# TC01660

**Appeal number SC/3022/2008**

***PROCEDURE – whether the Tribunal should hear proceed with the hearing of the appeal – rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – decision reserved at the hearing but the appeal heard on a provisional basis – reserved decision that it was in the interests of justice to proceed with the hearing***

***INCOME TAX and NATIONAL INSURANCE CONTRIBUTIONS – whether workers engaged by the Appellant were employees (for income tax purposes) and employed earners (for NICs purposes) – whether the Appellant had sufficient day-to-day control over the workers to make them his employees – held on the evidence that he had such control and that the workers were employees of the Appellant – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**PHILIP JOHN WRIGHT** **Appellant**

**- and -**

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

**TRIBUNAL: JOHN WALTERS QC**
**JULIAN STAFFORD FCA**

**Sitting in public in Colchester on 4 August 2011**

**The Appellant was neither present nor represented**
**Mr. Akash Nawbatt, Counsel, instructed by the Solicitor for HMRC, for the Respondents**

## DECISION

1. This appeal has a very long and complicated history.

2. The Respondents (the Commissioners of Inland Revenue, but to whom we refer throughout as 'HMRC') issued determinations under Regulation 49 Income Tax (Employments) Regulations 1993, determining tax due from the Appellant, Mr. P.J. Wright, as follows:

| Date Issued | Year of Assessment | Tax assessed |
|---|---|---|
| 8 March 2004 | 1999/2000 | £43,430.97 |
| 8 March 2004 | 2000/2001 | £39,359.60 |
| 8 March 2004 | 2001/2002 | £40,123.37 |
| 8 March 2004 | 2002/2003 | £17,640.42 |
| 28 April 2004 | 2003/2004 | £17,640.42 |

3. We note that copies of these determinations were sent to Messrs Martin Wright & Co. of 35 East Street, Colchester, then acting for the Appellant. Mr. Martin Wright, a chartered accountant, has been involved in this case throughout as the Appellant's adviser. He is not a relation of the Appellant.

4. HMRC on 8 March 2004 also issued a decision to the Appellant under section 8 Social Security Contributions (Transfer of Functions etc.) Act 1999 ("SSCTFA") in relation to national insurance contributions ("NICs") that certain persons described as employees were employed earners in respect of their engagements with the Appellant from the period from 6 April 1999 to 5 April 2003 and that the Appellant was liable to pay primary and secondary Class 1 contributions in respect of the earnings from those engagements and that the amount that the Appellant was liable to in respect of those earnings was £140,683.99.

5. HMRC on 28 April 2004 also issued a decision to the Appellant under section 8 SSCTFA in relation to NICs that certain persons described as employees were employed earners in respect of their engagements with the Appellant from the period from 6 April 2003 to 5 April 2004 and that the Appellant was liable to pay primary and secondary Class 1 contributions in respect of the earnings from those engagements and that the amount that the Appellant was liable to in respect of those earnings was £19,274.64

6. These determinations and decisions were appealed by Martin Wright & Co. on behalf of the Appellant by letters dated 30 March 2004 and 16 June 2004 and the appeal was heard by the Commissioners for the General Purposes of Income Tax ("the General Commissioners") for the Division of Colchester on 6 September 2005.

7. The General Commissioners accepted the Appellant's contention that the relationship of the workers to the Appellant was one of a contract for services (i.e. self-employment) but not a contract of employment and allowed the appeal.

8. At the request of HMRC, the General Commissioners stated and signed a case for the opinion of the High Court pursuant to the General Commissioners (Jurisdiction and Procedure) Regulations 1994 (SI 1994/1812). In the case they recorded that the Appellant and his wife had appeared in person and oral submissions had been made on his behalf by, amongst others, Robert Russell, M.P. (at that time the Member of Parliament for Colchester, of whom the Appellant was a constituent).

9. The appeal was heard before Lewison J (as he then was) sitting in the Chancery Division of the High Court on 6 February 2007. Again, the Appellant appeared in person. HMRC were represented by Mr. Nawbatt, who appeared before us.

10. Lewison J in a 23-paragraph judgment concluded:

> "that the facts as found by the General Commissioners do not lead to the inevitable conclusion that these workers were the employees of Mr. Wright during the relevant period. Whether they were or not is essentially a question of fact for the General Commissioners to determine. It is not for me to substitute my view of the facts for the view which they take. But, for the reasons I have given, I am satisfied that the General Commissioners did apply the wrong legal test and in those circumstances I must allow the appeal and remit the question to the general Commissioners."

11. Lewison J's decision that the General Commissioners had applied the wrong legal test was, as appears from paragraphs [10] and [11] of his judgment a decision that the General Commissioners ought to have answered, and did not answer, the question whether the Appellant had sufficient day to day control over his workers to make them his employees.

12. The formal Order of the High Court following the appeal and also dated 6 February 2007 was :

> (1) that the Appeal be allowed
> (2) that the matter be returned to the General Commissioners for re-trial applying the correct legal test in determining whether the workers were engaged under a contract for services
> (3) that the costs of the Appeal be reserved

13. It appears from the correspondence in our papers that the General Commissioners were unwilling to accept the return of the matter, because their Clerk wrote on 13 June 2007 to (a) the Department for Constitutional Affairs; (b) the Appellant, and (c) Larking Gowen, Chartered Accountants, of Colchester, with whom Mr. Martin Wright was by this time a partner, stating that they were considering remitting the matter to the Special Commissioners and that HMRC had indicated that they had no objection to that course of action.

14. The Clerk to the Special Commissioners wrote on 16 October 2007 to the Clerk to the General Commissioners accepting the transfer of jurisdiction in the appeal.

15. Larking Gowen (Mr. Martin Wright) wrote to the Clerk to the General Commissioners on 15 January 2008 complaining about the transfer of jurisdiction to the Special Commissioners, which, they stated, had been done without the opportunity for Larking Gowen or the Appellant to comment. They said that 'the communications that were apparently sent in June 2007' had not been received by them or the Appellant.

16. The Special Commissioner (Dr. J.F. Avery Jones CBE) made Directions in connection with the appeal on 5 February 2008.

17. Robert Russell MP wrote to the Office of the Special Commissioners in respect of the Appellant on 15 February 2008. He complained about the transfer of jurisdiction from the General Commissioners to the Special Commissioners. He said that he had attended the hearing of the appeal in the High Court 'to show support for' the Appellant and 'had previously written to the Judge'. He said:

> "It was quite clear to me that, in his summing up, the Judge wished to find in favour of my constituent but ruled that (on a point of law) the matter should be referred back to the General Commissioners.
>
> I have the Judge's ruling in front of me. He makes it absolutely clear that whether or not the workers in question were employees of Mr. Wright is a "question of fact for the General Commissioners to determine". He further stated that the General Commissioners had applied "the wrong legal test" (an indication which I took him to mean as I heard him say those words) that Mr. Wright was right and the HMRC was wrong, so he had to "remit the question to the General Commissioners".
>
> I have no doubt in my mind that the Judge was expecting the General Commissioners to use the "correct" legal test to reach the conclusion which they had done at the original hearing – on all eight counts!
>
> Therefore, I am astonished to be told by Mr. and Mrs. Wright that the General Commissioners do not intend to honour the verdict of Mr. Justice Lewison – and instead refer the case to the Special Commissioners. My constituent does not agree with this. He has already won his day in court, before the General Commissioners.
>
> The facts are those as determined by the General Commissioners. It is not Mr. Wright's fault that the "wrong legal test" was used to reach their unanimous verdict on all eight counts against him.
>
> I therefore, with the greatest respect, support Mr. Wright's contention that the General Commissioners should simply comply with the verdict of the High Court Judge and use the "correct" legal test to support the conclusions – on the facts they heard at the original hearing in Colchester – and find in favour of my constituent.
>
> Thank you."

18. In response, the Office of the Special Commissioners wrote to Mr. Russell on 29 February 2008 as follows:

> "The situation is highly unusual and [the writer has] referred [Mr. Russell's letter] to the Special Commissioner. His view is that since the Judge has ordered a re-trial applying the correct legal test, the General Commissioners could not just issue another decision based on the facts they have already heard. Since the legal test is different, the relevant facts may be different and will need to be proved. The Commissioner considers that it is in order for the General Commissioners to decide that such a re-trial would be too long or complex for them to deal with. Since the hearing was effectively starting again the Special Commissioner sees no reason why a different body, the Special Commissioners, should not hear it. In terms of time it is unlikely to make any difference which body hears it. The Special Commissioners are prepared to sit outside London if the parties wish."

19. Larking Gowen (Mr. Martin Wright) wrote to the Office of the Special Commissioners on 20 February 2008 again complaining about the transfer of jurisdiction and referring to the provisions of section 44(3) and (3A) Taxes Management Act 1970 ("TMA") which made provision for the transfer of jurisdiction and required the General Commissioners in such a case to consider any representations made to them by the parties before arranging for the transfer of proceedings to the Special Commissioners.

20. Larking Gowen (Mr. Martin Wright) wrote again to the Clerk to the Special Commissioners on 15 April 2008 re-iterating their position and in particular stating that Lewison J:

> "in his summary, noted that the N.E. Essex General Commissioners had made the correct decision but based on the wrong issue. The case was remitted to the General Commissioners for them to confirm the basis of their decision in favour of the taxpayer."

21. Larking Gowen appear to have written on 13 May 2008 to Mr. Justice Lewison.

22. However on 29 May 2008, Larking Gowen wrote to the Clerk to the Special Commissioners requesting that the hearing (before the Special Commissioners) be held outside London and more locally to the Appellant.

23. This request was not complied with and Larking Gowen wrote again on 2 July 2008 to the Clerk to the Special Commissioners noting their disappointment and stating that it would be very inconvenient for the Appellant if the appeal was heard in London and would involve significant additional cost. The letter added that Larking Gowen were continuing to consider a complaint concerning this matter relating to both HMRC and the Tribunal Service.

24. On 9 July 2008, the Clerk to the Special Commissioners wrote to Larking Gowen to say that the Special Commissioner had agreed to their request for a local hearing.

25. On 7 August 2008, Larking Gowen, by R.H. Jones, Technical Director of Taxation, wrote to the Officer of the Special Commissioners to say that the firm

"is currently unable to provide support to Mr. Wright in this continuing matter" and suggesting that the Office of the Special Commissioners should correspond directly with the Appellant.

26. On 3 October 2008, the Appellant himself wrote to the Office of the Special Commissioners stating that he would not be taking part in any "re-trial" on the basis that such a re-trial was an abuse. He wrote:

> "I remain perplexed at the manner in which you are dealing with this matter.
>
> At the High Court hearing in February 2007, Mr. Justice Lewison ruled that this case should be remitted to the General Commissioners for Colchester and North Essex and that the key point was the question of "control" of my workers. He concluded that I had insufficient control for my workers to be considered as employed.
>
> You are now proceeding towards, effectively, a "re-trial". I am not willing to participate in this as this is an abuse of the rules and seems to represent a personal vendetta against myself by HMRC.
>
> The facts relating to control of my workers were fully supplied to the General Commissioners at Colchester in September 2005; more than 3 years ago ..."

27. The Special Commissioners nevertheless set the appeal down for hearing. It was heard by Mr. Howard M. Nowlan, a Deputy Special Commissioner, in London on 26 March 2009. The Appellant did not appear and was not represented. Mr. Akash Nawbatt represented HMRC. Mr. Nowlan issued a decision dismissing the Appellant's appeal on 20 April 2009. By this time (with effect from 1 April 2009) the reform of the tribunals system had brought about the abolition of the General Commissioners and the Special Commissioners and the establishment of the First-tier Tribunal (Tax Chamber) and Mr. Nowlan's decision was released as a decision of that Tribunal, of which Mr. Nowlan became a Judge at its inception.

28. By a letter dated 29 June 2009, the Appellant wrote to the Tribunal Service applying for Judge Nowlan's decision to be set aside pursuant to rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). This superseded the Appellant's request for permission to appeal against Judge Nowlan's decision to the Upper Tribunal, which he had sent in a letter dated 28 May 2009.

29. The Appellant's application to set aside Judge Nowlan's decision was heard in public in London by Judge Theodore Wallce on 11 August 2009. Mr. Martin Wright represented the Appellant and Mr. Akash Nawbatt again represented HMRC. Judge Wallace's decision, which was released on 20 August 2009, was to allow the Appellant's application to set aside the decision released in 20 April 2009.

30. Judge Wallace concluded that it was in the interests of justice that Judge Nowlan's decision should be set aside and that the appeal should be listed for re-hearing by the First-tier Tribunal (this Tribunal) in Colchester.

31. Although Judge Wallace considered that the transfer of jurisdiction from the General Commissioners to the Special Commissioners had not been unlawful, he understood the Appellant's objections to it. Judge Wallace evidently regarded as significant the fact that the Appellant had been told that he could have a local hearing but the hearing before Judge Nowlan had been listed in London. Further the date of the listing (26 March 2009) was (which Judge Nowlan had not known) a date when Mr. Martin Wright, by then assisting the Appellant on a *pro bono* basis, was on holiday and for that reason not available. Additionally, HMRC had failed to comply with directions of the Tribunal in producing material without a direction, in failing to serve a Skeleton Argument on the Appellant and in sending in material late. Judge Wallace observed that if HMRC had complied with the directions of the Tribunal and done so in proper time, 'this may well have caused the Appellant to think again about not attending'.

32. Judge Wallace also made directions (released on 20 August 2009) in relation to the re-hearing in Colchester. He stated in his decision that these directions took account of the fact that the Appellant did not have a paid representative. The directions were as follows:

> "1. That within 28 days the Appellant notifies the Tribunal and the Respondents of the identity of all proposed witnesses (including the Appellant and if appropriate his wife) with an outline of the proposed evidence of such witnesses;
>
> 2. That within a further 21 days the Respondents serve statements by all witnesses intended to be called in addition to the statements of Anton Morris and Chris Elliot served on 17 March 2009 and the second statement of Anton Morris dated 10 August 2009;
>
> 3. That not less than 14 days before the hearing the Respondents serve on the Appellant a common bundle of documents together with a bundle of authorities;
>
> 4. That also not less than 14 days before the hearing the Respondents serve a skeleton argument on the Appellant and also the Tribunal."

33. The Tribunal Centre sent to the parties copies of Judge Wallace's decision and directions on 20 August 2009 and asked for the parties' dates to avoid for the re-hearing for the period November 2009 to January 2010 and the parties' estimates of the length of the re-hearing.

34. Mr. Martin Wright, on behalf of the Appellant, replied on 18 September 2009 giving dates to avoid and stating that the Appellant would intend to give evidence himself and would also call Mr. Brian Savage and Mr. Andy Davis as witnesses. The letter contained a brief outline of the evidence which the respective witnesses would give.

35. Mr. Martin Wright also wrote to the Tribunal Centre with details of a complaint that he and the Appellant wished to make against Mr. R.J. Ward, formerly Clerk to the General Commissioners for the Colchester and North Essex Division and asking for an explanation of the procedure for making the complaint.

36. HMRC (Nikky Fadero of the Solicitor's Office) wrote to the Tribunal Centre on 23 September 2009, following a telephone conversation on 21 September 2009, explaining that they took the view that the brief outline provided by the Appellant of his witness evidence was too sparse and that therefore HMRC were unable to comply with direction 2 of Mr. Wallace's directions. HMRC asked for the matter to be referred to a Tribunal Judge 'so that it can be ordered that the Appellant either produces witness statements or at least outline statements for the witnesses that he intends to rely upon so that [HMRC] can comply with direction 2'. HMRC also asked for an extension of time to respond to such witness evidence.

37. On 5 October 2009 the Tribunals Service wrote to the Appellant and Mr. Martin Wright explaining that it could not conduct an investigation into their complaint against Mr. Ward because the time for commissioning an investigation had passed.

38. On 12 October 2009, Judge Walters's directions made in response to HMRC's request were released. The Appellant was directed within 14 days to serve on HMRC and lodge with the Tribunal Further and Better Particulars of the evidence which the Appellant, Mr. Savage and Mr. Davis respectively proposed to give, in sufficient detail to enable HMRC to consider what evidence they needed to lead in reply. An extension of time was also given to HMRC to respond.

39. Mr. Martin Wright, for the Appellant, responded to Judge Walters's directions by a letter dated 19 October 2009 sent to the Tribunal Centre (and not to HMRC) and in the same letter confirmed certain dates in January 2010 which were not available for a hearing.

40. On 3 November 2009, HMRC (by Nikky Fadero) wrote to the Tribunal stating their view that the letter from Mr. Martin Wright dated 19 October 2009 had not provided HMRC with sufficient detail of the evidence proposed to be given, to enable HMRC to respond as directed. HMRC requested further directions to be issued.

41. On 5 November 2009, Judge Walters's further directions were released. They were in the following terms:

> "1. That the Appellant must within 21 days of the date of release of these Directions serve on [HMRC] and lodge with the Tribunal a detailed summary of the evidence which the witnesses propose to give in respect of each of the areas which M.J. Wright's letter dated 19 October 2009 indicates they would respectively cover. It is noted that no indication was given in that letter of the areas which the Appellant's own evidence would cover. What is required is not merely a statement of the topics which each witness will respectively cover but the substance of the evidence which will be given in relation to each of them. If the Appellant proposes to give evidence himself, a summary of his evidence must also be served and lodged as aforesaid.
>
> 2. That within a further 21 days after the service of such detailed summaries [HMRC] must serve on the Appellant and lodge with the Tribunal statements by all witnesses intended to be

called in addition to the statements of Anton Morris and Chris Elliot served on 17 March 2009 and the second statement of Anton Morris dated 10 August 2009.

3. If no satisfactory response is received to Direction 1, the Tribunal will direct that signed witness statements must be served by the Appellant and Mr, Brian Savage and Mr. Andy Davis to contain all the evidence that they intend to rely on at the hearing.

4. The appeal will be set down for hearing in the period 27 to 29 January 2010."

42. Later in November 2009 the Appellant wrote to the Tribunal requesting an extension of time to comply with Direction (1) above, which was granted. He also objected to the Direction that the Appellant's evidence should be served before any additional evidence was served by HMRC.

43. HMRC applied to vacate the hearing in January 2010.

44. The Appellant on 14 December 2009 applied for a further extension of time to provide 'more detail of my witnesses' statements'. This was granted.

45. On 11 January 2010 Mr. Martin Wright wrote to the Tribunal Service enclosing summaries of evidence from Mr. John Reagan, Mr. Andy Davis and Mr. Brian Savage. On 26 January 2010 Mr. Martin Wright wrote to the Tribunal Service enclosing summaries of evidence from the Appellant and Mr. Mick Morgan.

46. Copies of this evidence were sent, at the request of the Tribunals Service, by Mr. Martin Wright to HMRC on 27 January 2010.

47. On 5 February 2010 HMRC wrote to the Tribunals Service to say that HMRC did not intend to reply to the evidence served by the Appellant on HMRC on 27 January 2010.

48. Also on 5 February 2010 HMRC wrote to the Appellant informing him of this and enclosing at his request a copy of the notes of the interview that took place at Colchester on 3 October 2002 between HMRC compliance officers and Mr. Andrew Davies.

49. On 2 March 2010 the Tribunals Service informed the parties that arrangements had been made for the hearing of the appeal in Colchester on 26 and 27 July 2010.

50. On 9 March 2010 Mr. Martin Wright wrote to the Tribunals Service to inform that he would be away on those dates and asking for the hearing to be re-scheduled.

51. The Tribunals Service agreed to postpone the hearing.

52. In March and April 2010 there was correspondence involving Mr. Bernard Jenkin MP (then Member of Parliament for North Essex) and the progress of the

Appellant's complaint against Mr. Ward, the former Clerk to the Colchester and North Essex General Commissioners.

53. On 17 May 2010 the Appellant wrote to the Tribunals Service (Mr. Michael Coffey) requiring a full and appropriate response to the complaint. He added that Ms. Priti Patel MP (the Member of Parliament for Witham, of whom the Appellant is now a constituent) would be contacting the Tribunals Service about the matter and that he was 'not willing to proceed to a further tribunal hearing until there is a satisfactory response to my complaint which is crucial to the conduct and progress of this case'.

54. On 24 May 2010 the Tribunals Service Policy Officer, Mr. Aundrae Jordine, wrote to the Appellant and Mr. Martin Wright informing them that he had asked the former Chairman of the North East Essex Division if he would be prepared to conduct a late investigation into the allegations raised. Mr. Jordine stated in his letter that the complaints process was an administrative process for addressing the conduct of the Clerk and could not affect the proceedings currently before the First-tier Tribunal, adding that the Appellant and Mr. Wright should not expect the Tribunal to delay proceedings pending conclusion of any complaints process.

55. On 27 May 2010 the Tribunals Service (Mr. Michael Coffey) wrote to the Appellant making the point that the tribunal proceedings were separate from his compliant concerning the former Clerk and that the complaint was not a valid reason for delaying any hearing of his appeal. He asked for dates to avoid for August 2010.

56. The appeal was set down for hearing in Colchester on 16 and 17 December 2010, but HMRC applied for a new date because their Counsel was unavailable on those dates.

57. On 9 November 2010 the Tribunals Service Policy Officer, Mr. Aundrae Jordine, again wrote to the Appellant and Mr. Martin Wright with a substantive response to their complaint against the former Clerk to the North East Essex Division. The former Chairman had volunteered to conduct an investigation freely, but outside of his normal business hours and in his own time. Having considered in detail the points of complaint which the Appellant and Mr. Martin Wright had raised, his opinion was that the complaint could not be upheld. The letter of 9 November 2010 gave the Investigator's reasons and conclusions and advised the Appellant and Mr. Martin Wright that if they wished to take the matter further they should write to the Parliamentary Ombudsman, whose address was given. Copies of this letter were sent to Mr. Michael Coffey and Ms. Priti Patel MP.

58. On 19 January 2011, Mr. Martin Wright wrote to the Parliamentary Ombudsman with details of the complaint against the former Clerk and also against the Tribunals Service.

59. On 19 February 2011, the Tribunals Service wrote to the parties asking for dates to avoid for a hearing from May 2011.

60. On 7 March 2011, Mr. Martin Wright replied informing the Tribunals Service that the complaints had been passed to the Parliamentary Ombudsman (with the agreement and support of Ms. Priti Patel MP) and that 'until their investigation is completed [the Appellant] will not be attending any hearings'.

61. HMRC (Nikky Fadero) received a copy of that letter and wrote to the Tribunals Service on 29 March 2011 giving HMRC's dates to avoid and stating that in HMRC's view, notwithstanding the comments in Mr. Martin Wright's letter on 7 March 2011, the appeal should be listed and heard at a venue in Colchester without any further delay.

62. On 4 June 2011, the Tribunals Service wrote to the parties informing them that the appeal had been listed to be heard at Colchester on 4 August 2011.

63. On 14 June 2011, Mr. Martin Wright replied to the Tribunals Service on behalf of the Appellant as follows:

> "You wrote to Mr. P.J. Wright on 4 June 2011. We note that your letter was received on 9 June 2011. I am replying as Mr. Wright's adviser.
>
> Both Mr. P.J. Wright and myself are surprised that we have not been asked for dates to be avoided for a hearing. The proposed dates are only 8 weeks ahead.
>
> We have not had any communications from HMRC in the past 18 months. The last letter to Mr. P.J. Wright from HMRC was 3 November 2009 and the last 'copy letter' to yourselves from HMRC was 22 December 2009. Is this proposed hearing now to deal with this case as directed by Mr. Justice Lewison in the High Court in February 2007? We are not aware if HMRC proposes to call witnesses and, if so, who those witnesses are?
>
> Mr. P.J. Wright has made a formal complaint about the Clerk to Colchester and North East Essex General Commissioners (in 2007) and against HMRC. This complaint was formally lodged and supported by Ms. Priti Patel MP (Mr. P.J. Wright's constituency MP). The Parliamentary Ombudsman was unable to investigate the complaint against the Clerk to the Commissioners. However this complaint is being followed up and is now the subject of discussion and correspondence between Ms. Priti Patel and the Ministry of Justice.
>
> The second element of complaint was against HMRC. The Parliamentary Ombudsman will investigate this complaint if required but, firstly, asked that we exhaust HMRC's complaints procedure and, if necessary, involved [*sic*] the Adjudicator. Currently we are awaiting a full response to our letter of 22 March 2011 from HMRC's London Complaints Manager. These complaints are fundamental to the conduct and outcome of this case and until they are resolved we formally request an adjournment.
>
> I, also, note that the way in which this case has been conducted (and the 12 year duration) has caused great pressure and stress for Mr. P.J. Wright. Consequently, Mr. Wright's mental health is poor. Mr. Wright has been under the care of his GP for these issues for some considerable time. We will be forwarding a letter from his GP confirming that he is, currently, unfit to attend any hearing (this letter will be forwarded within 10 days). We, also, request an adjournment as Mr. P.J. Wright is unfit to attend a hearing.

Yours faithfully,"

64. HMRC (Nikky Fadero) wrote to the Tribunal on 7 July 2011 referring to the letter dated 14 June 2011 above. HMRC opposed the application for an adjournment of the hearing of the appeal in Colchester on 4 and 5 August 2011, for reasons given in their letter. As to the Appellant's health, HMRC wrote:

> "Unless the Tribunal Judge is persuaded that Mr. P.J. Wright is unfit to attend the hearing on 4 and 5 August 2011 because of the substance of a letter from his General Practitioner, which, as far as HMRC is aware, has not yet been obtained, then the hearing of the appeal should proceed on 4 and 5 August."

65. Mr. Martin Wright wrote to the Tribunal on 14 July 2011 as follows:

> "I enclose a medical certificate from Dr. C.P. Olver, Mr. Wright's GP confirming that he is incapacitated and unfit to attend the First-tier Tribunal proposed for 4 and 5 August."

66. A "Private Medical Certificate" dated 13 July 2011, referring to the Appellant and 'depression' as the medical condition causing incapacity was enclosed with Mr. Martin Wright's letter. The certificate was in the following terms:

> "I hereby certify that the above named patient was reviewed by me at the surgery and was unfit to attend Tribunals Service"

The certificate was, however, unsigned.

67. In response to the application for an adjournment made in Mr. Martin Wright's letter of 14 June 2011, and noting HMRC's opposition to such application, Judge Walters directed (release date: 20 July 2011) as follows:

> "1. The hearing of the appeal fixed for 4 and 5 August 2011 at Colchester will not be adjourned UNLESS the Tribunal receives before close of business on Thursday 28 July 2011 signed medical evidence in relation to the Appellant's condition including further details of the Appellant's incapacity in particular the doctor's opinion of when the Appellant will be fit to attend a hearing of the appeal.
>
> 2. The Appellant has leave to make at the commencement of the hearing on 4 August 2011 the argument that the hearing should be adjourned pending resolution of the complaints made against the former Clerk to the General Commissioners and against HMRC, but the Tribunal will continue to hear the substantive appeal if it does not uphold that argument."

68. A signed copy of the same "Private Medical Certificate" dated 13 July 2011 was received by the Tribunal and HMRC. HMRC say they received it on 2 August 2011. The information from the Tribunal Centre is that it was received there on 2 August 2011 also. On the other hand, Mr. Martin Wright's information (as per his "time line" attached to Ms. Priti Patel MP's letter to Jonathan Djanogly MP, Parliamentary Under Secretary of State at the Minister of Justice dated 1 November 2011) is that a medical certificate and note to comply with the Judge's direction was sent by first-class post and email on 22 July 2011.

69. The signed copy of the "Private Medical Certificate" dated 13 July 2011 was shown to Judge Walters on 2 or 3 August 2011. He noted that no further details of the Appellant's incapacity had been supplied and in particular that no opinion of the doctor as to when the Appellant would be fit to attend a hearing of the appeal had been provided (as required by the Directions released on 20 July 2011). Judge Walters therefore decided not to adjourn the hearing of the appeal from 4 August 2011. This decision was communicated by email by the Tribunal Centre to Mr. Martin Wright on 3 August 2011 at 2.15 pm.

70. Mr. Martin Wright responded by email to the Tribunal Centre at 3.38 pm on 3 August 2011 as follows:

> "Thank you for your email. I have spoken to Mr. P.J. Wright and we would be grateful if you would, please, pass on the following to the Judge.
>
> Mr. P.J. Wright cannot ignore medical advice. He has been advised that he should not attend this hearing because of the state of his mental health. The advice was given by his GP and supported by the medical counsellor whom Mr. Wright is seeing. Mr. Wright has seen 2 mental health counsellors on several occasions over the past few months.
>
> This case started 12 years ago. The stress, the amount of time and the cost involved are considerable for Mr. Wright. In addition to his mental health issues Mr. Wright is suffering from chronic type 2 diabetes with complications affecting his feet.
>
> Apart from health issues, Mr. Wright and his wife have lost their family home and Mr. Wright ceased his business in March 2009. Mr. Wright and his wife now live in rented accommodation and he is claiming benefits.
>
> Consequently, Mr. Wright is unable to fund any professional fees (my own help is entirely on an unpaid basis) and certainly could not consider employing a barrister. This is not a plea "for sympathy" merely a statement of facts.
>
> The facts of this case have largely disappeared into the "mists of time" – the relevant matters were 12 years ago and we do not believe human memory is that good. We do not concede the arguments put forward by HMRC.
>
> We fully appreciate the workings of the legal system relating to this case but we note that our complaints against the former clerk to Colchester Commissioners and HMRC remain unresolved. We will, within the next month, be progressing our complaint against the clerk to Colchester General Commissioners with the Legal Ombudsman. Following the response from HMRC to our complaints against that organisation we shall be taking those complaints to the Adjudicator (again within the next month).
>
> We are disappointed that this hearing is progressing, and that only HMRC's arguments will be heard, when Mr. Wright is unable to attend due to a serious mental health problem.
>
> Will you, please, confirm that these comments have been passed to the Judge."

71. These comments were passed to the Judge.

72. This was the state of facts when the appeal was called on for hearing on 4 August 2011 in Colchester. There was no representation by or on behalf of the Appellant. Mr. Akash Nawbatt appeared for HMRC.

**Our consideration of the issue of whether or not to proceed with the hearing of the appeal and the reasons for our decision to do so**

73. The first issue to be considered by the Tribunal was whether or not it should proceed with the hearing in the absence of the Appellant or any representation for the Appellant. Rule 33 of the Rules applies in this situation. Rule 33 provides as follows:

> "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal-
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
> (b) considers that it is in the interests of justice to proceed with the hearing."

74. Clearly the Appellant had been notified of the hearing (limb (a)). The question for the Tribunal's consideration was whether it was in the interests of justice to proceed with the hearing.

75. Mr. Nawbatt submitted that it was in the interests of justice to proceed with the hearing.

76. His main points were that the Appellant was asking the Tribunal for an open-ended adjournment. No indication had been given as to when the Appellants' procedural complaints would be resolved or finally disposed of, nor had any indication been given (despite the Tribunal's request) of when the Appellant would be fit to attend a hearing.

77. He submitted that it would not be in the interests of justice to make an open-ended adjournment. He referred in support of the submission in particular to the facts that (1) the matter had already been going on for 12 years; (2) there had already been numerous attempts to hear the appeal since Judge Wallace's decision and directions released on 20 August 2009; (3) at least one hearing had already been vacated by reason of Mr. Martin Wright's unavailability, but there was no indication that he could not attend on 4 August 2011; and (4) the Appellant had not complied with the conditions set down in Judge Walters's direction, released on 20 July 2011, for an adjournment of the hearing.

78. He submitted that nothing had been advanced by or on behalf of the Appellant to suggest that even if the Appellant himself could not attend the hearing, Mr. Martin Wright and the other witnesses for whom summaries of evidence had been received by the Tribunal on 26 January 2010 (Mr. John Reagan, Mr. Andy Davis, Mr. Brian Savage and Mr. Mick Morgan) could not attend without the Appellant. Even Mr. Martin Wright's email of 3 August 2011 made no suggestion of his own inability to attend the hearing. Further, the Tribunal would in any event be able to consider the summaries of evidence provided by those witnesses for the Appellant, and also the summary of evidence provided by the Appellant himself.

79. He reminded the Tribunal that Mr. Martin Wright had a full knowledge of the case and had been professionally involved since the assessments and decisions

had been made, early in 2004. He pointed out that the Appellant's trading and profit and loss account for the year ended 31 December 1999 – contemporaneous with the earliest year of assessment in issue in the appeal – had been prepared by Mr. Martin Wright's firm of Chartered Accountants. A chief reason for Judge Wallace's set-aside of Judge Nowlan's decision had been that the hearing on 26 March 2009 had gone ahead even though (unbeknown to the judge) Mr. Martin Wright had been unavailable on that date because he was on holiday.

80. He reminded the Tribunal that Mr. Martin Wright had represented the Appellant at the set-aside hearing before Judge Wallace on 11 August 2009.

81. He also submitted that the correspondence showed that the main grievance of the Appellant and of Mr. Martin Wright on his behalf had been the transfer of jurisdiction of the appeal once remitted by Lewison J. by the General Commissioners to the Special Commissioners. Ever since that had happened the Appellant, Mr. Martin Wright and various MPs, whose constituent the Appellant had been, had complained that the Appellant had been deprived of the fruits of his victory at the original hearing before the General Commissioners on 6 September 2005. The response of the Appellant and Mr. Martin Wright, with the assistance of the various MPs, had been to make procedural complaints against the former Clerk to the General Commissioners, HMRC, and possibly also the Tribunals Service and to state that until those complaints were resolved the Appellant would take no part in further hearings of the appeal – see: the Appellant's letter to the Special Commissioners dated 3 October 2008, and Mr. Martin Wright's letter to the Tribunal Service dated 7 March 2011.

82. Mr. Nawbatt submitted that this main grievance, even if understandable, was and ought to be no bar to the continuation of the judicial procedures appropriate to the determination of the appeal. As the Appellant and/or Mr. Martin Wright and/or at least one of the MPs had been informed in the correspondence, the complaints procedures against administrative failures by the former Clerk to the General Commissioners and/or HMRC and/or the Tribunals Service were entirely separate from the judicial procedure for the determination of the Appellant's appeal following Lewison J's order dated 6 February 2007 that the matter be returned to the General Commissioners for re-trial applying the correct legal test in determining whether the workers were engaged under a contract for services. Judge Wallace had found that the transfer of jurisdiction by the General Commissioners to the Special Commissioners had been lawful and in any event the functions of both the General Commissioners and the Special Commissioners had been transferred to the First-tier Tribunal (Tax Chamber) with effect from 1 April 2009.

83. Mr. Nawbatt in his submissions as to whether or not it was in the interests of justice to proceed with the hearing stated in terms that he did not place much reliance on the demands posed by the need to be fair to HMRC as well as to the Appellant. He submitted that HMRC represented the interests of other taxpayers, but the main thrust of his argument was that the interests of justice required a

determination of the appeal without further delay, rather than an open-ended adjournment at this stage. He added that HMRC's witnesses, Mr. Morris and Mr. Elliot, were attending a hearing of the appeal for a second time (they were present at the hearing on 26 March 2009) and had, as could be seen from the General Commissioners' case, also filed unsworn witness statements for use at the hearing on 6 September 2005. It was, in the nature of things, more difficult for them to give reliable evidence as time passed and that was another reason why it was in the interests of justice to proceed with the hearing on 4 August 2011.

84. The Tribunal heard these submissions and indicated that it would reserve its decision on the question of whether to proceed with the hearing pursuant to its powers under rule 33 of the Rules but nevertheless provisionally or *de bene esse* continue to hear the substantive appeal in the absence of the Appellant, adopting a 'roll-up' procedure analogous to that sometimes adopted by the High Court when hearing and reserving its decision on an application for permission to bring judicial review proceedings, and proceeding provisionally to hear the substantive application for judicial review. (A recent example of the use of this procedure is *R (oao Lunn and others) v Revenue and Customs Commissioners* [2011] EWHC 240 (Admin), [2011] STC 1028, a decision of Kenneth Parker J.) The Tribunal adopted this procedure pursuant to its general power to regulate its own procedure in rule 5(1) of the Rules, considering that such procedure would implement, in the circumstances of the proceedings before it, the overriding objective of the Rules that the Tribunal should deal with cases fairly and justly (rule 2(1) of the Rules).

85. It is appropriate at this stage in this Decision to record that the Tribunal, having given further consideration to the question of whether it ought to have proceeded with the hearing pursuant to its powers under rule 33 of the Rules has decided that such was indeed the right course to adopt. We give our reasons in the following paragraphs.

86. In reaching this decision the Tribunal accepts all the submissions made by Mr. Nawbatt and summarised above. However the fact that we have provisionally continued to hear the substantive appeal has been helpful in setting the context for considering those submissions. The question of the status of workers for tax purposes is highly fact-sensitive and we have been conscious of the poor quality of the evidence before us in considering it. It would have been very helpful to us to have had submissions addressed to us on behalf of the Appellant and to have heard oral evidence from him and his witnesses and, perhaps, to have received further documentary evidence. Although this is a factor which would normally weigh in favour of granting a further adjournment, we have concluded that the Appellant is responsible for the poor quality of the evidence and this factor cannot on its own outweigh the relevant factors which suggest that we should not grant a further adjournment.

87. The main consideration which was put to us as suggesting that it would be unfair and unjust to proceed to hear the appeal was that the Appellant had requested a further adjournment on health grounds. Normally the Tribunal would

grant an adjournment on these grounds. But the Tribunal has concluded that it should not follow its normal practice in this case. This is because, first, there have been very considerable delays in bringing the proceedings to the point of trial (as outlined above). This, by itself, would not have been enough to persuade the Tribunal not to follow its normal course and grant an adjournment on health grounds. However, despite the Tribunal's request that he should do so, the Appellant has failed to provide any medical opinion as to when he might be fit to attend a hearing of the appeal. This raises a real prospect of indefinite adjournments and an infinitely postponed disposition of the appeal, which the Tribunal considers would clearly not be in the interests of justice. The public interest in the finality of litigation must at some point prevail over conflicting interests and in the Tribunal's judgement that stage has now been reached.

88. The Tribunal notes that in *Khan v Director of the Assets Recovery Agency* [2006] STC (SCD) 154 the Special Commissioners were faced with a somewhat similar problem. Under the heading "Would it be contrary to natural justice for the Special Commissioners to proceed with the hearing in spite of the Appellant's ill-health?", the Special Commissioners noted that Counsel for the appellant in that case, Mr. Khan, had contended that 'the doctrine of natural justice' should apply – to oblige the Special Commissioners to adjourn the hearing – on account of Mr. Khan's inability to give instructions, attend the hearing an give evidence. The Special Commissioners concluded on this point (see: *ibid.* at [30]):

> "In our judgment, notwithstanding Mr. Khan's disability, this is a case where the tribunal should proceed with the hearing. We are not aware of any case where it has been held that the tribunal should not proceed in such circumstances by reason of the rules of natural justice. Article 6 [of the European Convention on Human Rights ("the Human Rights Convention")] does not assist Mr. Khan. Within the constraints of the statutory regime, which treats tax assessments as obligations that subsist until discharged, the position is clearly covered by the majority decision of the Court of Appeal in *Rose v Humbles* ([1972] 1 WLR 33, 48 TC 103) referred to in para. 22 above. In short, Mr. Khan's position is no different from that of the estate of a deceased taxpayer. Having said that, if this would enable Mr. Khan to attend to give evidence, we would be prepared to direct that the hearing is to take place as close as possible to Mr. Khan's home or, if necessary, to attend on him to receive evidence."

89. The reference to *Rose v Humbles* in para. 22 of the decision is as follows:

> "Mr. Khan's state of health may be such that he cannot give instructions as to the handling of the present appeals and that he cannot attend and give evidence. The present position under the law is that, in the case of an assessment validly made under section 29 Taxes Management Act 1970, the appeal tribunal has no power to discharge the assessment by reason of the taxpayer's disability from taking the necessary steps to challenge it. *Eagles (Inspector of Taxes) v Rose* (1945) 26 TC 427 decides that an assessment stands despite the fact that the General Commissioners have been unable to reach a decision on the evidence before them. The Court of Appeal in *Rose v Humbles* decided that the appellant's inability to give evidence at an appeal against a Schedule E assessment did not justify the court in setting the assessment aside. The point is that a tax assessment creates a liability which survives until discharged on appeal or by agreement. That is the position unless article 6 [of the Human Rights Convention] gives the taxpayer some additional protection."

90. The Tribunal makes the following points arising from these extracts from the decision in *Khan*.

91. First, the Special Commissioners decided that article 6 of the Human Rights Convention did not assist Mr. Khan, essentially on the basis that appeal proceedings against an assessment to tax do not involve criminal charge status (see: *ibid.* at [27]). So here, article 6 of the Human Rights Convention cannot assist the Appellant in this case – indeed it has not been suggested by anybody at any time that it does.

92. Secondly, the assessments and decisions in issue in this case place obligations on the Appellant unless and until payment of the tax and NICs demanded or the appeal against them is allowed or settled by agreement. The Appellant's inability to give evidence at an appeal does not justify the court or a tribunal in setting the assessments or decisions aside. Nor, we consider, is the increasing possibility as there is more delay in hearing the appeal of the facts of the case largely disappearing into the 'mists of time' on the grounds of faulty human memory – cf. Mr. Martin Wright's email to the Tribunal of 3 August 2011 – any justification for the Tribunal setting the assessments or decisions aside. Nor can the abolition of the General and Special Commissioners and the institution of this Tribunal have that result. As there is apparently no prospect of the appeals being settled by agreement or of payment of the tax and NICs demanded, the Tribunal can properly, as the Special Commissioners in *Khan* did, decide that the right course is to continue to hear the appeal in the Appellant's absence due to ill-health.

93. We add in relation to paragraph [30] of *Khan* that in this case, of course, the Tribunal has arranged to sit in Colchester for the Appellant's convenience and it has never been suggested that, were the Tribunal to attend on the Appellant at his home, his health would permit him to give evidence any more than it would permit him to give evidence at the arranged venue in Colchester.

94. The Tribunal regards the decision in *Khan* as support for its decision to proceed with the hearing in this case.

95. Hitherto, we have proceeded on the basis that the Appellant's claim to be prevented by ill-health from attending the appeal is genuine. The "Private Medical Certificate" is evidence that it is. However, the Tribunal notes that in his email to the Tribunal Centre of 3 August 2011 (the day before the hearing), Mr. Martin Wright said that "we [that is, presumably, the Appellant and he] will, within the next month, be progressing our [the Appellant's and his] complaint against the clerk to Colchester General Commissioners with the Legal Ombudsman. Following the response from HMRC to our complaints against that organisation we [that is, presumably, the Appellant and he] shall be taking those complaints to the Adjudicator (again within the next month)." This suggests that the Appellant's health does not prevent him pursuing his complaints against the former Clerk to the General Commissioners and HMRC, which we infer from the history of the matter related at length above, are the disputes that the Appellant

and Mr. Martin Wright are most interested in pursuing. We do not dismiss the possibility that the Appellant's claim to be unable to attend the hearing of the appeal on health grounds is a filibustering tactic intended to postpone the appeal indefinitely and on a par with his stated refusal to attend any hearing of the appeal until the other disputes are resolved.

96. After balancing the factors weighing in favour of and against granting a further adjournment and for the reasons indicated above, the Tribunal has finally decided to continue to hear the appeal in the absence of the Appellant and any representative, and in the absence also of his witnesses.

**Our consideration of the issues raised on the substantive appeal**

97. Lewison J. in his Judgment (para. 23) remitted to the General Commissioners the question of whether the Appellant's workers were or were not the Appellant's employees, which he described as 'essentially a question of fact'. He held that the General Commissioners had originally applied the 'wrong legal test'. He found that the test that they had applied was threefold: whether the contracts were oral or written; whether there were formal contracts protecting the workers; and whether there was a minimum requirement to pay the workers irrespective of demand or weather or whether payment to the workers was effected strictly on a work-done basis (*ibid.* para.10). He held that they should have (but had not) applied the test of whether the Appellant had sufficient day-to-day control over his workers to make them his employees (*ibid.* para.11).

98. The Order of the High Court of 6 February 2007 was that the matter be returned to the General Commissioners for re-trial applying the correct legal test in determining whether the workers were engaged under a contract of service.

99. Judge Wallace's decision (release date: 20 August 2009) was that the appeal be listed for re-hearing by this Tribunal.

100. This Tribunal is therefore engaged on a re-hearing, or re-trial, of the appeal, where the general issue is whether the Appellant's workers were his employees and the 'key [specific] issue' (cf. Lewison J's Judgment at para. 11) is whether or not the Appellant had sufficient day-to-day control over them to make them his employees.

101. The Tribunal had before it witness statements (dated 13 May 2005 and 21 March 2009) from Chris Elliot and witness statements (dated 30 March 2005 and 23 March 2009) from Anton Morris. Both Mr. Elliot and Mr. Morris attended the hearing and gave oral evidence.

102. The Tribunal also had before it statements (all unsigned, undated and carrying no Statement of Truth) from the Appellant, Andy Davis, John Reagan, Brian Savage and Mick Morgan.

103. The relevant evidence of each of these individuals in summary was as follows:

104. Chris Elliot said that he worked as a subcontractor for the Appellant from May 2001 for about a year. He had (as the Appellant knew) no prior experience and worked as a general labourer on building sites. He was always picked up for work in a van (sometimes the Appellant's van) and dropped off in the evening by the van. He worked with other people and he said: 'someone would have to tell me what to do and how as I had no experience in these jobs'. He could not choose what work to do. He was paid at a daily rate for days worked, but sometimes if he did not work the full day (because the weather turned bad) he would not get a full day's pay and was 'unlikely to get paid at all'. He was not paid for any days he did not work because of sickness or for any other reason. He had to ask at least two weeks beforehand for time off work. He had no tools and everything was provided for him (apart from a pair of toe-capped boots). The Appellant attended the sites where he was working but did not usually stay a full day. There was another worker (effectively a foreman) who was in charge when the Appellant was not on site. He was given no training by the Appellant, and learned through on-the-job experience. He said that he was often told by the Appellant that even if he was not sure what to do he should always make sure that he always looked busy. He had no public liability insurance of his own and was informed by the Appellant that he had 'paid it'. He thought he was covered by insurance arranged by the Appellant.

105. Anton Morris said that he worked as a subcontractor for the Appellant for approximately 2½ years between September 1999 and February 2002. He said he had limited prior experience of the general labouring work which was involved and was shown what to do by the other people he was working with. He was, however, a trained bricklayer, and undertook bricklaying work at the sites as required, for example building manhole covers. He provided his own basic tools: level, trowel, tape-measure, bolsters, hammers, shovel and forks. Major items of equipment were supplied by what he called the 'main contractors'.

106. Anton Morris explained that on one job at the Barbican in London, which was 'laying slabs on the High Street', the 'main contractor' would discuss with the Appellant how he wanted the slabs to look and the Appellant would then tell Mr. Morris and the gang he was working with what to do, 'for example what needed fencing off and what slabs need laying where'. He was taken to work in a van supplied by the Appellant and was paid a daily rate. The Appellant would tell the workers each day what work was required and if something more urgent came up he would sometimes 'pull me and the gang off and tell us what else to do'. If the Appellant was not on site, the site manager of the 'main contractor' – e.g. French Kier or Jacksons – would tell the workers what to do 'or would tell us if we were doing anything wrong'. There were occasions when Anton Morris worked on 'some private contracts for [the Appellant], including building a swimming pool in his back garden'. This was mainly done at weekends and the Appellant supplied the major equipment for these jobs.

107. At one point the Appellant arranged for Anton Morris to go on a course to obtain the necessary certificate to enable him to drive a dumper truck. The course cost £100, which was deducted from his pay. He was paid for the day on which he attended the course.

108. Anton Morris had similar arrangements regarding time off, part-worked days and insurance as those spoken to by Chris Elliot.

109. The Appellant's statement (headed 'Summary of Evidence') contains the following information. He states that he has worked within the construction industry for many years as a subcontractor and has supplied other subcontractors for their main contract work. He states that workers knew he had good contacts, so they would telephone him for work. His workers were taken on as self-employed 'with a CIS4 card'. No guarantee of the length of work was given and workers would supply their own tools and safety clothing. He stated that workers would supply their own transport 'if local' but that he would supply a van if they had a long way to travel.

110. The main contractor would ask the Appellant for particular skills and he would send them. 'The contractor would supervise them and put them to task'.

111. The Appellant confirmed that the workers were paid at a daily rate on a weekly basis. A week's payment was kept in hand. This was necessary to make sure time sheets were not falsified and to allow for correction of 'sub-contractors poor workmanship (a common problem) – the work would need to be rectified by the sub-contractor on an unpaid basis or money deducted'. Payment was made only for time worked on site. He confirmed the arrangement (as stated by Anton Morris) for courses – the Appellant paid for them and the cost was deducted from workers' earnings. He stated that 'if occasionally I was working on site with workers I also was under the main contractor's supervision'.

112. He made personal criticisms in his statement of Chris Elliot and Anton Morris. He stated: 'many workers asked how to get over becoming employed because myself and other businesses like me would not be able to pay them on an employed basis anywhere near the amount they would be paid as a sub-contractor. It was possible to become a limited company or put in for a CIS6 card at that time'.

113. Andy Davis in his statement said that he worked for the Appellant on a self-employed basis, working on various sites, mainly where French Keir were the main contractors. He states that he went on to work for French Keir on an employed basis because he wanted more security for his family rather than being a sub-contractor.

114. He confirmed that when working on sites for the Appellant he was picked up in the mornings and taken to work 'as I did not drive at the time'.

'Once on site we would be given our work to do by the main contractors'. He was supervised by the general foreman or site foreman, but he did not indicate whether these were the main contractor's foremen or the Appellant's foremen. He said that there was no guarantee of continuing work from the Appellant and that the Appellant 'came to site once a week approximately on an irregular basis.

115. Andy Davis said that he had his own tools and used 'other sub-contractors' tools or main contractor supplied tools'.

116. There was also in the Tribunal's papers notes and a transcript of an interview of Andy Davis (called 'Andrew Davies') by two HMRC officers on 3 October 2002. The notes were not signed by Andy Davis.

117. From the notes it appears that Andy Davis worked for the Appellant from January 2000 to April of May 2002 as a ground worker or general labourer, 'doing anything that needed doing'. During that time he worked only for the Appellant. He said in the interview that the Appellant himself was usually the site foreman who would keep a record of who was working on any particular day. But in the same paragraph he stated that whilst working at a site in Basildon he had only seen the Appellant twice during the whole period. He said that the Appellant did not supervise him when he was on site, but worked alongside him.

118. John Reagan in his statement explains that he was a general foreman for French Kier and that the Appellant had supplied competent and relevant labour as and when required for sites under his control. He stated that 'workers would turn up on site from [the Appellant] sometimes not the expected numbers. We (French Kier) would put them to work supervised by a French Kier foreman. He said that the Appellant never had control over his workers and that French Kier supplied directly all engineering and supervisory workers.

119. Brian Savage in his statement says that he was employed between January 2005 and September 2008 by All Aspects Paving Company Limited (which the Tribunal was told had been a company owned by the Appellant's wife) as a senior estimator or office manager, responsible for running the office and estimating for various domestic and commercial construction projects. He gave evidence on behalf of the Appellant at the hearing of the appeal by the General Commissioners on 6 September 2005.

120. Brian Savage stated that the Appellant 'was a sub-contractor (self-employed) who when instructed to carry out various works would call upon a selection of other sub-contractors to help complete the job involved, dependent upon the skills required and the availability of the operatives at any given time'. They (the workers) were, he said, all self-employed and only taken on on a short-term basis to complete a particular contract, which may have been 'for as little as 2 days or maybe 3 months'. The work was not continuous 'and they would be working from site to site for various contractors not only for [the Appellant]'.

121. Brian Savage stated that the workers were paid for the time they were on site working and were free to leave the site and withdraw their labour at any time. They all had the relevant CIS4 or 6 cards. They generally provided their own transport, handtools, protective clothing and so on. The main contractors would provide larger specialised equipment such as dumpers, kerb grabs and JCBs. The workers were generally unreliable and would often not turn up for work. 'The company often had more than one contract underway at any one time and that meant that [the Appellant] would visit the various sites on a regular basis to check with the main contractors involved that the teams of operatives were working reliably and to an acceptable standard. But day to day supervision on site was carried out by the main contractor's foreman/surveyors not [the Appellant].'

122. Brian Savage stated that the work was not continuous. The programme and planning of works were always carried out by the main contractors. The main contractors' surveyors set all levels etc. One worker had the use of a company van and would pick up 'some of the operatives' but many had their own transport and made their own way to site. The driver of the company van paid the company a weekly sum for the use of the van.

123. Mick Morgan, General Manager of TruSet Ltd.(a Colchester construction services firm providing civil engineering, surveying, setting out and project management services) made a statement as follows:

124. He said that the Appellant and his workforce had been engaged by him in his capacity as project manager at Milbank Floors Ltd. and in his capacity as contracts manager at Billam Group Ltd. He said that the terms of engagement had been in every case that the Appellant and his workforce carried out works under his direction according to instructions regarding what was to be done, where and when, which had been issued by him on a daily basis. Plant and materials had been supplied by Mick Morgan's employers for use as directed by him. The works had in every case been short term – 'i.e. less than 6 consecutive weeks at any one time'.

125. That being the evidence before the Tribunal, Mr. Nawbatt, for HMRC, took us through the case stated by the General Commissioners, Lewison J's judgment and Judge Nowlan's decision. He also made some specific submissions.

126. His comments on the case stated were as follows. First, he referred to the General Commissioners' description of the Appellant's business as 'providing groundwork and civil engineering services' (case, paragraph 5 (i)). At another point in the case (paragraph 5(v)) they said that the Appellant's main business during the period in question 'was to provide labour to Main Contractors'. Mr. Nawbatt submitted that neither finding was binding on the Tribunal and that on the evidence the Appellant's business was not the provision of labour or an agency-type situation, but, as Judge Nowlan had found (his decision, paragraph 13) the Appellant's business 'was to undertake with main contractors to provide sub-contract groundwork services, using his own workers to do this'. This

formulation, of course, is almost the same as the first of the General Commissioners' descriptions, at paragraph 5(i) of their case.

127. Secondly, Mr. Nawbatt referred the Tribunal to paragraph 5(xiii) and (xv) of the General Commissioners' case where they found that from the list of potential workers which the Appellant maintained, he decided which worker to select for which job or contract 'according to their skill, experience and availability' and that the Appellant 'could and did move workers from one job to another'. These findings appear to the Tribunal to be consistent with the evidence before us and we did not understand Mr. Nawbatt to disagree with them.

128. Turning to Lewison J's judgment, Mr. Nawbatt pointed out that at paragraph 1 the Judge had taken it as a fact that the Appellant had carried on business 'providing labour to main contractors engaged in groundwork and civil engineering'. This followed the formulation in paragraph 5(v) of the General Commissioners' case which he had criticised – see above at paragraph 126. The Judge repeated that formulation later at paragraph 12 of his judgment in his summary of the material facts.

129. Before Lewison J, HMRC appear to have fixed on the facts found by the General Commissioners at paragraph 5(xiii) of their case (and recorded by the Judge at paragraph 14 of his judgment) as follows:

> "[The Appellant] arranged (either by taking the workers by van himself or from pre-arranged pick up points or by supplying a van for this purpose) for the appearance of workers on site. [The Appellant] would usually give initial instruction to the worker himself and thereafter the precise on-site instructions lay with the on-site Foreman. The Site Manager/Foreman decided what time the work site started/finished and signed the workers allocation time sheets at the end of the day/week."

130. HMRC argued from these facts that the element of control exercised over the workers by the site foreman 'must be regarded simply as delegation by [the Appellant] to a third party to exercise the control over the workers which he himself was entitled to exert' – see: paragraph 17 of the judgment.

131. However the Judge rejected this argument. He said that he would not regard the mere fact that workers were told what to do by a site foreman as amounting to control by the Appellant – paragraph 19 of the judgment.

132. He cited the Court of Appeal's decision in *Bunce v Postworth Limited* [2005] EWCA Civ 490 as authority for the proposition that a worker (B) engaged under an agency agreement by S, who was sent on a regular basis to carry out work for S's customer, C, was not employed by S on the basis that S had delegated control of B to C. There had been a clause in the contract between B and S under which B undertook to comply with lawful instructions given by C. But Keene LJ in the Court of Appeal, noting that it was not in dispute that C had the power in reality to direct and control what B did and how he did it, said that there was no evidence that S had retained any such power and, therefore, S lacked

the necessary control over B for him to be seen as S's employee. The fact that C's power in reality to direct and control what B did and how he did it derived from B's contract with S did not detract from that analysis. See: paragraph 21 of Lewison J's judgment.

133. Lewison J. regarded the 'key issue' – the correct legal test – as being whether the Appellant had sufficient day-to-day control over his workers to make them his employees – see: paragraph 11 of his judgment. The General Commissioners had not addressed this issue or, so Mr. Nawbatt submitted, found the necessary facts to determine it and that is why the judge remitted the question to them.

134. Judge Nowlan approached his decision on the substantive issue – whether the workers were employees of the Appellant or engaged by him under contracts for services – in three different ways. All three ways led him to the conclusion that the workers were indeed employees of the Appellant.

135. First, he considered – in accordance with Lewison J's direction – whether the facts demonstrated that the workers worked under the control of the Appellant. He had received evidence from both Mr. Morris and Mr. Elliot and had the General Commissioners' case before him. He had not received statements (or, of course, oral evidence) from the Appellant or Messrs. Davis, Reagan, Savage or Morgan. Judge Nowlan commented that he had enquired as to whether they had fallen out with the Appellant and they had both responded by saying that they had not. Judge Nowlan went on to say: 'In general I add that everything that they said sounded to me to be honest, and indeed realistic'. This Tribunal, of course, has an indication in the Appellant's statement that both Mr. Morris and Mr. Elliot were on bad terms with the Appellant.

136. Judge Nowlan said (at paragraph 40 of his decision) that he had 'not the slightest hesitation in saying that on the evidence that was given to [him], the two workers who gave evidence, and implicitly the others since it was reasonably clear that these two workers were fairly representative, did work under the control of [the Appellant]'. He found that the Appellant regularly exercised either personally, or through other trusted workers of his, control over his work-force. He decided, on the basis of Lewison J's direction as to the significance of control that the workers were employees of the Appellant.

137. Judge Nowlan picked up on the point that the findings of fact made by the General Commissioners, considered as a whole, led to the conclusion that the business of the Appellant was to perform groundwork services on a sub-contract basis for main contractors rather than to provide labour to main contractors. He went on to observe that this meant that the facts were quite far away from those in *Bunce v Postworth Limited*, which concerned workers supplied by an agency to its customer, who might be considered as a main contractor. If the Appellant had been carrying on a business of providing labour to main contractors, as the General Commissioners stated at one point and Lewison J assumed, then the

workers might (or might not) have been controlled in the performance of their work by the main contractors rather than the Appellant. But the position was different if the Appellant's business had been to perform groundwork services on a sub-contract basis for main contractors.

138. Judge Nowlan said (at paragraph 43 of his decision):

> "For the reality is that in a case of this nature, the control exercised by the main contractors is essentially to co-ordinate the various sub-contractors, and to make it clear to each sub-contractor what must be done in accordance with the building plans, and in what order the different jobs must be done. In the performance of their various sub-contract roles it is each sub-contractor who exercises the control that is material for tax and employment purposes, and the overall coordination seems to me to be fairly irrelevant to these tax and employment tests."

139. On that basis Judge Nowlan decided that it was the control of the Appellant that was material. The Appellant's control was control over the workers. The control exercised by the main contractors was, in Judge Nowlan's words 'coordinating control' over the Appellant himself, his brother in law, or one of his trusted foremen and was not relevant to the control over the Appellant's workforce (paragraph 46 of his decision).

140. Judge Nowlan went on to test his conclusion against other touchstones of employment/self-employment – whether the workers could be considered in reality to be in business on their own account, and whether the workers could be considered to be self-employed, and not employees, if one 'stood back' and looked at all factors generally. He concluded that on both these tests the Appellant's workers were his employees.

141. Mr. Nawbatt, for HMRC, supported Judge Nowlan's reasoning in its entirety and invited this Tribunal to adopt it and Judge Nowlan's conclusions.

142. In our review of the evidence before us, we have well in mind that the only evidence carrying a statement of truth and where the witnesses presented themselves for cross-examination was that of Messrs. Elliot and Morris. We accordingly in principle would expect to attach more weight to their evidence than to any conflicting evidence in the unsworn (and unsigned) statements of the Appellant and his witnesses. Nevertheless we review all the evidence, which is more extensive than the evidence considered by Judge Nowlan.

143. Whether the Appellant had sufficient day-to-day control over his workers to make them his employees was the test highlighted by Lewison J and we start by considering the relevant evidence.

144. The preponderant weight of the evidence is that the workers we have heard from were controlled (by someone) in the sense relevant to employees. Chris Elliot said that 'someone would have to tell me what to do and how as I had no experience in these jobs'. Anton Morris said that he had limited prior experience of the general labouring work which was involved, and was shown

what to do by the other people he was working with. Although a trained bricklayer and sometimes deployed to do bricklaying work, we infer that bricklaying was incidental to the general labouring work he carried out. Andy Davis said he was supervised by the general foreman or site foreman and, in his 2002 interview, stated that he worked as a ground worker or general labourer 'doing anything that needed doing'. John Reagan said that his company, French Kier, would put the workers to work supervised by a French Kier foreman. Brian Savage (who we note was not in post until after the latest period covered by the assessments and decision appealed against) said that day-to-day supervision on site was carried out by the main contractor's foreman/surveyor. Mick Morgan said that the Appellant and his workforce carried out works under his direction according to instructions regarding what was to be done, where and when, which had been issued to him on a daily basis.

145. Although it is unsatisfactory not to have had evidence tested in the Tribunal from a broader spectrum of the Appellant's workers, we consider it is safe to conclude from this evidence (as Judge Nowlan did) that the workers were controlled in the sense relevant to employment. We find on the balance of probabilities that such was the case and that the workers did not exercise their respective trades independently. Indeed it is a feature of the evidence of Chris Elliot, Anton Morris and Andy Davisthat they were used as unskilled labour and this fact in itself makes it improbable that they were not under day-to-day control sufficient to make them employees.

146. The main question raised by Lewison J however is: was this control exercised by the Appellant or by someone else? Some of the evidence suggests that the main contractors (the Appellant's customers) exercised control over the workers and that the Appellant did not do so. We assume that this is the case which would have been advanced on behalf of the Appellant if he had been represented at the hearing.

147. The Appellant said in his statement that the main contractor would ask him for particular skills and he would send them. Then the main contractor would supervise them and put them to task. Andy Davis said that 'once on site we would be given our work to do by the main contractors' and that he was supervised by the general foreman or site foreman, which *could* (our emphasis) have been the main contractor's foreman. John Reagan said that 'we' (French Kier) 'would put [the workers] to work supervised by a French Kier foreman'. He said in terms that the Appellant never had control over his workers and that French Kier supplied directly all supervisory workers. Brian Savage said that day-to-day supervision on site was carried out by the main contractor's foremen/surveyors not the Appellant. As stated above, Mick Morgan claimed that the Appellant and his workforce carried out works under his direction.

148. Against this, and suggesting that the Appellant or his foremen exercised day-to-day control over the workers, was the following evidence. Chris Elliot's evidence was that the Appellant attended the sites where he was working

and, although he did not usually stay a full day (because, we infer, he had a number of contracts 'on the go' at the same time) there was another worker (effectively a foreman) who was in charge when the Appellant was not on site. We infer that the other worker acted in effect as the Appellant's deputy in supervising Chris Elliot (and other workers) on behalf of the Appellant. The (entirely credible) evidence of Chris Elliot that the Appellant often told him that even if he was not sure what to do he should always make sure that he always looked busy was also evidence suggesting that he was in reality under the day-to-day supervision of the Appellant. Anton Morris's evidence that at the job at the Barbican the Appellant, having discussed how the job was to be done with the main contractor, told Anton Morris and the gang he was working with what to do is also evidence that it was the Appellant who supervised Anton Morris on a day-to-day basis. To the same effect was Anton Morris's evidence that the Appellant would sometimes pull him and the gang off a job and tell them what else to do. That evidence is inconsistent with the workers being in reality under the day-to-day control of the main contractor and not the Appellant.

149. The Appellant's evidence that where there was poor workmanship by 'subcontractors' – i.e. by any of his workers – the work would need to be rectified by the 'subcontractor' on an unpaid basis or money deducted is also evidence that he (and not the main contractor) had day-to-day control over the workers (though it is also an indicator of self-employment i.e. ability to profit or suffer from good/bad service). They were in contractual relations with the Appellant and not with any main contractor and only the Appellant was in a position to deduct money from wages or to oblige a worker to rectify poor workmanship on an unpaid basis. Obliging a worker to do this is an example of the exercise of day-to-day control in reality.

150. Andy Davis's answer in his 2002 interview that the Appellant himself was usually the site foreman also points in the direction of the Appellant's day-to-day control, but has to be taken with his further statement that, at the site in Basildon, he only saw the Appellant twice during the whole period and that the Appellant did not supervise him when he was on site, but worked alongside him.

151. We agree with Judge Nowlan (see: the opening sentence of paragraph 43 of his decision) that the distinction between the analysis of the Appellant's business as one of providing labour to main contractors, on the one hand, or as one of undertaking with main contractors to provide sub-contract groundwork services, using his own workers to do this, on the other hand, is important.

152. We also agree that the evidence and the General Commissioner's findings taken as a whole support the conclusion that the Appellant's business was not the provision of labour to main contractors (which would make *Bunce v Postworth Ltd.* especially relevant) but was the provision by the Appellant himself to main contractors of sub-contract groundwork services. In the provision of these services, the Appellant used the labour of the workers.

153. The evidence for this is Anton Morris' explanation that on the job at the Barbican the main contractor would discuss with the Appellant how he wanted the slabs to look, which gives rise to the inference that the contractual obligation of the Appellant vis-à-vis the main contractor was to lay the slabs, rather than provide labour to the main contractor to do that job. More significant is Brian Savage's evidence (although we recall that he was not in post until after the relevant period, but we see no evidence that any procedures had changed in the interval) that he, apparently – though he does not say so expressly – working on behalf of the Appellant, was responsible for estimating for various domestic and commercial construction projects, rather than for the provision of labour. And Brian Savage says explicitly that the Appellant, *when instructed to carry out various works* (our emphasis), would call upon a selection of 'other subcontractors' to help complete the job involved. This is clear evidence from someone who ought to have known the nature of the Appellant's business that he was instructed to carry out various works, rather than provide labour. Brian Savage also said, in the same vein, that the programme and planning of works were always carried out by the main contractors, which is an indication that the main contractors planned the jobs that the Appellant was engaged to carry out.

154. Similarly, Mick Morgan says that the terms of engagement between the companies, for which he was project manager or contracts manager, engaged the Appellant (and his workforce) in every case to carry out works under his direction. In reality the engagement (i.e. contractual agreement) was with the Appellant alone – it has never been suggested that the main contractors engaged the workers as a contractual matter – and was to carry out works rather than supply labour.

155. Finally, the fact that the workers, on the evidence, seem to have been largely unskilled and that the jobs that they were engaged in were, on the evidence, all groundwork jobs, seems to us to be a further indication that the Appellant's business was the provision of sub-contract groundwork services and not the provision of labour. Unskilled workers could presumably assist in any stage of construction, and if the Appellant was in reality supplying their labour to main contractors, there would be no reason why they should only be engaged in groundwork operations. The point is reinforced by the evidence of Anton Morris, a trained bricklayer. He was put to work in laying slabs, drainage, block-paving work, concreting and dry-dumping (moving soil around in a dumper truck), digger driving and 'some bricklaying at these sites as required, for example building manhole covers'. All these jobs, including the building of manhole covers, are groundwork jobs. If the Appellant had been supplying Anton Morris's labour, as opposed to providing groundwork services, we would have expected Mr. Morris's evidence to have shown that he was engaged on bricklaying jobs which were not groundwork jobs – there would presumably have been plenty of such bricklaying jobs to be done.

156. Not only do we (for the reasons given above) agree with Judge Nowlan's conclusion that the Appellant's business was the provision of

groundwork services, but we also agree with him that this fact points towards the conclusion that day-to-day control over the workers was in reality exercised by the Appellant and not the main contractors. The main contractors' interest as against the Appellant was to see that the works were carried out, not, except incidentally, to supervise the workers. The Appellant's interest as against the main contractors was to carry out the works, and as against the workers to exercise day-to-day control over them either directly or vicariously, to ensure that the works were carried out to an acceptable standard.

157. Taking account of all the evidence and giving each part of the evidence such weight as we consider appropriate, we conclude that the Appellant exercised sufficient day-to-day control over his workers to make them his employees. This is the answer we give to the question (essentially one of fact) which Lewison J remitted to the General Commissioners to determine.

158. On that basis we dismiss the appeal, only adding that we agree with Judge Nowlan's conclusions that by applying the "own business" test and by standing back and looking at the other provisions of the contracts between the Appellant and the workers to see whether they were consistent with their being contracts of service (i.e. employments), we would reach the same conclusion as he did.

**Summary**

159. For the reasons given above we have decided to proceed to hear the appeal in the absence of the Appellant and any representative and we have decided to dismiss the substantive appeal.

**Right to apply to set aside this decision**

160. A party may apply for this decision to be set aside under paragraph (1) of Rule 38 of the Rules by reference to paragraph (2)(d) of Rule 38. A party wishing to do so must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of this decision to the party (Rule 38(3) of the Rules).

**Right to apply for permission to appeal**

161. This document contains full findings of fact and reasons for the Tribunal's decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JOHN WALTERS QC**

**JUDGE OF THE FIRST-TIER TRIBUNAL**
**RELEASE DATE: 13 December 2011**

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