[2020] EWCA Civ 328

Case No: A2/2019/0296

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
MRS JUSTICE LAMBERT
[2019] EWHC 45 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:10 March 2020

Before:

LORD JUSTICE UNDERHILL
LADY JUSTICE SIMLER
SIR JACK BEATSON

- -

Between:

HUDSON CONTRACT SERVICES LIMITED	**Appellant**
- and -	
THE CONSTRUCTION INDUSTRY TRAINING BOARD	**Respondent**

- -
- -

Jolyon Maugham QC and Christopher Stone (instructed by **KPMG LLP**) for the Appellant
Sam Grodzinski QC and Christopher Knight (instructed by **Fieldfisher LLP**) for the **Respondent**

Hearing date: 15 January 2020

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Approved Judgment

Lady Justice Simler:

Introduction

1. This is a second appeal brought by Hudson Contract Services Limited (referred to as "Hudson") against an assessment to levy by the Construction Industry Training Board ("the Board") dated 7 March 2017, in the sum of £7,964,584 in respect of Hudson's head office at Bridlington. Hudson appeals the judgment of Lambert J dated 18 January 2019. The judge dismissed its appeal (brought under s.12(4) Industrial Training Act 1982) from the judgment of the Employment Tribunal (Employment Judge Sarah Goodman sitting with Ms Church and Mr Noblemunn) promulgated on 18 May 2018, upholding the levy.

2. Liability to levy by the Board is imposed by the Industrial Training Act 1982 ("the 1982 Act") on an "employer in the construction industry" and is assessed in relation to each "construction establishment" of the employer "engaged wholly or mainly in the construction industry" during the relevant period.

3. In essentials, Hudson contends (both here and below) that it is not an employer in the construction industry because

   i) neither it nor its direct employees carry out any of the "principal [construction industry] activities" listed in Schedule 1 of the Industrial Training (Construction Board) Order 1964 (as amended by SI 1992/3048) ("the Scope Order"); and

   ii) it does not take any construction risk.

   Further, since Hudson does not direct, control or supervise any construction activities from its head office in Bridlington, but instead carries out payroll (and related) services in relation to self-employed operatives who perform construction activities, this is not a construction establishment *from* which construction industry activities take place, to be assessed for the purposes of levy.

4. Those arguments were rejected below. In summary, both the Employment Tribunal and Lambert J held:

   i) Hudson "employs" (in the extended sense given by the 1982 Act which includes self-employed workers) more than 20,000 self-employed operatives, the majority of whom work in the construction industry, carrying out a range of designated construction activities.

   ii) Whether Hudson is "an employer in the construction industry" is answered by reference to the activities of those people whom the statute deems to be its employees. Accordingly, Hudson is an employer in the construction industry.

   iii) Hudson has "a construction establishment" because the self-employed operatives work wholly or mainly in the construction industry and Hudson contracts with those employees from its head office, and they are paid from the head office. Accordingly, the construction industry activities take place *from* its head office at Bridlington.

5. The two central issues on this appeal, as they were below, are accordingly:

i) Whether Hudson is "an employer in the construction industry" for the purposes of s.11(2) of the 1982 Act and article 3(1) of the Industrial Training Levy (Construction Industry Training Board) Order 2015 ("the 2015 Order"), it being common ground that Hudson is "an employer" in the extended sense given by s.1(2) of the 1982 Act.

ii) Whether Hudson operates "a construction establishment" being an establishment "engaged wholly or mainly in the construction industry" for the purposes of article 5(2) of the 2015 Order; in other words, whether it is an establishment *from* which principal construction activities take place.

In addition, Hudson raises a further question as part of the construction establishment issue, concerning the proper meaning and application of article 5(4) of the 2015 Order.

6. Permission to appeal to this court was given by Bean LJ (by order dated 17 April 2019) on the basis that the case raises points of statutory interpretation not previously considered at this level.

7. For Hudson, Mr Jolyon Maugham QC appears with Mr Christopher Stone as they did below. For the Board Mr Sam Grodzinski QC appears with Mr Christopher Knight, who also appeared below. I am grateful to all counsel and those instructing them for the assistance they have provided by way of written and oral submissions in this case.

The background facts

8. The facts are not in dispute and can be summarised by reference to the findings of fact made by the Employment Tribunal.

9. Hudson was established in 1996, with a head office in Bridlington, East Yorkshire. It has no other relevant premises or potential establishments. At the time of the Employment Tribunal hearing it was paying 27,000 operatives each week (processing 1.4 million payments each year). Since the 2015 Order, Hudson has been registered by HMRC under the Construction Industry Scheme (the "CIS") established by the Finance Act 2004, as a gross payment subcontractor. Until then its clients paid it on a net paid basis.

10. Hudson's clients are small specialist construction firms engaged by a principal contractor to deliver a specific element of a construction project. Where a client requires the services of workers for such projects, the client identifies the particular individual required and contracts with Hudson to engage him or her under its standard form self-employed contract and to supply the services of that individual to the client. As Hudson's standard client contract provides, the "*service to be provided by Hudson is that of acting as an engager of such Freelance Operatives as the Client may select, and the supply of their services to the Client*" (clause 2). The client agrees with Hudson that it has no right (and shall not purport to have any right) to exercise supervision, direction or control over the manner in which the freelance operative carries out the services (clause 8).

11. The client is required to use Hudson's "Method Statement" to explain to the operative that he or she is to be engaged on a self-employed basis with Hudson (with the option of actual employment if that is preferred) and the individual then signs a contract for

services with Hudson at the client's premises (a copy of which is then filed at the Bridlington head office). The standard form contract for the provision of self-employed services between Hudson and the operative makes clear:

i) The operative is contracted to carry out services for the client "*operating in the construction sector*" (clause 1).

ii) Following the negotiation of terms between the operative and the client, Hudson steps into the shoes of the client and contracts with the Freelance Operative on the terms negotiated (clause 2).

iii) The operative agrees that "*he has no contract of any type whatsoever with the Client*" (clause 4) and "*is self-employed*" and "*bound to Hudson to carry out the Service mutually agreed with the Client and to satisfy*" each and every obligation which he has agreed with the Client he will satisfy (clause 7 (i) and (iii)).

iv) The operative must use his own tools and equipment necessary for providing his services; and may send a substitute (clause 7 (vii) and (ix)).

12. The client identifies the current site address and site representative in respect of the operative. The operative's qualifications and competence are checked by the client who is also responsible for arranging necessary insurance, negotiating rates of pay and for health and safety issues.

13. Hudson provides a software package to the client for the purposes of entering details of pay and hours for payroll purposes. The client is required to ensure that cleared funds are in Hudson's account for payment purposes. Hudson pays each operative, withholding the CIS tax element, and providing a pay breakdown to the operative, charging the client £15 per operative per week that the operative is supplied by Hudson to the client. Thus, Hudson has the administrative burden of operating a payroll function and takes on responsibility for dealing with compliance issues, including compliance with the terms of the CIS. The result is that the risk of employment tribunal proceedings and HMRC status enquiries shifts to Hudson.

14. Hudson's own directly employed workforce (those engaged under contracts of employment or equivalent) is small, including only its directors, two members of staff and a small team of regional auditors. The directly employed staff have wholly office-based functions save for the regional auditors. None of them do anything physical in the construction industry, and they do not have any supervisory, control or management function for construction activities of any kind. Hudson does not maintain a pool or bank of operatives and does not select those operatives it employs. Operatives are not despatched, directed or controlled from Hudson's head office and whilst members of the directly employed staff team may visit construction sites for audit purposes (to check that operatives who state they are self-employed, are self-employed) operatives do not generally visit head office or speak with the directly employed team.

15. The construction industry levy is collected under a series of "levy orders" made following consultation, at three year intervals, and most recently by the 2015 Order. Like Lambert J, I take the levy history so far as relevant, from the agreed statement of facts before the Employment Tribunal.

16. From at least 1982 until the second period of the 2015 Order, the calculation of levy payable by an employer included a "labour only offset." The effect of this was that payments made under labour only agreements in respect of work carried out at or from a construction establishment during a relevant base period, where the employer had received the same sum from another employer in the construction industry under a labour only agreement, could be offset against any payments made to employees under labour only agreements or as emoluments to employees. The effect was, given that the payments Hudson received from employers vastly exceeded its own payments to direct and statutory employees no levy would ever have been payable had Hudson been registered as prima facie liable to pay levy.

17. The method of calculating levy changed for the third period in the 2015 Order in that the labour only offset no longer applied, and a different mechanism was adopted, in part by reference to the CIS. The change is summarised by Kerr J in R (Hudson Contract Services Ltd) v The Secretary of State for Business, Innovation and Skills and The Construction Industry Training Board [2016] EWHC 844 (Admin) (referred to as "Hudson No.1"). By the 2015 Order, levy is imposed on "net payments" made to contractors in the construction industry under the CIS. Under the CIS, a "net paid" subcontractor has tax deducted at source by the employer who holds it on account of the subcontractor's tax liability. Subcontractors are not subject to such deductions if they are "gross paid", in other words, registered as such with HMRC under the CIS. But a contractor seeking gross paid status must satisfy various turnover and tax compliance tests, meaning in general, small sole traders, including labour-only subcontractors, tend to be net paid. Until 2015 Hudson was not registered for gross payments, had not registered with the Board and had never been asked by the Board to register. Hudson had never been assessed to levy until this time.

18. Hudson No.1 was a judicial review challenge by Hudson to the lawfulness of the 2015 Order. Kerr J accepted in broad terms that the 2015 Order was enacted to simplify levy collection while raising adequate funds to train the workforce and secure an adequate supply of skilled labour. He held that while Hudson did not retain the services of or employ a constant pool of construction industry labour, it benefitted nonetheless from a stable, well-trained workforce, without which it could not trade as effectively as it does. At [111] Kerr J held the new method of levy calculation did not lead to double taxation in the strict sense, in that no one person was liable to pay levy twice in respect of the same subject matter. Whilst there may be an element of double or multiple recovery in that levy payments may have to be made in a significant number of cases by more than one person in respect of the same subject matter, this was not unlawful.

19. The 2015 Order had three levy periods. This appeal concerns the third period, which ran from 1 January 2017 to 31 March 2017.

20. Hudson submitted a levy return on 19 December 2016 in which it stated that it did not have any construction establishments.

21. On 7 March 2017, the Board issued Hudson with an assessment to levy in the sum of £7,964,584. Given the "nil return" from Hudson, the Board estimated the levy figure at 0.5% on payments to employees on the payroll (the PAYE employees or directly employed workforce) and at 1.25% on the net paid (CIS taxable) operatives. Hudson's appeal to the Employment Tribunal was against the assessment in principle but was not, subject to that issue, a challenge to the quantum of levy.

The statutory framework

The 1982 Act

22. The 1982 Act maintained provision for the establishment of industrial training boards for the purpose of training people for employment in activities of industry or commerce. The Board is one such board, established under the original legislation, the Industrial Training Act 1964.

23. Section 11 of the 1982 Act provides the power to impose levy for the purpose of meeting the expenses of an industrial training board in the following terms:

> "(1) An industrial training board may from time to time submit to the Secretary of State proposals (in this Act referred to as "levy proposals") for the raising and collection of a levy to be imposed for the purpose of raising money towards meeting the board's expenses.
>
> (2) The levy shall be imposed in accordance with an order made by the Secretary of State (in this Act referred to as "a levy order") which shall give effect to levy proposals under subsection (1) above and shall provide for the levy to be imposed on employers in the industry, except in so far as they are exempted from it by the industrial training order, the levy order or an exemption certificate; but nothing in this Act shall be construed as requiring the Secretary of State to make a levy order in a case in which he considers it inexpedient to make one."

Accordingly, levy is to be imposed on "employers in the industry" unless they are exempted in one of the ways identified.

24. Employment is widely defined for these purposes by s.1(2) of the 1982 Act as follows:

> "employee" includes a person engaged under a contract for services and "employer" shall be construed accordingly;
>
> "employment" means employment under a contract of service of apprenticeship or a contract for services or otherwise than under a contract, and "employed" shall be construed accordingly; …"

The Scope Order

25. There is no definition of "the industry" in the 1982 Act. Instead it is defined in the Scope Order establishing the Board. Schedule 1 of the Scope Order includes a comprehensive list of activities which constitute "activities of the construction industry" in so far as they are carried out in Great Britain. These include:

> "(a) all operations in –
>
> i) the construction, alteration, repair or demolition of a building or part of a building;

ii) … .

(c) the manufacture of –

i) doors, window-frames, built-in storage units, stairs…;

(d) the construction of shop, office or similar fittings on the premises on which they are to be installed… ;

(e) …

(f) …

(g) the preparation of stone for building purposes;"

26. The activities listed at (a) to (g) are defined by Schedule 1 paragraph 3 as "principal activities of the construction industry".

27. "Related activities" are also defined by paragraph 3, as meaning "any of the following activities, that is to say – (a) research, development, design …; (b) …; (c) operations of a kind performed at office premises or laboratories or at stores; warehouses or similar places; (d) …(e) training of employees or apprentices; …"

28. Schedule 1 paragraph 1 provides that "related" or other incidental or ancillary activities, can also be activities of the construction industry if they fall within paragraph 1(h) or (i) of Schedule 1, as follows:

"(h) any activities (other than those above-mentioned) being –

(i) related activities incidental or ancillary to principal activities of the construction industry; or

(ii) activities undertaken in the administration, control or direction of one or more establishments, being establishments engaged wholly or mainly in principal activities of that industry, in related activities incidental or ancillary thereto, or in the administration, control or direction of one or more other establishments engaged in such principal or related activities;

and carried out, in either case, by the employer engaged in those principal activities or, where that employer is a company, by the company or by an associated company of the company;

(i) any activities of industry or commerce (other than construction activities) carried out at or from an establishment mainly engaged:-

(i) in construction activities; or

(ii) in construction activities and in activities described in the Appendix to this Schedule, but to a greater extent in construction

> activities than in activities described in that Appendix in relation to any one industry."

Accordingly for "related" or other ancillary activities to count as construction industry activities, the related activities must be carried out by the same employer who is engaged in principal activities.

The 2015 Order

29. The 2015 Order was made under s.11(2) of the 1982 Act. Article 2 sets out certain interpretative provisions. So far as relevant these include:

> "2(c) "construction establishment" has the meaning given in article 5;
>
> (d) "the construction industry" means the activities of the construction industry as defined by Schedule 1 to the Industrial Training (Construction Board) Order 1964 read together with the orders listed in the Schedule to this Order;
>
> (e) "contract payment" has the meaning given in article 7(3);
>
> (f) "emoluments" means –
>
> (i) salaries, fees and wages excluding fees which are paid to a company director who is remunerated solely by fees;
>
> (ii) any gratuity or other profit or incidental benefit of any kind obtained by an employee, if it is money or money's worth, other than pensions contributions;
>
> (iii) anything else that constitutes, or is intended to constitute, earnings of the relevant employment;
>
> (g) "employer" has the meaning given in article 3;
>
> (h) "labour-only agreement" means any agreement or arrangement (other than a contract of service, a contract of apprenticeship or a contract which requires substantial use of plant or specialist equipment or both) between an employer and any other person, the purpose of which is wholly or mainly the provision of services (not including professional services) of such a person or any other person to the employer; ……"

30. Article 3 of the 2015 Order provides, consistently with the 1982 Act, that levy shall be imposed on "employers in the construction industry" in respect of each of the three levy periods. Article 3(2) and (3) provide relevantly:

> "3(2) Subject to article 9, a person is liable to pay an amount by way of levy in respect of a levy period if that person is an employer in the construction industry at any time in that period.

> (3) In this Order (other than in this article), references to an "employer" are references to a person who is an employer in the construction industry."

31. Article 5 defines a "construction establishment". It provides,

> "5 (1) The Board must assess the amount of levy to be paid in respect of each construction establishment of an employer.
>
> (2) In this Order, "construction establishment" means any particular establishment of the employer engaged wholly or mainly in the construction industry during the necessary period.
>
> (3) in this article "the necessary period" means –
>
> (a) a period (which need not be continuous) consisting of a total of 27 or more weeks falling within the relevant base period; or
>
> (b) in the case of the construction establishment which started being engaged in the construction industry during the relevant base period, a period (which need not be continuous) –
>
> (i) falling within the relevant base period; and
>
> (ii) consisting of a total number of weeks exceeding one half of the number of weeks in the part of the relevant base period starting on the day on which the construction establishment started being engaged in that industry and ending on the last day of the relevant base period.
>
> (4) The person who on the first day of the relevant levy period owns or otherwise has responsibility for a construction establishment is to be treated as the employer of all persons employed at or from that establishment during the relevant base period."

32. Article 7 prescribes the method of calculating and assessing the amount of levy. For the third levy period which is the only period relevant on this appeal, article 7(2) provides:

> "(2) In respect of the third levy period, the amount of the levy to be assessed in respect of each construction establishment is -
>
> A + B
>
> where
>
> A is the amount equal to 0.5% of all emoluments which have been paid or are payable by the employer to or in respect of persons employed by the employer at or from the establishment in the relevant base period; and

> B is an amount equal to 1.25% of the relevant part of all contract payments made by the employer at or from the establishment in the relevant base period.
>
> (3) "Contract payment" has the meaning given to it by section 60 of the Finance Act 2004. ….."

33. Article 8(1) provides that the total amount of levy to be paid by an employer in respect of the relevant levy period is "the aggregate amount of levy assessed as payable for all construction establishments of the employer".

The judgments below

34. As already summarised above, the Employment Tribunal found that Hudson is an "employer in the construction industry" for two linked reasons. First, the Employment Tribunal concluded that what an employer does is to be determined by what its employees do. Secondly, since employees are defined by the 1982 Act to include self-employed contractors as well as directly employed employees, the question whether Hudson is an employer in the construction industry falls to be determined not just by reference to what its directly employed staff do, but also by reference to what the many thousands of self-employed operatives do. As the self-employed operatives are "in the construction industry", so too, the Employment Tribunal found, Hudson is also in the construction industry.

35. Lambert J's reasoning on the first issue was to similar effect: what Hudson does is to be answered not just by what the directly employed workforce do, but by what its 20,000 or more statutory employees do. As the Tribunal found, they are in the construction industry and therefore so is Hudson. She continued at [55]:

> "55. I do not find this conclusion to be illogical, counter-intuitive, irrational or absurd as Mr Maugham suggests. There are more ways of being in the construction industry than wielding a pickaxe or donning a high visibility jacket or by directing or supervising or controlling those engaged in the physical side of the industry. The employment contract is between Hudson and the operative. It is Hudson who pays the operative (having received cleared funds from the client). At a most basic level, Hudson's profits are derived from the construction industry. Mr Maugham reminds me of Kerr J's observation that Hudson provided "*services to employers in the construction*" industry (at [2]). I however do not have a difficulty with Hudson providing both a service to the construction industry and also being in the construction industry: the concepts are not mutually exclusive. Further, the construction is consistent with the purpose of the Board and the purpose of the levy which is for the better provision of training of persons for employment in the relevant industry as a whole, not just those who are directly employed, but everyone who is engaged in the construction industry and, as Kerr J identified, Hudson benefits from the existence of a large pool of appropriately trained operatives, just as does its clients."

36. On the second issue (whether Hudson has "a construction establishment") the Employment Tribunal held that an establishment's "whole or main" engagement in construction activity is assessed by counting its workers. The phrase "any particular establishment" in article 5(2) of the 2015 Order does not preclude there being only one.

37. The Tribunal had no difficulty with the concept of employees working *from* premises *at* which no construction activities took place, drawing on its collective experience in reaching that conclusion. For example, it compared Hudson's case with a hypothetical cleaning agency with cleaners based at premises at which they clean without any on-site supervision and employed by an employer they have never seen in whose office no one works, except perhaps a director or payroll clerk. The Tribunal reasoned, "*If the employer is an employer in the industry, because he does what his employees do, and they are all cleaners, and he has only one establishment, he has a cleaning establishment from which his employees work*".

38. The Employment Tribunal rejected the argument advanced by Hudson based on article 5(4) that, since Hudson's clients own or otherwise have responsibility for construction establishments (building sites and scaffolding yards), article 5(4) operates to treat Hudson's clients rather than it as "the employer" of all persons employed at will from the establishment during the relevant base period so that the clients continue to be liable to levy and Hudson is not so liable.

39. The Tribunal held that this provision (article 5(4)) is only concerned with who in the levy period is to pay levy assessed on activity in the corresponding base period in circumstances where construction activity during the base period may have been intermittent and there may also have been changes of management or ownership in the period between the end of a base period and the start of the levy period or indeed during the levy period. The Tribunal held that if Hudson was an employer in the industry and construction activities were carried out from its only establishment during a necessary period of the relevant base period, article 5(4) would only be relevant if there was a change of ownership or responsibility in respect of its establishment after the end of the base period, or after the start of the levy period. Since neither circumstance applied, article 5(4) was not relevant in this case. Accordingly, the Employment Tribunal concluded that Hudson's head office in Bridlington was a construction establishment wholly or mainly in the construction industry and that construction activities took place *from* the head office in the relevant period.

40. Lambert J's reasoning on the second issue also proceeded on the basis that just as an employer does what its employees do, so a construction establishment is a function of what its employees do. Relying on R (Bobcat Plant Hire) v Construction Industry Training Board [2003] EWHC 2383 (Admin), she adopted an "activities" approach, which involves counting how many of Hudson's employees work in construction, as opposed to non-construction, activities. Given that the statutory framework allows what she described as statutory employees (that is to say, self-employed workers) to be taken into account, Lambert J held that Hudson's head office is indeed engaged wholly or mainly in the construction industry.

41. Lambert J viewed the question whether Hudson has an establishment "at or from" which construction activities are carried on as the key battleground between the parties. Since it was common ground that no construction work is carried out *at* Hudson's

headquarters at Bridlington, the question was whether construction work is carried out "from" Bridlington. On this question she held at [60] to [61]:

> "60. ……Mr Maugham submits that this is a question of fact and I agree with him. The scheme does not provide any guidance as to how the question is to be answered but common sense would suggest the need for some sufficient connection between the employee, the employee's activity and the establishment. Mr Maugham submits that, when the role of Hudson and the nature of its business are analysed there is no sufficient connection. Mr Knight submits that the connection is more than comfortably made out. Mr Maugham also submits that I am bound by the factual findings of the Tribunal and on this topic, their conclusions are not fully realised and I should remit the issue back for the Tribunal to deal with properly.
>
> 61. I have no difficulty in concluding that for the purposes of the 2015 Order, there is a sufficient connection between Hudson's head office and the statutory employees and their activities. The relevant facts are those which were available to the Tribunal. First, the contract is between Hudson and the employee. The fact that the contract is signed at the client's offices is irrelevant; the client is acting as Hudson's agent. The operative is informed in clear terms that there is no contractual relationship between the client and him and that his contract is with Hudson. The operative is told that Hudson steps into the shoes of the client. Hudson knows the name of the operative and his trade and the client company, site address and client representative. The operative is paid by Hudson from the Bridlington head office, subject to Hudson deducting the appropriate tax figure. Hudson's operations are conducted from its head office; if status issues arise (in respect of which Hudson is liable) those issues will be handled from the Bridlington head office. These connecting elements are sufficient to meet the test."

42. Lambert J rejected Hudson's article 5(4) argument for broadly the same reasons as those given by the Employment Tribunal.

The appeal

43. Hudson appeals on the basis that in respect of both issues (namely, whether Hudson is "in the construction industry" and has an establishment "wholly or mainly in the construction industry") there were errors of law below in the approach to statutory interpretation and the tests mandated by the relevant statutory provisions were not applied. Since the question for this court is principally one of statutory construction, the question on this appeal is what is the proper interpretation of the statutory concepts giving rise to the imposition and assessment of levy, and were they properly applied to Hudson.

44. I take each of the two central issues I identified at the outset in turn, starting with the question whether Hudson is an "employer in the construction industry".

First issue: is Hudson an employer in the construction industry?

45. As set out above, the power to impose levy is provided by s.11(2) of the 1982 Act which determines that levy is to be imposed on "employers in the industry, except in so far as they are exempted from it". Consistently with that, article 3 of the 2015 Order, the critical levy imposing provision, imposes levy liability on "employers in the construction industry". Liability is not imposed on establishments, which are not the key concept or means by which the policy objective of this legislation is achieved as Mr Maugham QC submitted. Nor is the concept of employer subordinate to the concept of an establishment. I am in no doubt that the governing concept is the concept of an "employer in the industry" on whom liability is imposed. Just as employers are the target of liability to levy (see s. 11(2) of the 1982 Act and article 3 of the 2015 Order), employers may be exempted from such liability, and if so, exemption certificates are given to the employer (albeit in respect of one or more of its establishments) where the Board is satisfied that the employer has made its own training arrangements (ss.13 and 14 of the 1982 Act). Liability to levy does not depend on having a construction establishment, although the actual assessment of the amount of any liability depends on whether or not and if so how many relevant establishments an employer has.

46. Although it is true as Mr Maugham submits, that the 1982 Act does not define the phrase "employer in the construction industry" in a compendious manner, instead defining both "employer" and "the industry" separately, I do not accept Hudson's argument that these are legally and factually distinct concepts that must be answered in two stages. The "industry" is separately defined by s.1(2) of the 1982 Act simply because the 1982 Act applies across a range of industries and potential levying boards. The specific industry definition is set out separately in secondary legislation. There is no warrant in the legislation for separating the two concepts, or ignoring the concept of employer when considering whether the levy target is "in the construction industry".

47. To determine whether liability to levy is imposed on a particular person, the statutory question in both the 1982 Act and the 2015 Order is whether the person is an "employer in the construction industry" and not, for example, whether it is a company, business or establishment "in the construction industry". That is unsurprising in context. The levy funds the training of "employees" as defined and it is rational for levy to be imposed on those who benefit from a trained workforce of employees (as extensively defined), namely employers of those employees.

48. The term "construction industry" is itself defined by article 2(d) of the 2015 Order, also set out above. Reading in that definition to the levy imposing provision in article 3(1) of the 2015 Order, levy is imposed on employers performing activities of the construction industry as defined by Schedule 1 of the Scope Order. So the central question depends on what activities are performed by Hudson as employer, and whether they are principal activities in the construction industry, as defined by Schedule 1 of the Scope Order.

49. Mr Maugham agrees that the focus is on the activities performed but submits that whether Hudson is "in the construction industry" is a function of what it does and not a function of what its subcontractors or other third parties do. As a matter of commercial reality and fact, Hudson performs office based activities only (payroll and the like), in the course of its business of supplying operatives. The mere fact that the operatives perform construction industry activities does not mean their activities are Hudson's

activities simply by virtue of the extended definition of employee. What is important is to consider how Hudson defines its activities and what Hudson itself does. Critically in his submission, Hudson does not itself carry out any of the "principal activities" listed in sub-paragraphs (a)-(g) of Schedule 1 of the Scope Order (and therefore cannot be brought into scope by reference to the related activities at sub-paragraphs (h)-(i)). Rather, he submits that Hudson's business is essentially that of (or comparable to) a payroll agency. The focus must be on what Hudson contracts to do and the type of risk it takes because that reflects the economic and commercial reality. Here, he submits Hudson neither delivers, nor does it enter into contracts to deliver, construction industry outputs. It takes no construction risks. Its activities are solely "related activities". As a result, he submits Hudson is not in the construction industry.

50. I do not accept those submissions for the reasons that follow.

51. First, I agree that the focus of the legislation is on the activities (and whether they are construction industry activities) performed by the employer. There is nothing in the wording of the legislation to support the argument that risk (or output) is determinative, or indeed relevant. These concepts are simply not present in the legislation. At one point during the course of argument, Mr Maugham came close to accepting that concepts of risk and output could be restated so that his suggested test is whether the levy target has contracted to perform construction industry activities, but in my judgement, the key concept on the plain language of the 1982 Act and 2015 Order is whether the employer is performing relevant activities.

52. Secondly, companies and employers can only act through their employees. Likewise an employer can only perform activities by or through its employees.

53. There is no freestanding definition of "employer" or "employment" in the 2015 Order but the primary enabling legislation supplies the extended definitions of "employee" and "employment" (as set out above) and includes the self-employed and even those working "otherwise than under a contract".

54. Given the wide definition of employee and employment in s. 1(2) of the 1982 Act, it would require clear words in article 3 of the 2015 Order to displace those definitions. No such words are present. This is unsurprising given that the whole purpose of the legislation is to fund the training of *all* workers in the industry; training is not confined to direct employees only (see for example, s.5(1)(c) and (e) of the 1982 Act); and it is funded by reference to both categories of worker (direct employees and self-employed contractors – see article 7(2) definitions A and B of the 2015 Order). Moreover, as Mr Grodzinski QC submits, where the 1982 Act permits distinctions to be drawn between different classes of persons by way of consideration of levy, specific provision is made. For example, s.11(1) of the 1982 Act allows an industrial training board to submit levy proposals for the raising and collection of a levy to the Secretary of State, from time to time, and s.12 makes supplementary provision including at s. 12(2), that levy proposals may make different provision in relation to different classes or descriptions of employer. This represents a potential departure from the general approach otherwise adopted and could allow for a focus on the nature or activities of the employer as distinct from its employees. But there is no provision for treating different classes of employee differently.

55. There is nothing in the legislation, accordingly, that requires a focus on direct employees only, nor any rational reason in these circumstances to exclude from consideration the activities performed by Hudson's operatives, by considering only its directly employed workforce. As Hudson's contracts make clear, its operatives (who it engages and whose services it supplies) carry out construction industry activities for clients operating in the construction sector. It follows that Hudson performs these activities by or through its operatives and there is no compelling basis for excluding the activities performed by the majority of Hudson's 20,000 self-employed operatives who are, it is common ground, engaged wholly or mainly in construction industry activities.

56. Hudson is after all a sophisticated form of labour-only subcontractor, on terms that remove risk in relation to construction activity. If Mr Maugham's analysis were correct, it would apply to all labour-only subcontracting businesses including those with a labour force put at the disposal of construction industry contractors (say, a labour force of 1000 bricklayers for example) and those who simply find labourers and then supply them. On Mr Maugham's argument, these companies or businesses would not be in scope because all they do is supply labour (as Mr Maugham himself appeared to accept at one point during his submissions, albeit he sought to retreat from that position subsequently).

57. Furthermore, the result on this argument could well be that the only person performing construction activities is the self-employed labourer him or herself and there is no employer at all. I agree with Mr Grodzinski that this would be an irrational outcome in context given the purpose of the legislation, namely to fund the training of *all* workers in the industry and not just direct employees. Given the wide definition of employee and employment, labour only subcontractors are plainly "employers in the construction industry" performing construction activities by or through their labourers or labour force. Although the risks may be different in each case, there is otherwise no real distinction between Hudson's position and these counterfactual arrangements.

58. There is no requirement to look, as Mr Maugham submits would be the consequence of the Board's arguments, at whether workers are part-time or full-time, or at the time they spend performing relevant activities. An employer is "in" the industry if, through its workers of any kind, it performs construction industry activities. Such an employer is at risk of an assessment once this occurs. That risk may be mitigated by the assessment provision in article 5 of the 2015 Order, but that is a different point.

59. This analysis is not undermined (as Mr Maugham submits) by the different definition of "principal activities" given by Schedule 1 of the Scope Order as applied to the construction industry on the one hand and that given at paragraph 1(j) of Schedule 1 to the Industrial Training (Engineering Board) Order 1967 (SI 1967/279) ("the Engineering Scope Order"). Paragraph 1(j) includes as a "principal activity" of the engineering industry "the hiring out by an employer of individuals in his employment to persons engaging in any of the foregoing activities…". The Scope Order was made in 1964 and contains no similar provision. It was amended in 1967 and subsequently but the Board has not been able to identify any documents which provide a contemporaneous explanation for why the Engineering Scope Order was made in the terms it was, and why a similar provision was not included in the Scope Order for the construction industry.

60. I do not accept Mr Maugham's contention that the inclusion of paragraph 1(j) in the Engineering Scope Order is rendered redundant and serves no purpose on my construction of the Scope Order. No doubt there have been scores of different scope orders drawn up by different draftsmen at different times over the years. It is quite possible that paragraph 1(j) was regarded as desirable even though not strictly necessary, and may simply have been included as belt and braces clarification, to spell out what was inherently already there.

61. Accordingly, in agreement with both the Employment Tribunal and Lambert J, on a proper construction of article 3(1) of the 2015 Order Hudson is an employer in the construction industry. I would therefore dismiss this ground of appeal.

Second issue: does Hudson have a construction establishment?

62. It is common ground that if an employer is in the construction industry but does not have a qualifying construction establishment, there can be no assessment to levy. For an assessment there must therefore be a relevant "construction establishment"; that is to say, an establishment of the employer "engaged wholly or mainly in the construction industry during the necessary period". It is also common ground that this question resolves to whether construction activities take place "from" the Bridlington head office so that it is a "construction establishment" within the meaning of article 5(2) of the 2015 Order.

63. Ultimately, as Mr Maugham accepts, this is a question of fact and this court is bound by the findings of fact made by the Tribunal below. But Hudson contends that both the Employment Tribunal and Lambert J misdirected themselves, and Lambert J in particular, sought to replace the statutory question with a more open textured question, whether "there is a sufficient connection between Hudson's head office and the statutory employees and their activities" (see [61] of her judgment).

64. Mr Maugham submits that Hudson's case is straightforward. There are construction establishments at which self-employed individuals engaged by Hudson work doing construction industry activities, but these are construction establishments of clients rather than of Hudson. Furthermore, the only candidate to be a construction establishment in this case is Hudson's head office. There is no dispute that construction activities do not take place "at" Hudson's head office. So, he submits, the only question is whether construction activities take place "from" that head office. Mr Maugham submits that the only possible conclusion on the facts is that construction activities do not take place "from" that office so that it is not a construction establishment.

65. Mr Maugham contends that to regard a head office with some loose connection to the construction industry as being one from which construction activities take place would have the consequence that every head office is a construction establishment. That cannot have been the intention of the draftsman and has the effect that the concept of establishment effectively disappears and cannot deliver the important statutory objectives of this legislation.

66. Moreover, on the agreed facts, Hudson does not direct, control or supervise the construction activity its operatives carry out, whether from the Bridlington head office or from anywhere else. As a matter of construction of its contracts with clients and the operatives, it cannot do so and does not do so in any event. The reality is that Hudson

has no control over the locations at which the operatives work, does not visit the sites (save when conducting workplace audits) and does not even know what its operatives are doing or where they are doing it. The Bridlington head office is engaged in record keeping, contract and payroll administration. At best these are "related activities" but in the absence of principal construction activities also carried on by Hudson, these are not construction activities.

67. Mr Maugham submits that the head office of a cleaning company analogy advanced by the Employment Tribunal and adopted by Lambert J affords no proper analogy. The cleaning agency in such a case will direct or control or supervise the cleaning activities of its employees from that office. It will also have a contract to clean, together with insurance to cover the work of the cleaners, safety procedures to control the risks associated with cleaning and will invoice the cleaning, advertising its services as a cleaning agency. Mr Maugham submits that Hudson does and has none of these.

68. Again, I do not accept these submissions for the reasons that follow.

69. As a matter of statutory construction, the concept of a construction establishment is relevant to the assessment mechanism for levy but not to the imposition of liability. For liability purposes, the governing concept in the 1982 Act is an "employer in the industry" on whom liability to levy is imposed both by the 1982 Act and by article 3 of the 2015 Order, where liability depends on the person in question being "an employer in the construction industry" (see article 3(2)). The levy provision in article 3(2) is unqualified by reference to the existence or otherwise of a construction establishment and is framed in mandatory terms. All persons who are "employers in the construction industry" are by virtue of that status, at risk of an assessment.

70. However, the risk is mitigated when it comes to the Board making an assessment of levy to be paid. By article 5(1) and (2) of the 2015 Order, levy can only be assessed in respect of any particular establishment of an employer that is a "construction establishment" by virtue of it being "engaged wholly or mainly in the construction industry". In other words, where there is an employer in the construction industry with one or more potential construction establishments but none is "engaged wholly or mainly" in the construction industry, there can be no assessment to levy. Likewise, article 5(3)(a) provides for circumstances where even if the establishment is engaged wholly or mainly in the construction industry (by virtue of the construction industry activities of those employed at or from the establishment), it cannot be assessed to levy as a construction establishment unless it is so engaged for at least 27 weeks falling within the relevant base period. It is to my mind clear from the terms of article 5 that the purpose of assessing levy by reference to a construction establishment of an employer in the construction industry, is to ensure that such an employer with a mixed and/or varying workforce in which construction industry employees are either a minority of the workforce or their activities comprise both construction industry and non-construction industry activities and/or change over time, is not assessed to levy. This is for sound reasons in an industry involving a wide range of construction activities, from short and simple jobs to large scale projects; and workers with different skills or trades, who may work on a variety of jobs at different premises or establishments and/or for a variety of employers during any given levy period.

71. For these reasons too, I do not accept Mr Maugham's contention that the draftsman uses the concept of establishment to protect against levy avoidance and/or delineate the

territorial scope of the levy. I agree with Lambert J that the possibility of tax avoidance is inherent in any taxation scheme where taxpayers can choose to organise their affairs so as to minimise the impact of taxation.

72. The 2015 Order, not least articles 5(4) and 7(1) and (2), envisages persons employed (in the extended sense) "at or from" a relevant construction establishment. The ordinary case will be one in which workers doing construction work carry it out *at* the construction establishment at which they are employed. However, the legislation has a wider reach and plainly extends also to cover people who are not employed to do their work *at* a construction establishment, but who are employed *from* a different place (or base) to that at which they do their work activities, reflecting the wide range of circumstances deemed to be employment and workers who are treated as employees for levy purposes under the 1982 Act.

73. In any event, as Lambert J observed, if unintended tax avoidance occurs, this can be addressed by the consultation process prescribed by section 11 of the 1982 Act as part of the triennial levy cycle.

74. So, what does employed *from* mean in this context, and does it cover Hudson's operatives in relation to the Bridlington head office? I do not accept Mr Maugham's argument that the concept of being employed *from* is limited to a situation where, for example construction industry tools and/or equipment are kept at a base (or yard) and workers go from the base or yard to a construction site. That too may be a paradigm example. However, it is not difficult to imagine many different kinds of self-employed, agency and labour-only workers in the construction industry, who may never go to a yard or base of any kind, but instead, go straight from home to the particular site at which they are then working. (The cleaning agency analogy adopted by the Tribunal is an example in a different industry; there are many others). It seems to me that in that situation, if an operative is employed (in the extended sense used in the 1982 Act) by a company, agency or entity with whom his or her only legal relationship is the contract they have entered into, and the company is based at its head office, then the operative may be employed *from* the head office too. That the company does not control, supervise or organise the worker's work from the head office (or at all) is irrelevant in the context of employment in this extended sense. Similarly, that the operative has no contact with head office staff and does not go there is also irrelevant in this context.

75. In reaching its conclusion that Hudson's operatives are employed *from* the Bridlington head office, the Tribunal relied on the following facts. Significantly, the contract made between Hudson and the operative (and indeed Hudson and the client) makes clear that Hudson steps into the shoes of the client and contracts with the operative on the terms negotiated between the operative and the client. The operative expressly agrees that he or she has no contract of any type whatsoever with the client. In these circumstances the fact that the contract is signed at the client's offices is nothing to the point – the client is merely acting as Hudson's agent – and the contract is returned to Hudson's head office since Hudson is the contracting counterparty. Further, Hudson knows (from the completed contract) the name of the operative, his trade and the client company, representative and address of the site where the contract is completed. Hudson is responsible for deducting tax and national insurance contributions and paying each operative from the Bridlington head office. If and to the extent that any status issue arises, it is dealt with from the head office by Hudson.

76. In my judgment, both as a matter of law and on the facts I have summarised, the Employment Tribunal was entitled to conclude that Hudson's operatives are employed *from* the head office at Bridlington which is a construction establishment accordingly, and Lambert J was correct to reject this ground of appeal. I would therefore dismiss the construction establishment ground.

77. Finally, Mr Maugham relies on article 5(4) of the 2015 Order to contend that on its proper construction, it deems Hudson's clients rather than Hudson itself to be the employers of operatives engaged at their establishments, because it is the clients and not Hudson who own or are responsible for the construction establishments in question. Mr Maugham contends that it cannot have been the intention of the legislation that an individual could have two employers in respect of a single engagement in circumstances where article 5(4) refers only to "the person" and "the employer", and in his submission it is clear that the client is *the* employer (and the only employer) of an operative in a relevant levy period.

78. Again, I do not accept this submission. Article 5(4) of the 2015 Order provides:

> "The person who on the first day of the relevant levy period owns or otherwise has responsibility for a construction establishment is to be treated as the employer of all persons employed at or from the establishment during the relevant base period"

It forms part of the assessment scheme of article 5 identifying which relevant employer in respect of what construction establishment and for what period levy should be assessed.

79. The purpose of this particular provision is to address changes in ownership of or responsibility for a construction establishment during the relevant levy period, in order to identify *the* person responsible for paying the relevant levy. Article 5(4) focuses on the construction establishment: as shown by its clear words, "owns or … has responsibility for a construction establishment" and "persons employed at or from that establishment". It deems each establishment to be the levy responsibility of a single employer (who on the first day of the relevant period owns or is responsible for the construction establishment in question) during the levy period. That is not the same as saying that each employee must have or must be the responsibility of a single employer during the levy period as Mr Maugham submits. As Mr Grodzinski submits, such an interpretation is at odds with the clear wording of article 5(4) and would be highly impractical in an industry with a high self-employment rate and a wide range of construction activities, in which people work on numerous jobs for a variety of employers during any given levy period.

80. For all these reasons I would dismiss the appeal on all grounds advanced by Hudson. The assessment to levy made by the Board against Hudson in respect of the third levy period accordingly stands.

Sir Jack Beatson

81. I agree.

Lord Justice Underhill

82. I also agree.