[2021] UKUT 0037 (TCC)

Appeal number: UT/2019/0086 (V)

INCOME TAX, NATIONAL INSURANCE – "intermediaries legislation" – whether radio presenter would be an employee under a hypothetical direct contract – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Appellants**
-and-	
ATHOLL HOUSE PRODUCTIONS LIMITED	**Respondent**

TRIBUNAL: THE HONOURABLE MR JUSTICE MARCUS SMITH
JUDGE JONATHAN RICHARDS

Sitting in public by way of remote video hearing treated as taking place at The Rolls Building, Fetter Lane, London on 10 and 11 November 2020, and having considered further written submissions from the parties served on 18 and 19 November 2020

Adam Tolley QC and Christopher Stone instructed by the Office of the Advocate General for the Appellants

Keith Gordon, instructed by Carter Backer Winter LLP for the Respondent

DECISION

A. INTRODUCTION

1. The appellant company (the "Company") is the personal service company of Ms Kaye Adams, a journalist and broadcaster. The dispute between the Company and HMRC relates to the tax years 2015/16 and 2016/17 during which the Company and BBC Radio Scotland were party to two successive written contracts under which the Company agreed, in return for payment, to provide Ms Adams to present a radio show called "The Kaye Adams Show". HMRC formed the view that the arrangement fell within the "intermediaries legislation", commonly known as IR35. Accordingly, on HMRC's view, even though Ms Adams was not actually an employee of the BBC, the fee that the Company received from the BBC was to be treated as if it was employment income, with the Company being obliged to account for tax under the PAYE system and to pay national insurance contributions.

2. The Company appealed to the FTT against HMRC's determinations, arguing that the intermediaries legislation did not apply. Shortly before that hearing, HMRC accepted that the intermediaries legislation did not apply in the 2013/14 and 2014/15 tax years, when the Company and Ms Adams were party to materially identical contracts. In a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 11 April 2019, the FTT allowed the Company's appeal. HMRC now appeal to this Tribunal against the Decision and, in a Respondent's Notice, the Company asks this Tribunal to revisit aspects of its argument that were unsuccessful before the FTT.

B. THE INTERMEDIARIES LEGISLATION

3. Relevant aspects of the "intermediaries legislation" are contained in Chapter 8 of Part 8 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and in the Social Security Contributions (Intermediaries) Regulations 2000 (the "Regulations").

4. The conditions for the income tax legislation to apply are set out in section 49 of ITEPA 2003 which provides, so far as material, as follows:

> **49 Engagements to which this Chapter applies**
>
> (1) This Chapter applies where —
>
> > (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
> >
> > (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
> >
> > (c) the circumstances are such that —
> >
> > (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client…

> (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. There is no dispute that the first two conditions set out in section 49(1)(a) and section 49(1)(b) are met since Ms Adams, the "worker" for these purposes, personally performed services for the BBC and those services were provided, not directly, but under arrangements involving the Company.

6. The central question before the FTT was whether the condition in section 49(1)(c) was met. It was common ground between the parties that, in order to decide this in the case of a tripartite arrangement such as the present, the following three stage process provided a helpful structure:

> (1) *Stage 1.* Find the terms of the actual contractual arrangements (between the Company and the BBC on one hand and between Ms Adams and the Company on the other) and relevant circumstances within which Ms Adams worked.
>
> (2) *Stage 2.* Ascertain the terms of the "hypothetical contract" (between Ms Adams and the BBC) postulated by section 49(1)(c)(i) of ITEPA and the counterpart legislation as applicable for the purposes of NICs.
>
> (3) *Stage 3.* Consider whether the hypothetical contract would be a contract of employment.

7. This is the approach identified in *Revenue and Customs Commissioners v. Kickabout Productions Limited*, [2020] UKUT 216 (TCC) at [6]. The FTT followed this approach and we follow it when summarising the relevant parts of the Decision.

8. However, in order to put into context some of the later discussion, it is appropriate now to make some observations on the process by which the hypothetical contract is constructed at Stages 1 and 2, before reaching Stage 3, where the hypothetical contract is characterised:

> (1) It is clear that, for income tax purposes at least, this is not simply an exercise in pure "transposition" of terms from the actual contract into the hypothetical contract. As the Upper Tribunal (Mann J and UTJ Scott) said in *Christa Ackroyd Media v. HMRC* [2019] STC 2222 at [36]:
>
> > Section 49 explicitly requires the tribunal not to restrict the exercise of constructing the hypothetical contract to the terms of the actual contract, but to assess whether 'the circumstances' are such that an employment relationship would have existed if the relevant services had been provided by the individual directly and not via a service company, and section 49(4) provides that 'the circumstances … *include* the terms on which the services are provided, *having regard* to the terms of the contracts forming part of the arrangements …' (emphasis added).
>
> (2) It follows from this that it is not necessary to defer all analysis of the hypothetical contract, at Stage 2, until all terms of the actual contract have

been comprehensively determined at Stage 1. It may often be appropriate – in the iterative way identified by Lord Hodge JSC in *Arnold v. Britton*, [2015] UKSC at [77] – to construe the actual contractual arrangements (using the usual canons of construction) whilst considering at the same time how these arrangements would work when determining the content of the hypothetical contract. That approach is suited to the task of synthesising a single hypothetical contract from relevant "circumstances" that include the terms of two distinct contracts. That said, care must still be taken to ensure that ordinary principles of contractual interpretation are correctly applied at Stage 1 since, if the terms of actual contracts are wrongly construed, any error has the potential to infect the ascertainment of the terms of the hypothetical contract at Stage 2.

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

> (a) The relevant factual matrix may very well be different for the hypothetical contract than for either the contract between *A* and *B* and *B* and *C*).
>
> (b) An entire agreement clause in the contract between *A* and *B* will be unlikely to operate in the case of the hypothetical contract.

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

> circumstances beyond those relevant to the construction of an actual contract concluded between *A* and *B*.

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

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

While Regulation 6 does not contain a counterpart to section 49(4) of ITEPA that expressly directs attention at the actual contract(s) concluded between the relevant parties, we consider that the overall effect of the provision is similar to that of section 49 of ITEPA, particularly when the national insurance and income tax provisions deal with similar and overlapping subject matter.

C. THE DECISION

(1) The terms of the actual contractual arrangements

10. The FTT was shown two written agreements between the Company and the BBC which, apart from the fact that they related to different periods, were in materially the same terms. The FTT saw no need to distinguish between the two agreements ([7] of the Decision) and we will, accordingly, refer to both agreements as the "Written Agreement", without distinguishing between them unless necessary.

11. At [80] of the Decision, the FTT concluded that these two written agreements:

> Do purport to be a complete record of the actual agreement between the parties.

The parties disagreed as what the FTT meant by this phrase, and made different submissions in relation to it:

> (1) HMRC submitted that it was a factual finding to the effect that the parties agreed that the Written Agreement was a complete record of the parties' actual agreement.
>
> (2) The Company submitted that the FTT could have meant no such thing, given that the FTT went on to make findings to the effect that aspects of the parties' true agreement could be inferred from conduct and were inconsistent with the Written Agreement.

12. In our judgment, HMRC's contention is closer to the mark. At [80] of the Decision, the FTT was considering the Written Agreement and contrasting it with the "incomplete and ambiguous" contracts considered in the case of *Carmichael and another v. National Power plc*, [1999] ICR 1226, which Lord Irvine described as not being intended to "set

out an exclusive memorial of [the] relationship." In drawing that contrast, the FTT was concluding that, at least on its face, the Written Agreement was intended to set out an exclusive memorial of the relationship as between the Company and the BBC. Accordingly, on the FTT's finding at [80], this was not a case in which the contracts in question were partly in writing and partly to be inferred from conduct. Rather, as we read the FTT's finding at [80], all of the terms of the contract were reduced to writing, the only question being the extent to which terms that apparently formed part of that agreement (because they were set out in the written document) were actually part of that agreement given the subsequent conduct of the parties. It is here, of course, that Stages 1 and 2 of the process described in paragraph 8 above must simultaneously be borne in mind: the manner in which subsequent conduct can be taken into account may be very different according as to whether one is construing the actual contract (where subsequent conduct is likely only to be relevant to questions of variation, waiver or estoppel) or the hypothetical contract (where "the circumstances" are to be taken into account).

13. At [55] of the Decision, the FTT provided a detailed summary of the terms of the Written Agreement, which we need not reproduce in its entirety. At this stage it is sufficient to note the following provisions:

> (1) The Company was required to provide the services of Ms Adams as presenter of the Kaye Adams Programme for a minimum commitment of 160 programmes during the period governed by each agreement in return for a minimum fee of £155,000. If the BBC required Ms Adams's services for more than 160 programmes, the Company would be paid the additional rate of £968.75 per programme (Decision at [55(a)] and [55(b)].
>
> (2) The services of Ms Adams to the BBC were not exclusive. However (Decision at [55(d)]), Clause 8.1 of the Written Agreement gave the BBC a right of "first call" as follows:
>
> > During the Term, the BBC will have first call on the freelance services of the Contributor (subject only to the prior professional commitments of the Contributor which have been confirmed to the BBC Representative in writing prior to signature hereof).
>
> (3) Moreover the Written Agreement provided (at Clause 8.2) for Ms Adams to obtain consent from the BBC if she wished to undertake other engagements as follows:
>
> > During the Term, the Contributor will not without the prior written consent of the BBC Representative, 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 it would be reasonable for the BBC Representative to withhold consent where such third party could reasonably be considered to be in direct competition with the Services (e.g. in terms of scheduling either the provision of the Services or their being made available to the public) or which would otherwise conflict with the BBC's Standards.

(4) The Company was required to provide the freelance services of Ms Adams as required to present the Kaye Adams Programme together with such other services normally associated with such "as are usually provided by a professional first class presenter" (Decision [55(e)]). The Company had to procure that Ms Adams would, if required, attend at such times and such 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]" (Decision at [55(f)]).

(5) If, in exceptional circumstances, Ms Adams was not available for reasons beyond her reasonable control, the Company could provide a substitute to the BBC, provided that reasonable prior notice was given, and the BBC approved that substitute (Decision at [55(t)]).

(6) The agreements gave the BBC a high degree of editorial control over the content of the programme that Ms Adams broadcast.

14. The witness evidence heard by the FTT revealed that there was a conflict between the terms of the Written Agreement and the way that agreement had been performed in at least the following respects:

(1) The evidence from Ms Adams and Mr Paterson, the editor in charge of the Kaye Adams Programme, suggested that <u>in practice</u> the BBC did not seek to control or restrict Ms Adams's work for other broadcasters but, on the contrary, sought to accommodate it or work around it by, for example, allowing her to present the programme from other locations when that was required by her commitments to other broadcasters. Their evidence was that it suited the BBC for Ms Adams to have a high national profile arising from non-BBC work (Decision at [57(l)] and [87]).

(2) Two witnesses said, in their evidence, that the Company had no right to provide a substitute for Ms Adams, even in exceptional circumstances (Decision at [57(t)] and [59(b)]).

(3) Ms Adams had considerable practical control over the content of the programme, and the BBC exercised a "light touch" in its editorial control over the programme (Decision at [57(e), (n), (o)], [58(c)] and [59(a)]).

(2) *Autoclenz*

15. Faced with this divergence between the terms of the Written Agreement and the actual performance by the parties of that agreement, the FTT asked: (i) whether the BBC had a contractual right to control or restrict Ms Adams's other work, but chose not to exercise that right; or (ii) whether the Written Agreements did not reflect the true bargain between the parties, so that the BBC held no such right. The FTT applied an analogous approach to the Company's apparent right to provide a substitute for Ms Adams in exceptional circumstances, and to the BBC's apparent rights to exercise a high degree of editorial control.

16. In considering this divergence, the FTT conducted a detailed survey of the law on contractual construction, including the decision of the Supreme Court in *Autoclenz v Belcher*, [2011] UKSC 41 at [19] to [33] and the law relating to that decision. It also considered the effect of the decision in *Carmichael*, as to the circumstances in which the determination of the terms of a contract involved a question of fact and the circumstances in which it involved a question of law.

17. It will be necessary to return to the decision in *Autoclenz*, its scope and its applicability, when considering HMRC's appeal against the Decision. For present purposes, it is sufficient to note the following from the FTT's approach at [19]*ff* of the Decision:

> (1) Absent rectification or sham, the written terms of a contract agreed between *A* and *B* generally governed the (contractual) relationship between *A* and *B*.
>
> (2) In the context of contracts of employment, a court or tribunal must be particularly astute to understand the reality of the agreement between employer and employee, so that the relative bargaining power between those parties is taken into account and the employer is not permitted to insert into the written contract terms that do not affect the "true" agreement between the parties.

18. The FTT summarised these principles at [27] and [28] of the Decision:

> 27 It can be seen from the above that Lord Clarke [in *Autoclenz*], 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 [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 the 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 the 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.

19. The FTT concluded, at [81] and [91] of the Decision, that it had to determine, as a matter of fact, and by reference to all of the evidence, including the terms of the Written Agreement and the witness evidence, whether the terms of the Written Agreement accurately reflected the actual agreement between the Company and the BBC. The FTT considered, as described in paragraph 17 above, that the Written Agreement might not reflect the true agreement between the parties even where it was neither a sham nor fell to be rectified.

20. Applying these principles – which, for convenience, we shall refer to as the "FTT's *Autoclenz* approach" – the FTT concluded (at [93] of the Decision) that the Written Agreement did not reflect the actual agreement between the Company and the BBC. The FTT found that:

> (1) The true agreement between the Company and the BBC did not give the BBC first call over Ms Adams's services and did not require her to seek the prior written consent of the BBC before taking on other engagements.
>
> (2) The BBC could not control the content of Ms Adams's other engagements, although it could penalise her retrospectively if it considered that content brought the BBC into disrepute or could result in the BBC suffering OFCOM sanctions.
>
> (3) Instead, subject to the BBC's right to impose sanctions, Ms Adams was free to enter into other agreements as she wished, although in practice she quite sensibly ensured that the relevant editorial team at the BBC was aware in general terms of her other work on TV and radio.

21. The FTT concluded, similarly, at [95] of the Decision, that the Company had no right to provide a substitute for Ms Adams. However, it concluded (at [96] of the

Decision) that the BBC did have the high degree of editorial control specified in the Written Agreements, although in practice it did not exercise those rights because any disagreements between Ms Adams and the BBC editorial team were resolved collaboratively.

22. Except for the aspects described above, where the FTT considered the Written Agreement did not reflect the "true" agreement between the parties, the FTT concluded that the terms of the agreement between the Company and the BBC were in all material respects as set out in the Written Agreement. At paragraph [102] of the Decision, the FTT set out a summary of what it considered to be the material terms of the actual agreement between the Company and the BBC.

(3) The terms of the hypothetical contract

23. Having summarised what it regarded as the relevant terms of the actual agreements at [102], the FTT concluded, at [103] of the Decision, that those terms would have been transposed into a hypothetical contract entered into directly between Ms Adams and the BBC.

(4) Whether the hypothetical contract would have been an employment contract

24. At [43] to [51] of the Decision, the FTT considered relevant authorities on the distinction between an employment contract (or a "contract of service") and a contract for services. It paid particular attention to the three-stage test outlined by MacKenna J in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*, [1968] 2 QB 497. Given the importance that MacKenna J's articulation has assumed, it worth setting out here the substance of MacKenna J's test at 515-517:

> 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.

25. The FTT thus devoted separate sections of its analysis to each stage of the three stages framed by MacKenna J in that case, "mutuality of obligation" being considered at [46]*ff* of the Decision, "control" at [48] of the Decision and "the other provisions of the contract" at [49]*ff* of the Decision.

26. The FTT started the process of applying the law to the terms of the hypothetical contract as it had found them by observing at [105] of the Decision that

> …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.

27. With this in mind, the FTT began its analysis with a high-level impression as to conclusions that it had drawn from the pattern of Ms Adams's career as a freelance journalist which had spanned 20 years saying at [114] of the Decision:

> 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.

28. It based that "impression" on conclusions that it had drawn from Ms Adams's evidence as to, among other matters, the pattern of her career as a journalist which had spanned 20 years ([106] to [110] of the Decision) and on the extent to which she derived income from, and devoted time to, projects unconnected with her work on the Kaye Adams Show. However, at [115] of the Decision, the FTT acknowledged 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 a contract of employment. With that observation in mind, it analysed the hypothetical contract by reference to the three headings given by MacKenna J in *Ready Mixed Concrete*.

29. The FTT concluded at [117] of the Decision that there was sufficient "mutuality of obligation" to satisfy the first heading identified in *Ready Mixed Concrete*. Neither party seeks to challenge this conclusion, and we therefore need say nothing more about it.

30. The FTT then considered the extent of "control" that the BBC would have under the hypothetical contracts. It noted at [118] and [119] of the Decision that the BBC would have had a contractual right to "pull rank" and exercise control over the content of shows that Ms Adams was presenting. It noted that it was unlikely that, in practice, it would ever need to do this, since it was in Ms Adams's interest to act in a manner with which the BBC was content. It was unlikely that a situation would ever arise where she and the BBC were at an impasse. However, at [119] of the Decision, the FTT concluded that it was the existence of the contractual right, rather than the likelihood of that right being exercised, which was relevant to the analysis of "control" at the second *Ready Mixed Concrete* stage.

31. At [121] to [123] of the Decision, the FTT concluded that there were limits on the control that the BBC could exercise since, in the light of its previous findings as to the terms of the actual contracts between the Company and the BBC, the FTT considered that the BBC did not have the right to control the identity and nature of Ms Adams's other engagements.

32. The FTT did not express a final conclusion as to whether there was sufficient "control" to satisfy the second *Ready Mixed Concrete* test and gave the following qualified conclusion in relation to the first two *Ready Mixed Concrete* tests at [124] of the Decision:

> 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 being an employment contract.

33. With that observation, the FTT turned to considering the third *Ready Mixed Concrete* stage, namely whether there were any factors that were inconsistent with the hypothetical contract being a contract of employment. At [125] to [127] of the Decision, the FTT highlighted the following factors that were inconsistent with employment status:

> (1) The "crucial fact" that the BBC did not have first call on Ms Adams's time or any control over her other engagements.
>
> (2) The fact that Ms Adams had no right to use BBC equipment except when she was in the studio or presenting programmes outside the studio and had no access at all to BBC systems when she was at home.
>
> (3) The absence of any entitlement in the actual agreements between the BBC and the Company to any holiday or sick pay, maternity leave or pension entitlement.
>
> (4) The fact that Ms Adams was treated differently from BBC employees: for example, she did not have any periodic reviews of her performance or the right, which BBC employees enjoyed, to apply for vacancies within the BBC.
>
> (5) The fact that the BBC chose not to exercise its contractual right to require Ms Adams to attend editorial training and to undergo periodic medicals, suggested that she was not seen as being part of the BBC's organisation, as Lord Denning had put it in in *Bank voor Handel en Scheepvaart N.V. v Slatford* [1953] 1 QB 248 (at 295)).

(6) The fact that the actual contracts between the BBC and the Company contained statements to the effect that they were not intended to create a relationship of employer and employee.

34. The FTT set out its overall conclusion, that the hypothetical contract was not one of employment, at [129] of the Decision:

> 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.

D. THE GROUNDS OF APPEAL AGAINST THE DECISION AND THE RESPONDENT'S NOTICE

35. HMRC appeals against the Decision on the following grounds:

(1) *Ground 1*. The FTT took the wrong approach to the identification of the terms of the hypothetical contract, in that it misapplied the Supreme Court's decision in *Autoclenz*. In particular, the FTT erred in taking into account material other than the content of the Written Agreement, and was not justified in doing so by the decision in *Autoclenz*.

(2) *Ground 2*. The FTT failed to appreciate that the third stage of the *Ready Mixed Concrete* test involved the application of a "negative condition", inviting a consideration of whether, even though an arrangement has sufficient "mutuality" and "control" to satisfy the first two stages, it nevertheless does not give rise to a contract of employment. The FTT should not, therefore, have approached its analysis of the third stage of the *Ready Mixed Concrete* test from an "evenly balanced starting point" (in the words of *Weight Watchers v. HMRC*, [2012] STC 265).

(3) Ground 3. The FTT erred in basing its conclusions on an impressionistic overview (specifically, at [105] to [114] of the Decision) that Ms Adams was in business on her own account.

(4) Ground 4. Even if the FTT was correct in its identification of the terms of the hypothetical contract, the FTT nevertheless should have concluded that there was some "sufficient framework of control" so as to satisfy the second stage of the *Ready Mixed Concrete* test.

(5) *Ground 5*. The FTT erred in law and/or took into account an irrelevant consideration in finding, at [126] of the Decision, that the BBC did not view Ms Adams as "part of the organisation". In so doing, the FTT inappropriately relied upon the test suggested in *Bank voor Handel en Scheepart NV v. Slatford*, [1953] 1 QB 248.

(6) *Ground 6.* The FTT erred in law and/or took into account an irrelevant consideration in treating the absence from the actual contracts of contractual or statutory employment rights as a factor that was inconsistent with the hypothetical contracts being contracts of employment.

36. In its Respondent's Notice, the Company argues that either (i) the FTT concluded that there was insufficient control at the second *Ready Mixed Concrete* stage or that (ii) if the FTT decided that there was sufficient control, it was wrong to do so.

E. GROUND 1

(1) Introduction

37. Ground 1 involves the following broad challenges to the FTT's findings as to the terms of the hypothetical contract:

> (1) First, HMRC contended that the FTT followed the wrong approach, and took into account irrelevant considerations when deciding that aspects of the Written Agreement did not set out the true agreement between those parties. For example, in HMRC's submission, the FTT was wrongly swayed by a consideration of the subjective views of Ms Adams and Mr Paterson of the BBC (who was not part of the BBC's legal team and took no part in the contractual negotiations) as to what they <u>believed</u> the terms of the contract to be. In a similar vein, HMRC contended that the FTT was wrong to take into account what they termed Ms Adams's "elective ignorance" of the terms of the actual contract, and the fact that in practice the BBC chose not to enforce all of the terms of that contract.
>
> (2) Second, HMRC contended that the FTT made perverse factual findings arising out of Mr Paterson's evidence, since his evidence positively supported the proposition that the BBC did have the contractual rights of first call and control of Ms Adams's other engagements.
>
> (3) Finally, HMRC contended that the FTT based its analysis on the findings as to the terms of the hypothetical contract set out at [102] of the Decision, but those terms were materially incomplete.

38. There is a significant difference between the first challenge – which asserts an error in approach amounting to an error of law on the part of the FTT – and the second and third challenges, which in substance contend that the FTT made an erroneous evaluation of the evidence before it (albeit one, in HMRC's submission, which amounted to an error of law).

(2) The first challenge

(a) The correct approach in principle

39. We propose to begin with the first challenge, which turned on the correctness of what we have termed the FTT's *Autoclenz* approach (see paragraph 19 above). Essentially, the FTT considered that it was permissible to depart from the written words

of an agreement that the parties to that agreement had assented to in circumstances other than rectification or sham, examining the written agreement in light of "how the parties to the agreement conducted themselves in practice and what their expectations of each other were" (to quote from [27(d)] of the Decision, set out at paragraph 17(3) above).

40. By definition, we are considering a case which does not involve (i) rectification, (ii) "sham" in the *Snook v. London and West Riding Investments Ltd*, [1967] 2 QB 786 sense or (iii) a subsequent variation of the bargain or a waiver of contractual rights. It is clear law that, subject to certain narrow and well-defined exceptions, it is not legitimate to use as an aid in the construction of a contract in writing anything which the parties said or did after it was made: Beale (ed), *Chitty on Contracts*, 33rd ed (2018) at [13-136].

41. HMRC contended that *Autoclenz* itself did not support the FTT's *Autoclenz* approach and that in following that approach the FTT "erred in its understanding and/or application of the judgment of the Supreme Court in *Autoclenz* and applied a novel (and legally unsound) approach to departing from the terms of a written agreement" (quoting from paragraph 16 of HMRC's written submissions).

42. In these circumstances, it is necessary to consider the Supreme Court's decision in *Autoclenz* with some care:

> (1) At the outset it must be stressed that *Autoclenz* involved neither the intermediaries legislation nor the creation of a hypothetical contract within the meaning of that legislation. It concerned a dispute between a company and those "employed" by it, as to whether these persons were "workers" for the purposes of the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998. The company contended that these persons – the claimants – were sub-contractors, and not employees, and the claimants contended the precise reverse.
>
> (2) The contract between the company and the claimants was in writing, and contained a provision whereby the claimants confirmed that they were "self-employed independent contractors" (clause 2) and stated (in clause 3) that "the subcontractor is not, and that it is the intention of the parties that the subcontractor should not become, an employee of Autoclenz. Accordingly, the sub-contractor is responsible for the payment of all income tax and national insurance contributions arising on or in respect of payments made to the sub-contractor by Autoclenz and the subcontractor agrees that he shall indemnify Autoclenz in respect of any liability to tax and national insurance contributions for which Autoclenz may be held liable on or in respect of such payments".
>
> (3) Subsequently, Autoclenz introduced further contractual documents that sought to reinforce the self-employed status of the claimants. In particular, these documents provided that:
>
> > (a) The claimants, as independent contractors, were "entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with

Autoclenz's requirements of sub-contractors" (i.e., a substitution clause, whereby the claimants could perform by providing the services of another); and

(b) The claimants were under no obligation to provide their services to Autoclenz on any particular occasion nor, in entering into the agreement, was Autoclenz undertaking any obligation to engage the claimants' services (i.e., a clause specifying that the services offered by the claimants could be accepted at Autoclenz's discretion).

(4) It was common ground that these provisions formed a part of the written agreement between Autoclenz and the claimants, and the Supreme Court recognised that these provisions rendered it extremely difficult to accord the claimants the status of a "worker" within the meaning of the relevant Regulations (at [10]).

(5) However, the Supreme Court also noted that had the claimants not signed the revised contracts, they would have been offered no further work; and that the revisions were effectively imposed on the claimants by Autoclenz, albeit that the claimants went into the agreements "with their eyes open" (at [11]).

(6) The Supreme Court affirmed the ordinary principles regarding the terms of express contracts at [20] and made clear (in [21]) that "[n]othing 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". That approach involved "a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship" (at [22]).

(7) It is not possible to discern a single, "bright-line" test articulating a single different approach to contracts of employment, rather than – say – commercial contracts. That is because the differences between such contracts are ones of fact and degree and involve not the creation of new rules, but rather the sensitive (and, in particular, context sensitive) deployment of existing and well-established rules. Thus – drawing on the important exposition at [22]*ff* of *Autoclenz* – the following points may be made:

(a) The doctrine of "sham" arises where all of the parties to the contract have the common intention that the acts or documents forming the contract between them are not to create the rights and obligations which they give the appearance of creating. Obviously, a court will be astute to disregard an agreement or a term in an agreement that misrepresents its true nature.

(b) But it is important to note that the doctrine of sham shades ineluctably into other interpretative approaches that do not necessarily involve the conscious misrepresentation of the true

agreement between the parties. One example involves those cases where the parties attach a label which inaccurately describes the substance of the agreement between them. The case – *par excellence* – that illustrates this is *Street v. Mountford*, [1985] AC 809, where Lord Templeman memorably stated of a lease to property described and labelled a "licence" (at 819):

> My Lords, Mr Street enjoyed freedom to offer Mrs Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr Street pleased. Mrs Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

(c) Where such "window-dressing" exists in the form of a mere "label", it is straightforward for a court to disregard the label as infelicitous when it failed properly to describe the substance of what has been agreed. But it is important to appreciate – particularly in cases where there is a contractual mismatch in negotiating power, that typically (but not always) arises in contracts of employment – that the substantive terms of the agreement may themselves amount to "window-dressing", whereby the status or classification of a contract is sought to be altered without actually affecting its true nature. As Elias J stated in *Consistent Group Ltd v. Kalwak*, [2007] IRLR 560 (in a passage approved by the Supreme Court at [26]), when considering the use of substitution clauses to precisely this end:

> 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 (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…"

(d) We doubt whether, in such cases, the language of "sham" is appropriate, although Professor Davies (in her article *Sensible Thinking About Sham Transactions*, (2009) 38 ILJ 318, referred to with approval by the Supreme Court) did refer to "a sham in a non-technical sense". Professor Davies described the methods used to ensure a characterisation of a contract not in accordance with its true substance, beginning with the easy case of labels (at 320, which she described as the "least subtle form of disguise") before moving on to "more subtle devices". In this context, she helpfully described the case of *AG Securities v. Vaughan* (also referred to with approval by the Supreme Court) (at 320):

> What of more subtle devices? Since one of the requirements of a lease is that it confers a right to exclusive possession, an obvious strategy for landlords to adopt is to insert a clause into the agreement denying exclusive possession. In *AG Securities v. Vaughan, Antoniades v. Villiers*, [1990] 1 AC 417, HL, a couple rented a one-bedroom flat. They signed two separate licence agreements which reserved to the landlord a right to introduce other people to the flat. This did not fit the *Snook* definition of a sham because there was no common intention to deceive third parties as to the nature of the transaction. Instead, the House of Lords described the clause as a "pretence" designed to take the agreement outside the protection of the Rent Acts. The landlord never had any intention of enforcing it. Lord Templeman emphasised two key points: that an individual might be prepared to sign anything in order to obtain shelter and that the Rent Acts themselves do not permit contracting out (at 458). Thus, the courts should be astute to protect individuals against exploitation and to prevent landlords from avoiding the Rent Acts by more subtle means.

(e) The problem with "subtle devices" is exactly that – they are subtle – and differentiating a device from a provision forming part of the true substance of the bargain is not straightforward, as Elias J rightly said in *Kalwak*. Nevertheless, it must be undertaken in order to ascertain the true contracting intentions of the parties. In order to ascertain the true contracting intentions, it is (exceptionally) permissible to look to the parties' subsequent conduct. That is not merely to ascertain whether what was initially agreed has been varied (it is self-evident that a subsequent variation is evidenced by subsequent events), but also in order to justify an inference regarding the existence or otherwise of a "subtle device". As Smith LJ stated (in a passage cited with approval by the Supreme Court at [31]):

> 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…

43. *Autoclenz*, it must again be stressed, was a case of considering an actual contract where the parties to it were at issue as to its true nature. Different considerations apply in the case of the hypothetical contract that must be constructed (by which we mean "built" not "interpreted") according to the intermediaries legislation that we have described. As to this:

> (1) We consider that the points articulated in paragraph 8 above must be borne in mind when conducting the process.
>
> (2) We are satisfied that – for those reasons – whilst a tribunal must obviously have regard to the rules that would apply when seeking to characterise the nature of, and construe the terms of, an actual contract, the questions posed by the intermediaries legislation cannot be determined solely by an application of such rules. The process of synthesising the hypothetical contract out of the actual contracts in fact agreed involves additional considerations, and not merely the usual processes of interpretation.
>
> (3) Therefore, even if, as HMRC argue, the FTT misunderstood or misapplied *Autoclenz* it does not follow that its conclusion on the effect of the intermediaries legislation was incorrect. HMRC complain that the FTT placed too much focus on issues such as the parties' subjective beliefs and their subsequent performance of the contract. But these matters are relevant "circumstances" that should be considered when determining the hypothetical contract. Significantly, in this case, there was no dispute between Ms Adams, the Company and the BBC on any of the terms set out in the Written Agreement that HMRC considered to form part of the hypothetical contracts. Therefore, the FTT was obliged to consider whether, in the light of subsequent events, these terms should form part of a hypothetical contract between Ms Adams and the BBC, losing the intermediary that actually existed, namely the Company.

(4) However, the FTT followed an approach that left it vulnerable to errors as to the application of the *Autoclenz* principle and the consequent determination of the terms of the actual contract. Having, following a detailed consideration of *Autoclenz*, determined the terms of the actual contracts (at [102] of the Decision), the FTT spent a single paragraph ([103]) in concluding that all of those terms transposed into the hypothetical contract. That approach suggested that it was basing its conclusions as to whether or not the hypothetical contract contained disputed terms primarily on its conclusions as to the terms of the actual contracts with a corresponding risk of error if it had determined those terms wrongly.

(b) The correct approach in practice

44. With these broad principles in mind we turn to the conclusions of the FTT as to the nature of the actual agreement between the Company and the BBC.

45. We agree with HMRC that the FTT had before it a situation where the parties to the actual agreements (the Company and the BBC) had shown an intention to reduce those agreements entirely to writing (see the FTT's finding at [80] of the Decision). That is, of course, supported by Clause 16.10 of the Written Agreement, which contained an "entire agreement" clause.

46. On a close analysis, the FTT's conclusions that the Written Agreement did not reflect the true agreement of the parties was based on three principal factors:

(1) The FTT's conclusions, at [87] and [88] of the Decision, that since the BBC did not in practice seek either to control Ms Adams's other engagements or insist on any right of "first call", it could not have had the rights in those regards apparently set out in the Written Agreement.

(2) Its conclusions, at [89] to [90] of the Decision, that neither Ms Adams nor the BBC believed, as a subjective matter, that the BBC had rights of "first call" or to control other engagements.

(3) Its conclusion, at [90] of the Decision, that Ms Adams had not herself even read the Written Agreement and in practice conducted herself in accordance with the terms she thought had been agreed with Mr Zycinski.

47. The FTT, therefore, gave considerable weight to factors that would not normally justify a conclusion that the Written Agreement did not reflect the true agreement of the parties. As we have described, there is no reason why such factors cannot be considered and in many cases, construing and analysing the true nature of the contractual relationship between an employer and an employee will require regard to such factors.

48. However, although a "realistic and worldly wise" examination of the circumstances might involve a court or tribunal taking into account after-the-contract events and the subjective views of the parties, where such matters are relied upon as an aid to the construction of the contract at issue, that must be justified by reference to the existing

and well-established rules that we have described, albeit read in the context sensitive way required by the Supreme Court in *Autoclenz*.

49. We do not consider that the FTT properly explained in the Decision the basis upon which the factors to which it had regard were indeed relevant to ascertaining the true terms of the Written Agreement between the Company and the BBC. In particular, we note the following:

> (1) The Written Agreement was, indeed, a standard form contract whose drafting the BBC controlled. However, we do not consider that this fact alone justified the FTT in departing from normal principles of contractual interpretation. There was no obvious imbalance in bargaining power between the Company (and, Ms Adams as, in effect, the person behind the Company) and the BBC, as demonstrated by the FTT's finding (at [88] of the Decision) that the BBC took steps to accommodate Ms Adams's other commitments and the evidence (at [44(l)] of the Decision) to the effect that the BBC also gained from the profile that her non-BBC work generated.
>
> (2) Moreover, the FTT did not conclude that the right of "first call" or the right to control Ms Adams's other engagements were "unrealistic" at the time the Written Agreements were signed. The right of first call set out in clause 8.1 of the Written Agreement was certainly drafted broadly. It can be read, for example, as giving the BBC the right, several months into the contract, to decide that it wished Ms Adams to present considerably more than the 160 shows that formed the "Minimum Commitment" and insist that, even if Ms Adams had other competing engagements, the BBC had the right of "first call" in relation to those additional shows. In such a case, Ms Adams's protection, consisting of the right to notify the BBC, before signing the Written Agreement, of the other competing engagements might be illusory since she might not even have known about them at the time of the Written Agreement. However, one-sided though it was, we do not consider that the possibility of the BBC seeking to enforce its right of "first call" was unrealistic: that right applied to shows within the Minimum Commitment just as much as it applied to additional shows and it was plainly realistic for the BBC to wish to be able to ensure that, if it had scheduled an episode of the Kaye Adams Show for a particular date, Ms Adams could not plead a competing engagement.
>
> (3) In our judgment, the BBC's rights to control other engagements also embodied rights that the BBC could realistically wish to enforce. When Ms Adams presented BBC programmes, she would be associated with the BBC in a public forum. The BBC, therefore, had a legitimate interest in ensuring that her other engagements would not cause the BBC damage or embarrassment. More fundamentally, the BBC had a legitimate interest in ensuring that Ms Adams did not present similar shows for direct competitors. Clause 8.2 of the Written Agreement was quite broadly drafted and it might have been irritating for Ms Adams to seek written consent from the BBC for her other work given that the BBC were only offering her a

minimum of 160 shows a year. However, the BBC's rights were realistically qualified as consent could not be refused unreasonably.

(4) The right of substitution was a right given to the Company, not to the BBC. We acknowledge that, in communications between Ms Adams and HMRC, Ms Adams said "…of course not…" when asked whether she was entitled to send a substitute. However, that simply demonstrates that she did not know all of the terms of the Written Agreement; it does not render Clause 16.4 of the Written Agreement "unrealistic". We would regard the right of substitution as quite realistic: it operated in limited "exceptional circumstances" and could only be invoked on prior notice to the BBC and in circumstances where the BBC was happy with the substitute being proposed.

50. In short, we consider that the FTT erred in its application of *Autoclenz*. It departed materially from normal principles of contractual interpretation without a sufficiently secure basis in a "realistic and worldly wise" examination of the Written Agreement and the surrounding circumstances (including the post-contractual) to make such a departure permissible. That was an error of approach. In the light of that conclusion, we do not need to consider HMRC's separate challenge (the second challenge described in paragraph 36(2) above) to the conclusions that the FTT drew from Mr Paterson's evidence.

(3) Ascertaining the terms of the hypothetical contract and the third challenge

51. In this section, we set out our conclusions as to what the terms of the hypothetical contract were after applying what we consider to be the correct approach to the Written Agreement. In doing so, we will address the rest of HMRC's arguments on Ground 1, namely that the FTT had, in its findings as to the terms of the hypothetical contract set out at [102] of the Decision, left important terms out of account namely that:

(1) The hypothetical contract was for a material duration (of one year) and involved significant commitment on both sides, as it would have required Ms Adams to work for the BBC for at least 160 days in that year.

(2) The hypothetical contract would, like the Written Agreement, have required Ms Adams to attend at such times and at such places as the BBC deemed reasonably necessary.

(3) The hypothetical contract would, like the Written Agreement, have required Ms Adams to comply with the BBC's Editorial Guidelines and other editorial policies and guidelines (including OFCOM's codes).

52. As we have found, the FTT followed the wrong approach when deciding that rights of "first call" and control over Ms Adams's other engagements were not part of the actual contracts. However, despite this error of approach, the FTT made a number of factual findings to the effect that the parties' conduct in practice was not, in many respects, consistent with the Written Agreements. Therefore, the question that arises is whether the hypothetical contract should be constructed having regard to the position

set out in the Written Agreement or by reference to the different way in which the parties conducted themselves in practice.

53. Our conclusion set out above to the effect that the rights of first call, control over other engagements and substitution were "realistic" does not dispose altogether of this issue. As we have noted, *Autoclenz* was a two party case, where the courts involved were construing an actual contract between the parties to that contract. Even if (as we have found) the subsequent conduct considered by the FTT was not sufficient to justify a departure from the terms of the Written Agreement, that does not mean that the hypothetical contract must adhere rigidly to the terms of that agreement. Inevitably, as we described in paragraph 8 above, the constructing of the hypothetical agreement involves doing violence to the terms of the Written Agreement and considering it in the light of the agreement that subsisted between Ms Adams and the Company.

54. In short, whilst the terms of that the relevant parties in fact agreed remains highly material to the content of the hypothetical contact, we do not consider that it is appropriate for a Tribunal to consider itself bound by the ordinary contractual rules (as interpreted by *Autoclenz* or otherwise), as opposed to these rules being a highly material factor. To put the same point another way, the parties' subsequent conduct might amount to a relevant "circumstance" (for the purposes of section 49(1)(c) of ITEPA and Regulation 6 of the Regulations) such that different terms should be imported into the hypothetical contract.

55. However, it would not, in our judgment, be correct simply to construct the hypothetical contract by reference to Ms Adams's and Mr Paterson's imperfect, and sometimes incorrect, understanding of the terms of the Written Agreement. That would be to place too much weight on matters not necessarily relevant to the construction of the hypothetical contract which – after all – will have governed the hypothetical legal relationship between Ms Adams and the BBC from its inception.

56. The construction of the hypothetical contract involves the court in a "counter-factual" exercise: if Ms Adams and the BBC had concluded the contract directly between themselves, what would its terms have been? In this case, the Written Agreement represents a safe starting point, since it was what the BBC agreed with the Company and what the Company (controlled by Ms Adams) agreed with the BBC. However, the following additional points must be borne in mind:

> (1) During the tax years in issue, Ms Adams and the BBC enjoyed a harmonious and reasonable working relationship. The precise terms of the Written Agreement did not matter greatly since there was no occasion on which one party needed to insist upon the strict contractual terms subsisting between the Company and the BBC. In short, there was no "flashpoint" at which one party asserted a right which the other party was inclined to resist. Such flashpoints are of extraordinary value in working out precisely what the parties (albeit after the event) intended.
>
> (2) Suppose, for example, in the "real world", the BBC had insisted on its right (as we have found it) of first call, Ms Adams had strenuously resisted the right so exercised, and the BBC had capitulated without much demur.

> Or, by contrast, the BBC had serially insisted on this right, and Ms Adams had complied without demur? Simply focussing on the parties' harmonious conduct, and ignoring such counter-factual questions, runs the risk of ignoring the reality (if that word can be used in a hypothetical case) of the terms of the Written Agreement as transposed into the hypothetical contract.
>
> (3) In short, in considering the terms of the hypothetical contract regard must be had to what can be drawn from certain hypothetical "flashpoint" scenarios, like the one described. There is nothing particularly artificial in this. The fact is that in the real world, when a genuine and not a hypothetical contact is being construed, there will likely be a "flashpoint" where the parties' intentions will be manifested for the court (as appropriate) to take into account.

57. That is the exercise we now carry out. We start with the BBC's rights to restrict Ms Adams's other engagements, reflected in clause 8.2 of the Written Agreement. A potential "flashpoint" for the purposes of clause 8.2 could arise if Ms Adams took on work for someone that the BBC considered to be a competitor, or unsuitable, at a time that clashed with an episode of the Kaye Adams Show. The FTT made no express finding to the effect that, even in such a scenario, the BBC would have concluded that there was little it could do under the terms of the Written Agreement.

58. Moreover, the evidence did not support a conclusion that, even if the BBC was fully aware of the extent of its contractual rights to restrict other engagements, it would have declined to exercise those rights. The closest the evidence comes to addressing this point is in a note of a meeting between the BBC and HMRC on 27 September 2016, HMRC representatives asked, among others, Mr Paterson, the following questions and received the following answers:

> Q: If Kaye takes time off, how does that work, what notice would she give?
>
> Mr Paterson: She makes contact with me and SP, can be short or long term, she tells us when she is available, e.g. today she is doing a conference, next week, Loose Women one day.
>
> Q: If she was scheduled in tomorrow and let you know at 8pm that she wouldn't be there?
>
> Mr Paterson: She would say there is a problem for tomorrow and we would look at alternatives, the programme is the Kaye Adams programme, we have to fill the airtime.

59. We read those answers as dealing largely with matters of process. Mr Paterson was not a lawyer and admitted that he did not know the detailed terms of the Written Agreements. Mr Paterson's second answer can be read as addressing the situation of a last minute, but "justifiable" inability to work (for example, sudden illness or family emergency) and not as suggesting that the BBC would have considered that there was nothing it could do if Ms Adams said that she was proposing to do work for a competitor instead of presenting the Kaye Adams Show. Even understood in that way, his answer is ambiguous. The statement that "we would look at alternatives" suggests that the BBC might look for an alternative presenter for the particular show, or perhaps not air the

show at all. However, that impression is contradicted by Mr Paterson's insistence that the programme is "the Kaye Adams programme" – suggesting that the Show could not be presented by anyone else. There was also the acknowledgement that "we have to fill the airtime", which suggests that something would have to be broadcast.

60. For all those reasons, Mr Paterson's answer does not suggest that, faced with a hypothetical flashpoint, the BBC would have declined altogether to seek to enforce its rights under clause 8.2. Nor – had it chosen to enforce its rights under clause 8.2 – is there anything to suggest that Ms Adams would have resisted and forced the BBC to litigate.

61. That conclusion is not altered by the fact that, in practice, the BBC did not require Ms Adams to obtain approval in advance, pursuant to clause 8.2 of the Written Agreement, before taking on other work. Mr Paterson had said in his evidence (recorded at [58(e)] of the Decision) that, as a result of his ordinary discussions with Ms Adams, he came to know about the nature of much of her other work. The fact that the BBC did not remind Ms Adams of the contractual obligation to obtain advance approval for that work does not demonstrate that the BBC would never in practice have enforced clause 8.2. At most it demonstrates that the BBC had no objection to the other engagements of which it became aware.

62. Overall, therefore, we have reached the conclusion that clause 8.2 of the Written Agreement should form part of the hypothetical contract.

63. To an extent, the BBC's right of "first call" set out in clause 8.1 overlaps with the rights set out in clause 8.2: if the BBC has "first call" over Ms Adams's services at a particular time, that necessarily excludes the possibility of her working for someone else at the same time. However, the right of "first call", at least read literally, appears to go further than clause 8.2 in three respects:

> (1) Clause 8.2 only restricts Ms Adams's ability to "appear in any other third party audio and/or visual content". It thus would not obviously have prevented her from giving a talk, not to be broadcast, at a corporate event.
>
> (2) Clause 8.2 only operates to restrict Ms Adams's ability to undertake particular other engagements (i.e. those engagements for which prior written consent has not been obtained). By contrast, clause 8.1 purports to give the BBC first call over the entirety of Ms Adams's freelance services.
>
> (3) A competing engagement of Ms Adams could only be "saved" from the operation of clause 8.1 if it was notified in writing before the Written Agreement was signed. By contrast, Ms Adams could obtain consent pursuant to clause 8.2 at any time during the term of that agreement.

64. The FTT found that the BBC realised that Ms Adams would work for a variety of presenters during the term of the Written Agreement and actively sought to accommodate them ([88] of the Decision). Ms Adams's evidence (which Mr Tolley, QC did not suggest to be challenged) was that the BBC benefited from the additional media profile that these other activities generated. In those circumstances, we regard it as inconceivable that the BBC would have exercised its contractual right of "first call"

to preclude Ms Adams from taking on another engagement simply on the ground that it was not notified before the Written Agreement was signed. We also consider that the FTT's findings establish that it was inconceivable that the BBC would in practice have sought to prevent Ms Adams from taking on any other work simply on the ground that it had first call over all of her freelance services. We consider that had the BBC sought to enforce clause 8.1 according to its strict contractual terms, (i) Ms Adams would have pushed back hard, on the basis of "this is not what I agreed to do" and (ii) the BBC would have backed down because the enforcement of clause 8.1 in accordance with its strict terms is (or would be) likely to be characterised as unreasonable.

65. However, the FTT's findings do not support a conclusion that the BBC's flexibility was unlimited. As the FTT recorded at [100] of the Decision, under the Written Agreements, the BBC had chosen to secure Ms Adams's services for a minimum of 160 shows. Therefore, if Ms Adams had pleaded the presence of other engagements as a reason why she could not present any one of the first 160 shows, we do not consider that the FTT's findings support a conclusion that the BBC would have taken no action at all under the contract. As Mr Paterson noted in his answers to HMRC's questions set out at paragraph 46 above, the BBC had airtime to fill. Therefore, while we are quite willing to accept that the BBC might have been prepared, in the context of one of the first 160 shows, to "work around" other engagements by for example allowing Ms Adams to present those shows from different locations, we do not accept that the BBC would have refrained from exercising rights of "first call" in relation to those shows altogether.

66. There were no findings of the FTT dealing with the hypothetical situation of the BBC asking Ms Adams to present a 161st show, with Ms Adams saying she could not do so because of the presence of other commitments. That may well be because the situation was of academic interest since, as Ms Adams said, in her second witness statement (at paragraph 16), she presented fewer than 160 shows for the BBC in both 2015/16 and 2016/17.

67. Given the absence of any findings dealing, even obliquely, with how such a situation might be addressed, and given that the question is a counter-factual one, we express our own conclusion on this point. We consider that, in practice, the BBC would have responded in a similar way to that set out at paragraph 65 above. We are in no doubt that the BBC, recognising that the 161st show was more than the minimum set out in the Written Agreement, would have given a good deal of notice and would have been particularly sensitive in working around any other commitments that Ms Adams had. However, we see no basis in the evidence for a conclusion that, if Ms Adams implacably refused to present the 161st show, the BBC would have concluded that it would simply refrain from enforcing its right of "first call".

68. On a related point, the BBC's right under clause 3.2.4 was to require Ms Adams to attend "at such times and places as the BBC deems reasonably necessary". We consider that the FTT's findings are entirely consistent with a conclusion that the BBC would have enforced that right, if necessary. However, in determining what was "reasonably" necessary, the BBC would be contractually obliged, as it did in practice, to take into

account Ms Adams's other engagements and work around them where it would be reasonable to do so.

69. That leaves the matters set out at paragraph 51(1) and paragraph 51(3) above which we would determine as follows:

(1) The hypothetical contract would have provided for Ms Adams to present a minimum of 160 shows over a period of one year. (Ms Adams's objection to the inclusion of such a term was based on her assertion that the Written Agreement imposed no obligation on her to perform any particular episode of the Kaye Adams Show, an argument that we have rejected in our discussion above).

(2) The hypothetical contract would have required Ms Adams to adhere to the BBC's editorial policies from time to time and OFCOM guidelines. (Mr Gordon did not challenge this conclusion).

70. Our conclusion therefore is that, in addition to the terms of the hypothetical contract set out by the FTT at [102] and [103] of the Decision, the hypothetical contract would have included the following terms:

(1) A right in the BBC to restrict Ms Adams's other engagements as set out in clause 8.2 of the Written Agreement.

(2) A BBC right of "first call" on the terms set out in clause 8.1 of the Written Agreement modified as follows:

(a) Ms Adams did not have to notify all of her competing engagements to the BBC before signature of the Written Agreement.

(b) The BBC had to have a good reason for insisting that Ms Adams give it first call on her services at the expense of other engagements. Non-exhaustive examples of good reasons were that the competing engagements were unsuitable from a BBC perspective: either because they could have reflected poorly on the BBC or because they would involve Ms Adams not being available for an episode of the Kaye Adams Show.

(c) Before enforcing its contractual right of first call, the BBC had to engage in reasonable discussions with Ms Adams to see if adjustments to the schedule could be made to accommodate her reasonable other commitments, for example, by allowing Ms Adams to present the show from a different location. The obligation of flexibility that this imposed on the BBC was higher in relation to any episode of that show beyond the 160th.

(3) An obligation on the BBC to provide, and Ms Adams to present, at least 160 episodes of the Kaye Adams Show per year.

(4) An obligation on Ms Adams to attend at such times and such places as the BBC reasonably required, with the question of what attendance is

"reasonable" to be determined so as to give Ms Adams a reasonable opportunity to undertake other appropriate non-BBC engagements.

(5) An obligation on Ms Adams to adhere to BBC editorial policies and applicable OFCOM guidelines to the same extent as set out in the Written Agreement.

F. THE OTHER GROUNDS OF APPEAL

71. Our conclusion on Ground 1 means that there was an error of law in the Decision. That error of law resulted in the FTT omitting from the hypothetical contracts those terms that we have outlined in paragraph 70 above. In the section that follows, we will re-make the Decision by applying the test in *Ready Mixed Concrete* to what we have judged to be the correct formulation of the hypothetical contract. There is accordingly no need to consider HMRC's other grounds of appeal (or the points arising out of Respondent's Notice) which are based on the FTT's analysis of what we have determined to be an incomplete picture of the hypothetical contract since, in remaking the Decision, we will be replacing the FTT's analysis with our own. Nevertheless, since those other grounds of appeal and the Respondent's Notice raise issues that are relevant to our own re-making of the Decision, we will set out some conclusions on the principles of law which they raise.

(1) Grounds 2, 5 and 6

72. We need say little about HMRC's Ground 2 as both parties are agreed that the third stage of the *Ready Mixed Concrete* analysis starts from an assumption that there is sufficient mutuality and control for a contract to be one of employment. Accordingly, the parties are agreed that, when we come to evaluate that third stage, we should, as was said in the *Weight Watchers* case, not proceed from an "evenly balanced starting point".

73. The same is true of Ground 5. Neither party seeks to argue that an examination of whether Ms Adams was "part of the organisation" of itself provides any principled reason why the hypothetical contract would, or would not be, of employment.

74. There is some difference of principle raised by HMRC's Ground 6. HMRC argue that the existence or otherwise of contractual or statutory employment rights in the Written Agreement is of no relevance at all to the question of whether Ms Adams would be an employee under the hypothetical agreement. The Company argues that the absence of any such terms is a pointer against employment status. However, this difference is more apparent than real. Both parties acknowledge that there is a sound reason why the Written Agreement contains no such terms: it was entered into between the Company and the BBC, and so could not on any view embody a relationship of employment. Faced with such an obvious explanation for the absence of such terms, we consider that any inference that it raises is, at most, slender. We will not treat the absence as necessarily irrelevant so that we put it out of our mind completely, but we will accord it little, if any, weight.

(2) Ground 3 – "business on own account"

75. Both parties agreed that, if a person is "in business on their own account", to quote the phrase used in *Hall v Lorimer* [1994] 1 WLR 209, that may supply a reason why, at the third *Ready Mixed Concrete* stage, a contract is not one of employment even though it provides for a sufficient framework of mutuality and control.

76. The parties disagreed in two general respects. First, they disagreed as to whether the FTT had taken into account relevant factors in determining whether Ms Adams would be carrying on "business on her own account" and whether the FTT gave appropriate weight to certain factors. Since we are remaking the FTT's decision, we do not need to focus on the factors that the FTT took into account and so, in the next section, we set out our own conclusions on the issue which will necessarily involve us setting out, and evaluating, the relevant factors. Accordingly, in this section, we address questions of principle relevant to the third *Ready Mixed Concrete* stage.

77. The Company emphasises the breadth of the factual enquiry quoting, in support, the familiar passage of Mummery J at first instance in *Hall v Lorimer* which the Court of Appeal endorsed:

> 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.

78. HMRC argue that any such analysis should be rigorous, should be directed at the contracts whose status as employment contracts is disputed and should involve something more than a purely impressionistic analysis of such facts as strike a tribunal as relevant. The FTT's analysis, they argue, fell short of the requirements. For example, they criticise the "impression" that the FTT formed, set out at [110] of the Decision, that Ms Adams carries on a profession in her own account as being nothing to the point since, even if she did so generally, it is quite possible for a person to carry on some activities as an employee and some as an independent contractor. In a similar vein, they argue that the FTT did not have sufficient material available to it to support its conclusion, at [106], that Ms Adams had been a freelance journalist for over 20 years since it could not apply the *Ready Mixed Concrete* criteria to all the engagements she entered into over that period. In any event, HMRC argue, the FTT was required to consider the particular engagements with which it was concerned in the context of the overall pattern of work in the two relevant tax years, but not to place them in the context of Ms Adams's career as a whole.

79. We agree with HMRC that any analysis of whether a person is carrying on business on their own account needs to be approached with appropriate rigour. The task is not simply to accumulate impressions and test them against a pre-conceived notion of what constitutes employment. Rather, the task is to consider, at the third *Ready Mixed Concrete* stage, whether the taxpayer's status as a person carrying on business on his or her own account is sufficient to displace the prima facie evaluative conclusion reached following the first two stages, that the person is an employee. However, we do not agree that the task can only be performed by reference to the contract whose status is in issue or evidence relating to the tax years in dispute. The reason why a self-employed plumber doing some work on the first day of a tax year is not an employee is to be found not just in the contractual terms and conditions governing that piece of work, but also in the continuum of that plumber's working life over previous tax years. A conclusion that the plumber is not an employee can be sustained even without a painstaking review of every single engagement undertaken over the past few years. A similar position applies in Ms Adams's case. If the facts demonstrate that her professional life both in the tax years in dispute, and in previous tax years, involved her carrying on a business on her own account, and if the hypothetical contract with the BBC would be regarded as entered into the course of that business, that would be perfectly capable of supporting a conclusion that the hypothetical contract was not one of employment.

80. That leads to the related question of the weight to be placed on the FTT's finding at [112] of the Decision that over 50% of Ms Adams's income in the tax years in dispute would have emanated from her engagement with the BBC when taken together with our conclusion that, under the hypothetical contract, she would have had to work for the BBC for at least 160 days a year. HMRC argue that this factor is highly significant; Ms Adams submits it is of little weight.

81. In the next section, we will draw together all of our conclusions on relevant factors and weigh them in the balance. At this stage, we will observe only that the extent of Ms Adams's economic dependence on the BBC, and the magnitude of the time commitment that would be involved in discharging her duties under the hypothetical contracts, are relevant factors. However, a review of the way this point has been addressed in other authorities suggests that those factors are unlikely, on their own, to determine the issue one way or the other.

82. In *O'Kelly and others v Trusthouse Forte plc*, [1983] ICR 728, the Court of Appeal was considering the employment status of a group of casual waiters who provided their services to a hotel. Although the hotel had no contractual obligation to offer them work, in practice it did so and many of the casual waiters worked more hours in particular weeks than did the hotel's employed waiters. Moreover, such was the frequency and dependability of work offered by the hotel that some of these casual waiters had no other sources of income. The appeal tribunal had held, reversing the first instance decision of the industrial tribunal, that the dependence on a single employer was inconsistent with the waiters carrying out a business on their own account saying:

> Standing back and looking at the matter in the round, what we have to ask is whether these applicants can be said to have been carrying on

> business on their own account. We can well understand that casuals who have their services to sell, and sell them in the market to whoever needs them for the time being, can be said to be in business on their own account in the marketing or selling of their services; but we find it difficult to reach that conclusion in a situation where the services are, in fact, being offered to one person only against a background arrangement (albeit not contractual) which requires the services to be offered to one person only and which involves a repetition of those contracts (albeit under no obligation to do so) as is shown by the weekly pay packet, the holiday pay and other matters f that kind. In our judgment, each of these individual contracts is a contract of employment, not a contract for services.

83. However, the Master of the Rolls criticised this passage saying:

> This must involve a misdirection on a question of law or every independent contractor who is content or able only to attract one client would be held to work under a contract of employment. Indeed, I could as well point out that what distinguishes the applicants' contracts from those of waiters who admittedly work under contracts of employment is that the applicants were employed to wait at a given function and were not available to the company for general deployment as waiters during their hours of work. But if I did so, I too should be usurping the functions of the industrial tribunal.

84. It follows that it would be possible for Ms Adams to be carrying out a business on her own account, even if working for the BBC provided her only material source of income. However, that does not make an analysis of the degree of her dependency on the BBC, the length of her engagements or the number of other people for whom she worked irrelevant to the question of her employment status under the hypothetical contract since, in *Hall v Lorimer*, the Court of Appeal held that these factors were relevant.

85. Finally on this topic the parties were rightly agreed that a person can be an employee in relation to certain activities, and an independent contractor in relation to certain others. Put another way, the mere fact that a person carries out some activities as an independent contractor does not compel the conclusion that no activities are carried out as an employee (or vice versa). That is the case even where all activities are carried out in a similar "sphere": as Rowlatt J said in *Davies v Braithwaite*, [1931] 2 KB 628 at 635:

> For instance, a musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately.

86. This principle, however, raises some difficult issues given that, as both parties accept, the fact of a person being in "business on their own account" can, at the third stage of the *Ready Mixed Concrete* analysis, prevent a contract from being one of employment. The difficulty is illustrated by the judgment of the High Court in *Fall v Hitchen*, [1973] 1 WLR 286. *Ready Mixed Concrete* was not referred to in the judgment (although it was evidently mentioned in argument) and nor was the three-stage approach of *Ready Mixed Concrete* followed.

87. The facts of *Fall v Hitchen* concerned a professional dancer who entered into a contract with the Sadler's Wells Ballet under which he would perform and rehearse with them for a fixed period and thereafter on a rolling basis subject to termination on two weeks' notice. During the term of the contract, he was required to be available full-time for Sadler's Wells during specified hours. In return, he was to be paid a weekly sum whether he was called upon to perform or rehearse or not. Sadler's Wells, however, actively encouraged him to do outside work and the contract permitted him to do so with the consent of Sadler's Wells, not to be unreasonably withheld.

88. The General Commissioners found as a fact that the dancer regarded his contract with Sadler's Wells as an interim measure designed to support him while he looked for other work that he thought would further his artistic career. To that end, while he was working at Sadler's Wells, he had some auditions for other work, which were unsuccessful. Importantly, the General Commissioners found that, even though the auditions were unsuccessful, the dancer was carrying on the profession of a theatrical artist while working at Sadler's Wells (see 291H of the judgment). They also found that his work for Sadler's Wells "constituted an incident in the carrying on of his profession as a theatrical artist" (see 291E of the judgment).

89. Despite those findings of fact, the High Court concluded that the contract with Sadler's Wells constituted a contract of employment. It is not entirely straightforward to see how the same conclusion would be reached if, applying a *Ready Mixed Concrete* analysis, the fact of a contract being entered into as part of a business being conducted by the dancer on his own account, was treated as a potential exception that operated at the third stage of analysis. However, we consider that the same conclusion could be justified, even on a *Ready Mixed Concrete* analysis. At 292H to 293A, it seems to us that the High Court was drawing an implicit contrast between the kind of work that the dancer was performing for Sadler's Wells (with its fixed hours and fixed remuneration not dependent on whether the dancer was actually called on) and the dancer's other work under which he would be engaged for particular roles and only paid for those roles. That contrast, we consider would, even applying a *Ready Mixed Concrete* analysis, support the conclusion that the contract with Sadler's Wells was not carried on as an aspect of the dancer's business carried on his own account so that, at stage three of the analysis, there was an insufficient indication to displace the indications of employment produced at the first two stages.

(3) Ground 4 and the Respondent's notice – "control"

90. To an extent, the parties' arguments on HMRC's Ground 4 and the Respondent's Notice were focused on what the FTT had decided, with HMRC submitting that the FTT had decided the issue in their favour, by concluding that there was sufficient "control" under the hypothetical contract to satisfy the second *Ready Mixed Concrete* stage and the Company arguing that the FTT had determined that there was insufficient control. Since we have concluded, at Ground 1, that the FTT applied its analysis to an incomplete version of the hypothetical contract, it falls to us to determine the extent of the BBC's control and, accordingly, the question of what the FTT did, or did not, decide is of correspondingly less relevance.

91. We set out our conclusions on "control" in the next section. However, since the parties' arguments on Ground 4, and the Respondent's Notice raise questions of principle that are relevant to that task, we will address those issues now.

92. We understood the parties to be agreed on the following propositions:

> (1) The existence of control "to a sufficient extent", is a necessary, though not sufficient, element of an employment relationship (*Ready Mixed Concrete* at 517A).
>
> (2) In determining whether the right of control exists in a sufficient degree, the putative employer's power to decide what is to be done, the way in which it is to be done, the means to be employed in doing it and the time and the place where it is to be done must all be considered (*Ready Mixed Concrete* at 515F). As a shorthand we will, like the parties, refer to this as control over the "what", the "how", the "when" and the "where".
>
> (3) What is relevant is the right to control, not whether it is exercised in practice (*White v Troutbeck* [2013] IRLR 286; and *Autoclenz* at [19] in the judgment of Lord Clarke).
>
> (4) Similarly, the absence of a practical ability to control how a skilled person performs his or duties is not conclusive of the absence of an employment relationship (*White v Troutbeck* at [42]).

93. In his submissions on behalf of the Company, Mr Gordon argued, in reliance on the decision of the Supreme Court in *The Catholic Child Welfare v Various Claimants* [2013] AC 1 that these days, control over the "what" is the most significant aspect of the test. We accept that submission, at least in the context of people, like Ms Adams, who possess, as the Supreme Court put it, in the *Catholic Child Welfare case* "a skill or expertise that is not susceptible to direction by anyone else in the company that employs them." However, we do not consider that this means that the "where" or "when" are of no importance. In his skeleton argument, Mr Gordon canvassed the examples of a self-employed taxi driver on one hand and an employed chauffeur on the other, arguing that control over the "what" was the same in both cases and consisted of a right to require the driver to deliver a passenger to a particular location. That is true, but it seems to us to overlook the importance of control over the "where" and "when" in such a case. The self-employed taxi driver could choose when to seek fares, by contrast with the employed chauffeur. Similarly, the employer could compel the chauffeur to drive to Manchester, whereas a self-employed taxi driver might choose only to seek fares in London. Accordingly, in appropriate cases, control over "where" and "when" remain useful indicators of control.

94. Mr Gordon went on to argue that where a person is engaged to perform specific tasks, it would be wrong to focus, when considering the extent of control on the task or tasks contracted for. He gave the example, of a decorator engaged for a two-week period to redecorate a client's home with the client specifying the colour scheme to be used. He argued that, where the decorator is engaged to perform a specific task, even the client's complete control over the "what" is insufficient to satisfy the second *Ready Mixed Concrete* stage. Rather, he submitted, in such a case there could only be

sufficient control if the decorator agreed to be available to perform whatever tasks the client required during the period of engagement.

95. Mr Gordon submitted that this approach to the question of "control" in the context of task-specific engagements was supported by the passage from the decision of the Master of the Rolls in *O'Kelly v Trusthouse Forte plc* that we have quoted at paragraph 83 above. We do not, however, accept that in this passage the Master of the Rolls was making a determination of law to the effect that, as Mr Gordon submitted in his skeleton argument, "… an employee can generally be moved to different tasks at the employer's command". Rather, he was expressing a view on the facts of the case before him, carefully noting that the task of finding facts was that of the industrial tribunal. Nor do we consider that any such rule of law is needed since there is a ready answer to Mr Gordon's apparent conundrum: even if there is sufficient "control" at the second *Ready Mixed Concrete* stage, the decorator in his example will not be an employee if, at the third *Ready Mixed Concrete* stage, it is concluded that he or she is carrying on a business on their own account.

96. In addition, if there were a principle of law of the kind for which Mr Gordon argues, courts and tribunals would become involved in impressionistic analyses of "how wide" any rights of redeployment would need to be in order to meet the test of control. For example, would an ophthalmic surgeon cease to be an employee because he or she could not be required to perform surgery on feet? Would a TV company need to be able to require a presenter to perform secretarial duties in order for the presenter to be an employee, or would it be sufficient to be able to require the presentation of a different show? The *Ready Mixed Concrete* criteria have stood the test of time because they are perceived to offer the prospect of consistency of outcome across many different engagements. The gloss that the Company proposes to the test of control would diminish this consistency.

97. It follows that we do not accept Mr Gordon's submission that the absence from the hypothetical contract with Ms Adams of any clause allowing the BBC to deploy on tasks other than the Kaye Adams Show is fatal to the argument that the BBC had sufficient control at the second *Ready Mixed Concrete* stage. We do, however, accept that the presence or absence of such a provision would be of some relevance in determining whether there is "some sufficient framework of control".

G. REMAKING THE DECISION

98. The FTT decided that there was sufficient mutuality of obligation to satisfy the first *Ready Mixed Concrete stage*. Neither party has sought to challenge that conclusion and we respectfully agree with it. Accordingly, in this section we will focus on the analysis of the second and third *Ready Mixed Concrete* stages.

(1) Stage Two – "control"

99. Under the hypothetical contract, the BBC had some control over the "where" and the "when". It had, as we have found, a qualified right of "first call" on Ms Adams's services under which she would present at least 160 episodes of the Kaye Adams

Programme each year. The BBC had a right to schedule those programmes when it chose. Clause 3.2 of Part B of the Written Agreement provided that Ms Adams had to be contactable throughout any call day if required and attend at such times and such places as the BBC deemed reasonably necessary. Those rights of control over the "when and where" were not absolute, however, as the BBC had to behave reasonably in working around Ms Adams's other engagements (see our conclusions at paragraph 70 above). Nevertheless, the BBC's rights of control over the "when" and "where" were significant because:

> (1) Unless Ms Adams could demonstrate an alternative engagement on a particular day, there was no restriction on the BBC's rights to schedule an episode of the programme on that day, at a time of its choosing and to require Ms Adams to present the programme from a location of its choosing.
>
> (2) If Ms Adams could demonstrate an alternative engagement that would make her unavailable to present the programme, the fact of that clash would prima facie make it reasonable for the BBC to withhold any consent that was required for the other engagement and so, by extension, to require Ms Adams to present the programme at the stipulated time and place. Admittedly, that outcome was qualified by the BBC's obligation to consult reasonably. However, if there was a clash that could not be resolved by reasonable accommodations, the BBC's stipulations as to the time and place at which Ms Adams performed her duties would prevail.

100. In arguing against the above conclusion, Mr Gordon pointed out that, on occasions when Ms Adams chose to put family responsibilities above work (see [57(g)]) of the Decision, the BBC had not insisted on Ms Adams continuing to perform the letter of the contract. He also noted that Ms Adams's witness statement suggested that she decided herself when to arrive at BBC studios and how soon after each broadcast of the show she would leave. However, as we have noted, the test of "control" is not focused on what happens in practice; rather it is concerned with whether there is the right of control. We are quite prepared to accept that, in practice, given the harmonious relationship to which we have already referred, the BBC was prepared to grant Ms Adams substantial latitude. But that does not alter the conclusion that the BBC had significant rights of control over the "where" and the "when".

101. In a similar vein, we do not consider that the conclusion is altered by Ms Adams's evidence (referred to at [57(d)] of the Decision) that she decided how long she needed to spend preparing for each episode of the show, sometimes spending as little as 20 minutes and sometimes as long as 2 hours. In our judgment, this evidence simply demonstrates that, under the hypothetical contract, it would have been Ms Adams's responsibility to arrive appropriately prepared for each episode of the show, but that how she achieved the requisite level of preparation was up to her. This is an aspect of the BBC's relatively modest control over the "how", which does not alter the conclusion that it had a good degree of control over the "where" and the "when".

102. We now turn to the issue of control over the "what". As we have noted in the previous section, we dismiss the Company's argument of principle to the effect that the BBC could only have sufficient control over the "what" if the hypothetical contract

contained rights for Ms Adams to be deployed more widely than in presenting the Kaye Adams Show. It is therefore necessary to evaluate the nature and extent of the rights that the BBC would have had under that contract.

103. Under the hypothetical contract, the BBC could compel Ms Adams to present the Kaye Adams Show and undertake reasonable tasks associated with that role, such as promotion and the provision of "such other services as are usually provided by a professional first class presenter". Certainly that does not amount to a general right of deployment, but equally we do not accept Mr Gordon's submission that the right of control was narrow.

104. Most importantly, the BBC had the right to determine the form and content of show. In practice, it was prepared to give Ms Adams a high degree of autonomy so that it was Ms Adams who determined the content of the show and also the direction each episode would take while it was being broadcast. It was scarcely surprising that the BBC gave her that latitude as she was an expert with a proven track record of presenting popular and successful shows. However, provided that the show continued to answer to the description of "The Kaye Adams Show", there was no constraint on the BBC's right to determine the content or format of the show. Ms Adams was rightly proud of her ability to "bring a human touch to the stories making the news". But if the BBC had required the Kaye Adams Show to include a much greater emphasis on classical music, she would have had no contractual right to object even if she felt that she would not relish such a task and presenting such a programme might detract from her brand generally.

105. In his submissions, Mr Gordon sought to downplay the significance of this control as being mere "editorial control" that was imposed only to meet the BBC's regulatory guidelines and could only be exercised after the event by imposing sanctions on Ms Adams if she failed to comply. We disagree. The control was significant and related to the very tasks that Ms Adams could be required to perform.

106. The BBC also had some control over the "how". Under the hypothetical contract, it could require Ms Adams to adhere to the BBC's and OFCOM's guidelines. Admittedly, there was little that the BBC could do in "real time" if Ms Adams breached those guidelines. However, as we have observed at paragraph 92(4)above, this is not necessary and, in any event, the BBC retained a right to impose sanctions should Ms Adams fail to adhere to its stipulations as to how the show should be conducted.

107. Overall, in our judgment there was a sufficient framework of control for the second *Ready Mixed Concrete* test to be satisfied.

(2) Stage Three

108. Given the conclusions we have reached on "mutuality" and "control", the prima facie conclusion is that, under the hypothetical contract, Ms Adams would have been an employee of the BBC. In this section, we consider whether there is a reason for that prima facie conclusion to be displaced. The Company's argument is that the conclusion

should be displaced because, when entering into the hypothetical contract, Ms Adams would have been entering into business on her own account.

109. The FTT found, at [110], that over her career, Ms Adams had tended to carry out a profession on her own account. HMRC criticise this finding as "impressionistic", but we do not accept that criticism. Since the hypothetical contract could be prevented from being an employment contract if Ms Adams entered into it as part of a business carried out on her own account, it was relevant for the FTT to consider the extent to which she had, whether in the tax years in dispute or previously, carried on any such business. Moreover, the FTT's finding is based on its analysis of Ms Adams' other activities and so is not vitiated by its flawed determination of the terms of the hypothetical contract with the BBC. Therefore, in our judgment, unless the FTT's conclusion that Ms Adams carried on some business on her own account was flawed for some other reason, we consider that we should accept it.

110. HMRC argue that the FTT's conclusion was flawed because the FTT did not have evidence to determine whether Ms Adams had been self-employed over her 20-year career. We do not accept that either. In her second witness statement, Ms Adams said that she had worked as a freelance for the majority of her career. She gave details of other work she had done. This included co-presenting the ITV show "Loose Women" for which, on her evidence, she was paid on a "show by show" basis (see paragraph 8 of her second witness statement), the show was commissioned for a maximum duration of 12 weeks at a time and was off-air for a period of 12 months (paragraph 6 of her second witness statement). She explained what she regarded as the "ebb and flow of a freelance presenter's role", the uncertainty of the industry she worked in and the fact that roles could come to an end without notice. That evidence was entirely consistent with a conclusion that Ms Adams' other work was undertaken as an independent contractor.

111. Standing back, and viewing these matters in the round, we consider that we should accept the FTT's findings that:

> (1) Over her professional career generally, Ms Adams had tended to carry on her profession as an independent contractor rather than an employee.
>
> (2) Her activities as an independent contractor included activities similar to those she performed for the BBC under the hypothetical contract, namely the presentation of shows discussing topical content.

112. However, those findings do not dispose of the issue. As is clear from *Fall v Hitchen*, the mere fact that a person carries out some business on own account in a tax year, does not prevent even similar activities from being undertaken as employee. Furthermore, there may be some material factor arising out of the years here under consideration that justify a different characterisation. It is, therefore, necessary to consider whether the activities that Ms Adams performed for the BBC under the hypothetical contract were of the same nature and kind as those that she carried on as an independent contractor. It is also necessary, when doing so, to consider whether there is some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor.

113. As we have noted at 111(2), the FTT concluded that Ms Adams's activities under the hypothetical contract were similar in nature to those she performed in the course of her self-employed profession. HMRC argue that that the extent of Ms Adams's economic dependency on the BBC constituted a relevant difference so that the hypothetical contract was nevertheless one of employment. That difference is of potential relevance. If the hypothetical contract took up a significant amount of Ms Adams's time, or introduced a significant a degree of economic dependence on the BBC, those factors could, by analogy with the judgment in *Fall v Hitchen* negative the inference that she entered into that contract as part of her profession as a freelance presenter. That said, we agree with the FTT's statement at [113] of the Decision that matters such as this need to be judged by reference to an appropriately broad sample of Ms Adams's professional career rather than simply by reference to a snapshot in the two tax years in dispute. As the Master of the Rolls observed in *O'Kelly*, it is conceptually possible for a person to provide services to just a single customer, but to remain an independent contractor. By parity of reasoning, any economic dependence on the BBC in the particular tax years under appeal should not automatically lead to a conclusion that she would have been an employee in those years, but has to be understood in the context of Ms Adams's profession as conducted in surrounding tax years.

114. The FTT found at [112] of the Decision that, in the tax years under appeal, somewhere between 50% and 70% of Ms Adams's gross income would have come from the hypothetical contract. The FTT also found that a "significant part" of her working day would be taken up with BBC work on days when the Kaye Adams programme was being aired. To that we would add that, under the hypothetical contract, Ms Adams would have been obliged to present at least 160 shows a year, so BBC work would have taken up a good proportion of her available working time.

115. Those figures are significant. However, they have to be understood in the context of Ms Adams's chosen profession. Her second witness statement in particular paints a vivid picture of the uncertainties inherent in it. Not only are audiences fickle, but a change of a show's producer might result in a reduction of airtime. Even ostensibly successful and popular shows like "Loose Women" could go off air for 12 months. Understood in those terms, we do not consider the stability and economic dependence which the hypothetical contract afforded to be inconsistent with a conclusion that it was entered into in the course of Ms Adams's profession as a freelance journalist and broadcaster. Rather, the conclusion that we have reached is that, in an uncertain profession, Ms Adams had succeeded in those tax years for the time being at least in securing a reasonably stable revenue stream that was material in amount. No doubt the longer that state of affairs persisted, the less likely it would be that successive renewals of the hypothetical contract would be entered into in the course of her freelance profession. Similarly, if, over time, Ms Adams's other revenue streams had diminished so that the BBC work represented a greater percentage of her gross income, she might have tipped over into employment. However, HMRC accepted that in the tax years 2013/14 and 2014/15, the hypothetical contract was not of employment (see [3] of the Decision). We do not consider that the degree of economic dependence in just two following tax years was sufficient to displace that conclusion.

116. We therefore do not consider that there was any relevant difference between the characterisation of Ms Adams's activities under the hypothetical contracts in the 2015/16 and 2016/17 tax years and the characterisation of either (i) her activities under hypothetical contracts with the BBC in 2013/14 and 2014/15 or (ii) her other activities as a self-employed journalist and broadcaster in other tax years. Therefore, we consider that the prima facie conclusion reached at the end of Stage 2 is to be displaced because, when entering into the hypothetical contracts here at issue, Ms Adams would have been entering into business on her own account.

117. Although the Company sought to draw assistance from a comparison between Ms Adams' (hypothetical) case and other BBC employees, we derived no assistance from this (one way or the other). Whilst we do not say that such comparisons might not be relevant in other cases, in this case we found them not to assist, and therefore say no more about them.

H. DISPOSAL

118. We are conscious that we have differed from the FTT as to the terms forming part of the hypothetical contracts. In those circumstances, we considered carefully whether we should remit the matter back to the FTT. We decided not to, because we derived enormous assistance from the careful way in which the FTT found the facts and set out its findings in the Decision, to which we pay tribute. Those findings have enabled us to adopt what we consider to be the more proportionate course of remaking the Decision. Given that the task at the third stage of the *Ready Mixed Concrete* analysis involves a multifactorial analysis, we are reassured that our own independent analysis of the facts and counter-factual matters in issue have led us to the same conclusion as the FTT.

119.For the reasons we have given, we conclude that HMRC's appeal must be dismissed.

THE HONOURABLE MR JUSTICE MARCUS SMITH

JUDGE JONATHAN RICHARDS

RELEASE DATE: 18 February 2021