



TC06444

Appeal number: TC/2017/01591

INCOME TAX - intermediaries legislation – IR35 – personal services company – hypothetical contract - whether contract of employment - no – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MDCM Ltd

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE IAN HYDE
MOHAMMED FAROOQ**

Sitting in public at Birmingham on 8 November 2016

Mr Daniels, director, appeared for the Appellant

Mr Burke, Officer, appeared for the Respondents

DECISION

1. This appeal is concerned with whether the appellant's contractual arrangements are such that Mr Daniels, the appellant's principal employee, should be treated as an employee of the ultimate contracting company under Parts I to IV of the Social Security (Contributions and Benefits) Act 1992 ("the Intermediaries Legislation"), commonly known as "IR35".

Issues

2. On 8 September 2016 HMRC issued determinations under Regulation 80 of the Pay As You Earn Regulations 2003 for years 2012-13 and 2013-14 and decisions under Section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 for the period 6 April 2012 to 5 April 2014 ("the Assessments"). The reason for the Assessments was that HMRC believed that the Intermediaries Legislation applied to treat the appellant's contract with an independent introductory company, Solutions Recruitment Limited ("Solutions") and Solutions' contract with a construction company, Structure Tone Limited ("STL"), as a contract of employment between Mr Daniels and STL.

3. The appellant appealed the Assessments on 4 October 2016.

4. It was accepted in the course of the hearing that this appeal concerned only the principle as to whether the Intermediaries Legislation applied. If the Tribunal determined that it did then it would be for the parties to try and agree the amount of tax due or otherwise revert to this Tribunal.

5. There was also an issue in the appeal as to whether HMRC were entitled to raise an assessment outside of the four year limitation set out in section 35 Taxes Management Act 1970 ("TMA") based on a discovery assessment within section 29 TMA. However, the appellant did not challenge that point in the hearing and so for completeness we find that HMRC were so entitled.

6. Finally Mr Daniels also took the point that HMRC had only taken the contract for STL when they had considered and accepted the tax position on other contracts on essentially identical terms. However, whilst the existence of those contracts are useful background material, this Tribunal can only consider the question put to it and it is irrelevant for this purpose that HMRC may have taken a different view on contracts which may or may not be identical but which are not part of this appeal.

7. Mr Daniels appeared for his company and gave oral evidence. Mr Philpott, the finance director of STL, provided a witness statement and gave oral evidence. Mr Ford and Mr Lightowler both being HMRC officers involved in the investigation also provided witness statements and gave oral evidence. We find the facts as set out below.

MDCM

8. The appellant is a company of which Mr Daniels and his wife are the directors and employees. The appellant's business consists of providing construction management services to construction companies.

5 9. Mr Daniels has a long experience in the construction industry, with a background in quantity surveying as an employee of a major construction company. He set up the appellant in 2004 to escape working for a large company and now provides construction services management services, including night shift management. Mrs Daniels is a director and employee of the appellant but no evidence was given as to her role in the business.

10 10. Mr Daniels explained the nature of his work. Many construction companies only employ a limited number of staff to keep down overheads. When there is demand for work on a specific project the company will hire in the additional staff for the duration of the project. On some construction contracts, particularly in London with tenanted buildings occupied during the day who have a right to quiet occupation, the
15 work needs to carry on a night, hence the need for a night shift manager. The night shift manager, as with a day manager, is responsible for the site including the works done by subcontractors, co-ordination of suppliers, safety issues and other matters associated with overall site supervision.

20 11. This appeal concerns the contract with Solutions and STL but as background we were provided with copies of four other contracts between the appellant and Solutions in addition to the contract that related to the STL engagement but no contracts between Solutions and STL or any other construction companies. The terms on which the appellant contracted with STL were reasonably standard.

25 12. If a construction company needed workers with Mr Daniels' expertise, they would contact STL who in turn would contact Mr Daniels as director of the appellant. At this point STL would not reveal the name of the construction company but would indicate a day rate, typically around £310, the location of the work and the likely length of the project. If the appellant accepted the instruction, the appellant and STL would enter into a contract in standard form and STL would enter into a separate contract with the
30 construction company at a higher day rate, for example £370.

35 13. The terms of the standard contract between the appellant and Solutions provided that the contract could be terminated on the "relevant period of notice" being given by the company, the format of the contract being that this period was to be specified in the "schedule of services" which was completed on each instruction. Often the notice period line in the schedule was completed as "N/A" or left blank. Mr Daniels gave evidence that there was in reality no notice period.

40 14. The standard terms of appointment would simply be for the day rate and so would not involve any reimbursement by either the construction company or Solutions for travel or subsistence expenses. Mr Daniels lives in the West Midlands and so when the work was in London Mr Daniels would drive to London and stay at a hotel, sleeping during the day. Mr Daniels would personally be reimbursed his expenses by

MDCM, presumably in effect out of the day rate. The hotel costs were typically £75-100 a day and food £25.

15 Mr Daniels would not routinely incur further additional costs in carrying out his work. However, on one occasion for a different company he ordered some £60,000 of
5 bricks because they were short on the site. MDCM ordered the bricks and was reimbursed by the construction company with the addition of a 20 % margin. VAT was charged and recovered by MDCM. Whilst very profitable, because of the credit risk and potential delay in payment Mr Daniels would only do so for companies he was comfortable with. He did not do so for STL.

10 16. The terms of the standard contract between MDCM and Solutions provided that MDCM could provide a substitute for Mr Daniels;

15 “You the Representative are the individual carrying on the Company business, and nominated by the Company to provide the Services; the Company may arrange for the Services to be provided by utilising a suitable substitute individual, provided that it has our prior written agreement which agreement will not be withheld in the case of a suitably qualified person...”

17. Indeed Mr Daniels suggested that MDCM need not at the outset have provided STL with Mr Daniels. Mr Daniels gave two examples where MDCM offered to provide substitute services in addition to or as cover for Mr Daniels. However,
20 HMRC pointed out these were proposed substitutions which did not actually happen and in any event they were proposals for companies to provide services not individuals. We therefore find that whilst the contract with Solutions included a right to substitute another suitably qualified individual it was never exercised by MDCM.

The STL Contract

25 18. The terms of the MDCM contract with Solutions in respect of STL followed the same standard terms. Mr Philpott explained that STL is a construction company that specialises in the fit-out and refurbishment of buildings in London. On larger projects there is a need for night shift managers. STL has employees who can fulfil the role but when they have too many projects they look for external recruitment companies to
30 provide additional staff.

19. In October 2012 STL required a night shift manager for the construction project at Prospect House in London and contacted Solutions. Solutions provided Mr Daniels who started work on 26 October 2012 and continued working full time including through the Christmas period. Mr Daniels was not interviewed for the job and Mr
35 Philpott stated that he had never heard of MDCM until asked by HMRC as part of their enquiries. On or around April or May 2013 the Prospect House project was finishing but STL had need of a night shift manager at another project in London, Aldwych House. STL asked Solutions and Mr Daniels whether he would like to move over to be the night shift manager for Alwyck House and he agreed. He continued to
40 work until 19 July 2013. However the STL contract with Solutions was still treated as applying.

20. Mr Daniels had to work during established shift times of 5:30pm to 7am, although if all the work had been done for that shift he could leave early. This applied Monday to Friday and, at the outset also included some weekend work, although this stopped due to concerns about working excessive hours.

5 21. As night shift manager Mr Daniels reported to the project manager Mr Hawes who at the start of the shift provided him with a list of instructions on matters that needed to be done during that shift. He was also required to manage the site generally including making sure the correct workers were on site, ensuring that the work was being done and being done safely. Mr Daniels would be STL's representative on the
10 site, wearing the company's branded high visibility jacket and hard hat in order to be identifiable as the contact point amongst the contractors.

22. Mr Daniels reported to Mr Hawes but according to Mr Daniels, Mr Hawes was only on site one a week for a cursory look around.

15 23. Mr Daniels represented STL as contact point for contractors. However, he did not participate in STL staff meetings or functions.

24. The day rate paid by Solutions to MDCM on the STL contract was £310 a day. Throughout the period of the STL contract Mr Daniels would at the end of the week submit a timesheet to Mr Hawes who would sign it off and send it to Solutions. Solutions invoiced STL based on the days worked and Solutions would pay MDCM.

20 25. In accordance with the normal arrangements STL was not responsible for any of Mr Daniels' travel, hotel or subsistence expenses which were paid for by MCDM.

25 26. In the Solutions contract that related to the STL engagement the notice period line in the schedule was completed as "N/A". There was also produced in evidence a copy of the "assignment" or terms of engagement between STL and Solutions. It describes the services as being provided by MDCM whose representative is Mr Daniels. The contract term is "ongoing", the day rate £370 and period of notice is described as "none".

30 27. Mr Daniels gave evidence that there was in reality no notice period and when the STL contract ended Mr Daniels left on 19 July 2013, the day he was told he was no longer required and received no pay for any days after that or any pay in lieu. We accept Mr Daniels evidence which supports the wording in the relevant contracts and find that there was no notice period on either party and no entitlement to any severance pay or pay in lieu.

35 28. We also find that, whilst he would presumably have been entitled to sick pay, holiday pay and other employee benefits from MDCM, neither MDCM nor Mr Daniels had no entitlement to any such payments or equivalent from the STL arrangements. The only payment obligation from STL was £370 a day for each day Mr Daniels attended the site. If Mr Daniels was sick he would call in, STL would find or ask Solutions for a substitute and that substitute would be paid under separate
40 arrangements but MDCM would not be paid.

29. Mr Daniels did not purchase any goods on behalf of STL.

30. The contract between MDCM and Solutions which applied to the STL arrangements provided that MDCM could provide a substitute for Mr Daniels. Indeed Mr Daniels suggested that MDCM need not at the outset have provided STL with Mr Daniels. However, Mr Philpott gave evidence that STL required the services of Mr Daniels. On those days when Mr Daniels gave notice that he would not be on site STL would call Solutions and ask for a substitute. They did not ask Mr Daniels to provide one nor would they accept that Mr Daniels was entitled to provide one. We accept Mr Philpott's evidence notwithstanding the terms of the MDCM contract with Solutions.

31. STL provided third party insurance for Mr Daniels whilst he was carrying out his duties on site. However MDCM took out its own insurance as required by the Solutions contract.

32. STL provided Mr Daniels with personal protection equipment being a high visibility vest, gloves and hard hat. He had access to the STL computer on site but was not provided with a mobile phone and used his own when working on the site.

The Legislation

33. The Intermediaries Legislation provides in so far as is relevant to this appeal;

“49(1) This Chapter applies where-

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

(aa) the client is not a public authority,

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

(c) the circumstances are such that-

(i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under client, or

(ii) the worker is an office-holder who holds that office under the client and the services relate to the office.

(2)

(3)

(4) The circumstances referred to in subsection (1)(c) include the terms upon which the services are provided, having to the terms of the contract forming part of the arrangement under which the services are provided.

(4A)....

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

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

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

(b) the worker or an associate of the worker-

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

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

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

20 50(2)

50(3)

50 (4)....

25 51(1) where the intermediary is a company the conditions are that the intermediary is not an associated company of the client that falls within subsection (2) and either-

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

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

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

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

51(2)...

51(3) a worker is treated as having a material interest in a company if-

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

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

has a material interest in the company

(4) for this purpose the material interest means-

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

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

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

The issues

34. It is agreed that the conditions in section 51 are met, the appellant not being an associated company of STL and Mr Daniels having a material interest in MDCM by virtue of owning all the shares. The only question in this appeal is therefore whether the conditions in section 49 are satisfied.

35. HMRC argues that Mr Daniels as the worker personally performs services for a client STL under a contract which is via an intermediary, MDCM, and that if these services were provided directly between Mr Daniels and STL then under that hypothetical contract Mr Daniels would be regarded for income tax purposes as an employee of STL. There is no statutory definition of employment and so the principles established in case law apply.

36. On the facts of the arrangements HMRC highlight;

25 (a) the personal services of Mr Daniels were required. Mr Philpott on behalf of STL confirmed that they would not accept any substitute. Further, Mr Daniels stated that he was not in a position to send a substitute even if STL were to accept someone.

30 (b) STL exercised a significant degree of control over Mr Daniels. STL set what work was to be done and how it was to be done, Mr Daniels being required to carry out in each shift the tasks set by the project manager. STL also decided where and when the work has to be done.

(c) Neither MDCM nor Mr Daniels incurred any financial risk

37. Mr Daniels only challenges HMRC’s argument on the point that, had there been a direct contract between him and STL, he would have been an employee. Mr Daniels argues that a number of factors in the STL arrangements point towards this not being the case;

(a) there was no notice period– the contract was terminated on 19 July 2013 with no notice

(b) there was no entitlement to severance pay in the event of termination of the contract

(c) there was no entitlement to holidays or holiday pay

(d) there no entitlement to reimbursement of travel or accommodation expenses

5 38. Further, according to Mr Daniels, HMRC did not recognise or take into account the binding nature of the contracts between the three parties.

Authorities and case law

39. We agree with HMRC that the issue is whether Mr Daniels, on a hypothetical contract between Mr Daniels and STL, Mr Daniels would be regarded as an employee
10 of STL. The task is to look at the relationship, stripping out the presence of the legal entities MDCM and Solutions. There is no statutory definition of employment and so, having set up the hypothetical direct relationship between Mr Daniels and STL, the principles established in case law apply to determine whether it is one of employment.

40. The employment test proposed by HMRC and which we accept is as set out by
15 MacKenna J in *Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497;

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

41. MacKenna J went on to say;

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

30 42. In *Hall v Lorimer* [1994] 1 All ER 250, an appeal from a decision of the Special Commissioners on this question of the hypothetical contract for the purposes of the Intermediaries Legislation, Nolan LJ in giving the judgment of the Court of Appeal rejected a prescriptive list of factors to take into account and said:

35 “in cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments in one case maybe unhelpful in another. I agree with the view expressed by Mummery J in the present case, at page 944D of the report way he says;

5 “in order to decide whether a person carries on business on his own
account it is necessary to consider many different aspects of that person’s
work activity. This is not a mechanical exercise of running through items
on a checklist to see whether they present in, or absent from, a given
situation. The object of the exercise is to paint a picture from the
accumulation of detail. The overall effect can only be appreciated by
standing back from the detailed picture which has been painted, by
viewing it from a distance and by making an informed, considered,
10 qualitative appreciation of the whole. It is a matter of the evaluation of the
overall effect of the detail, which is not necessarily the same as a sum
total of the individual details. Not all details are equal weight or
important in any given situation. The details may also vary in importance
from one situation to another.”

15 Nonetheless, in deference to the submissions of Mr Goldsmith, I am prepared to
follow his suggested path and see where it takes us.”

43. HMRC have listed and considered a number of factors in considering the nature
of Mr Daniel’s relationship with STL under the hypothetical contract. Taking note of
Nolan LJ’s approach that the facts must be considered in the round, this list provides a
convenient structure to consider the terms of the hypothetical contract we are directed
20 to consider by the Intermediaries Legislation.

Control

44. HMRC argue that control by STL is the most important factor. Further, taking
MacKenna J’s comments in *Ready Mixed Concrete*, control includes the power of
deciding the thing to be done, the way in which it shall be done, the means to be
25 employed in doing it, the time when, and the place where it shall be done. Further, it
is not a question as to whether control was actually exercised, but the right of control
that is important. Where the worker is a skilled professional then control is less
important and in the case of an expert, neutral in determining the employment status.

45. HMRC point out that STL controlled the time Mr Daniels worked as he was
30 required to work during the shift patterns, albeit he could leave early if the work was
finished. Mr Daniels argues that this is not control but merely the way all construction
sites are necessarily run.

46. HMRC made a submission that STL controlled where Mr Daniels worked because
they redirected him to work on Aldwych House but this submission was withdrawn
35 during the hearing after hearing witness evidence, it being clear that the STL had
asked Mr Daniels whether he wanted to work on the Aldwych House site.

47. HMRC argued that STL controlled how Mr Daniels carried out the work in that he
was required to report to the project manager Mr Hawes who directed what Mr
Daniels did by giving him a list of instructions on matters that needed to be done
40 during that shift. He was also required to manage the site including making sure the

correct workers were on site, ensuring that the work was being done safely and be point of contact for all workers.

48. Mr Daniels argued that the only control exercised was that which necessarily came with the operation of large-scale construction sites which lays down the structure of the programme and timeline for the execution of the construction activities. In other words when he came on the site there would be work to be done but that was dictated by the phase of the construction programme, what had happened on that day, for example if there had been delays or a problem had arisen. However, during the shift he could organise matters as he saw fit and his supervisor would only visit once a week.

49. We agree that STL directed what Mr Daniels had to do during the shift. However, we agree with Mr Daniels that that was no more than telling Mr Daniels what needed to be done on site by the contractors which Mr Daniels supervised. This followed from the stage reached in the work programme and dictated the work done by everyone on site whether employed or self employed.

50. Further, there was no evidence that STL controlled how Mr Daniels would carry out his role in fulfilling the work programme for that shift beyond wearing STL safety equipment to identify him as STL's representative. He was supervised by Mr Hawes but Mr Hawes only visited the site occasionally and Mr Nicholls was left to his own devices during the shift. We agree with Mr Daniels that STL did not exercise any more control on the site than they would over an independent contractor.

51. Further, the fact that STL had to ask for his agreement before Mr Daniels moved over to the Aldwych House site indicates no power to direct where Mr Daniels would work. In considering that point we have taken the view that both periods, Prospect House and Aldwych House are part of a single continuous hypothetical contract rather than two separate ones. Both parties assumed that this was the case and in the artificial world required by the Intermediaries Legislation, it seems to us that this is correct.

Personal services and mutuality of obligations

52. We have found that the appellant could not provide and STL was not required to accept a substitute for Mr Daniels. Accordingly we do not accept it would be a term of the hypothetical contract between Mr Daniels and STL. We therefore find that the hypothetical contract is one of personal services with no right of substitution and that there is a mutuality of obligation between STL and Mr Daniels.

Financial risk

53. HMRC say that employees do not tend to take financial risk and Mr Daniels took no financial risk and should not be treated as taking any in the hypothetical contract.

54. Mr Daniels argued that he bore the cost of the travel, hotel and food expenses. If he had been an employee he would have been put up in a hotel, had his vehicle funded and living away from home expenses. Where he was comfortable with the contractor

– as he had with a previous company – he might supply materials but this would be at his risk and he did not feel comfortable doing so with STL as he had not worked with them before.

5 55. It was debated at the hearing whether the travel, hotel and food expenses were relevant to the hypothetical contract. Under the hypothetical contract we must assume that MDCM does not exist. It matters therefore whether the under the hypothetical contract Mr Daniels is paid £310 a day and pays expenses of around £100 a day or is paid £210 a day and STL pays the expenses. The legislation does not direct us to an answer on this point.

10 56. In economic terms, whilst he was reimbursed by MDCM, Mr Daniels bore the cost via his ownership of MDCM. STL did not bear any risk. Accordingly we find that in the hypothetical contract Mr Daniels should be treated as being paid £310 a day and paying his own expenses. However, we do not find that this is a very significant as a financial risk factor for these purposes. Travel, hotel and food
15 expenses are often borne by employees.

57. We accept that on occasion Mr Daniels would purchase goods for other contractors. However, that did not happen here because Mr Daniels did not know STL well enough and so we discount it from any financial risk or characteristic of the hypothetical contract.

20 **Provision of equipment**

58. We have found as a fact that STL provided safety equipment to Mr Daniels and accordingly find that it would do so in the hypothetical contract.

Right to terminate the contract

25 59. Mr Daniels points out that he was not entitled to any notice period in the contract or to any severance pay. He was notified on 19 July 2013 that the contract was terminated and he did no more work after that date with no severance payment.

30 60. We have found that there was no requirement on either party to give notice to terminate in the STL arrangements or entitlement to severance pay or pay in lieu. Accordingly we find as a fact that in the hypothetical contract between STL and Mr Daniels there would be no entitlement to notice either way or entitlement to severance pay or pay in lieu.

Length of engagement

61. HMRC do not ascribe any particular significance to this factor save that longer contracts tend to indicate employment and this contract was open ended.

35 62. The contract - and so the hypothetical contract - was necessarily open ended with, as set out above, no notice period for termination.

Employee benefits

63. By this HMRC means whether the individual in the hypothetical contract is entitled to pension contributions, sick pay, holiday pay or any other employee type benefits. Mr Daniels points out that he was not entitled to any of these benefits.

5 64. However, HMRC argue that as an employee of MDCM these were a matter for MDCM. If the hypothetical contract with STL was found to be one of service then he would have been entitled to these benefits.

10 65. We do not think that HMRC can dispense with this point so easily by saying it was a matter for MDCM or that there was no employment contract. Indeed it is necessarily circular for HMRC to argue that he would have had such rights were he an employee. The fact that Mr Daniels is an employee of MDCM, with consequential rights, cannot be relevant to the hypothetical contract. Nor can the availability of statutory entitlements be relevant, the hypothetical contract being necessarily concerned with contractual rights. As with the right of substitution we are concerned with what would be the terms of a direct relationship between Mr Daniels and STL.
15 That cannot be answered by saying Mr Daniels was an employee of MDCM. We do not accept that were Mr Daniels to have a direct contract with STL, STL would give Mr Daniels sick pay, holiday pay or any other employee type benefits.

20 66. Accordingly, we find that in the hypothetical contract between STL and Mr Daniels he would not be entitled to any sick pay, holiday pay or any other employee type benefits.

Part and parcel of the organisation

67. Where the individual is integrated into the business – rather than working for their own account – then this would tend to indicate employment.

25 68. We have found as a fact that Mr Daniels was not invited to STL meetings or functions or other events run for employees. We find therefore that in the hypothetical contract Mr Daniels would also not be so invited.

Exclusive services

69. HMRC did not rely on this point as exclusivity can be a feature of employed and self employed contracts.

30 Basis of payment

70. HMRC accept that typically an employee would be paid a fixed wage or salary by the week or month and often qualify for additional payments such as bonuses and overtime payments. Self-employed workers tend to be paid a fixed sum for a particular job and tend to issue an invoice for the work carried out.

35 71. HMRC accept that as Mr Daniels was paid on a daily rate for work done this factor points towards Mr Daniels being self employed.

Mutual Intention

72. Any statement in a contract as to whether the parties intended there to be an employment relationship is of limited relevance in the context of the hypothetical world of the Intermediaries Legislation. However, whilst we are satisfied that neither Mr Daniels nor STL wanted an employment relationship, we were not aware of any wording to that effect.

Decision

73. The Tribunal's task is to determine the terms of the hypothetical contract between Mr Daniels and STL and then, as outlined by Mummery J in *Hall v Lorimer*, "it is a matter of the evaluation of the overall effect of the detail".

74. The hypothetical contract can from our findings be summarised as follows;

- a) Mr Daniels is not controlled any more than any other contractor and could refuse to work on another site
- b) there was a contract for personal services as Mr Daniels could not provide a substitute to STL (even if Solutions contract said he could).
- c) Mr Daniels was paid £310 a day and had to pay his own travel, hotel and other expenses.
- d) Mr Daniels took no other financial risks
- e) There was no requirement on either party to give notice to terminate or entitlement to severance pay or pay in lieu.
- f) STL provided safety equipment to Mr Daniels
- g) Mr Daniels was not integrated into the STL business

75. For the reasons set out above we do not accept HMRC's arguments about control but do agree that the requirement for personal services and lack of financial risk point to an employment relationship. However, we find that the nature of the payment arrangements, a flat rate per day with no notice period and no entitlement to any employee benefits are inconsistent with employment. Further, Mr Daniels was not treated as an employee.

76. On balance we find that under the hypothetical contract required by the Intermediaries Legislation Mr Daniels would not be an employment contract and so this appeal is allowed.

77. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to

“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

5

**IAN HYDE
TRIBUNAL JUDGE**

RELEASE DATE: 12 APRIL 2018

10