the parties as to the validity of the Determinations and the Notice assuming that IR35 did apply to the Appellant in relation to the tax years of assessment in question. The only issue between the parties is whether the conclusion on which the Determinations and the Notice are based – namely, that IR35 applied to the Appellant in relation to the tax years of assessment in question - is correct. In that regard, the burden of proof is on the Appellant to show that the conclusion is incorrect.

Background

5. The background to the present appeals is as follows.

6. The Appellant is the personal service company of Ms Kaye Adams, who performs services for the BBC and other media organisations. Ms Adams started her career with Central Television in 1984 and has been a freelance journalist since the mid-1990s. Her work other than for the BBC has included appearances on TV in programmes such as "Loose Women" on ITV and the newspaper review on Sky, together with columns for various newspapers and magazines such as The Daily Mirror, The Sunday People and No 1 magazine. In addition, Ms Adams has worked extensively in the corporate sector, hosting events and awards evenings and giving presentations. Ms Adams also has a significant social media profile and has written two books in collaboration with her friend and colleague, Ms Nadia Sawalha.

7. So far as the BBC is concerned, during the two tax years of assessment to which the appeal relates, Ms Adams presented a programme on BBC Radio Scotland called "The Kaye Adams Programme". The show ran for three hours on each weekday morning, between 9 am and noon, with a phone-in for the first hour and items of topical interest thereafter. During the two tax years of assessment in question, Ms Adams provided her services to the BBC pursuant to two agreements between the BBC and the Appellant. At the hearing, we were provided with the terms 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 agreement and the parties informed us at the 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.

The relevant legislation

8. Chapter 8 of Part 8 to the ITEPA 2003 deals with the provision of services through an intermediary.

9. Sections 49 to 51 of the ITEPA 2003 provide as follows:

"49 Engagements to which this Chapter applies

(1) This Chapter applies where—

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

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

(c) the circumstances are such that, 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.

(2). . . . . .

(3) The reference in subsection (1)(b) to a "third party" includes a partnership or unincorporated body of which the worker is a member.

(4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

(5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1).

50 Worker treated as receiving earnings from employment

(1) If, in the case of an engagement to which this Chapter applies, in any tax year—

(a) the conditions specified in section 51, 52 or 53 are met in relation to the intermediary, and

(b) the worker, or an associate of the worker—

(i) receives from the intermediary, directly or indirectly, a payment or benefit that is not employment income, or

(ii) has rights which entitle, or which in any circumstances would entitle, the worker or associate to receive from the intermediary, directly or indirectly, any such payment or benefit,

the intermediary is treated as making to the worker, and the worker is treated as receiving, in that year a payment which is to be treated as earnings from an employment ("the deemed employment payment").

(2) A single payment is treated as made in respect of all engagements in relation to which the intermediary is treated as making a payment to the worker in the tax year.

(3) The deemed employment payment is treated as made at the end of the tax year, unless section 57 applies (earlier date of deemed payment in certain cases).

(4) In this Chapter "the relevant engagements", in relation to a deemed employment payment, means the engagements mentioned in subsection (2).

51 Conditions of liability where intermediary is a company

(1) Where the intermediary is a company the conditions are that the intermediary is not an associated company of the client that falls within subsection (2) and either—

(a) the worker has a material interest in the intermediary, or

(b) the payment or benefit mentioned in section 50(1)(b)—

(i) is received or receivable by the worker directly from the intermediary, and

(ii) can reasonably be taken to represent remuneration for services provided by the worker to the client.

(2) An associated company of the client falls within this subsection if it is such a company by reason of the intermediary and the client being under the control—

(a) of the worker, or

(b) of the worker and other persons.

(3) A worker is treated as having a material interest in a company if—

(a) the worker, alone or with one or more associates of the worker, or

(b) an associate of the worker, with or without other such associates,

has a material interest in the company.

(4) For this purpose a material interest means—

(a) beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5% of the ordinary share capital of the company; or

(b) possession of, or entitlement to acquire, rights entitling the holder to receive more than 5% of any distributions that may be made by the company; or

(c) where the company is a close company, possession of, or entitlement to acquire, rights that would in the event of the winding up of the company, or in any other circumstances, entitle the holder to receive more than 5% of the assets that would then be available for distribution among the participators.

(5) In subsection (4)(c) "participator" has the meaning given by section 417(1) of ICTA."

10. In this case, it is common ground that, in respect of the two tax years of assessment in question:

(a) Ms Adams personally performed services for the BBC (so that Section 49(1)(a) of the ITEPA 2003 was satisfied);

(b) those services were provided not under a contract directly between the BBC and Ms Adams but instead under arrangements involving the Appellant (so that Section 49(1)(b) of the ITEPA 2003 was satisfied);

(c) the Appellant was not an associated company of the BBC and Ms Adams had a material interest in the Appellant (so that the conditions in Section 51 of the ITEPA 2003 were met in relation to the Appellant); and

(d) Ms Adams either received from the Appellant, or had rights which entitled (or in certain circumstances would have entitled) her to receive from the

Appellant a payment or benefit which was not employment income (so that, if Ms Adams had an engagement to which the Chapter applied, then, under Section 51 of the ITEPA 2003, the Appellant was required to be treated as making to Ms Adams, and Ms Adams was required to be treated as receiving from the Appellant, a payment which was to be treated as earnings from employment.)

11. It therefore follows that the only question which is in issue between the parties in relation to the application of Chapter 8 of Part 8 to the ITEPA 2003 is whether Section 49(1)(c) of the ITEPA 2003 was satisfied in relation to the two tax years of assessment in question – namely, whether, if the services supplied by Ms Adams to the BBC had been supplied under a contract directly between Ms Adams and the BBC, Ms Adams would have been regarded for income tax purposes as an employee of the BBC.

12. Both parties agree that, in this context, despite some differences in the wording, the relevant NI legislation gives rise to precisely the same tests as the legislation set out above. That legislation is as follows.

13. Section 8 of the SSCTFA provides that "it shall be for an officer of the Board … to decide such issues relating to contributions… as may be prescribed by regulations made by the Board."

14. Regulations 5 and 6 of the 2000 Regulations provide as follows:

"Meaning of intermediary

5.—(1) In this Part "intermediary" means any person, including a partnership or unincorporated association of which the worker is a member–

(a) whose relationship with the worker in any tax year satisfies the conditions specified in paragraph (2), (6), (7) or (8), and

(b) from whom the worker, or an associate of the worker–

(i) receives, directly or indirectly, in that year a payment or benefit that is not chargeable to tax as employment income under ITEPA 2003, or

(ii) is entitled to receive, or in any circumstances would be entitled to receive, directly or indirectly, in that year any such payment or benefit.

(2) Where the intermediary is a company the conditions are that–

(a) the intermediary is not an associated company of the client, within the meaning of section 416 of the Taxes Act, by reason of the intermediary and the client both being under the control of the worker, or under the control of the worker and another person; and

(b) either–

(i) the worker has a material interest in the intermediary, or

(ii) the payment or benefit is received or receivable by the worker directly from the intermediary, and can reasonably be taken to represent remuneration for services provided by the worker to the client.

(3) A worker is treated as having a material interest in a company for the purposes of paragraph (2)(a) if–

(a) the worker, alone or with one or more associates of his, or

(b) an associate of the worker, with or without other such associates,

has a material interest in the company.

(4) For this purpose a material interest means–

(a) beneficial ownership of, or the ability to control, directly or through the medium of other companies or by any other indirect means, more than 5 per cent. of the ordinary share capital of the company; or

(b) possession of, or entitlement to acquire, rights entitling the holder to receive more than 5 per cent. of any distributions that may be made by the company; or

(c) where the company is a close company, possession of, or entitlement to acquire, rights that would in the event of the winding up of the company, or in any other circumstances, entitle the holder to receive more than 5 per cent. of the assets that would then be available for distribution among the participators.

In sub-paragraph (c) “close company" has the meaning given by sections 414 and 415 of the Taxes Act, and “participator" has the meaning given by section 417(1) of that Act…

Provision of services through intermediary

6.—(1) This Part applies where–

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

(aa) the client is not a public authority,

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

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

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

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

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

(2A) Holding office as a statutory auditor of the client does not count as the worker being the holder of an office with the client for the purposes of paragraph 6(2)(b).

(3) Where these Regulations apply–

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

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

and Parts I to V of that Act have effect accordingly.

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

15. It can be seen that, pursuant to Regulation 6 of the 2000 Regulations, the issue which needs to be determined is whether, if the services supplied by Ms Adams to the BBC had been supplied under a contract directly between Ms Adams and the BBC, Ms Adams would have been regarded for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 as employed in employed earner's employment by the BBC.

The relevant case law

16. We would start this section of our decision by noting that, for the most part, there is no disagreement between the parties as to how the prior cases in this area of tax law are to be interpreted. Instead, their disagreement stems largely from their respective views on how the principles which are set out in those prior cases are to be applied to the facts in this case. However, where there is a disagreement between the parties in relation to the interpretation of the prior cases, we will note it in the paragraphs which follow and then set out our conclusion in relation to that disagreement.

17. The starting point in any examination of the relevant case law must be to the statement made by Robert Walker LJ in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 to the effect that the purpose of the IR35 legislation is "to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation". It follows that, if, once

one ignores the corporate structure (ie the tripartite nature of the arrangement) which actually exists in this case (as Section 49(1)(c) of the ITEPA 2003 and Regulation 6(1)(c) of the 2000 Regulations require), the relevant worker should be regarded as an employee of the client, then the IR35 legislation is in point.

The hypothetical contract

18. In his decision in the High Court in *Usetech Ltd v Young* [2004] TC 811 ("*Usetech HC*"), Park J stated that:

"A more general point of construction is worth spelling out at this stage. The conditions of [Sections 49(1)(a) and 49(1)(b) of the ITEPA 2003] involve an analysis of the actual facts and legal relationships, but when that analysis shows that those two [Sections] are satisfied [Section 49(1)(c) of the ITEPA 2003] involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain…" (see paragraph [9] in *Usetech HC*).

The appropriate approach to construction

19. In constructing the terms of that hypothetical contract, Special Commissioner Colin Bishopp, at first instance in *Usetech Ltd v Young* [2004] STC (SCD) 213 (*Usetech SC*"), noted that:

"I agree with the view expressed in *Lime-IT Ltd v Justin* (*Officer of the Board of Inland Revenue*) [2003] STC (SCD)15 that, while the 'contract' between the client and the worker may be hypothetical, it is necessary to consider the actual, rather than any hypothetical, facts of the case" (see paragraph [8] in *Usetech SC*),

whilst Park J in the High Court in that case observed that, in a tripartite arrangement involving just two contracts - which are the facts in the present appeal but were not the facts in that case - the contract by reference to the contents of which the terms of the hypothetical contract are to be determined is the contract between the end-user (in this case, the BBC) and the service company (in this case, the Appellant).

20. In that regard, Park J said:

"The structure primarily contemplated by the legislation seems to me to be one where there are two contracts: the first is a contract of service, written or oral, between the worker and his one-man service company (the equivalent of Usetech), and the second is a contract between the service company and the end user (the equivalent of ABB) for the service company to furnish the personal services of the worker to the end user. In a case which is as straightforward as that I think that the contents of the notional contract between the worker and the end user will be fairly obvious: they will be based on the contents of the second contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user" (see paragraph [36] in *Usetech HC*).

21. The parties are agreed in relation to the approach described in paragraphs 19 and 20 above. They agree that the terms of the hypothetical contract between the end

user and the worker should be based on the actual facts – namely, the terms of the actual agreement between the service company and the end user.

22. However, the parties do part ways in relation to the extent to which the terms of any written agreement which existed between the service company and the end user are to be treated as constituting the terms of the actual agreement which existed between those two entities.

23. The leading case in relation to this question is the decision of the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41 ("*Autoclenz*"). In her closing submission, Ms Roxburgh referred us to paragraph [25] of the decision in *Autoclenz*, in which Lord Clarke (with whom the other members of the Supreme Court agreed) cited, with approval (see paragraph [29] in *Autoclenz*), the following extract from the judgment of Elias J in *Consistent Group Limited v Kalwak* [2007] IRLR 560 ("*Kalwak*"):

"57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697G)

'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'

58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

24. Ms Roxburgh submitted that the above words meant that the fact that a right which was contained in the written agreement between the service company and the end user had never been exercised did not mean that that right could not be treated as forming part of the actual agreement between the two parties if the clause giving rise to that right "genuinely reflect[ed] what might realistically be expected to occur". In Ms Roxburgh's view, the only terms of the written agreement which might be disregarded in this way were those which amounted to a sham or were contemplating an "unrealistic possibility".

25. In response, Ms Murray pointed out that the above extract was just part of a much longer exposition by Lord Clarke of the circumstances in which the terms of a written agreement may be disregarded. Ms Murray submitted that that exposition made it clear that the circumstances in which it was permissible to disregard a right which was set out in a written agreement were much broader than simply cases of sham or unrealistic possibilities. In her view, it was necessary in each case to consider all of the evidence to determine whether a right which was set out in a written agreement was in fact a true term of the actual agreement.

26. Given the significance of this issue to the question which is at the heart of the appeal, we have set out the relevant paragraphs of Lord Clarke's judgment in full below. Lord Clarke said as follows:

"[20] The essential question in each case is what were the terms of the agreement. The position under the ordinary law of contract is clear. It was correctly summarised thus by Aikens LJ in the Court of Appeal:

"87 . . . Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any additional oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract: see eg *L'Estrange v Graucob* [1934] 2 KB 394. If a party has not signed a contract, then there are the usual issues as to whether he was made sufficiently aware of the clauses for a court to be able to conclude that he agreed to the terms in them. That is not an issue in this case.

88 Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.

89 Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties, the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract. See, generally, the discussion in the speech of Lord Hoffmann, 48 to 66, in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 with whom all the other law lords agreed…."

[21] Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken. Again, Aikens LJ put it correctly in the remainder of para 89 as follows:

"But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. But in each case the question the court has to answer is: what contractual terms did the parties actually agree?"

[22] In this context there are three particular cases in which the courts have held that the ET should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship: *Consistent Group Ltd v Kalwak* ("*Kalwak*") [2007] IRLR 560 in the EAT (but cf [2008] EWCA Civ 430, [2008] IRLR 505 in the Court of Appeal), *Firthglow* **Ltd** *(t/a Protectacoat) v Szilagyi ("Szilagyi")*[2009] EWCA Civ 98, [2009] ICR 835 and the Court of Appeal decision in the present case.

[23] Those cases must be set in their historical context, which includes *Snook v London and West Riding Investments* **Ltd** *("Snook*") [1967] 2 QB 786, [1967] 1 All ER 518 , [1967] 2 WLR 1020 and *Tanton*. Although *Snook* was not an employment case but arose out of the hire purchase of a car, I refer to it because of the statement of Diplock LJ, which has been often

referred to in the employment context. He said this at p 802 with reference to the suggestion that the transaction between the parties was a sham:

"I apprehend that, if it [ie the concept of sham] has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities . . . that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

I would accept the submission made on behalf of the Claimants that, although the case is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement. That can be seen in the context of landlord and tenant from *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, [1985] 2 WLR 877 and *Antoniades v Villiers* [1990] 1 AC 417, [1988] 3 All ER 1058, [1988] 3 WLR 1205, especially per Lord Bridge at p 454, Lord Ackner at p 466, Lord Oliver at p 467 and Lord Jauncey at p 477. See also in the housing context *Bankway Properties **Ltd** v Pensfold-Dunsford* [2001] EWCA Civ 528, [2001] 1 WLR 1369, [2001] 2 EGLR 36 per Arden LJ at paras 42 to 44.

[24] Those cases were examples of the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result. The same approach underlay the reasoning of Elias J in *Kalwak* in the EAT, where the questions were essentially the same as in the instant case. One of the questions was whether the terms of the written agreement relating to the right to refuse to work or to work for someone else were a sham. Elias J referred to part of the judgment in *Snook* quoted above at para 53. At para 56 he noted that in *Tanton* Peter Gibson LJ had recognised (at p 697G) that such terms might be a sham. He also noted that the Court of Appeal had emphasised that the question whether there was an obligation personally to perform the work had to be determined by asking what legal obligations bound the parties rather than by asking how the contract was actually carried out. The employer's appeal in *Tanton* was allowed on the ground that the ET wrongly drew an inference from the way the contract was carried out.

[25] At paras 57 – 59 Elias J said this:

"57 The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697G) 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'

58 In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

59 . . . Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

[26] There is in my opinion considerable force in the approach set out in those paragraphs. Elias J dismissed the employer's appeal from the ET but his decision was reversed by the Court of Appeal, comprising May, Rimer and Wilson LJJ. The differences between the reasoning of Elias J and that of the Court of Appeal were discussed in some detail by the Court of Appeal in the later case of *Szilagyi* (comprising Sedley, Keene and Smith LJJ) and indeed by the Court of Appeal in this case. In *Szilagyi* the court was considering similar questions. The principal question was whether written partnership agreements were a sham. The principal judgment was given by Smith LJ.

[27] Smith LJ referred to the dicta of Diplock LJ in *Snook*. She also referred in detail to *Kalwak* in the EAT and in the Court of Appeal, and to *Tanton*. She quoted para 58 from Elias J's judgment in *Kalwak* which I have set out above. At para 48 she noted that in the Court of Appeal Rimer LJ scrutinised Elias J's judgment and was critical of the reasoning by which he had upheld the ET's decision. However, she added that the court allowed the appeal on the ground that the ET's decision was inadequately reasoned and remitted the case for rehearing. She then said that it did not appear to her that the court was critical of Elias J's test and added that it seemed to her that Rimer LJ approved that test as being in compliance with Diplock LJ's definition of a sham.

[28] For my part, I am not persuaded that that is so. It appears to me that the reasoning of Rimer LJ and that of Elias J are not consistent. In this regard I agree with the view of Judge Clark to that effect in the EAT. See also a valuable article by Alan Bogg in (2010) 126 LQR 166, 167-168. Rimer LJ said at para 28 in *Kalwak* that a finding that the contract was in part a sham required a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. He was there applying the approach of Diplock LJ in *Snook* to this situation. In my opinion that is too narrow an approach to an employment relationship of this kind. In this regard I agree with the views expressed by ACL Davies in an illuminating article entitled *Sensible Thinking About Sham Transactions* in (2009) 38 ILJ 318, which was a note on *Szilagyi* published before the decision of the Court of Appeal in the instant case.

[29] However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Kalwak* and of the Court of Appeal in *Szilagyi* and in this case to that of the Court of Appeal in *Kalwak.* The question in every case is, as Aikens LJ put it at para 88 quoted above, what was the true agreement between the parties. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak*, of Smith and Sedley LJJ in *Szilagyi* and this case and of Aikens LJ in this case."

[30] In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of looking at the reality of the obligations and in para 58 to the reality of the situation. In this case Smith LJ quoted (at para 51) para 50 of her judgment in *Szilagyi*:

"51 The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by.

[31] She added in paras 52, 53 and 55:

"52. I regret that that short paragraph requires some clarification in that my reference to 'as time goes by' is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.

53. In my judgment the true position, consistent with *Tanton, Kalwak* and *Szilagyi,* is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right….

55. It remains to consider whether the EJ directed himself correctly when he considered the genuineness of the written terms. I am satisfied that he directed himself correctly in accordance with, although in advance of, *Szilagyi*. In effect, he directed himself that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the written contract had not in fact been exercised did not mean that they were not genuine rights."

[32] Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in *Szilagyi* and in paras 47 to 53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

"What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

I agree.

[33] At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

"recognising as it does that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract."

I agree.

[34] The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

"92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent

the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ..."

[35] So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

27. It can be seen from the above that Lord Clarke, with whom the other members of the Supreme Court agreed, was making the following five points:

> (a) first, as a matter of general contractual law, a party will be bound by a term of a written agreement unless that party is able to show that, because of a mistake, the relevant term does not reflect what was agreed by the parties and therefore rectification of the agreement is appropriate;
>
> (b) secondly, in the case of contracts concerning work and services, where a party alleges that a term of a written agreement does not reflect what was agreed by the parties, rectification principles are not in point because it is not generally alleged that there has been a mistake in setting out the terms. Thus, in such cases, the question which the court has to answer is what contractual terms did the parties actually agree?
>
> (c) thirdly, whilst a court may disregard a term of a written agreement if the parties have conspired to misrepresent the true contract to a third party, that is not the only circumstance in which a court may do that. In each case, the court needs to identify the terms of the actual agreement between the parties;
>
> (d) fourthly, in order to achieve that end, the court must examine all of the relevant evidence. That will include the term of the written agreement and evidence as to how the parties to the agreement conducted themselves in practice and what their expectations of each other were; and
>
> (e) finally, the fact that a right set out in a written agreement has not been exercised in practice does not necessarily mean that that right does not exist.

28. Although Lord Clarke, in the course of his decision, expressed his approval of the approach adopted by Elias J in *Kalwak* - see paragraph [29] of the decision - his analysis as a whole shows that he was not limiting the circumstances in which a court can disregard a term of a written agreement to those where the term in question is a sham or is contemplating an unrealistic possibility. Instead, he was saying that a court needs to consider all of the evidence to determine whether the term reflects the actual agreement between the parties. It is perfectly possible that that evidence will show that a term which is not a sham and does contemplate a realistic possibility nevertheless does not form part of the actual agreement between the parties.

29. For the above reason, we prefer the submissions of Ms Murray to those of Ms Roxburgh in this regard. It is quite clear from the Supreme Court decision in *Autoclenz* that the correct approach to adopt in all cases is to identify the actual legal obligations of the parties and that, in carrying out that exercise, the relevant court or tribunal must examine all of the relevant evidence. That evidence will obviously

include the terms of any written agreement which may have been executed by the parties but it will also include evidence of how the parties conducted themselves in practice. The latter evidence may be so persuasive that the relevant court or tribunal can infer that the practice of the parties, where it is contrary to the terms of the written agreement, accurately reflects the terms of the actual agreement between the parties.

30. It follows that to say that the term of any written agreement must necessarily be regarded as being a term of the actual agreement unless it is a sham or is contemplating an unrealistic possibility is too restrictive an approach. It involves giving too much force to the terms of the written agreement at the expense of other evidence which may be compelling in demonstrating that the actual agreement between the parties did not in fact contain that term.

31. Notwithstanding the above, in conducting this process, the relevant court needs to be mindful of the warning given by Smith LJ in paragraph [53] of the Court of Appeal decision in *Autoclenz* that "the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations" created by the actual contract. For example, one should not inevitably draw the conclusion that a right set out in the written agreement was not part of the actual agreement simply because it was not exercised. The fact that it was not exercised does not of itself mean that it was not part of the actual agreement between the parties giving rise to genuine rights and obligations.

32. The ramifications of this conclusion are addressed below, in the section of this decision which identifies the terms of the actual agreement between the BBC and the Appellant.

33. For completeness, we should note that the issue which we are addressing in this context is that of identifying whether the terms of each written agreement between the BBC and the Appellant accurately reflected the terms of the related actual agreement which had been reached by the BBC and the Appellant in the first place and not whether the parties may, following the inception of each actual agreement on the terms set out in the related written agreement, have agreed to vary one or more of those terms. The latter question has been addressed by the Supreme Court in its recent decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 ("*Rock*") and it is apparent from that decision that different considerations apply in a case where a contract is alleged to have been amended. In particular, the Supreme Court held in *Rock* that a contract which stipulates that it cannot be amended except in writing - which is the situation in relation to each written agreement between the BBC and the Appellant in this case - can be amended only by way of a subsequent written agreement between the parties.

A contract for services or a contract of service

34. Once the terms of the actual agreement between the service company and the end user (and, hence, the terms of the hypothetical contract between the end user and the worker) in each particular case have been determined, it is necessary to consider whether those terms are such that the hypothetical contract amounts to a "contract for services" (entered into by a self-employed individual in the course of carrying on business on his or her own account) or a "contract of service" (ie an employment contract).

35. A number of general observations may be made in this regard.

36. First, the approach which needs to be adopted is the one described by Nolan LJ in *Hall v Lorimer* [1994] WLR 209 ("*Hall*") at page 216, citing the judgment of Mummery J at first instance in that case) to the following effect:

"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J said in *Walls v Sinnett (Inspector of Taxes)* [1986] STC 236 at 245: "It is, in my judgment, impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight was given by another tribunal to the common facts. The facts as a whole must be looked at, and a factor which may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case.""

37. In other words, the relevant court or tribunal must eschew the purely mechanical exercise of running through items on a checklist and instead stand back and make an informed, considered, qualitative appreciation of the whole. In doing so, as Vinelott J observed in *Walls v Sinnet* [1987] STC 236 at page 245F, because each case turns on its own specific facts, no assistance is gained by comparing the facts in one case with the facts in another because the facts that may be compelling in one case may not be compelling in the context of another.

38. In that regard, Nolan LJ in *Hall* noted that the test which had been applied in many cases, of whether the individual in question was carrying on business on his own account, "may be of little assistance in the case of one carrying on a profession or vocation." He went on:

"A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business. For my part I would suggest there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular pay master for the financial exploitation of his talents may well be significant."

39. Secondly, in the context of a person whose work involves a series of engagements with different end users, the judgment of Nolan LJ in *Hall* is again instructive. In discussing whether it was still appropriate following a change in law in 1956 to regard a contract of employment as being analogous to a contract giving rise to a "post", as had been held by Rowlatt J in *Davies v Braithwaite* [1931] 2 KB 628 ("*Davies*"), Nolan LJ agreed that "Rowlatt J's conception of a "post", if by that is meant something which could be filled by successive holders, is therefore no longer a helpful analogy in deciding whether or not an employment exists. But his judgment continued:

'When a person occupies a post resting on a contract, and if then that is employment as opposed to a mere engagement in the course of carrying on a profession, I do not think that is a very difficult term of distinction, though perhaps a little difficult to apply to all cases. But I would go further than that and say that it seems to me that where one finds a method of earning a livelihood which does not consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other—and in the case of an actor's or actress's life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining one engagement, then another, and a whole series of them—then each of those engagements cannot be considered an employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments. In this case I think it is quite clear that the respondent must be assessed to income tax under Sch. D, because here she does not make a contract with a producer for a post. She makes a contract with a producer for the next thing that she is going to do, and then with another producer, and then a third producer, and at any time she may make a record for a gramophone company or act for a film. I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career.'

In *Fall v Hitchen* at page 295 of the report Sir John Pennycuick quoted that passage and continued:

'In that judgment, Rowlatt J holds that the word "employment" means a post, and distinguishes it from a succession of engagements made in the course of carrying on a profession. He then goes on to hold that, on the particular facts of that case, Miss Braithwaite did not hold any post and that none of her particular engagements could be treated as a post, but that on the contrary all her successive engagements must be treated as incidents in the conduct of her profession. The learned judge nowhere says that if an actor enters into a contract in such terms as to amount to what he calls a post, then that actor is not chargeable under Sch E but under Sch D. On the contrary, it is implicit in the whole of his judgment, it seems to me, that if a professional person, whether an actor or anybody else, enters into a contract involving what the learned judge calls a post, then that person will be chargeable in respect of the income arising from the post under Sch E notwithstanding that he is at the same time carrying on his profession, the income of which will be chargeable under Sch D. The instance of a musician puts that point very neatly. I do not think that most people today would use the word "post", which does not seem very apt to cover the countless instances of employment in the sense of a contract of service; but every word of that judgment is applicable as between the carrying on of a profession and an engagement in the course of carrying on that profession, on the one hand, and a contract of employment, on the other hand.'

With those words of Pennycuick V-C I would respectfully agree..."

40. It is clear from these words that a worker whose working life generally involves entering into a series of engagements in the course of self-employment is not precluded 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 worker's being an employee. In *Fall v Hitchen* [1973] 1 WLR 286 ("*Fall*"), a taxpayer who generally carried on business on his own account as a dancer and entered into a contract with Sadler's Wells as an interim measure was held to have been an employee under that contract.

41. Whilst the circumstances in *Fall* involved successive engagements, the same is also true in relation to engagements which are concurrent. Thus, it does not automatically follow that just because, at any particular time, a worker's engagements

with end users generally amount to self-employment, the relevant worker's engagement with a particular end user cannot amount to an employment contract, and vice versa. For example, in *Sidey v Phillips* [1987] STC 87, the taxpayer's income from carrying on his profession as a barrister was taxable under Schedule D as income from self-employment but his fees from part-time lecturing were held to constitute employment income.

42. Thirdly, a statement in a contract disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement – see the judgment of Henderson J in *Dragonfly Consultancy Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2008] EWHC 2113 (Ch) ("*Dragonfly*"). Henderson J noted that, as had previously been stated in, for example, *Ready Mixed Contract (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*"), in borderline cases, a statement as to the parties' intentions might help to tip the balance one way or another but, in the vast majority of cases, this was not the case. He added that, in a case such as the one he was considering (which also concerned a services company providing the services of the worker to the end user), such a statement was even less likely to be relevant because the tripartite nature of the arrangement meant that one was necessarily constructing the terms of the hypothetical contract between the end user and the worker and not considering the terms of an actual agreement. But he went on:

> "55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

Features of an employment contract

43. In addition to the general observations set out above, the case law provides valuable guidance in relation to the factors which point to the conclusion that a particular contract is an employment contract and not a contract for services.

44. The traditional definition of an employment contract is the one set out by MacKenna J in *RMC* at page 515, as follows:

"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.

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."

45. It has been said in later cases that the first two conditions set out above amount to an "irreducible minimum by way of legal requirement for a contract of employment to exist" (see Buckley J, Longmore LJ and Brooke LJ in *Montgomery v Johnson Underwood Ltd and another* [2001] ICR 819 ("*Montgomery*") at paragraphs [23], [46] and [47] and Stephenson LJ in *Nethermere (St Neots) Ltd v Gardiner [*1984] ICR 612 at page 623).

Mutuality of obligation

46. The first of MacKenna J's three conditions is commonly termed "mutuality of obligation". In order for a contract to be an employment contract, there should be an obligation on the part of the putative employer to provide work and an obligation on the part of the putative employee to accept work. A feature of an employment contract is that the employer is obliged to pay the employee regardless of whether or not the services in question are performed – see Sir Christopher Slade in *Clark v Oxfordshire Health Authority* 41 BMLR 18 at page 30, *Carmichael v National Power PLC* [1999] ICR 1226 ("*Carmichael*") at page 1230G, *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651 at paragraphs [9] and [10] and *Usetech (HC)* at paragraph [64].

47. Another feature of the "mutuality of obligation" is that it generally involves a requirement that the employee performs the work in question personally (leaving aside a limited or an occasional power of delegation). In other words, an unrestricted right to provide a substitute is inconsistent with a contract of employment – see *Weightwatchers UK Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2012] STC 265 at paragraph [37].

Control

48. The second of MacKenna J's three conditions refers to the right of the putative employer to control how, what, where and when the work which is to be carried out by the putative employee is conducted. A right to exercise that control is indicative of a contract of employment. In that regard:

> (a) as noted in paragraph 31 above, it does not matter whether the right is actually exercised as long as it is in fact a term of the actual agreement (see *Autoclenz* at paragraph [31]);
>
> (b) it is apparent from the Court of Appeal decision in *Troutbeck SA v White & Anor* [2013] EWCA Civ 1171 ("*Troutbeck*") that what matters is not whether, in practice, the putative employee has day-to-day control over his or her work but rather whether the putative employer has control

under the terms of the actual agreement – see paragraphs [7], [16] to [19], [37] and [38] of the decision;

(c) it has been held in some of the older cases that, if all or a significant number of the terms of an agreement between a putative employer and a putative employee who is a professional or has great skill and experience point towards the agreement's constituting an employment contract, then those factors cannot be outweighed by a lack of control – see Lord Parker CJ in *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576 at page 581H, referring to earlier decisions by Lord Somervell in *Cassidy v The Minister of Health* [1951] 2 KB 343 and Lord Denning in *Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101, C.A.; and

(d) however, those cases preceded the formulation of McKenna's tripartite test in *RMC* and, as noted in paragraph 45 above, the second limb of that test – the right to control the putative employee - has subsequently been described in at least two Court of Appeal decisions as forming part of an "irreducible minimum by way of legal requirement for a contract of employment to exist". It would therefore seem that the better view in this context is the one expressed by Buckley J in *Montgomery* at paragraph [19], to the effect that "some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment".

The other provisions of the contract

49. Even if the terms of the hypothetical contract satisfy the first two conditions laid down by MacKenna J in *RMC* as being required in order for a contract to amount to a contract of service, it will not be treated as such a contract if the other terms of the hypothetical contract are inconsistent with that analysis.

50. In this regard, the cases have identified a number of features which can be said to typify a contract of service, such as the provision by the putative employer of the equipment needed in order to fulfil the terms of the agreement, the provision by the putative employer of clothing (such as a uniform) and the provision by the putative employer of the benefits which one would normally associate with ongoing employment, such as holiday and sick pay, maternity leave and an entitlement to a pension.

51. We would make the following observations in this regard:

(a) first, in the current age of flexible working, when employees frequently work from home, using their own equipment, the fact that a putative employee fulfils the terms of the agreement by working from home and using his or her own computer is not as potent a contra-indicator of employment status as it once was;

(b) similarly, whilst requiring the putative employee to wear a uniform would be consistent with employment status, the contrary cannot be said to indicate very much; as many employees wear their own clothes to work, the fact that a putative employee wears his or her own clothes when

fulfilling the terms of an agreement cannot be said to indicate that the agreement is not an employment contract; and

(c) the same cannot be said about holiday and sick pay, maternity leave and an entitlement to a pension. These are all common features of an employment contract and therefore their absence from a contract would generally be regarded as being inconsistent with the conclusion that the contract is a contract of service.

The evidence

52. For the purposes of the 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 is a senior content producer on morning radio programmes – and Mr Adonis Zanettos – Ms Adams's accountant - and we heard oral evidence at the hearing from each of Ms Adams, Mr Paterson and Mr Zanettos.

53. We were also provided with:

(a) copies of the two written agreements to which we have referred in paragraph 7 above;

(b) 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

(c) 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.

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

The written agreements

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

(a) 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);

(b) 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);

(c) 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

- the Appellant had entered into the written 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");
- she would make herself available to complete such editorial training as the BBC might from time to time require;
- 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;
- 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
- 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);

(d) 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:

- 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
- 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 7 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);

(e) 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);

(f) 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);

(g) 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);

(h) 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);

(i) 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);

(j) 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 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);

(k) it specified that:

- 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]";
- 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

- 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);

(l) it specified that Ms Adams would

- 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");
- complete such editorial training as the BBC might from time to time require;
- not include in her contributions "remarks or interjections that the BBC has asked or may ask [Ms Adams] to avoid";
- 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;
- 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
- not act in a way which could be regarded as bullying or harassment,

(clause 9.4 of Part B);

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

- none of the contributions would infringe any person's intellectual property rights or bring the BBC into disrepute;
- neither the Appellant nor Ms Adams would do anything which might expose the BBC to civil or criminal proceedings;
- 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;

- 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]";
- 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;
- 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;
- 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;
- 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 written agreement,

  and 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);

(n) it provided for the BBC to have the right to terminate the written 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);

(o) 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 56(d) 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);

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

- for up to 3 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
- 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);

(q) it contained an acknowledgment from both parties to the written 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);

(r) 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);

(s) 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

(t) 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).

56. Now that we have summarised the material terms of the written agreements, we turn to the evidence which was provided by the witnesses. We consider that it is 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. Where a specific extract from that material is pertinent to the evidence given by a witness, we will refer to it in our summary of the relevant witness's evidence.

The witness evidence

57. The material parts of Ms Adams's evidence may be summarised as follows:

(a) 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;

(b) 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 the BBC 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;

(c) 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 Alison Denver 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;)

(d) 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 am;

(e) 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;

(f) 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;

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

(h) none of the agreements which were pertinent to the appeal 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;

(i) 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 3 weeks as a result. The BBC did not pay her for the programmes which she had missed during the period of her suspension;

(j) 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";

(k) 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 her 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;

(l) 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;

(m) 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;

(n) 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;

(o) 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 agreement between the BBC and the Appellant;

(p) 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;

(q) her work for the BBC during the two tax years of assessment in question had been no different in terms of content or approach from her work for the BBC in the earlier tax years of assessment which were also the subject of the Determination and the Notice and 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 of assessment 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 of assessment 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;

(r) 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;

(s) she had not read the written agreements which were relevant in this case 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;

(t) 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

(u) 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.

58. The material parts of Mr Paterson's evidence may be summarised as follows:

(a) 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;

(b) 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";

(c) 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);

(d) 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;

(e) 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;

(f) 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;

(g) 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 57(c) above, this was consistent with the answer given by Ms Denver to the same question at the meeting of 27 September 2016 between the Respondents and the BBC);

(h) 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;

(i) 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

(j) 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.

59. 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 of assessment 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:

> (a) 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;
>
> (b) 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 contract between the BBC and the Appellant; and
>
> (c) Ms Adams did not have an annual review, unlike BBC employees who had regular formal appraisals.

60. 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 arguments of the parties

61. As we have observed in paragraphs 16 to 51 above, there is very little disagreement between the parties in relation to the legal principles which are applicable in this case.

62. They are agreed that the appeal stands or falls on the question of whether the terms of each hypothetical contract between the BBC and Ms Adams were such that the relevant hypothetical contract should be seen as a contract for services (as the Appellant contends) or as a contract of service (as the Respondents contend).

63. They are also agreed that the terms of each hypothetical contract are to be derived from the terms of each actual agreement between the BBC and the Appellant.

64. Furthermore, they are also agreed that, in determining whether each hypothetical contract amounts to an employment contract, the three-stage test set out by MacKenna J in *RMC* should be applied – that is to say:

(a) does the hypothetical contract involve "mutuality of obligation"?

(b) does the hypothetical contract involve sufficient control by the BBC over Ms Adams to make the BBC Ms Adams's master? and

(c) are the other provisions of the hypothetical contract consistent with its being an employment contract?

65. However, the parties do diverge in their construction of the terms of the hypothetical contract for the above purposes.

Mutuality of obligation

66. In relation to mutuality of obligation, the Appellant submitted that:

(a) Ms Adams did not get paid if she did not present a programme – see clause 6.5 of Part B in each written agreement between the BBC and the Appellant;

(b) Ms Adams had the right to provide a substitute in exceptional circumstances – see clause 16.4 of Part B in each such written agreement; and

(c) it followed from the features of the actual agreement noted in paragraphs 66(a) and 66(b) above that the hypothetical contract lacked the element of mutuality which was the first of MacKenna J's three conditions in RMC.

67. In response, the Respondents contended that:

(a) Ms Adams was entitled to be paid, come what may, if the reason why she did not reach the Minimum Commitment was because the BBC did not offer her the opportunity to present her programme when she was available. This was clearly set out in clause 14.2 of Part B of each written agreement and that had been confirmed both by Ms Denver at the meeting of 27 September 2016 between the Respondents and the BBC and by Mr Paterson in his oral evidence; and

(b) in addition, Ms Adams had no meaningful right of substitution. The right of substitution described in clause 16.4 of Part B of each written agreement was so severely circumscribed as to be worthless. In the first place, it was expressed to be exercisable only in exceptional circumstances and, in the second place, the warranty set out in clause 11.14 of Part B of each written agreement meant that any substitute would need to be both a director of, and a shareholder in, the Appellant in order to qualify as a substitute and the possibility that any potential replacement would have satisfied those tests was remote. In addition, Ms Adams's own response to the question about the possibility of her providing a replacement described in paragraph 57(t) above showed that she did not believe that she had a right to do so and the evidence of Mr Hollywood was that no such right existed.

Control

68. In relation to control, the Appellant submitted that:

(a) during the term of each actual agreement between the BBC and the Appellant, Ms Adams was free to take on other commitments without seeking the prior consent of the BBC provided that those other commitments did not bring the BBC into disrepute. Indeed, Ms Adams was free to give priority to those other commitments, as was shown in those cases where she would not present her programme unless the BBC agreed to allow her to present her programme from outside the studio in order to facilitate another commitment. Thus, the BBC did not in fact have first call on Ms Adams's services during the term of each hypothetical contract, as each written agreement suggested;

(b) Ms Adams also enjoyed a great deal of autonomy in terms of dictating the content of the programmes which she presented. She was in control of the microphone during the show and decisions leading up to the presentation of the show were made on a collaborative basis with the editorial team, as opposed to being imposed on her by the editorial team;

(c) the suspension which the BBC had imposed on Ms Adams in 2011 following her tweet about Boris Johnson was not an example of the BBC's exerting control over one of Ms Adams's other engagements pursuant to its rights under clause 8.3 of Part B of each written agreement. Instead, it should be regarded as an example of the BBC's exercising its rights under clause 9.4.5 of Part B of each written agreement – to suspend Ms Adams for bringing the BBC into disrepute by virtue of the content of her tweet; and

(d) it followed from the features of the arrangement noted in paragraphs 68(a) to 68(c) above that each hypothetical contract lacked the element of control which was the second of MacKenna J's three conditions in *RMC*.

69. In response, the Respondents contended that:

(a) it was clear from the terms of each written agreement and the evidence of Ms Adams, Mr Paterson and Mr Hollywood that, although the process of presenting the programme was very largely collaborative, the BBC retained ultimate editorial control over the content of the programme (see the "Contributor Guarantee" which was executed pursuant to Part A of each written agreement and clauses 8 and 9 of Part B of each written agreement). In that regard, the editorial team might not physically be able to stop Ms Adams from acting in breach of its directions in any particular case – because Ms Adams had control of the microphone – but the BBC had the right to impose sanctions on Ms Adams if she were to depart from those directions, for example, by acting in breach of the Guidelines or the Standards;

(b) similarly, the BBC had ultimate control over the other engagements which Ms Adams was able to accept during the term of each hypothetical contract. The terms of each written agreement showed that the BBC had first call on Ms Adams's services and that, without the BBC's prior written consent, Ms Adams could not take on any commitments other than those which had been confirmed to the BBC in writing prior to the commencement of the relevant written agreement– see clauses 3.2 and 8.1 of Part B of each written agreement;

(c) the rights of control referred to in paragraphs 69(a) and 69(b) above may not have been exercised in practice by the BBC. However, clauses 16.1 and 16.2 of Part B of each written agreement expressly contemplated that the BBC might choose not to exercise such rights without being deemed to have waived such rights and without being precluded from exercising such rights in the future;

(d) moreover, those rights of control were not rights which could properly be regarded as a sham or as contemplating an unrealistic possibility. Therefore, the proper approach was to treat those rights as being part of the terms of each actual agreement between the BBC and the Appellant, even though the BBC may not have exercised them; and

(e) in any event, the fact that the BBC suspended Ms Adams in 2011 after the tweet in relation to Boris Johnson demonstrated that the BBC did exercise its rights of control from time to time. That event occurred before the commencement of the actual agreements which were the basis for the hypothetical contracts in this case but those actual agreements were in substantially similar terms to the agreement which had existed in 2011 (as was shown by paragraph [51] in Ms Adams's second witness statement) and it demonstrated that the rights of the BBC described in the two written agreements were capable of exercise throughout the term of each actual agreement between the BBC and the Appellant, even if the BBC chose not to exercise those rights.

Other provisions

70. Finally, in relation to the other provisions of each hypothetical contract, the Appellant observed that Ms Adams was not entitled to holiday or sick pay or maternity leave and was not entitled to a pension. In addition, she was not entitled to apply for other jobs within the BBC in the way that BBC employees could do and was not subject to certain procedures which applied in relation to employees, such as formal disciplinary procedures and appraisals. Each of those things was inconsistent with the conclusion that each hypothetical contract was an employment contract.

71. In particular, the Appellant submitted that the absence of any entitlement to holiday or sick pay, maternity leave or pension from the terms of each actual agreement between the BBC and the Appellant (and, hence, from each hypothetical contract between the BBC and Ms Adams) was a significant indication that each hypothetical contract was not an employment contract.

72. In response, the Respondents made the point that, whilst it might well be true that the absence of such provisions from an actual agreement between a putative employer and a putative employee would be inconsistent with the proposition that that actual agreement was an employment contract, the same could not be said in relation to a hypothetical contract (such as the ones which needed to be considered in this case) constructed out of a tripartite arrangement between an end user, a service provider and a worker. In their view, since each actual agreement whose terms were being used to construct the relevant hypothetical contract was an agreement between two companies – namely, the BBC, as end user, and the Appellant, as service provider – and that actual agreement was therefore demonstrably not an employment contract, the absence of terms in the actual agreement for the provision of such benefits was hardly surprising and therefore could not be seen as an indication that the relevant

hypothetical contract was not an employment contract. As support for this proposition, the Respondents referred us to the recent decision in *Christa Ackroyd Media Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 69 (TC) ("*Ackroyd*"), where the First-tier Tribunal made exactly that point in paragraph [171] of its decision. Moreover, the Respondents added that the absence of such provisions from each actual agreement (and, hence, each hypothetical contract) was a neutral feature in relation to this issue because Ms Adams "would in any event be entitled to statutory benefits in respect of sick pay and maternity leave and pay" (see paragraph 7.15 of the Respondents' skeleton argument).

73. The Respondents submitted that, on the contrary, the fact that Ms Adams could be required to undergo editorial training – see the "Contributor Guarantee" which was executed pursuant to each written agreement and clause 9.4.3 of Part B of each written agreement – and had agreed to assign all of her moral rights in her work product in connection with the programme – see the "Contributor Guarantee" which was executed pursuant to each written agreement and clause 5 of Part B of each written agreement – were entirely consistent with each hypothetical contract's being a contract of employment.

74. More generally, adopting the approach laid down by Mummery J at first instance in *Hall* and adopted by Nolan LJ in the Court of Appeal in that case - which is to avoid applying a checklist and instead to stand back and consider the overall picture which arises out of the accumulated facts:

> (a) the Appellant submitted that Ms Adams was a freelance journalist with many different engagements who, under each hypothetical contract, was engaged by the BBC to present 160 programmes (subject to adjustment upwards or downwards depending on the circumstances which developed over the term of the relevant contract). Ms Adams did not hold herself out as being part of the BBC, as was shown by the fact that she had her own social media accounts and did not have a BBC social media account. Instead, she was in business on her own account, as was shown by her focus on her own brand and her many other engagements; whilst
>
> (b) the Respondents contended that the overall picture which arose out of the terms of each written agreement was that, regardless of Ms Adams's relationship with the other organisations to whom she provided her services during the term of her engagement by the BBC, her relationship with the BBC under each hypothetical contract was one of employment. Moreover, the fact that Ms Adams may have had other engagements in which she was not an employee but instead carrying on business on her own account was irrelevant because those other engagements were relatively insignificant in terms of both remuneration and time spent.

A question of fact or a question of law?

75. Before we can reach any conclusion on the question of law which is in issue in this case – that is to say, whether or not each hypothetical contract in this case was a contract for services or a contract of service - we need to determine the terms of the actual agreement on which the terms of that hypothetical contract are based.

76. Whether the determination of those terms is a question of law or a question of fact is itself difficult to determine. This was an issue in *Carmichael*, where the House of Lords had to determine whether the terms of the agreement between the parties had to be determined solely by reference to the written terms which had passed between them or could instead be determined by taking into account both those written terms and the intentions and conduct of the parties.

77. In his decision in *Carmichael*, Lord Hoffman, referring to the case of *Davies v Presbyterian Church of Wales* [1986] ICR 280, noted that the construction of written documents is a question of law but that this rule applied only where the parties "[intended] all the terms of their contract (apart from any implied by law) to be contained in a document or documents". He went on:

"On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact" (see *Carmichael* at page 1233B).

78. In *Carmichael*, the House of Lords held that it was permissible for the industrial tribunal in that case to have taken into account, in determining the terms of the agreement in that case, the belief and conduct of the parties to the agreement and that this was a question of fact and not law. Lord Hoffman noted:

"In a case in which the terms of the contract are based upon conduct and conversations as well as letters, most people would find it very hard to understand why the tribunal should have to disregard the fact that Mr Lovatt and Mrs Carmichael both agreed that the CEGB were under no obligation to provide work and the respondents under no obligation to perform it. It is, I think, pedantic to describe such evidence as mere subjective belief. In the case of a contract which is based partly upon oral exchanges and conduct, a party may have a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. As the Court of Appeal pointed out, the tribunal did not make any specific findings about what was said at the interviews or on any other occasion. But the terms of the engagement must have been discussed, and these conversations must have played a part in forming the views of the parties about what their respective obligations were.

The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970 1 All ER 796, [1970] AC 583* may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible for the same purposes as it would be if the contract had been in writing, namely to support an argument that the terms have been varied or enlarged or to found an estoppel" (see *Carmichael* at page 1234F).

79. In *Carmichael*, the written terms of the agreement between the parties were incomplete and ambiguous. In addition, they had been drafted by a lay person and the evidence of the parties as to what they understood to have been agreed was not directly contrary to those written terms. It is therefore not surprising that the House of

Lords held that the evidence of the parties as to their understanding of the agreement between them was highly relevant in determining the terms of that agreement and that that determination was a question of fact and not law. In the words of Lord Irvine in *Carmichael*, the parties in that case did not intend the written agreement "to constitute an exclusive memorial of their relationship" (see *Carmichael* at page 1231A).

80. In contrast, the present case involves circumstances where the terms of each written agreement do purport to be a complete record of the actual agreement between the parties. It is therefore distinguishable from *Carmichael*. Nevertheless, it is plain from the lengthy extract from Lord Clarke's decision in *Autoclenz* set out in paragraph 26 above that, in the case of a contract concerning work and services, the same principle applies in determining whether a term set out in a written agreement accurately reflects the agreement between the parties. In other words, it is necessary for the relevant tribunal or court to determine, as a question of fact, whether the written agreement between the parties accurately reflects the actual agreement between the parties.

81. It follows that, before we can address the question of law which is at the centre of this case – which is to say, whether the hypothetical contract constructed out of each actual agreement between the BBC and the Appellant is a contract for services or a contract of service - we need to determine, as a question of fact, whether the terms of each written agreement between the BBC and the Appellant accurately reflected the related actual agreement between those companies. It is to that question which we now turn.

Our findings of fact

82. Each of the findings of fact set out below has been made on the balance of probabilities.

83. Our task in finding the facts has been rendered more difficult by the fact that:

(a) unfortunately, we were not provided with any evidence from Mr Jeff Zycinski – the head of radio at BBC Scotland who initiated, and then conducted on behalf of the BBC, the discussions between the BBC and Ms Adams which led to her presenting the programme – anyone from the BBC's legal and business affairs team – which was responsible for sending each written agreement to Ms Adams – or anyone from the BBC's business management team – which was responsible for keeping a record of the number of programmes which had been presented by Ms Adams during the period of each written agreement. It would have been helpful in particular to have heard from the member of the BBC's legal and business affairs team who was responsible specifically for dealing with the two written agreements in this case; and

(b) as both Mr Paterson and Ms Adams were keen to stress, production of Ms Adams' programme was very much a collaborative effort in which the interests of the BBC and Ms Adams were generally very closely aligned. There was thus very little reason for either party to each actual agreement between the BBC and the Appellant to seek to rely on its rights under the relevant agreement. In virtually all cases, any disagreement between the parties could be solved by discussion and without recourse by

either party to the relevant agreement of its rights under the relevant agreement.

84. Nevertheless, in addition to being taken through the terms of the written agreements, we have had the benefit of hearing and/or reading the witness evidence of Mr Paterson and Mr Hollywood and the shortcoming noted in paragraph 83(a) above has largely been alleviated by that evidence. In particular, the written and oral testimony of Mr Paterson, who was closely involved with the making of the programme and therefore had a sound knowledge of how the relationship between the BBC and Ms Adams operated in practice, was of considerable assistance to us in determining the terms of each actual agreement between the BBC and the Appellant.

First call and control over other engagements

85. In determining the terms of each actual agreement between the BBC and the Appellant, a significant point of difficulty lies in trying to distinguish between, on the one hand, a right which exists under the terms of each such agreement but has never been exercised and, on the other hand, a right which does not exist under the terms of each such agreement. The Respondents say that, if it is necessary to determine which of those two categories a right which appears in the written agreement between the BBC and the Appellant falls within, then the right in question must fall within the first category as long as the right is not a sham and is one which the BBC might reasonably have been expected to want. However, as we have already concluded in paragraphs 22 to 33 above, the Supreme Court decision in *Autoclenz* demonstrates that the correct approach to this question is more nuanced than that. In such a case, the mere fact that the right appears in the written agreement, is not a sham and is one which the BBC might reasonably have been expected to want is not enough for the right to fall within the first category if the evidence as a whole shows that the right in fact falls within the second category.

86. It is inevitably difficult to distinguish evidence suggesting that a right falls within the first category from evidence suggesting that the right falls within the second category, since the same evidence can often indicate that either is the case. In other words, the fact that the parties to a written agreement have not adhered strictly to the terms of that written agreement might mean that that written agreement does not reflect the terms of the actual agreement between them but it might also mean that one party has decided not to enforce its rights under the actual agreement between them. Determining which of those is the case is by no means straightforward. However, it is a task which we must undertake in order to determine the relevant facts in this case.

87. A striking feature of the present circumstances is that, whilst each written agreement specified that the BBC had first call on Ms Adams's time during the term of the agreement and that Ms Adams was required to obtain the BBC's permission in advance of entering into any other engagements during the term of the agreement, both Ms Adams and Mr Paterson were clear that neither of these was the case. The evidence of both Ms Adams and Mr Paterson was to the effect that the BBC simply did not have the right of first call on Ms Adams's time or the right to control Ms Adams's other engagements. It was not to the effect that the BBC had those rights but chose not to exercise them. In this regard, see paragraphs 57(l) and (p) and paragraph 58(e) above.

88. Indeed, the evidence we heard suggested that the BBC took steps to accommodate Ms Adams's other engagements when it could – for example, by agreeing to her presenting the programme from outside the studio when that was required by Ms Adams's other commitments – see paragraph 57(l) above. Thus, the evidence of Ms Adams was that, far from being entitled to compel her to refuse her other engagements on the basis both that it had first call on her time and that Ms Adams required its permission to enter into those other engagements, the BBC did whatever it could to accommodate those other engagements.

89. In addition, although Ms Adams accepted that the BBC could penalise Ms Adams retrospectively by suspending, or, in a severe case, terminating, the actual agreement between the BBC and the Appellant if it considered that the content of any of Ms Adams's other engagements brought the BBC into disrepute or could result in the BBC's suffering OFCOM sanctions, both Ms Adams and Mr Paterson said that the BBC did not have any right to control that content – for example, by requiring Ms Adams to submit it to the BBC for approval in advance. In this regard, see paragraphs 57(i) and (p) and paragraph 58(e) above.

90. The position summarised in paragraphs 87 to 89 above is contrary to various express terms of each written agreement between the BBC and the Appellant. However, Ms Adams testified that she had no knowledge of the terms of each written agreement and had had no negotiations on those terms with the BBC legal and business affairs department. As far as she was concerned, she had reached an understanding with Mr Zycinski as to the nature of the arrangement between the BBC and the Appellant and she, not unnaturally, considered that both he, as the representative of the BBC and she, as the representative of the Appellant, knew what they had agreed. Thus, although she signed each written agreement, she candidly admitted that she did not know what the written agreements said. In this regard, see paragraphs 57(h) and (s) and paragraph 58(d) above.

91. In the light of the principles set out by Lord Clarke in *Autoclenz*, as discussed in paragraphs 22 to 33 above, we need to determine, in the light of all the evidence, whether the terms of each actual agreement between the BBC and the Appellant entitled the BBC to have the right of first call on Ms Adams's time and to control the nature and content of her other engagements (albeit that the BBC chose not to exercise those rights) or whether, on the contrary, the BBC had no such rights. The evidence which we need to consider in that regard includes both the terms of each written agreement and the witness evidence which has been presented to us.

92. In conducting that exercise so far as the right to first call on Ms Adams's time and the right of control over Ms Adams's other engagements are concerned, we have taken into account both the express terms to that effect in each written agreement and the fact that the terms of clause 16.10 of Part B of each written agreement stipulated that "[this] contract will 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…". We have also taken into account the fact that both Ms Adams and Mr Paterson were very clear in stating that the BBC did not have the right of first call on Ms Adams's time or the right to control Ms Adams's other engagements.

93. We found both Ms Adams and Mr Paterson to be very credible witnesses and we have accordingly concluded, on balance, that, notwithstanding the terms of each written agreement, including clause 16.5 of Part B of each written agreement, the evidence described in paragraphs 87 to 89 above is so compelling that we are satisfied that, to the extent that the position summarised in paragraphs 87 to 89 above is contrary to the terms of each written agreement, the relevant written agreement did not reflect the terms of the actual agreement between the BBC and the Appellant which the relevant written agreement purportedly recorded. Accordingly, we find as facts that:

> (a) during the term of each actual agreement between the BBC and the Appellant, the BBC did not have the right of first call on the services of Ms Adams and Ms Adams was not required to seek the prior written consent of the BBC before taking on other engagements;
>
> (b) the BBC could not control the content of Ms Adams's other engagements (although the BBC could penalise Ms Adams retrospectively by suspending, or, in a severe case, terminating, the actual agreement if it considered that that content brought the BBC into disrepute or could result in the BBC's suffering OFCOM sanctions); and
>
> (c) instead, subject to the retrospective sanction mentioned in paragraph 93(b) above, Ms Adams was free to enter into her other engagements as she wished, although, in practice, she quite sensibly ensured that the programme's editorial team was aware in general terms of her work on TV and radio.

Right of substitution

94. In similar vein, although clause 16.7 of Part B of each written agreement ostensibly provided for Ms Adams to have a right of substitution "in exceptional circumstances" and subject to the BBC's prior approval, the evidence of Ms Adams and Mr Hollywood mentioned in paragraph 57(t) and paragraph 59(b) above demonstrates that this right was illusory.

95. Accordingly, we find as a fact that there was no right of substitution under each actual agreement between the BBC and the Appellant.

Editorial control

96. We have detected no similar inconsistency in relation to the other terms of each written agreement between the BBC and the Appellant and the witness evidence.

97. In particular, we consider that, although the BBC might have exercised a light touch when it came to exercising editorial control over Ms Adams, and that, in practice, all disagreements between Ms Adams and the editorial team were resolved collaboratively, the BBC had the contractual right to exert that control, not least because it had ultimate responsibility for the content of the programme. In this regard, see paragraphs 57(e), (n) and (o), paragraph 58(c) and paragraph 59(a) above.

98. We therefore find as a fact that those terms in each written agreement which stipulated that the BBC had ultimate editorial control over the content of the

programme were also terms in each actual agreement between the BBC and the Appellant.

Other terms

99. As for the other material terms of each actual agreement, subject to the point mentioned in paragraph 100 below, given that there is no inconsistency between those terms and the witness evidence, we find as a fact that those terms were also terms in each actual agreement between the BBC and the Appellant. This means that, inter alia, we find as facts that Ms Adams had no entitlement under each actual agreement to holiday or sick pay, maternity leave or a pension entitlement (see paragraph 57(a) above) and was treated differently from the BBC's employees when it came to matters such as reviews, changes in job specification and applying for jobs internally within the BBC (see paragraph 58(j) and paragraph 59(c) above).

100. In this regard, we should note that, although Ms Adams in her oral evidence expressed some surprise at the fact that 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 (and also said in her answer to question 43 in the Correspondence that she would not expect to be paid if the BBC were to request her not to do a programme when she was available to do so) – see paragraph 57(c) above - we found the Respondents' and the BBC's notes of the meeting of 27 September 2016 and the evidence of Mr Paterson recorded in paragraph 58(g) above to the contrary in this regard to be more compelling. We are reinforced in this conclusion by the fact that, if each actual agreement had been intended to operate in the way suggested by Ms Adams, then there would have been no need for a Minimum Commitment or a Minimum Fee. Instead, each actual agreement could simply have specified a fee per programme.

101. Finally in this section of this decision, we should note that, although the terms of each written agreement (and each actual agreement) gave the BBC the right to require Ms Adams to attend editorial training and/or to undergo a full medical, should the BBC have wished her to do so, the evidence of Ms Adams, which we accept, was that no such request was ever made – see paragraph 57(u) above.

Discussion

102. The findings of fact set out in paragraphs 82 to 101 above mean that, in our view, the following were the material terms of each actual agreement between the BBC and the Appellant:

> (a) during the term of the relevant agreement, the BBC did not have first call on Ms Adams's time and Ms Adams did not need to obtain the BBC's permission before accepting any other engagements;
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> (b) the BBC could not control the content of Ms Adams's other engagements (although the BBC could sanction Ms Adams retrospectively if it considered that that content brought the BBC into disrepute or could result in the BBC's suffering OFCOM sanctions);

(c) Ms Adams had no right of substitution but had instead to perform the relevant services herself;

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

(e) 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;

(f) 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;

(g) 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;

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

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

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

(k) 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.

103. The terms of each actual agreement between the BBC and the Appellant as described above should be regarded as being the terms of each hypothetical contract between the BBC and Ms Adams – see Park J in *Usetech HC* as mentioned in paragraph 20 above.

104. Having thus determined the terms of each such hypothetical contract, it is necessary to consider whether the application to each such hypothetical contract of the three conditions set out by MacKenna J in *RMC* suggests that the relevant hypothetical contract was a contract for services or a contract of service.

105. We start our analysis in that regard by reiterating that, as outlined by Mummery J at first instance in *Hall* and endorsed by Nolan LJ in the Court of Appeal in that case, the answer in cases such as the present one should not involve the slavish application of a checklist but should instead involve a consideration of the overall picture which emerges from the accumulated detail.

106. In that context, a significant point which emerged from the evidence was that Ms Adams has been a freelance journalist for over 20 years, during which time she has had a continuous series of engagements with various media organisations, some of which engagements were concurrent with her engagement by the BBC over the two tax years of assessment in question. Ms Adams has also written two books with her friend and colleague, Ms Sawalha.

107. Ms Adams also gave evidence to the effect that, consistent with a career of the nature described above, she has an acute awareness of the need to build and manage her own reputation and brand - for example, by developing her own social media presence and by managing her engagements in such a way as to increase her profile with the public.

108. Ms Adams said in the course of her evidence that it is for her role on Loose Women that she is primarily recognised by the public. Ms Adams stressed that, for that reason, she was anxious to maintain, and even increase, her role on Loose Women, even though it was not as well-remunerated as her other engagements, precisely because of the value which her exposure on Loose Women offered to her in the pursuit of her career. In that sense, it seems to us to be fair to say that Ms Adams's professional identity is, if anything, linked more closely to Loose Women than it is to the BBC.

109. Finally, Ms Adams explained to us how 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.

110. Taking all of the above features into account, the impression which we have derived from the evidence is that Ms Adams carries on a profession on her own account in much the same way as did the vision mixer, Mr Lorimer, in *Hall*. We accept that Ms Adams did not in any meaningful sense provide her own equipment in order to carry out her work for the BBC - although she did use her own IPad and mobile phone in the course of her work, both inside and outside the studio - that she did not hire any staff to assist her in work and that she ran no financial risk apart from the risk of bad financial debts and of being unable to find work. However, these were all true of Mr Lorimer in *Hall* and, as was noted by Nolan LJ in that case, "the question, whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation".

111. Nolan LJ in *Hall* went on to explain that, in the case of such a person, it is far more meaningful to consider the extent to which the individual in question is dependent on one particular paymaster for the financial exploitation of his or her talents, the length of the relevant engagements, and the number of different clients involved in those engagements.

112. In considering those features in the present case, there was some debate between the parties as to the precise percentage which Ms Adams's work for the BBC over the two tax years of assessment in question bore to Ms Adams's work overall, both in terms of financial remuneration and in terms of time taken. It is clear that the percentage in each case was significant - both parties agreed that her remuneration under the two contracts with the BBC amounted to over 50% of her income and, on the days on which she presented the programme, a significant part of her working day would be taken up with the programme. However, we do not think that Ms Adams's other work over that period can aptly be described as being *de minimis* or insignificant, either in terms of remuneration or in terms of Ms Adams's overall working time. Even on the basis of the Respondents' own figures – which are lower than those of the Appellant – approximately 30%, on average, of Ms Adams's gross income over the two tax years of assessment derived from engagements which were

not with the BBC and it is therefore apparent that Ms Adams must have spent a meaningful part of her overall working time on those other engagements.

113. In any event, we think that it is inappropriate in relation to this issue to focus solely on the two tax years of assessment in question. Instead, those two tax years of assessment need to be considered in the round, in the context of Ms Adams's professional career as a whole. This is because Ms Adams's engagement with the BBC did not occur in isolation. Instead, it was just part of her overall professional career and it would therefore be wholly artificial in that context to disregard her overall professional career when addressing this issue in relation to the two tax years of assessment in question. When one does that, it is apparent that, in relation to that whole, Ms Adams's work for the BBC was less significant – both in terms of remuneration and in terms of time spent - than in the two tax years of assessment in question, as the Respondents themselves accepted in deciding shortly before the hearing not to oppose the Appellant's appeal in relation to the two earlier tax years of assessment which were included in the Determinations and the Notice.

114. Thus, the overall impression which we have derived from the evidence before us is that Ms Adams generally carries on her profession as an independent provider of services and not as an employee.

115. Having said that, it is clear from the words of Sir John Pennycuick V-C in *Fall*, which were cited with approval by Nolan LJ in *Hall*, that, even if a person generally carries on his or her profession by entering into a series of engagements in the capacity of an independent contractor, that does not prevent a particular engagement from amounting to an employment if the terms of the particular engagement are more consistent with a relationship of employment (or what Rowlatt J in *Davies* would term a "post") than a relationship of client and independent contractor.

116. So, with that in mind, we now turn to consider whether the various features of each hypothetical contract which we have identified in paragraphs 102 and 103 above indicate that each such contract was a contract for services or instead indicate that, as was the case in relation to the actual contract which was in issue in *Fall*, each such contract was a contract of service.

117. In that regard, we agree with the Respondents that the first of MacKenna J's conditions in *RMC* – the need for a contract to contain "mutuality of obligation" if it is to be an employment contract – is satisfied in relation to each hypothetical contract. This is because:

> (a) if the BBC had decided after entering into the actual agreement on which the relevant hypothetical contract is based that it did not wish Ms Adams to fulfil the Minimum Commitment set out in the relevant actual agreement when Ms Adams was able and willing to do so, then it would still have been obliged to pay the Minimum Fee to the Appellant, come what may. (The fact that the Appellant would not receive the Minimum Fee if the failure to reach the Minimum Commitment was attributable to the non-availability of Ms Adams is neither here nor there in this regard;) and
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> (b) Ms Adams was required to present the programmes (and fulfil the other obligations of the Appellant under the actual agreement on which

the hypothetical contract is based) herself – we have found as a fact that there was no right of substitution under each actual agreement.

118. Each hypothetical contract also conferred on the BBC a degree of control over the working output of Ms Adams in relation to the programme. Although the BBC did not have cause to exercise that control during the term of either actual agreement, it is clear that its editorial team could have pulled rank on Ms Adams in relation to editorial matters if matters had ever reached a stage where a disagreement between Ms Adams and the editorial team as to the content of a particular programme reached an impasse.

119. That position was extremely unlikely to arise. After all, as Ms Adams said herself, why would she want to breach the Guidelines or Standards or otherwise act in a manner which could give rise to concerns for the BBC? That would be detrimental both to her ongoing relationship with the BBC and to her professional career as a whole. However, the mere fact that that position was extremely unlikely to arise – and, in practice, appears not to have arisen - does not alter the fact that, had it arisen, the BBC had the right under each actual agreement to exert control and it is that contractual right which is relevant in relation to this question.

120. Similarly, in our view, the fact that the BBC could not physically prevent Ms Adams from acting in a manner of which it disapproved – because Ms Adams had de facto control of the microphone – is also irrelevant to this question because the BBC could exercise its control retrospectively by suspending Ms Adams without payment for a period of time or even terminating the actual agreement without having to make further payment.

121. However, the BBC's control did not extend to control over the identity and nature of Ms Adams's other engagements because we have found as facts that, notwithstanding the terms of each written agreement which suggest that the contrary was the case, over the term of each actual agreement, the BBC did not have first call on the services of Ms Adams and that Ms Adams was free to pursue her other engagements without first seeking the permission of the BBC. Indeed, the evidence we heard suggested that, far from being entitled to compel Ms Adams to refuse her other engagements on the basis both that it had first call on her time and that Ms Adams required its permission to enter into those other engagements, the BBC had no control over Ms Adams's ability to enter into those other engagements and tried to facilitate those other engagements on certain occasions.

122. That is not to say that the BBC had absolutely no control over the manner in which Ms Adams conducted her other activities. Since the BBC was closely associated with Ms Adams through her presentation of the programme, it was obviously concerned to ensure that Ms Adams did not say or write anything in the course of her other engagements which might bring the BBC into disrepute or result in its suffering OFCOM sanctions. However, we do not regard that level of control over Ms Adams's other activities as being a significant factor in reaching a conclusion on the issue which is central to this case. That is because it is perfectly natural for an organisation which is entering into a significant contract with an independent contractor to want to ensure that the contractor in question does not do anything which might cause harm to the organisation. The fact that each actual agreement included such provisions is therefore, in our view, a neutral feature in determining the nature of each related hypothetical contract.

123. In short, although each hypothetical contract did give the BBC an element of control over the manner in which Ms Adams performed her services, that control did not extend to the nature of Ms Adams's other engagements or, except to the extent that such content could damage the BBC, the content of such other engagements.

124. Even if the existence of "mutuality of obligation" and the BBC's editorial control means that each hypothetical contract met the first two of MacKenna J's conditions in *RMC*, MacKenna J stated in *RMC* that those conditions are necessary, but not always sufficient, in order for a contract to amount to an employment contract – see the extract from his decision set out in paragraph 44 above. As noted in, inter alia, *Montgomery*, those conditions are an "irreducible minimum by way of legal requirement" but they will not, in and of themselves, suffice if the other terms of the relevant contract are inconsistent with the relevant contract's being an employment contract.

125. In this case, in addition to the crucial fact that, as noted in paragraphs 85 to 93 above, the BBC did not have first call on Ms Adams's time or any control over Ms Adams's other engagements, there are a number of other features of each actual agreement (and, hence, each hypothetical contract) which are not consistent with the contracts' being employment contracts. These are as follows:

> (a) Ms Adams had no entitlement to use BBC equipment except when she was in the studio or presenting programmes outside the studio. She therefore had to use her own laptop and mobile phone to perform the services under each actual agreement when she was not in the studio. In addition, we heard that Ms Adams sometimes used her own devices when she was in the studio or presenting the programme from outside the studio. Even more significantly, Ms Adams had no access to the BBC system when she was at home. In her testimony, she said that, when she sent out the suggested script for each programme on the night before the programme aired, one of the purposes in doing that was to enable the editorial team to put the script onto the BBC system early the next morning.
>
> At the hearing, Ms Roxburgh made the point that, in this current day and age, it is not unusual for an employee to use his or her own devices when carrying out the duties of his or her employment outside the office. That is undoubtedly true. But, in our opinion, it is unusual for an employee to have no access to his or her employer's system when carrying out work for the employer whilst outside the office. As a general rule, an employee has access to that system when he or she is carrying out the duties of his or her employment, regardless of whether that is occurring inside or outside the office. So Ms Adams's inability to access the BBC's system when she was outside the studio is in our view a factor which is inconsistent with the proposition that her relationship with the BBC under each hypothetical contract amounted to a relationship of employer and employee.
>
> To a slightly lesser extent, so too is the fact that, in practice, Ms Adams occasionally had to use her own IPad and mobile phone on certain occasions when she was in the workplace – whether in the studio or doing an outside broadcast. Ordinarily, an employee would not need to use his or her own devices when carrying out work in the workplace;

(b) Ms Adams was not entitled under each actual agreement to any holiday or sick pay, maternity leave or a pension entitlement. These are also features which are inconsistent with a relationship of employer and employee.

We have considered the two submissions made by the Respondents in this regard which are described in paragraph 72 above and do not agree with either of them.

As regards paragraph [171] in *Ackroyd*, whilst we agree that the First-tier Tribunal in *Ackroyd* did make the point to which the Respondents have alluded, that decision is not binding on us and we do not agree with the reasoning on that point which is set out in the decision. It seems to us that, regardless of the fact that the actual agreement on which the terms of the hypothetical contract is based is an agreement between two companies, it would still be open to the parties to that actual agreement to agree that at least three of the above benefits (and, in a less obvious manner, the fourth) would be made available to the worker by the end user.

For example, the end user could agree with the service provider that, should the worker be unable carry out his or her duties because of holiday, illness or pregnancy, the end user would nevertheless pay the service company as if the worker had in fact carried out his or her duties. In that way, the end user would, in effect, be providing holiday and sick pay or maternity leave to the worker in precisely the same way as for its employees. There is no reason why the fact that the actual agreement was between the end user and the service provider should preclude the provision of such benefits and therefore, in our view, the fact that an actual agreement between an end user and a service provider made no such provision would be of significance in determining whether the terms of the hypothetical contract which is required to be constructed out of that actual agreement are consistent with those of an employment contract.

The same is true, albeit in a slightly more obscure manner, in the case of a pension entitlement because, in relation to that benefit, there is nothing to prevent an end user from making additional payments to the service provider under the actual agreement between them on the express basis that the service provider should use those payments to provide pension benefits to the service provider's own employee - ie the worker. The absence of any such provision from the actual agreement between the end user and the service provider (and therefore from the hypothetical contract between the end user and the worker) could therefore also be seen as being inconsistent with the proposition that the hypothetical contract is an employment contract.

Thus, in our view, the fact that provisions to the above effect were not included in either written agreement between the BBC and the Appellant points away from the conclusion that the relationship of the BBC and Ms Adams under each hypothetical contract should be regarded as a relationship between an employer and an employee.

In addition, we do not accept the argument made by the Respondents in their skeleton that the absence of such provisions from each actual

agreement (and, hence, each hypothetical contract) is a neutral feature in relation to this issue because Ms Adams "would in any event be entitled to statutory benefits in respect of sick pay and maternity leave and pay" (see paragraph 7.15 of the Respondents' skeleton argument, as mentioned in paragraph 72 above).

It seems to us that this is a circular argument because those benefits would have been available to Ms Adams only if the relevant hypothetical contract had been an employment contract and therefore the availability of such benefits cannot simply be assumed when one is determining whether the provisions of the relevant hypothetical contract were consistent with its being an employment contract in the first place; and

(c) similarly, the terms of each actual agreement were such that Ms Adams was treated differently from the BBC's employees in a number of other respects. For example, she did not have an annual (or indeed, any) review and she was not subject to the formal processes within the BBC in relation to any changes in the nature of her work for the BBC. Similarly, she did not have the right to apply for vacancies within the BBC in the way that BBC employees were able to do.

126. In addition, whilst it might be said that the fact that the BBC had the contractual right to ask Ms Adams to attend editorial training and to undergo a full medical is consistent with each actual agreement's being a contract of service, we think that the fact that the BBC never exercised either right is of passing interest in this context because it provides an insight into the way in which the BBC viewed its relationship with Ms Adams. Essentially, she was not seen as being "part of the organisation" (as Lord Denning put it in *Bank voor Handel en Scheepvaart N.V. v Slatford* [1953] 1 QB 248 (at page 295)) but instead as an external services provider. Thus, there was no need for the BBC to treat her in the same way as it treated its employees in those respects.

127. 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. As was the case in relation to the ability of the BBC to ensure that Ms Adams did not do anything in the course of her other engagements which might cause prejudice to the BBC, 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.

128. Finally, although we have borne in mind the caveats in this respect made by Henderson J in *Dragonfly*, we should note that the statements made in each written agreement and the Contributor Guarantee to the effect that the relationship between the BBC and Ms Adams was not intended to be a relationship of employer and employee – see clauses 11.14 and 16.5 of Part B of each written agreement and paragraph 11 of each Contributor Guarantee – are consistent with the proposition that the parties to the arrangement intended the relationship between the BBC and the Appellant/Ms Adams to be that of a client and an independent contractor and not that of an employer and an employee. As noted by Henderson J in that case at paragraph [55], "[if] the actual contractual arrangements between the parties do include statements of

intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract". In our view, this is a case where there is material which justifies the inclusion of such statements in the relevant hypothetical contracts and therefore these statements contribute to the general impression that the parties did not regard their arrangement as giving rise to a relationship of employer and employee.

129. For the reasons set out in paragraphs 105 to 128 above, we have reached the conclusion that each hypothetical contract in this case was a contract for services and not an employment contract. In summary, we consider that, when one stands back from the detail and considers the whole picture in this case, as is suggested by the language of Mummery J in *Hall*, that picture is one which leads us to conclude that each hypothetical contract between the BBC and Ms Adams was a contract for services and did not give rise to a relationship of employer and employee.

Ackroyd

130. We note that the conclusion we have reached in relation to Ms Adams is different from the conclusion which was reached in relation to Ms Christa Ackroyd by a differently-constituted First-tier Tribunal in *Ackroyd*. Strictly, it is not necessary for us to distinguish the facts in the two cases because:

(a) as we have already noted in paragraph 125(b) above, another decision of the First-tier Tribunal is not binding on us; and

(b) in any event, as we have noted generally in the course of this decision, each case involves a value judgment and, particularly given the approach to the issue outlined by Mummery J in *Hall*, it is inevitable that different people may come to different conclusions on the same facts.

131. Notwithstanding the above, we believe that there are significant differences in the facts of the two cases which are material in this context. First, in *Ackroyd*, the contract between the BBC and Ms Ackroyd's service company was 7 years' long and it followed a contract which was 5 years' long. In contrast, each contract in this case was for approximately 1 year. Secondly, the ratio of Ms Ackroyd's non-BBC income to Ms Ackroyd's BBC income was materially different from the comparable ratio in relation to Ms Adams. Ms Ackroyd's non-BBC income was effectively *de minimis*. For example, the First-tier Tribunal in *Ackroyd* noted that, in the calendar years ending 31 December 2009 and 31 December 2010, Ms Ackroyd's BBC income amounted to 98% and 96.5%, respectively, of her aggregate gross income. These figures are some way north of the equivalent figures in relation to Ms Adams. Thirdly, Ms Ackroyd was given a clothing allowance whereas no such allowance was made to Ms Adams. Fourthly, the First-tier Tribunal in *Ackroyd* found as a fact that the BBC had first call on Ms Ackroyd's time, that Ms Ackroyd attended BBC training sessions and that Ms Ackroyd could be told by the BBC whom she was interviewing. None of these features was present in the relationship between the BBC and Ms Adams. Finally, Ms Ackroyd was required to obtain the consent of the BBC for her non-BBC engagements whereas we have found as a fact that, notwithstanding the terms of each written agreement in this case, each actual agreement between the BBC and the Appellant (and, hence, each hypothetical contract between the BBC and Ms Adams) did not require Ms Adams to seek the consent of the BBC before accepting other engagements.

132. For the above reasons, we consider that there are grounds for believing that the First-tier Tribunal in *Ackroyd* might well have reached the same conclusion in that case as we have done in this case if they had been presented with the facts in this case.

Conclusion

133. For the reasons set out in paragraphs 102 to 132 above, we have concluded that the appeal should be allowed.

Right to appeal

134. 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: 11 APRIL 2019