[2020] UKFTT 0109 (TC)

TC07603

Appeal number: TC/2017/03624

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation – IR35 – sections 48-61 ITEPA 2003 – personal service company – if the services were provided by the worker directly to the client, would there be a contract of employment – appeal dismissed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

RED, WHITE AND GREEN LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 3, 4 and 5 June 2018

Mr Robert Maas, of Carter Backer Winter LLP, for the Appellant ("RWG")

Mr Adam Tolley QC and Mr Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents ("HMRC")

DECISION

1. RWG is what is commonly known as a "personal services company" ("**PSC**"). It was formed by Mr Eamon Holmes and acted as the vehicle through which his services were provided to ITV Studios Limited ("**ITV**") as presenter on its show This Morning under a series of contracts between the parties.

2. RWG appealed against determinations and notices issued by HMRC for income tax and national insurance contributions ("**NICs**") asserted to be due under the Pay as You Earn System on income paid to it by ITV under the contracts for the provision of the Mr Holmes' services as regards the tax years 2011/12 to 2104/15 (under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003/2682 and s 8 of the Social Security (Transfer of Functions, etc) Act 1999). The tax and NICs are asserted to be due under provisions which are commonly referred to as "IR35" (under s 48 to s 62 of the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**") and regulation 6 of the Social Security Contributions (Intermediaries) Regulations SI 2000/727).

3. In outline, IR35 applies where an individual provides services to a client under arrangements involving a third party, such as a PSC, broadly, if the individual would be regarded for income tax purposes as an employee of the client if the services were provided under a contract directly between the client and the individual. In that case, the income received by the third party for the individual's services is treated as employment income. The tribunal is asked only to consider whether there is in principle any such liability and not to consider the amount of the liability.

Background and overview of the dispute

Legislation

4. The conditions for IR35 to apply are set out in s 49 ITEPA as follows:

> "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"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client…..
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contract forming part of the arrangement under which the services are provided.
>
> (5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1)."

5. The conditions for the corresponding NICs provisions to apply are broadly the same as those in s 49 ITEPA except that the provision corresponding to s 49(1)(c) provides that:

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

6. There is no dispute that the conditions in s 49(1)(a) and (b) ITEPA and in the corresponding NICs provisions are satisfied. The only issue is whether the condition in s 49(1)(c), and in the corresponding NIC provision, are met. It is common ground that the burden of showing whether it is met is upon RWG.

Background to IR35

7. As set out in the press release issued when IR35 was first introduced in 1999 the concern, which the legislation was introduced to prevent, was that it was possible "for someone to leave work as an employee on a Friday, only to return the following Monday to do exactly the same job as an indirectly engaged 'consultant' paying substantially reduced tax and national insurance". However, as Walker LJ emphasised in *R (on the application of Professional Contractors Group Ltd) v IRC* [2002] STC 165, IR35 does not apply automatically where a person acts through a PSC. He said, at [12] of that case, that it does not apply at all unless the relevant person's "self-employed status is near the borderline and so open to question or debate"; the whole regime is "restricted to a situation in which the worker, if directly contracted by and to the client 'would be regarded for income tax purposes as an employee of the client'" as "determined on the ordinary principles established by case law…." This was referred to with approval by Henderson J in *Dragonfly Consultancy Limited v HMRC* [2008] EWHC 2113 (Ch) at [10].

8. That is not to say, however, that IR35 is restricted to applying only in cases involving artificiality. As Walker LJ put it at [51] of the *Professional Contractors Group* case, the aim of both the income tax and NICs provisions:

> "is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation".

Approach to IR35

9. The parties were agreed that determining whether the legislation applies calls for a two stage exercise (see *Usetech Ltd v Young (Inspector of Taxes)* [2004] STC (SCD) 213 at [35], [36] and [47]; and *Future On-Line Limited v Foulds (Inspector of Taxes)* [2005] STC 198 at [25]):

> (1) At the first stage the tribunal essentially has to determine the basis on which ITV and Mr Holmes would have engaged under direct contractual arrangements between them for the provision of his services. I refer to this as the "assumed contract" or "assumed relationship".
>
> (2) The tribunal must then determine the nature of the assumed contract between Mr Holmes and ITV, as either an employment or a self-employment relationship, by reference to the well-established legal principles applied by the courts in determining whether an employment relationship exists.

10. There is a "slight, but potentially significant" difference in the approach for income tax and NICs purposes (although in practice the outcome may be the same) as set out by Henderson J at [17] of *Dragonfly Consultancy Limited*:

(1) The NICs test requires "the arrangements themselves to be embodied in a notional contract, and then asks whether the circumstances (undefined) are such that the worker would be regarded as employed".

(2) On the other hand, the income tax test: "…directs attention in the first instance to the services provided by the worker for the client, and then asks whether the circumstances (widely defined in paragraph 1(4) in terms which include, but are not confined to, the terms of the contract forming part of the arrangements) are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded as an employee of the client." As the Special Commissioner said in that case the income tax test appears, therefore, to require a wider enquiry into what the terms of a direct contract would have been given there is no limitation in the wording to contract terms which are encompassed in the arrangements or the circumstances.

11. I note that in *Usetech Ltd v Young* (2004) 76 TC 811, at [36], Park J envisaged that in a straightforward case where there are two contracts in place (between the PSC and the worker and between the PSC and the client), the content of the assumed or notional contracts will be "fairly obvious":

> "they will be based on the contents of the second contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user."

12. He continued that deciding on the terms of the assumed contracts may be more complicated where, for example, there is an agent in the contracting chain. He noted that in *R (on the application of the Professional Contractors Group Ltd and others)* v *IRC* [2001] STC 629 (at page 651) Burton J was of the view that in such a case "all relevant circumstances would fall to be taken into account in determining the contents of the hypothetical contract between the worker and the end user, including the provisions (or the absence of particular provisions) of a contract between an agency" and the end client (see [46] and [47]).

13. However, there is no such complexity in this case. In my view, in these circumstances, the actual contractual terms between ITV and RWG constitute the best available evidence of what the terms of a direct contract would have been. On that basis I consider that, for the purposes of determining whether IR35 applies, Mr Holmes should be assumed to have entered into a series of contracts with ITV based on the actual contracts between RWG and ITV on terms as near as may be to the actual contractual terms. On that approach I do not consider there is any difference in the outcome under the slightly different formulations of income tax and NICs tests and the parties did not suggest there was.

14. As regards the classification of the hypothetical relationship, it was common ground that there are three cases of particular importance, which form the basis of the subsequent case law:

(1) In *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 MacKenna J set out the often quoted three stage test for there to be contract for services at page 515:

> "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

I refer to the first test set out by MacKenna J as the mutuality test and to the second as the control test. This formulation for the existence of a contract of service has been approved in a number of subsequent cases including by the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41 at [18].

(2) In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, Cooke J approached the question of whether there was an employment contract by examining whether the individual in question was "in business on his own account".

(3) In *Hall v Lorimer* [1994] 1 WLR 209, STC 23 the court interpreted the approach in *Market Investigations Ltd* essentially as requiring a multi-factorial exercise.

Evidence and facts

Evidence

15. I have found the facts on the basis of the evidence given by Mr Holmes, who attended the hearing and was cross-examined, and the documents in the bundles. The bundles contained notes of a meeting between HMRC and ITV which took place on 4 March 2015 (the "**meeting notes**"). The attendees included the editor of This Morning, the head of Production for Daytime Programmes and a member of ITV Business Affairs. The parties both appeared to accept that the comments of the ITV representatives set out in the notes can be taken as an accurate reflection of ITV's views on its relationship with Mr Holmes. I refer to those comments as the comments of ITV.

16. In giving his oral evidence, Mr Holmes was prone to arguing his own case with counsel rather than focusing on answering the factual questions asked of him. He was on occasions rather impatient with the line of questioning put to him and made some rather sweeping statements in support of his position, in particular, as regards his "total control" in respect of how he operates as a presenter on This Morning. HMRC raised criticisms of Mr Holmes as a witness on these and related grounds. However, I do not consider that any adverse inference should be drawn from this albeit that the scope of some of Mr Holmes' more general statements has to be considered in the light of his more specific responses and the other evidence. I regard Mr Holmes' reaction to some of the questions he was (quite properly) asked by Mr Tolley as simply the human reaction of a person who is plainly of a questioning mindset and mindful of the implications of what he was being asked. Overall Mr Holmes did ultimately generally answer the questions he was asked. I have commented further where relevant below.

Facts

Contractual terms

17. RWG was incorporated on 26 April 2001. Mr Holmes is the sole director and the majority shareholder. His children own the remaining shares in RWG.

18. Mr Holmes started presenting on This Morning from at least 2006. Mr Holmes thought he had worked on the programme for as many as 15 years. During the relevant tax years, RWG entered into four contracts with ITV for the provision of services by Mr Holmes on This Morning for the periods starting and ending on the dates shown below (the "**agreements**"):

start date	*end date*	*date signed*
24 July 2011	20 July 2012	7 October 2011
1 September 2012	19 July 2013	2 November 2012
2 September 2013	18 July 2014	24 October 2013
1 September 2014	17 July 2015	undated

19. At the hearing Mr Holmes was unclear as to what happened in the gap periods between the expiry of one agreement and the conclusion of the next. He concluded that he did not know what the position was without checking his records. However, in the correspondence in the bundles, Mr Holmes' representatives confirmed to HMRC that he worked on This Morning in the gaps between the contracting periods set out above through a different PSC, Holmes and Away Limited.

20. HMRC were critical of Mr Holmes' inability to confirm what happened in the gap periods and his apparent lack of knowledge of the contractual arrangements (see [77] to [79]). However, I found it credible that Mr Holmes left such matters to others he engaged to advise him (such as his agents and accountants). Mr Holmes has a forceful personality and his passion for his presenting and journalistic work was readily apparent. In that context, I find it unsurprising that Mr Holmes would want to engage others to organise and deal with the legal and other details of his engagements for him so that he can focus on what really interests him, namely, his presenting and journalistic work.

Terms of the agreements between ITV and RWG

21. The description of the main terms of the agreements between ITV and RWG set out below is taken from the first agreement except where expressly stated to the contrary. Whilst there were some differences in the wording of the later agreements the parties were content to proceed on the basis that these were not material (other than as regards the periods covered and the dates on which Mr Holmes was required to present).

22. *Recital*: The recital set out that the agreement related to the provision of Mr Holmes services on This Morning (including This Morning Saturday and This Morning Sunday) consisting of episodes of approximately 120 minutes duration.

23. *Services and fees*: RWG was required to procure that Mr Holmes "shall render his Services….on an exclusive basis" during the specified period "or such other dates as may be agreed with the executive producer of the Programme..".

(1) In the first agreement, RWG was required to procure that Mr Holmes would provide his services on (a) every Friday during the term but excluding four specified Fridays and such Fridays in July as ITV may confirm, (b) every Monday to Thursday in the relevant weeks when he was not required to work on Friday, (c) subject to written confirmation by ITV, five dates in December 2011 and January 2012, and (d) such other dates and locations as notified to RWG in advance by ITV "at our sole discretion".

(2) In the second, third and fourth contracts, RWG was required to provide Mr Holmes' services (a) on a certain number of Fridays (except in weeks where he provided his services on Monday to Thursday in the relevant week), (b) where requested by ITV, at ITV's sole discretion, Monday to Thursday (inclusive) of certain weeks during the term, and (c) such other dates and locations as notified to RWG in advance by ITV at ITV' sole discretion.

(3) In the meeting notes, it is recorded that the provision giving ITV the right to specify other dates of work and location were there "in case ITV need to use them" but as regards location "in reality will not be used as show is based in the studio 99% of the time". It was noted, however, that the programme is always evolving and at that time ITV were thinking about taking the show on the road in September and "[Mr Holmes] would be expected to take part" and that it was possible that they would tailor the venue to suit him such as an item from Northern Ireland. The editor thought it would be unlikely he would refuse.

(4) RWG was required to procure that Mr Holmes understood and acknowledged that the necessities of production may require ITV to change and/or reschedule the dates specified and that he "shall be as flexible as possible in this regard". It was stated that where "[ITV] cancel any dates and are unable to reschedule for reasons other than [Mr Holmes'] unavailability or reasons mentioned in [the termination provisions set out below], [RWG] shall be entitled to payment in full for any cancelled dates".

In the meeting notes ITV is recorded as stating that this provision allows ITV to reorganise to accommodate one-off events such as a general election.

(5) RWG agreed to procure that Mr Holmes understood that he may be required to work such hours as are necessary to perform his duties in a first class manner. It was stated that his working hours may exceed 48 hours per week. RWG was required to procure that he consented to working hours in excess of 48 hours per week "as is necessary to perform his duties".

In the meeting notes ITV is recorded as confirming in effect that this was a generic contract term which was to cover "different workers/ scenarios within the Working Time Regulations". The hours Mr Holmes was engaged for were to cover the programme, briefings, production, call and pre-screen briefings etc (see (7) below).

(6) RWG agreed to provide the services of Mr Holmes "as a first class presenter in full and willing cooperation with requests made to [Mr Holmes] from time to time by the executive producer of the Programme….in accordance with terms of this Agreement and such services shall be deemed to include (without limitation)" appearing as a presenter in live or pre-recorded episodes of This Morning based in the studio and recording additional links for the weekend

episodes of This Morning. Mr Holmes said he had never had to do a pre-recorded episode. Weekend link recording sessions were a feature only of the first agreement; thereafter This Morning was no longer shown at the weekends.

(7) RWG was obliged to make Mr Holmes available not only to carry out the work in the studio, but also to:

(a) attend a reasonable amount of filming sessions, production meetings and rehearsals for the programme;

(b) provide creative input to the programme's production;

(c) participate in occasional short voice-overs and video tape recordings;

(d) provide interviews, contributions and behind the scenes material and participate in online chats and webcasts;

(e) make reference to the website, the twitter account and other websites connected with the programme from Mr Holmes official personal social networking site (if any) at least once per his appearance on the programme;

(f) provide one blog post per appearance on the programme, be available to have a photograph taken for the ITV and/or programme website and be available for a reasonable amount of time for behind the scenes filming per appearance on the programme;

(g) undertake promotional and public relations work from time to time; and

(h) render such other services as are usually rendered by a first class television presenter (referred to together as the "Services").

(8) It was stated that: "[RWG] acknowledge that [Mr Holmes'] participation in the Programme throughout the Term in the manner set out above is integral to the Programme and a material term of the Agreement."

(9) RWG was entitled to a fixed fee for each show performed and a further small fee for each weekend link recording session undertaken (plus VAT if applicable).

(10) The fees were payable upon completion of the services for each engagement type undertaken during the term of the agreement. It was provided that ITV would produce invoices relating to the fees and that RWG would accept tax invoices created by ITV on its behalf in respect of payments due under the agreement.

24. *Benefits*: RWG was entitled to receive certain additional benefits for Mr Holmes, namely, (a) the provision of a car for him to travel in to and from the studio, (b) a selection of clothing for his appearances on the programme, (c) the reimbursement of reasonable travel and accommodation expenses where he was required to render services outside a 50 mile radius from Charing Cross in London, and (d) any other expenses directly incurred in connection with the services on presentation of receipts and subject to prior approval by ITV. Mr Holmes said that the clothing benefit was worth around £5,000 to £6,000 per year. He accepted that ITV provided all necessary insurances. He provided his own earpiece.

25. *Option to renew*: RWG granted and, procured that Mr Holmes, granted ITV an exclusive option to engage Mr Holmes as a presenter on any further series of This Morning and/or spin off programmes, if any, on substantially the same terms and conditions set out in the agreement. This was exercisable by ITV, at its sole discretion, at any time during the period from signing of the agreement until the period ending three months after the expiry of the term.

26. *Copyright and other rights*: RWG assigned to ITV all relevant copyright and moral rights. ITV had the unlimited right to edit, copy, alter, add to, take from, adapt and/or translate the product of Mr Holmes' work.

27. *Editorial control*: RWG was required to acknowledge and procure that Mr Holmes acknowledged that "[ITV] shall have absolute discretion and control over the editorial content of the Programme and to the Products of [Mr Holmes'] Services".

28. *Restrictions on activities*: RWG warranted that neither it nor Mr Holmes would "enter into any professional or other commitment or undertake work for any third party which would or might conflict with the full and due rendering of [Mr Holmes'] Services and observance of [Mr Holmes'] obligation herein" and would not "engage in any conduct that may bring [ITV], the Programme or the Broadcaster into disrepute".

29. *Warranties and undertakings*:

(1) RWG warranted that "the rights hereby granted and assigned are vested in [RWG] and/or to [Mr Holmes] absolutely".

(2) RWG agreed to procure that "[Mr Holmes] shall provide the Services conscientiously and in a competent manner as a first class presenter as and where required and in full willing co-operation with such persons as [ITV] may require".

(3) RWG agreed to procure compliance with health and safety guidelines and that "[Mr Holmes] shall obtain knowledge of and comply with all rules and regulations for the time being in force at such places where [Mr Holmes] provides his Services, and of the television programme guidelines laid down by OFCOM including without limitation regarding undue prominence".

(4) RWG agreed and agreed to procure that "[Mr Holmes] agrees… that he shall not wear clothing, accessories or footwear which are branded or have visible logos. If asked to do so by [ITV], [Mr Holmes] shall immediately remove or change any item of clothing, accessory or footwear. [ITV's] decision in this regard shall be final".

(5) RWG agreed to and to procure that Mr Holmes:

(a) "notifies [ITV] prior to the transmission of the Programme of any press, radio or television advertisement or commercial which [Mr Holmes] makes, contributes to, appears in or promotes or which [Mr Holmes] has made, contributed to, appeared in or promoted which might be broadcast any time transmission of the Programme";

(b) "shall use his best endeavours to attain and maintain such as state of health as will enable him to render the Services…as effectively as possible and as will enable [ITV] to effect insurance on [Mr Holmes] on

reasonable terms for our own benefit against losses arising from [Mr Holmes'] liability to perform the said Services";

(c) "shall not…without our consent engage in any hazardous pursuits….nor take any risk the taking of which would invalidate or affect any normal policy of insurance on his health or life or otherwise affect the performance of his Services herein";

(d) "shall not advertise or endorse any products, services or refer to any charity whilst providing the Services during the recording or live transmission of the Programme…";

(e) "shall not use the name of the Programme or ITV or the Programme broadcaster…or use his role in, or association with the Programme in connection with any commercial or charitable work for any third party without our prior written consent";

(f) "shall at our reasonable request undergo a full medical examination by a doctor…and acknowledge that the engagement herein is subject to the results of such medical examination being to our satisfaction";

(6) In the meeting notes ITV are recorded as confirming that for the purposes of the above provisions, a statement of Mr Holmes' health would be enough. If ITV asked Mr Holmes to undertake something out of the ordinary, such as to climb a mountain, then he would be asked to undergo a medical examination for insurance purposes. Insurance would be to cover ITV and as part of the health and safety requirement.

(7) RWG warranted that:

(a) it had "disclosed to [ITV] and shall procure that [Mr Holmes] has disclosed to [ITV] prior to signature of this Agreement and will continue to disclose to us…all commercial activities involving [RWG] and/or [Mr Holmes] or any commercial use of [Mr Holmes'] role in, or association with, the Programme (including but not limited to the endorsement and/or setting up of any products or services and/or activity which we may consider could be associated with the Programme) (the foregoing shall be collectively referred to as the "Commercial Activities")";

(b) it would and would procure that Mr Holmes would not without ITV's prior written consent, "enter into any <u>new</u> contract or arrangement for [RWG's] or [Mr Holmes'] participation in or authorisation of any Commercial Activities unless it is approved by [ITV] in advance in writing with such approval not to be unreasonably withheld or delayed….it shall be reasonable for [ITV] to withhold our approval inter alia if in [its] reasonable opinion any of your new Commercial Activities might bear unfavourably upon [ITV], the Programme, our editorial independence or reputation or our other programmes or conflict with activities of the Programme or [ITV]"; and

(c) it "shall fully and effectively indemnify" ITV for any losses and costs in respect of any breach by RWG or Mr Holmes under the agreement.

(8) In the meeting notes ITV is recorded as stating that:

(a) ITV would need to know about Commercial Activities in case of conflict or reputational damage. If Mr Holmes continued to be involved with commercial entities that conflicted or caused reputational damage, then ITV may look to revisit the relationship. As a commercial channel ITV has to be careful about possible conflicts with programme sponsors. If Mr Holmes chose to promote a product then the terms of the engagement would be reviewed.

(b) As regards the indemnity provision, on a practical basis if there was a clear breach of protocol and the programme was sued for something Mr Holmes said/did then ITV would revert to him. This clause was in the agreement "to reinforce the fact that breaches will not be viewed favourably".

30. *Promotion*: "You hereby undertake and shall procure that [Mr Holmes] undertakes (without the requirement for further payment) to be available …..for press interviews, promotional shoots, photographs, press launches, public relations and other events and feature articles and/or any other advertising, publicity and promotional requirements in connection with the Programme, the broadcaster of the Programme and/or the ITV group" (including online activities) "as and when reasonably required and requested by us and you hereby grant and shall procure that [Mr Holmes] hereby grants to us unlimited rights to use the products of the same in any manner and in all media, for promotional purposes connected with the Programme and products or services thereof…"

31. There was a statement that nothing in the agreement constituted Mr Holmes as an employee and RWG was solely responsible for all taxes.

32. ITV agreed that, subject to compliance with the agreement, and "subject to the practice of the person(s) commissioning or financing the production of the Programme, if the Programme shall incorporate any part of the Services [ITV] agree to accord [Mr Holmes] a screen credit and, as we deem appropriate, credit in advertising material issued in connection with the presentation of the Programme".

33. *Termination*:

(1) The contract could be terminated as a result of a number of stated events, including:

(a) if RWG or Mr Holmes "fails, refuses or neglects to perform any of the obligations herein or are otherwise in breach of any obligation undertaking or warranty contained in this Agreement and such failure, refusal, neglect or breach is not remedied (if capable of remedy) within 2 (two) days of our written notice to you requiring the same";

(b) Mr Holmes' inability personally to render the services, including an inability due to ill-health, injury, mental or physical disability or other cause for more than five days in aggregate provided none of these were caused by Mr Holmes' reckless and/or wilful acts or omissions;

(c) RWG or Mr Holmes gave public expression to any matter of public, political, social or other controversy;

(d) RWG or Mr Holmes "commit any act or do or neglect to do anything, the commission or omission of which brings or is intended to

bring [Mr Holmes], the Programme, [ITV], any of our group companies or the broadcaster into public disregard or involves [ITV] or the broadcaster in conflict with OFCOM"; and/or

(e) if production of the programme was hindered by certain events beyond the parties' control (such as strikes, technical failures or natural disasters) (defined as an "Event of Force Majeure") for more than five business days.

(2) If the contract was terminated under the above provisions, RWG was entitled to receive only payment accrued as due and payable prior to the date of termination in respect of the services rendered.

(3) ITV also had the right to terminate the engagement on four weeks written notice without specifying any reason on paying a portion of the fee commensurate to the amount of services provided up to the date of termination (which was to constitute the full extent of ITV's liability to RWG and Mr Holmes as a result of such termination).

(4) ITV was entitled to suspend Mr Holmes' engagement if RWG or Mr Holmes was in breach of the agreement or Mr Holmes was incapacitated from rendering the services by ill-health, injury, mental or physical disability or other cause or if the programme was prevented, interrupted or delayed by any Event of Force Majeure. The suspension was to last during the relevant event plus such further period (not exceeding five days) as may reasonably be required by ITV to resume using the services. Whilst the suspension was in place no payment was due provided that all other obligations and warranties remained in place. Mr Holmes was not permitted, without ITV's prior written consent, to render his services to any other party during the period of suspension.

(5) In the meeting notes ITV is recorded as stating that the above provisions are generic terms and conditions and the provision regarding four weeks' notice is not particularly relevant in this case but possibly would be invoked if the programme ratings fell and ITV did not want to give this as a reason for termination.

34. *Assignment*: ITV was entitled to assign the benefit of the agreement and of the services and products to any third party and RWG was required to procure that Mr Holmes provided his services to any such assignee on the basis that ITV remained liable for all obligations under the agreement notwithstanding the assignment. It was stated that: "Neither [RWG] nor [Mr Holmes] shall assign, transfer, sub-contract, sub-licence or deal in any manner which this Agreement or any of the rights and obligation arising from this Agreement".

35. I note that the terms refer to ITV's obligations to Ofcom. In short Ofcom is the body which is required under the Communications Act 2003 (as amended) and the Broadcasting Act 1996 (as amended) to draw up a code for television and radio, covering standards in programmes, sponsorship, product placement in television programmes, fairness and privacy. I refer to this code as the Ofcom code. Broadcasters are required by the terms of their Ofcom licence to observe the Ofcom Code. Where the Ofcom code has been breached, Ofcom will normally publish a finding and explain why a broadcaster has breached the code. When a broadcaster breaches the code deliberately, seriously or repeatedly, Ofcom may impose statutory

sanctions against the broadcaster. The code is set out in terms of principles, meanings and rules and, for some sections (such as fairness and privacy) also includes a set of "practices to be followed" by broadcasters. Ofcom state that the principles are there to help readers understand the standards objectives and to apply the rules and that broadcasters must ensure that they comply with the rules as set out in the code. Ofcom state that programme makers who require further advice on applying the code should, "in the first instance, talk to those editorially responsible for the programme and to the broadcaster's compliance and legal officers".

Inducement letters

36. Mr Holmes also entered into four "inducement" letters the first of which was dated 7 October 2011 and the rest were undated. In this Mr Holmes agreed (amongst other undertakings) that:

(1) RWG was entitled to his exclusive services.

(2) He was bound by the terms of the agreement between RWG and ITV and he confirmed the truth of the warranties, representations and undertakings contained in the agreement and further agreed to render the services to ITV as set out in the agreement.

(3) If RWG was dissolved or unable or neglected or refused to perform and observe its obligations under the agreement between RWG and ITV, he would notify ITV immediately and, if ITV so required, he would enter into an identical agreement with ITV in place of RWG and would do and execute all such acts, deeds and documents as ITV may from time to time require to confirm such substitution.

37. In the meeting notes ITV are recorded as stating that as all contractual discussions are with an agent and seldom with the individual, in the inducement letter the individual provides an affirmation that he understands what is expected of him.

Mr Holmes – background and other work

38. Mr Holmes described himself as a freelance journalist and broadcaster. He said that, since 1990, when his contract with his then sole employer, BBC North West, was not renewed unexpectedly, he resolved never to work for one employer again and became, in his view, "totally freelance". He regarded himself as a "one man band" who is "answerable to no one but himself...a gun for hire - on my terms. Engagers sign me up for my profile and what my USP brings to their project". He said that he is available to work for all print and broadcast outlets and does so if the project and conditions are right. He considered he is an "impact player" who "bring[s] something to a programme rather than the other way about" which in his view "comes from ability, experience, attitude, expertise, personality and often celebrity".

39. Mr Holmes explained that he obtains engagements through his agents or sometimes he is approached directly. The agent negotiates his terms of engagement whether he contracts directly in his own name or through RWG. In 2011 to 2015 he worked as a presenter on many projects and broadcasts including as a presenter of Sky News' "Sunrise" morning show. He presented on that show from 6am to 9am on weekdays. He said that appearing on that programme occupied a great deal more of his time than his work on This Morning.

40. It is not clear whether during the relevant period Mr Holmes was engaged directly by a Sky entity to present Sunrise and not through RWG (or another PSC). His advisers stated in a letter of 11 March 2014 to HMRC that he was engaged as a sole trader in respect of his work on that programme. Mr Holmes also said he thought that was the case. In a letter dated 17 July 2014 HMRC said that a colleague had looked at the contract with Sky and considered this to be a sole trader agreement which would not need to be considered under IR35. In a letter dated 18 August 2014 HMRC referred to that contract as being between Sky and Mr Holmes and not with RWG and said that it was for that reason that they had determined that IR35 did not apply to that contract. It is not clear from the correspondence what period the relevant contract related to. As set out below, RWG's advisers produced a schedule showing RWG as being in receipt of income in respect of Sunrise in the periods ending on 30 April 2014 and 30 April 2015. At the hearing, Mr Maas produced a contract between British Sky Broadcasting Limited and RWG dated 31 October 2013 which related (amongst other matters) to the provision of Mr Holmes services in respect of Sunrise from that time onwards during the relevant period. It appears, therefore, that Mr Holmes services were provided through RWG at least from that time onwards.

41. Mr Holmes explained that he also did a number of one-off engagements. His earnings from those engagements were taxed on the basis that he was self-employed. He noted that when he left Sunrise the audience fell by 65% and did not recover in over a year. He thought that this showed the individuality that he brings to programmes. He said that whilst the programmes throw him the ingredients it is "up to me how I put them together or present them". He added that he does not read from an autocue because anyone can do that.

42. He thought that anyone in the industry would be shocked if he were classified as ITV staff. He is known for being hard working and never stopping. That is because in the freelance world "if you stop, you fall off the conveyor belt and someone else takes your place. Few jobs or positions are safe and the broadcasters know it". He said that he:

> "deliberately spread the risk of losing a sole source of income and therefore I am in charge of my own destiny. It's an industry where you can never rest, or never deliberately relax. Work is short for me at the moment and I am frantically pursuing possible future plans. That is the life of a freelance."

43. He continued that unlike most presenters he was not "beholden or exclusive" to any one broadcaster; rather he worked for numerous parties on television, radio, and online, he worked as a contributor to magazines and newspapers, he hosted corporate events and he was involved in media training. He said that he did not have a "staff job" anywhere; rather as a "one-man band, I am responsible for what I do and where I do it".

44. Mr Holmes listed his other engagements (in addition to his work on Sunrise and This Morning) as including appearing on/presenting BBC Songs of Praise and TalkSport Radio, conducting TalkRadio profile interviews, writing columns for Best Magazine and the Daily Mirror, appearing on numerous series on Channel 5, appearing on ITV's Good Morning Britain and Loose Women, appearing on various panel shows, Manchester United Television and a game show series for Fox TV in the USA. He also has a production company which develops programme formats and ideas.

45. RWG's advisers produced a schedule which they said showed the income RWG received in respect of Mr Holmes' work on This Morning, Sunrise and other activities in each period of 12 months ending on 30 April in the specified year and the percentage that income formed of its total income. The percentages were as follows:

	This Morning	***Sunrise***	***Other income***
2012	71.8	-	28.2
2013	72.8	-	27.2
2014	31.8	54.1	14.7
2015	18.6	80.0	1.6

46. As noted, it is not clear whether Mr Holmes' work on Sunrise during the relevant period was performed under a contract directly with Mr Holmes or under contracts with RWG at least in respect of 2014 and 2015 as the schedule suggests. If the income from Sunrise did not arise to RWG, its income from This Morning was never less than 68% of its total income from all sources. If the income from Sunrise is correctly included for the later two years, the income from This Morning was never less than 19% of RWG's total income.

47. According to HMRC's analysis of the schedules provided, during the relevant period, Mr Holmes presented (a) 92 episodes of This Morning and 21 or 22 weekend links in the tax year 2011/12 (b) 59 episodes in the 2012/13 tax year (c) 45 episodes in the 2013/14 tax year and (d) 54 episodes in the 2014/15 tax year. Whilst Mr Holmes primarily presented the programme on Fridays, in each year he presented it on other days on numerous occasions.

48. In the correspondence in the bundles, RWG's advisers accepted that the income in respect of This Morning was RWG's main income in the tax years 2011/12 and 2012/13. Mr Holmes accepted that RWG received a regular stream of work in respect of This Morning which paid for his secretary and driver and funded other projects.

49. Mr Holmes' personal tax returns and calculations for the relevant periods show that he had substantial amounts of income which he accounted for as income from self-employment in the tax years in question: namely, as regards turnover and self-employment profit in respect of the tax years 2011/12, 2012/13, 2013/14 and 2014/15 respectively: (a) £424,783 and £298,755 (b) £406,624 and £286,532 (c) £464,483 and £348,286 and (d) £251,319 and £169,371.

50. In its accounts for the periods ending on 30 April 2013, 30 Aril 2014 and 30 April 2015, RWG is shown as having turnover from business activities of £267,862, £634,762 and £1,025,348 respectively.

Nature of work on This Morning

51. Mr Holmes said that This Morning is regarded as a light entertainment programme by ITV. On its website it is billed as a morning magazine featuring a mixture of celebrity interviews, showbiz news and topical discussions. He thought that the show he presented on Fridays was a "less newsy" and a more entertaining programme than the show on the other days of the week. The audience for the Friday programme is significantly higher than that for the other days.

52. He said that he is the best live television presenter in the country; that skill keeps him in high demand. He thought that he was engaged by ITV because he could do the job better than anyone else, he could bring or hold ratings and he could create a rapport with guests and viewers. He considered that he is the market leader and an expert in his field. In his view, ITV want him as an entertainer who brings a maverick element to the show.

53. He considered his role to be that of the "anchor man" who brings his own stamp and interpretation to the programme. In his view, his role is specialist and not simply to present material devised by others. It is to mould the features that the programme maker wishes to put into the programme into a coherent whole, to interview guests, to participate in phone-ins and generally to create an entertaining programme. He said in his witness statement that in a live programme he:

> "flies by the seat of my pants and anyone who's in the studio with me needs to hold on to my coat tails. Once I am on air I am effectively in total control of what needs to happen. If I were to say something that the producers felt to be unacceptable, there is nothing they could do. I am obviously aware of the Ofcom guidance and it would clearly be damaging not only to ITV but also to me personally if I were to deliberately breach it."

54. Mr Holmes stressed on a number of occasions in his oral evidence that in his view he "controls" the show. He said "it is me telling them what to do, not the other way around" and "in practice I dictate" the programme and "I am my own creation, I am not anybody's slave on This Morning" and that people would laugh if it was suggested that he was controlled. He said he was not there to follow other people's rules. As a career broadcaster and expert in his field, others asked him for advice. In my view, these general comments have to be viewed in the light of his more specific comments and the views of ITV as recorded in the meeting notes (in each case, as set out below). Overall in that context, I accept that, in practice, Mr Holmes had considerable autonomy over the way in which he presented on the live show using his own presenting style and words and that, as regards matters that were pre-planned, due to his considerable experience and expertise, his views often prevailed.

55. Throughout the period in dispute Mr Holmes' co-presenter was normally his wife, Ms Ruth Langsford. He said that, although they were each engaged separately by ITV, ITV wanted the chemistry between them to drive the show. He thought it was largely irrelevant to ITV how he and Ms Langsford split the work between them. In his view, the interaction between them "brings the sparkle" and gives an "intimate feel" to the show. He could only achieve this if he is left alone to get on with it and be himself. With his co-presenter he decided the shape of the show and who should front a particular item. Decisions usually need to be made "on the hoof" during the course of the show. He said that it is not practicable to bring the producer into such on-air discussions when the show is live and often the producers are younger and less experienced (he thought their average age was around 27). He said that it was a case of him telling them what to do.

56. He accepted that ITV wanted *his* services. He was not permitted to provide a replacement. If he was ill it was for ITV to find someone else and RWG did not get paid for that other person's services. In the meeting notes the editor is recorded as confirming that if for any reason RWG could not fulfil the contract, it would be for ITV to get a replacement and there would be no payment to RWG.

57. In the meeting notes:

(1) The editor is recorded as stating that he expected (a) a first class presenter to be legally aware, competent, have specific skills, deal with camera directions and generally be able to hold it together irrespective of what is happening elsewhere and (b) that the presenter would "lead the show". He said that Mr Holmes "runs his own ship within the timeframes".

(2) As regards ancillary activities, it was noted that Mr Holmes did a lot of press for This Morning but otherwise had no requirement apart from as regards Twitter. If Mr Holmes "pushed back then agreement would need to be renegotiated with Business Affairs and agent" but ITV were not aware of any push back. The editor said that Mr Holmes hates being bothered with "all the add-ons" but is more open than most to doing other things and trying something different.

(3) It was also noted that the broadcasts of the programme had to comply with the Ofcom code and that as Mr Holmes had 25 years of experience of doing the job he "knows what is and is not acceptable". Mr Holmes was not provided with the Ofcom code but ITV "would expect him to know this. He is an experienced journalist/ presenter". Information would go out through briefings and if guidance on the code was updated Mr Holmes would be told.

Typical day

58. In the meeting notes, ITV are recorded as setting out the following as regards preparation for the show:

(1) There is a programme format and the editor is responsible for the running of the programme along with the various producers.

(2) The Friday programme is about two thirds prepared beforehand at a meeting held on a Wednesday.

(3) The researcher/producer prepares and writes a brief which is given to Mr Holmes the night before the show.

(4) Mr Holmes is expected to have read the morning newspapers and to be up to date on breaking news. Mr Holmes brings his own expertise to bear as regards the brief, for example, he may ask for specific items to be checked or suggest clips. He may choose to ignore the research information provided.

59. Mr Holmes account accords with this in that he said that typically the editor telephones him on the day before the show to discuss the broad shape of the next day's show. He would then do his own background research in the evening. He added that if he did not want to interview someone that the editor put forward he would tell him so when he spoke to him. There was little point in him interviewing someone who he did not think he could interact with. If, however, ITV were anxious for such a person to be interviewed, he would leave that interview for Ruth to do.

60. In the meeting notes the editor is recorded as stating that it would be unreasonable for Mr Holmes not to do an item because he was not interested - he would push him to do it. The position was negotiated and allowed for flexibility on both sides according to changing circumstances. However:

> "ultimately the final say is [the editor's]….Day before the show the producer will phone EH to discuss what they are going to do. EH will be asked for his

> input, opinions on the material, etc. EH delivers the programme and he has freedom as to how this is delivered. For example when the "daily phone in" is broadcast it is normal to disguise voices, usually to cover legal issues. EH has objected to this and they did try operating without the disguise but it continues to be used. EH has influenced what is broadcast and [the editor] has dropped guest/topics where EH has voiced concerns. If [the editor] was particularly passionate that an item should be included then it would be. [The editor] can't recall any time when this has happened."

61. Mr Holmes said in his witness statement that he generally arrived at the studio half an hour before the show to be made up for the television lighting. At the hearing he referred to arriving minutes before the programme on occasions. He said that the editor generally came into make-up for a brief discussion, and then he went on air.

62. At the meeting with HMRC the editor is recorded as explaining the following as regards the morning of the show:

(1) There is a full meeting with Ms Ruth Langsford at 08.30am where the producer meets her and discusses anything which has changed from the previous phone call. Mr Holmes usually arrives around 10.30am and any discussion takes place in make-up. The editor would love Mr Holmes to get in 30 minutes earlier but he cannot impose specific times on him.

(2) The expectation is that Mr Holmes will have done all that is expected of him; that is what makes him a first class presenter.

(3) Mr Holmes knows when he has to be on air but can cut it fine depending on traffic getting from Sky to ITV. Other presenters are on a much tighter rein but the editor has total trust in Mr Holmes to do his job.

(4) Mr Holmes knows not to wear anything which could be seen as endorsing a product (such as Louboutin shoes, Paul Smith ties, ICE watches, etc.) If he was wearing any such item he would be asked to remove it and, if it comprised clothing/ shoes, it would be replaced from items in the ITV wardrobe.

(5) Mr Holmes is provided with a car every day he is on the show to bring him to the studios from home or from Sky. That allows Mr Holmes to work whilst travelling. Mr Holmes does not incur expenses. If he had to do an outside broadcast ITV would provide hotel accommodation and a car. Costs are closely monitored within ITV for budgetary purposes. All booking for this is usually done by ITV.

63. Mr Holmes said that he prepared his own notes but ad-libbed. Whilst "in theory" links to specific segments of the show are scripted in practice, he generally uses the autocue as no more than a guide. He finds the wording can conflict with the ebb of the show and he can improve on it during a live situation. He thought that viewers could always identify presenters who are "autocue slaves" and those who bring their own life to a show with different words. At the hearing he said he did not look at the autocue because the audience can tell from a presenter's eyes when he is simply reading it.

64. The following is recorded in the meeting notes as regards ITV's views of how Mr Holmes operates:

(1) As regards "creative input" it was stated that there is "nothing prescriptive". The editor would not expect Mr Holmes to ask for everything to

be done for him. It would be a cause for concern if Mr Holmes was not considered to be self-efficient in his role. Mr Holmes' skill is in understanding what people are interested in - if he simply presented without adding to the process, then this would be a concern. The audience appear to like the inter-spouse relationship.

(2) Mr Holmes more than any other presenter on the programme will do "his own thing". There is no script for interviews for the show. Autocue is used to start and end an item but otherwise everything is ad-libbed. Mr Holmes structures as he likes but the editor intervenes if he strays into anything which might have legal repercussions or the guest is uncomfortable but Mr Holmes often ignores this advice. Mr Holmes is "creative with autocue"; he will pick out key words and this can play havoc with items. Whilst programmes such as the News are heavily reliant on autocue, "This Morning is very different, more like light entertainment, a mix of light-hearted and serious items, interspersed with adverts, cookery, etc. Difficult show to pull off."

(3) ITV provides earpieces, moulded and customised for all the main presenters (although I note that Mr Holmes used his own earpiece). These are used mainly if the presenter is getting into legal issues or as regards timings, not really for specific questions. The more experienced the presenter the less the gallery is involved. Mr Holmes is vastly experienced in the job he does and is not therefor fed information or questions.

65. Mr Holmes explained that after the show there is a "de-brief" with the producer and editor. The team discuss what could have been done better and give ideas for future programmes. He sometimes attended these and by and large wanted to be there. He had never been required to do a pre-recorded episode of the programme. During the relevant period he did not attend production meetings or rehearsals.

66. In the meeting notes the editor is recorded as stating the following: he does not expect presenters to attend meetings outside those required, such as the daily de-brief, but if Mr Holmes had another engagement that would be honoured. At the de-brief Mr Holmes is very vocal and offers a lot of "what he could have done better", what the programme could do better and how guests could have performed better. He has given guests his opinion which is not always comfortable. If working Monday to Thursday there would be an outline of the following days show.

Preparation, interviews and use of autocue/scripts

67. Mr Holmes noted that he had to do a lot of interviews on the show. In his view, the best interviewers listen and do not read prepared questions. It is not wise to try to script it because the skill is to be able to "pounce on something that the interviewee says in order to lead them into revealing something new". He said that similarly it is not possible to script phone-ins where the caller phones to speak to an expert and he needs to put the caller at ease. All that can sensibly be scripted are the links between the various items and the introductions to the commercial breaks but he prefers to use his own introductions adapted to suit the flow and energy of the programme. He does not, therefore, generally read the script when live on air; he just looks at the running order and goes with it.

68. Mr Holmes said that he does a lot of his own preparation; he said that he is like a sponge in absorbing information on whatever the topic may be (whether from

newspapers, the radio or television). That is what excites him about his job. His knowledge and interpretation has to be better than everyone else's.

69. He accepted that he was given research notes or briefing notes as regards interviewees and items to be covered but said that he did not use them much. He said that it is very nice to have some background from the briefings. Generally, these just gave him supplementary information on an interviewee. He did not have to ask any suggested questions set out in such documents. He did not rehearse for this. When interviewing he tries to be human, to interact naturally with the guests and make them comfortable. The most important thing is to take care of the guests. In the meeting notes it is recorded that ITV said that, whilst ITV briefs the guests about behaviour, Ms Langsford and Mr Holmes walk round all the guests putting them at ease and alerting them to specific questions they want to ask.

70. He accepted that introductory words were scripted if it was a sensitive interview; the script would state that it was advisable to use the words set out. He said at different points again that otherwise he did not read out "intros", that he memorises them, that in fact he writes the scripts but does not follow them slavishly, they are really just an aid and he always enhances and personalises them and that he does not just read them or follow what some apprentice has written although he later accepted that he read scripted guest introductions 10% of the time. He did not accept that he was contractually obliged to follow such scripts but considered it was his choice whether to do so. In his view, he is engaged for his skill and talent in using words. He said that he is his own person or creation.

71. He said initially that he was able to decide in reality who should be interviewed and the stories to run and referred to a veto. He said he could not remember ever saying he did not want to do something such as an interview and ITV insisting that he did. He later accepted, however, that ultimately ITV have the right to decide who to interview. He said that it would be "career suicide" to disagree with ITV's decision about who should be interviewed, which would be done only by someone rich enough to walk away from the work. He said that if there was a disagreement it would probably go higher up the chain of command within ITV. He had refused to interview particular people and usually his explanation for that was accepted. He accepted he deferred a lot to ITV but said that the clauses in the contract giving ITV control in this respect were never implemented; things rarely got to that stage. It was sorted out beforehand and accepted usually that he was right when he set out his reasons.

72. In the meeting notes it was recorded that ITV said the following as regards interviews and legal issues:

> (1) ITV choose the guests. EH has not refused to interview a guest. There are some guests he prefers to others. If he did object to doing an interview, the editor would be responsible for dealing with this.
>
> (2) ITV do the research. Mr Holmes is given a brief and a script the night before. The bigger the interview the more he will be involved. For example, when Hilary Clinton appeared on the show both presenters read her book, did his own research, suggested, clips, etc. He rarely follows a brief and often diverges from the point at issue. There are hard timings but he will push to the wire in spite of any time limit. His timings are fluid which is different from other presenters; he continues to run a story as he needs to.

73. Mr Holmes said that in practice he can dictate the tone of the programme and what is on it. In the context of his other evidence set out above, I take the reference to the ability to dictate what is on the show to mean, an ability to direct how the items (as essentially selected by ITV) are presented. He noted that it was him who got reported to Ofcom if there was a problem. If he asked an inappropriate question, he regarded that as his fault although he accepted that ITV could be fined. He thought that ultimately the sanction was that he would "get the sack" if there was an issue.

74. Mr Holmes later accepted that ITV had the ultimate right of editorial control because they "pay the bills, they have the right to do things" and that it was necessary for them to have that control in order to comply with their obligations under the Ofcom code. He stressed, however, that no-one could control him in the sense of controlling what he said; he was engaged for his talent in choosing the right words to make the show entertaining. He said that he had been reported to Ofcom but he had never lost a case. In his view, ultimately the general public decide whether he stays on the television or not. He concluded that This Morning is ITV's "football" or "train set" and at the end of the day, ITV "can take it home" by which he meant that they could in effect give him a red card but it had never happened that way.

75. It was put to him that RWG was required to comply with requests made by the executive producer of This Morning. He said that in practice this did not happen; in his view this was just a standard term in the contract. He had the power to say "yes" or "no". For example, if he was asked to cover the Royal Wedding it was up to him whether he did that or not. He accepted, however, that such matters were agreed on a consultative and collaborative basis.

76. In the meeting notes, ITV is recorded as stating that:

(1) If there were a legal issue, the editor would be responsible in his capacity as such. ITV as the broadcaster would also be held responsible. If Mr Holmes consistently ignored the editor/ITV then it is possible that it would affect other work being offered. If an individual wished to take proceedings against Mr Holmes then ITV would not expect to be involved in defending any action.

(2) It would be great if Mr Holmes did as he was told. The reality is that he is popular, what he brings is his personality and viewers respond to him. He will ask awkward questions of guests and is allowed to go with it.

(3) He is good at the difficult interview. For example, last year a guest had attracted a lot of media attention and their PR asked that certain questions were not asked. Mr Holmes did ask as he argued this was what the audience would be interested in. Once a question is asked it is too late for the editor/producer to do anything about it. This action can lead to guests being lost to the show in the future. In this instance the guest has subsequently appeared on the show.

(4) The show is very much personality driven-presenter lead. The editor did not believe that Mr Holmes had ever been overruled. He is so experienced that if he says something won't work it won't work. His personality drives the show. On Friday the programme is introduced as This Morning with Eamon and Ruth; he has made the programme his own. On other days it is simply introduced as This Morning.

(5) Mr Holmes is not subject to any formal assessment. The editor has personal development interviews with his own team but not with Mr Holmes.

Audience feedback and figures would indicate if something is wrong which would then be discussed.

Awareness of contractual terms and attendance

77. Mr Holmes said at the hearing that he very rarely read any of the contracts. He considered that was what his agents were there for. He said that he was just too busy to read the contracts and left that to others. When he was asked if he performed his services as an employee of RWG (albeit there was no written contract between him and it) he said he really did not know. Answering this question was beyond his "pay grade"; that was something for his agent and advisers to consider. He agreed that it was his choice whether to enter into an agreement with ITV or not but he left others to look after all this stuff. He said that every contract negotiation is painful and he emphasised the rivalry between channels. He said that during his career he had "loved many" but "trusted few".

78. Similarly, he said he was not qualified to comment on whether he entered into the contract with ITV as a director of RWG. In his view, he was just acting as Eamon Holmes the presenter. He saw himself as RWG. He did not think of any legal distinction between him and RWG; he was working as RWG. Again, he described it as beyond his pay grade to comment on the legal basis for his work and whether he was obliged to work for RWG. It was put to Mr Holmes that RWG must have had the legal right to direct him what to do as it was obliged under the contract to provide his services to ITV. He said that "I am RWG" and that he just decided if he was available. He said again that he was the company and he made the decision.

79. He said that the reality is that ITV would not have him without Ms Langsford. He negotiated and argued with ITV and the contract was often signed after the shows started in September. He accepted that "on paper" the agreements were specifically for his services. He considered that many terms of the agreements did not in reality apply to him they were simply terms of a "standard contract". He said he did not work to this contract and that the words in them are not worth the paper they are written on.

80. HMRC were critical that Mr Holmes did not accept the above points and his view of the effect of the agreements. However, I note that Mr Holmes cannot be expected to have legal knowledge and was commenting therefore on his understanding of the effect of the agreements from a lay person's perspective (and see the comments at [20]). In that context, I take his comments that the terms did not apply to him as confirmation that the terms were simply not enforced in a number of instances.

81. Mr Holmes accepted that he knew in advance at the start of the relevant agreement that there were a minimum number of days on which he would be required by ITV to present This Morning. He said that this was the way it worked in the freelance world; it was like an appointment book. It was put to him that the later agreements identified the Fridays that he was required to work and left it to the sole discretion of ITV to determine which weeks he would be required to work on a Monday to Thursday. He confirmed that it was his expectation that there would be some days other than Fridays when he would have to work, in particular, during school holidays. That he was in fact so required is confirmed by the invoices in the bundles relating to the fees for the days he worked on This Morning.

82. Mr Holmes emphasised that there was always a negotiation and he did not take anything for granted. He later accepted that there were many occasions when he worked on more days than just Fridays. He accepted that viewed retrospectively there was a regular pattern of work, the work was substantial and in practice his contract was renewed on the same terms However, he emphasised that, at the time, he did not view it as regular and renewal was not taken for granted; negotiations were very difficult and the renewal was not obtained without pain.

83. He noted that when he had a double hip replacement in 2016 ITV did not pay him any sick leave and he did not get any holiday leave. He was on his own and as a freelance had to get back to work as soon as possible. I note that this was outside the period under consideration in this appeal and the tribunal was not provided with the contract relating to this period. Mr Holmes continued that it was a case of "play or you don't get paid" or "pay for play"; ITV would hold payment until he did the show. He noted that the television industry can be vicious and ruthless. He said that he took the risk if the contract was not signed and, if he was responsible for not being able to do the show, he did not get paid.

84. It was put to him that invoices were issued for payments due to RWG in the periods before the contract was signed (covering, for example, the period in September before the contract was signed in October) as demonstrated by a schedule of invoices in the bundles. He said that the agent wanted to get the monies in. He reiterated that his understanding was "no play, no pay". If he was responsible for not doing the show he did not get paid. On being shown the schedule of invoices, when it was put to him again that he invoiced for services before the contract was signed, he said that he would need his agents to explain to him what the situation was in that respect.

85. It was put to him that if ITV cancelled an appearance on this Morning and could not re-schedule, they would still have to pay him (broadly, other than where the difficulty was down to his unavailability). He said he thought that had never happened. He said that insisting on payment if a show was cancelled by ITV would look disruptive; it would create tension with ITV.

86. As regards whether RWG was obliged to ensure he attended a show, Mr Holmes said that he could not have turned up. He could just call in sick. ITV could not put a gun to his head or arrest him. In practice, however, he had a good working relationship with ITV; he worked collaboratively with them. He did not accept there would be a breach of contract if he just did not turn up; he did not see how ITV would know what his situation was and what they could do about it. In any event they had never twisted his arm in 15 years. He did the occasional on location broadcast but that would be agreed in a collaborative way. It would be accepted if it was not feasible for him to get somewhere. On the whole dates were agreed. ITV could notify him of other dates but he has a lot of other jobs and ITV accept it is unreasonable to ask him to do things if he cannot reorganise his other jobs.

Restrictions on other activities

87. Mr Holmes initially suggested that the contractual restrictions on other Commercial Activities did not apply to him as, during the relevant period, he was acting as a news presenter on Sunrise and was prevented from advertising by Ofcom guidelines applicable to such presenters. However, I note that the definition of

Commercial Activities is broader than advertising. During the period Mr Holmes received a significant income from endorsing and advertising the Deed Poll service. He accepted that he had to have permission from ITV to do this but that it was not to be unreasonably withheld but he did not think he had asked for permission on this occasion. He did not ask unless it was something that could bring ITV into disrepute. If it was for something innocuous permission would be granted.

88. Mr Holmes thought the restrictions in the agreements were simply what he would expect to have to comply with as a live broadcaster; it was no more than he would limit himself to in any event. He said that the restrictions such as those on not undertaking sporting activities are just standard terms which don't affect him really and anyway he does not mind not going skiing. He thought he might have had a medical when he first started work on This Morning.

89. In the meeting notes, ITV are recorded as stating the following as regards the contractual restrictions on Mr Holmes' other activities:

(1) Programmes that do not conflict with This Morning (such as BBC breakfast) are not a problem. Mr Holmes had appeared on the One Show which has a similar format to This Morning but it is not on at the same time as This Morning so therefore there is no conflict. Mr Holmes would let ITV know what he is doing but he does not need their permission.

(2) Any commercial issues would need to be flagged up.

(3) Anything in print is fine and no clearance is needed.

(4) If Mr Holmes brought ITV into disrepute there would be repercussions. Presenters must be impartial and neutral. Discussions would take place behind the scenes if it was felt that the mark had been overstepped.

(5) As set out above, ITV did not provide the Ofcom code to Mr Holmes but would expect Mr Holmes to know this as an experienced journalist and presenter. Information may be sent out through briefings and he would be told if the guidance was updated.

(6) As noted, if Mr Holmes he wore an item with branding to the studio he would be asked to remove it and it would be replaced from the ITV wardrobe.

(7) ITV needed to know about his Commercial Activities in case of conflict or reputational damage. If he continued to be involved with commercial entities then ITV may terminate the relationship. As a commercial channel ITV has to be careful about possible conflicts with programme sponsors. If he chose to promote a product the engagement would be reviewed. If there was a clear breach of protocol and the programme was sued for something Mr Holmes said or did then ITV would revert to him under the indemnity provision. The clause is there to reinforce the fact that breaches will not be viewed favourably.

(8) As regards extra activities this would be negotiated with the agent and if asked to do something on a non-working day then a fee may be paid.

Discussion and decision

Assumed relationship

90. To recap, as set out at [9] to [13], my view is that, at the first stage of the required analysis as to whether IR35 applies, I should assume that ITV and Mr Holmes entered into a series of contracts corresponding to the actual agreements made between ITV

and RWG on terms as near as may be to the actual terms of those agreements. Essentially, therefore, the assumed contracts are to be regarded as comprising the actual contractual terms in the agreements as though references in those terms to RWG were to Mr Holmes (and with appropriate related modifications). I do not consider it necessary to paraphrase the terms of the agreements or set them out excluding references to RWG and inserting references to Mr Holmes. However, I note that I accept that, as in the actual agreements, the assumed contracts would not contain provision for Mr Holmes to receive any benefits such as holiday or sick pay or pension rights and would include provisions in relation to VAT.

91. I note that the wording of the legislation is broad enough to enable the tribunal to have regard to matters beyond the actual contractual terms or to depart from them in determining the basis of the assumed contracts. That may be necessary where, for example, there is more than one contract in question (such as where an agent is involved in the contractual chain). However, in this case, where there is no such complication, the actual contractual terms represent the best available evidence of what would have been agreed between ITV and Mr Holmes. It is reasonable to suppose that the parties would have contracted on those terms barring any terms applicable only due to the interposition and nature of RWG. Mr Maas accepted that was the case.

92. It follows that it is necessary to consider the correct interpretation of the actual contractual terms under the usual principles of contractual construction (taking into account the surrounding circumstances to the extent permissible under the applicable principles) and to apply that interpretation to the corresponding terms assumed to apply to the assumed contracts. (I must, of course, take into account all relevant circumstances at the second stage of the analysis, in determining the nature of the assumed contracts, in accordance with and as permitted under the relevant case law.)

Contractual interpretation

93. Mr Tolley emphasised that the contractual analysis requires an objective exercise as set out in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 4 All ER 615*;* the parties' subjective intentions are not usually relevant. Mr Maas appeared to accept this. However, at times he suggested that the provisions which HMRC argued gave ITV the right to control Mr Holmes did not confer a "real" right of control. His point was that, in practice, ITV simply could not control what Mr Holmes said and did whilst presenting This Morning live on air such that any purported right in that regard could not really be intended to have effect. Mr Maas did not cite any specific authority in support of this view.

94. Mr Tolley referred to *Autoclenz Ltd v Belcher* as authority that the fact that a contractual term is not enforced does not mean that it does not form part of the agreement. However, in my view, that comment has to be read in the context of the overall decision in that case as set out below.

Wood v Capita

95. In *Wood v Capita Insurance Services Ltd* Lord Hodge set out that prior to this decision there was some debate about the respective importance of "textualism" and "contextualism" in interpretation. Lord Hodge said that both approaches have a role and it is not a case of one approach or the other. He set out, at [10], that the court's

task is to ascertain "the objective meaning of the language which the parties have chosen to express their agreement" and noted that it has:

> "long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…"

96. He continued that it is affirmed in the cases that "the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations" is of relevance. He noted, however, that when in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (at pages 912-913) reformulated the principles of contractual interpretation, "some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past". But Lord Bingham in an extra-judicial writing (*A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390) "persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree".

97. In the passage in the *Investors* case to which Lord Hodge referred, Lord Hoffmann gave the following guidance on the relevance of background information:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) …Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification…."

98. At [11], Lord Hodge said the following as regards interpretation as "a unitary exercise":

> "where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause….and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

99. He said, at [12], that this unitary exercise involves "an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated" and to his mind:

> "once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed

> analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each".

100. He concluded at [13] that "textualism" and "contextualism" are not "conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation". Rather when interpreting any contract, they can be used "as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement". He noted that the extent to which each "tool" will assist the court will vary according to the particular circumstances:

> "Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.....The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

Autoclenz

101. In *Autoclenz* the question was whether individuals who provided car valeting services to Autoclenz had certain rights as "workers". This involved assessing what kind of contract the individuals worked under. In doing so, the Supreme Court considered to what extent a court can disregard terms included in a written agreement and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.

102. Having referred to the tests set out in *Ready Mixed Concrete*, at [19], Lord Clarke noted that the following was not contentious:

> "(i) ….There must be an irreducible minimum of obligation of each side to create a contract of service". (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status [referring to *Express & Echo Publications v Tanton* [1999] IRLR 367 at 699H]. (iii) *If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement*: see eg the *Tanton* case, at p 687G." (emphasis added)

103. Lord Clarke said, at [21], that nothing in this judgement was intended to affect the usual principles which apply to ordinary contracts and, in particular, to commercial contracts. He noted that there is, however, a body of case law in the context of employment contracts in which a different approach has been taken, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties and rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms. He noted, at [22], that there are three particular cases in which the courts have held that the employment tribunal should adopt a test that focuses on "the reality of the situation" where written documentation may not reflect the reality of the relationship: *Consistent Group Ltd v Kalwak* [2007] IRLR 560, in the EAT [2008] EWCA Civ 430 and, in the

Court of Appeal [2008] IRLR 505, *Firthglow Ltd (t/a Protectacoat)* v *Szilagyi* [2009] EWCA Civ 98 and the Court of Appeal decision in *Autoclenz*.

104. He said, at [23], that those cases must be set in their historical context, which includes *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. In *Snook* Diplock LJ described the concept of a "sham" as follows at page 802:

> "….. it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…… for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

105. Lord Clarke said that this is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement. However, it is not authority for the proposition that this form of misrepresentation is the *only* circumstance in which the court may disregard a written term which is not part of the true agreement.

106. At [25], he referred to the decision of the EAT in *Kalwak*, in particular at [57] to [59], where Elias J (as he then was) cautioned that tribunals must be alive to the fact "that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship" and, at [58] and [59], that:

> "….if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

107. Lord Clarke said, at [26], that in his view there is "considerable force" in this approach. He noted that Elias J's decision in *Kalwak* was reversed in the Court of Appeal and, in his view, the reasoning in the two decisions was incompatible. He noted that Rimer LJ was applying the approach in *Snook* when he said, at [28], that a finding that the contract was in part a sham required a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. In his opinion, however "that is too narrow an approach to an employment relationship of this kind". He concluded, at [29], that he "unhesitatingly" preferred the approach of Elias J and of the Court of Appeal in *Szilagyi* and in *Autoclenz.* He concluded that the question in every case is, as Aikens LJ put it at [88] of the decision of the Court of Appeal in *Autoclenz* "what was the true agreement between the parties".

108. At [30] he noted that in the passages referred to in *Kalwak* Elias J quoted Peter Gibson LJ's reference in *Tanton* to the importance of looking at the reality of the obligations and to the reality of the situation. He referred to the comments of Smith

LJ in the Court of Appeal decision in *Autoclenz* where, at [51], she quoted [50] of her judgment in *Szilagyi* that the court has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, "as time goes by", by which, as she clarified at [52], she meant "at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them". He cited the following passages from her judgment:

> "53. ……where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.…
>
> 55. ….I am satisfied that [the employment judge] directed himself correctly….that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the written contract had not in fact been exercised did not mean that they were not genuine rights."

109. He continued, at [32], that in the Court of Appeal Aikens LJ stressed, at [90] to [92], the importance of identifying what were the actual legal obligations of the parties and "correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. Lord Clarke noted that Aikens LJ added the following comment, with which he expressly agreed:

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

110. I note that in the *Chartbrook* case referred to, Lord Hoffmann's comments that the parties' private intentions may be relevant evidence were made in the context of assessing whether a contract was subject to rectification on the basis that it was not in accordance with an asserted prior consensus based wholly or in part on oral exchanges or conduct. He said that, on the other hand, "where the prior consensus is expressed entirely in writing…such evidence is likely to carry very little weight" although he did not think that it is inadmissible. He referred to his previous comments in *Carmichael v National Power plc* [1999] 1 WLR 2042, at 2050 to 2051,

similarly made in the context of a case where the contract was to be determined not only according to written terms but also the conduct of the parties (on the basis that the written terms did not represent the whole agreement between the parties) and:

> "The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done".

111. At [33] Lord Clarke noted that, at [103], Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

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

112. Lord Clarke agreed with the above statements and concluded, at [34], that the "critical difference between this type of case and the ordinary commercial dispute" is as identified by Aikens LJ, at [92], as follows:

> "…..the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ..."

113. He took from this, at [35], that:

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

114. HMRC do not accept that the principle set out in this case, a summarised at [35], applies to the construction of the terms of contracts of this kind in place between a client and a PSC as then adopted as the basis for the assumed relationship between the parties for IR35 purposes. However, I cannot see why, as a matter of principle, the approach advocated in *Autoclenz* should not apply in these circumstances. It is not a question of ignoring the corporate structure but of acknowledging that a company, owned (as to the majority of shares) and operated by the individual whose personal services it provides, is likely to be in the same position as regards bargaining power as the individual would be if he contracted directly for the provision of his services.

115. It is not clear that Mr Maas was basing his view that certain terms are not "real" ones on this principle on the basis there was such a disparity in bargaining power between ITV and RWG/Mr Holmes. However, even if that is taken to be the case, on the robust approach advocated in *Autoclenz*, taking into account all surrounding circumstances including the conduct of the parties, I cannot see any basis for a conclusion that the contractual terms in the agreements relating to control did not represent the real legal agreement between the parties.

116. There is no evidence that viewed objectively, having regard to the reality of the situation, the relevant terms, whereby ITV had control of when and where the services were provided and Mr Holmes was subject to editorial control and to restrictions on his other activities did not represent the true agreement between the parties. The evidence does not demonstrate that these are terms inserted as a matter of form only which do not genuinely reflect what might realistically be expected to occur. This is addressed further in the conclusions set out below on the nature of the assumed relationship between ITV and Mr Holmes.

Implied contract of employment between RWG and Mr Holmes

117. Finally in this section, I have considered HMRC's argument that it is necessary to imply a contract of employment between RWG and Mr Holmes in order to give legal efficacy to many of the provisions in the agreements, such as those under which RWG had to ensure that Mr Holmes did a number of matters. HMRC said that this is relevant as (a) the tribunal must consider all the circumstances in deciding on the nature of the assumed relationship and (b) it follows that under such an implied contract RWG had a right of control over Mr Holmes which rebuts any contention that the nature of his work is inherently so skilled, difficult or immediate, that it is not possible for a party to have a right of control over him. Mr Maas did not agree with this but did not make detailed representations on it.

118. Mr Tolley referred to the decisions in *Catherine Lee v Lee's Air Farming* [1960] 3 WLR 758 and S*ecretary of State for Business, Enterprise & Regulatory Reform v Neufeld & Another* [2009] EWCA Civ 280)[2009] 3 All ER 79 in support of this argument. In the *Lee* case it was held that the deceased sole shareholder and director of a company acted as its employee in carrying out its business of aerial top dressing using a plane he flew (thereby entitling his wife to bring a claim for compensation (under certain provisions in New Zealand)). Lord Morris concluded as follows:

> (1) In view of their nature, he could not see that the operations were carried out by the deceased as governing director; they must have been performed under a contractual relationship with the company. There was no reason to challenge the validity of that relationship on the basis that "it was not nor could be suggested that the company was a sham or a mere simulacrum". It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company.
>
> (2) It is a logical consequence of the decision in *Salomon v Salomon & Co* [1897] AC 22 that one person may function in dual capacities. On that basis there was no reason to deny the possibility of a contractual relationship or why it could not be a contract of services. He did not agree that there was a difficulty on the basis that "the deceased could not both be under the duty of giving orders and also be under the duty of obeying them". He said that control remained with the company "whoever might be the agent of the company to exercise it" and notwithstanding the deceased was the agent as the governing director:
>
> > "If the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the company is recognised. Just as the company and the deceased were

> separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased."

119. In the *Neufeld* case it was held, with reference to the *Lee* case, that there was no reason as a matter of principle why a sole director and shareholder of an insolvent company could not be held to be an employee of the company (in which case he could claim from the Secretary of State amounts due under a statutory scheme such as unpaid wages, unpaid holiday pay and redundancy). At [28], Rimmer LJ noted that it might be thought that in such a company there could be no control of the putative employee. In practice control would be exercisable by the putative employee himself since he controls the company and so it would be "easy to conclude that that cannot be real control". However, he said, at [29], that, on the basis of the decision in *Lee,* that issue could not be regarded "as providing a threshold obstacle to the creation of a valid contract of employment".

120. He commented, at [34], that in referring to cases where "the company was a sham or a mere simulacrum" Lord Morris probably had in mind the limited cases where the courts have, for policy reasons, "pierce[d] the veil" of incorporation and treated a one-man company as "the *alter ego* of the controlling shareholder, that is to treat them as one". In that case any suggestion that the individual had a service contract with the company would not succeed but he considered that "such circumstances, at least in a case in which the company is a genuine trading company, would be exceptional".

121. Mr Tolley also referred to the case of *Smith v Carillion (JM) Ltd & Anor* [2015] EWCA Civ 209 [2015] IRLR 467 where, in the context of assessing the employment status of a worker who was engaged through an agency, the Court of Appeal set out the principles governing whether and in what circumstances a contract between the worker and the contractor to whom he is providing his services can be implied. They said the following at [21]:

> (1) The onus is on a Claimant to establish that a contract should be implied: see the observations of Mance LJ, as he then was, in *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.
>
> (2) A contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in *James* which considered two earlier decisions on agency workers in this court, *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437and *Cable and Wireless plc v Muscat* [2006] ICR 975. It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed (para. 23). Mummery LJ stated that the EAT in that case had:
>
> > "… correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213, 224:
> >
> > > "necessary . . . in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with

one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

(3) The application of that test means, as Mummery LJ pointed out in *James* (para. 24), that no implication is warranted simply because the conduct of the parties "was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."

(4) It is, however, important to focus on the facts of each case. As Mummery LJ observed in *James* (para.51): "there is a wide spectrum of factual possibilities. Labels are not a substitute for a legal analysis of the evidence." The question a Tribunal needs to ask is whether it is necessary, having regard to the way in which the parties have conducted themselves, to imply a contract between worker and end user…."

122. Mr Tolley submitted that it was necessary to imply a contract of employment between RWG and Mr Holmes in order to give legal efficacy to many of the provisions in the agreements.

(1) Legal efficacy can be given to provisions, such as those under which RWG had to ensure that Mr Holmes did a number of matters, only on the basis that RWG had a right of control over the performance of Mr Holmes' services as its employer; otherwise RWG would not be in a position to make those representations.

(2) Similarly, RWG would not be in a position to assign to ITV the copyright in the product of Mr Holmes' services unless there was an employment relationship in place. In that case it follows as an incident of law that copyright in the artistic or film work performed by the employee in the course of the employment belongs to the employer (see s 11 of the Copyright, Designs and Patents Act 1998).

Decision on implied employment contract and control issue

123. I cannot see that "it is necessary… in order to give business reality" to the relevant transactions to imply that Mr Holmes was acting as the employee of RWG as regards the provision of his services to ITV. I accept that the fact that Mr Holmes was the majority shareholder in and the sole director of RWG does not of itself preclude a finding that he also acted, in a different capacity, as the employee of RWG in providing the services to ITV. However:

(1) In fact, his services could have been provided by RWG to ITV under a number of different arrangements with RWG and not just by virtue of an employment relationship, such as a contract for services or an agency.

(2) The agreement is silent as to how RWG was in a position to assign the copyright. That could take place in a number of ways; under an assignment by Mr Holmes in a freestanding contract or under a contract for services or a contract of employment. Whilst on HMRC's view it may be necessary to imply an assignment, it is not necessary to imply a contract of employment for such an assignment to be regarded as having taken place.

124. In any event, I can see no reason why, if it is found, contrary to my view, that RWG controlled Mr Holmes as its employee, it must somehow follow that ITV has the ability to control Mr Holmes under the assumed contracts or that such a

conclusion bolsters that view. Whilst I must have regard to all the circumstances in determining the nature of the assumed contracts, this is not a circumstance of relevance which casts light on the nature of the deemed relationship.

125. It is inherent in the exercise I am required to undertake, as based on the hypothesis of a direct relationship between ITV and Mr Holmes, that RWG essentially drops out of the picture; the question is the nature of the relationship between ITV and Mr Holmes assuming RWG was not interposed between them. That is subject to the proviso that plainly the nature of the actual relationship between the RWG and ITV is highly relevant to determining the nature of the assumed relationship. As set out above, it is reasonable to suppose that, had Mr Holmes stood in the shoes of RWG as the contracting party, he would have entered into the same or substantially the same contractual terms with ITV as RWG in fact did and that the same circumstances would apply in relation to *that relationship*.

126. In taking this stance HMRC are seeking in effect to place ITV in the position of RWG as regards its relationship with Mr Holmes. I cannot see, however, that the nature of the assumed relationship as regards control by ITV is informed by what is in effect an implied right of control as a purely legal construct under a different (assumed) relationship between Mr Holmes and ITV. As noted in the *Neufeld* case it is difficult to see that such control is "real" given the nature of a one-man company although as a legal matter that is no bar to the creation of an implied employment contract. In my view that legal construct, uninformed by any actual terms between RWG and Mr Holmes, casts no meaningful light on the control that ITV may be taken to have over Mr Holmes

127. I have concluded, therefore, that whether Mr Holmes was employed by RWG is not relevant to the analysis of whether ITV controlled Mr Holmes under the assumed contracts.

Nature of the assumed relationship

Caselaw

128. The next stage of the analysis is to determine the nature of the assumed contracts according to the principles set out in the caselaw.

129. The starting point is MacKenna J's well-known summary of the principles to be applied in *Ready Mixed Concrete* as set out above. It was held in that case that a person who was engaged to carry concrete for a company which sold it was an independent contractor. As regards the mutuality test MacKenna J said that "there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind". He said at 515E that the obligation to provide work is a personal one; generally the freedom to delegate to another is inconsistent with a contract of service:

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

130. He noted, at 515E, that "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. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters…."

131. He continued, at 516A, that to find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered by implication.

132. He described the third condition as a "negative" one and illustrated its interaction with the other tests with a number of examples (at 516B to 517B). He said that, for instance, if a person is engaged to build for another person but provides the necessary plant and materials at his own expense, there is a contract to produce a thing (or a result) for a price. On the other hand, if a labourer has to provide some simple tools and to accept the builder's control, the obligation to provide the tools is not a sufficiently important matter to affect the substance of the contract as one of service. He said that, in other words, an obligation to do work subject to the other party's control is "a necessary, though not always a sufficient, condition of a contract of service" and:

> "If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."

133. He continued to cite a number of authorities from which he concluded, at 522G, that the common law test as regards control is not to be restricted to the power of control over the manner of performing service but is wide enough to take account of investment and risk. He also referred to the well-known dictum of Denning LJ in *Bank voor Handel en Scheepvaart N.V. v Slatford* [1953] 1 QB 248 where he said that "the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation". He said that this raised more questions than he knew how to answer but he could at least "invoke the dictum to support my opinion that control is not everything".

134. In the decision the following year in *Market Investigations Ltd* Cooke J held that a lady who belonged to a panel of part-time interviewers carrying out surveys for a market research company was an insured earner for NICs purposes on the basis that each of her assignments constituted a separate contract of service. He said, at 183D to F, that it has for long been apparent that an analysis of the extent and degree of control is not in itself decisive in determining whether a person is an employee and that the inadequacy of this test was pointed out by Somervell LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343 at 352:

> "The master may be employed by the owners under what is clearly a contract of service, and yet the owners have no power to tell him how to navigate his ship. As Lord Parker CJ pointed out in *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349 at 351, when one is dealing with a professional man, or a man of some particular skill and experience, there can

be no question of an employer telling him how to do the work; therefore the absence of control and direction in that sense can be of little, if any, use as a test."

135. He referred to the comments of Lord Denning as set out above and those of Lord Wright and of the US Supreme Court respectively that the question whether a person is an employee may be determined by asking "whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior" or "as a matter of economic reality (see *Montreal Locomotive Works v Montreal and A-G for Canada* [1947] 1 DLR 161, at 169 and *US v Silk* (1946) 331 US 704). He considered, at 184G, that these observations indicated that "the fundamental test" to be applied is this:

> "'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'".

136. In his view, there is no single definitive test, at 184H:

> "no exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant…..
>
> nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases".

137. He thought that the most that can be said is that "control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor" and the factors which are of importance are, at 185A to B:

> "whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

138. He concluded that the company had extensive control consistent with employment in that case (through a guide on the technique of interviewing (much of which was couched in imperative language) and detailed instructions on conducting the interviews (see 185E to 186B). HMRC pointed to the fact that Cooke J said his conclusion on control was not affected by the fact there was a practical limitation on the possibility of giving instructions to the relevant individual while actually working in the field, because her supervisor would then have no means of getting into touch with her as:

> "there must be many cases when such practical limitations exist. For example, a chauffeur in the service of a car hire company may, in the absence of radio communication, be out of reach of instructions for long periods.

139. At 188A to C, Cooke J did not think it could be said the individual was in business on her own account as an interviewer on the basis that she was free to work as an interviewer for others (although there was no finding that she did so) and in her work she would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own:

> "The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs Irving did not provide her own tools or risk her own capital,

nor did her opportunity of profit depend in any significant degree on the way she managed her work".

140. The approach of assessing whether the relevant person was in business on his own account was followed in *Fall (Inspector of Taxes) v Hitchen* (1973) 1 WLR 286 and *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374. In *Fall v Hitchen* it was held, at 292H to 293A, that a professional dancer was taxable as an employee on his earnings from a contract with a ballet company; virtually all the relevant factors pointed to there being a contract of service:

> "The taxpayer is engaged to work for a minimum period of rehearsal plus 22 weeks, and thereafter until the contract is determined by a fortnight's notice on either side; he is engaged to work full-time during specified hours for a regular salary; the company has the first call upon his services, and indeed the exclusive call subject only to this, that its consent to the taxpayer performing elsewhere should not be unreasonably withheld; and then, again, the company provides and owns the gear used by the taxpayer with one exception….."

141. It was noted, at 293F to G, that counsel for the appellant relied on *Davies (H.M . Inspector of Taxes) v Braithwaite* [1931] 2 K.B. 628 in contending that the word "employment" in the relevant taxing provision does not include engagements entered into as an "incident" to the carrying on of a profession, on the basis that "incident" means "that which formed part of the fabric of the profession". The parties both referred to the decision in this case as interpreted in *Fall v Hitchin* and *Hall v Lorimer*. In *Davies*, the issue was whether a professional actress was taxable on her income on the basis it was generated from self-employment rather than employment. HMRC pointed to Rowlatt J's comments:

> (1) At 634, that he did not think the tax position turned on the degree of skill at all; "the most skilful and distinguished persons, whose qualifications are very rare, in art or medicine, or any other profession where distinction is difficult to obtain, might well enter an "employment"".
>
> (2) At 635, that a person can have both an employment and a profession at the same time….":
>
> > "A man might have the steadiest employment in the world by day, and he might do something quite different in the evening and make some more money by the exercise of a profession or vocation….and even if it were in the same sphere, I do not see why he should not have both an employment as well as a profession. For instance, a musician, who holds an office or employment under a permanent engagement can at the same time follow his profession privately."

142. At 635, Rowlatt J said that he thought the legislature "had in mind employments which were something like offices", and said he thought "of the word "posts" as conveying the idea required". He continued, at 635 to 636, to draw a distinction between an employment "post" of an on-going nature (taxable as employment income) and a series of engagements undertaken in the course of a profession or trade (taxable as trading income):

> "…. it seems to me that where one finds a method of earning a livelihood which does not consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other - and in

> the case of an actor's or actress's life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining one engagement, then another, and a whole series of them - then each of those engagements cannot be considered employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments."

143. Rowlatt J thought it clear, at 636, that the appellant in that case fell on the self-employment side of the line as she did not contract with a producer for a post but rather she:

> "makes a contract with a producer for the next thing that she is going to do, and then another producer, and then a third producer, and at any time she may make a record for a gramophone company or act for a film. I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career."

144. In *Fall v Hitchen* Sir John Pennycuick V-C commented that Rowlatt J was not saying that a professional such as an actor could not be engaged on an employment basis or as he put it in a post (and his comments were approved in *Hall v Lorimer*). He noted, at 295H to 296A, that nowhere did Rowlatt J say that "if an actor enters into a contract in such terms as to amount to what he calls a post, then that actor is not chargeable" on the income as employment income. On the contrary, "it is implicit in the whole of his judgment that:

> "if a professional person, whether an actor or anybody else, enters into a contract involving what Rowlatt J. calls a post, then that person will be chargeable in respect of the income arising from the post [as employment income] notwithstanding that he is at the same time carrying on his profession, the income of which will be chargeable [as self-employment income]. The instance of a musician puts that point very neatly".

145. He did not think, at 296B, that most people today would use the word "post", which does not seem very apt to cover the countless instances of employment in the sense of a contract of service. However, at 296B to C:

> "every word of that judgment is applicable as between the carrying on of a profession and an engagement in the course of carrying on that profession, on the one hand, and a contract of employment, on the other hand. The fact that an actor normally undertakes a succession of engagements in the course of carrying on that profession in no way involves the result that if an actor enters an acting employment in the nature of a post, that he is not assessable under Schedule E in respect of the income arising from that employment".

146. In the *Lee Ting Sang* case the Privy Council held that the applicant, who was a casual worker on a building site, was an employee of the subcontractor for whom he was working at the time he suffered an accident (and was, therefore, entitled to be compensated under a Hong Kong ordinance). Lord Griffiths said, at 383F to G, that all the tests, or indicia, mentioned by Cooke J in the *Market Investigations* case pointed to the status of an employee. The applicant did not provide his own equipment; it was provided by his employer. He did not hire his own helpers; he gave priority to the sub-contractor's work and if asked to do an urgent job he would tell those he was working for that they would have to employ someone else: "if he was an independent contractor in business on his own account, one would expect that he

would attempt to keep both contracts by hiring others to fulfil the contract he had to leave". It was also found, at 384A to C, that he had no responsibility for investment in, or management of, the work on the construction site. The conclusion, at 384D, was that:

> "the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks. *The applicant ran no risk whatever save that of being unable to find employment which is, of course, a risk faced by casual employees who move from one job to another*…." (emphasis added)

147. In the well-known 1994 decision in *Hall v Lorimer* the Court of Appeal held that a vision mixer, who in a year entered into between 120 and 150 engagements (of between 1 and 19 days) with 20 or more production companies, was self-employed. Having reviewed the above authorities, including the decision in *Lee Ting Sang*, Nolan LJ accepted, at 216C, that "an employment properly so called is not the less an employment because it is casual rather than regular". He noted, at 216C to D, that, it was acknowledged that, unlike the work of Mr Lee Ting Sang, Mr Lorimer's work depended upon his own "rare skill and judgment". However, he agreed that the nature and degree of skill involved in the work cannot alone be decisive; for example, "[a] brain surgeon may very well be an employee. A window cleaner is commonly self-employed".

148. Nolan LJ expressed reserve about adopting the same approach as that taken by Lord Griffiths in applying the tests set out by Cooke J (at 216D). He noted that in such cases "there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another". In a passage at 216E, he agreed with the view of Mummery J in the High Court (at 944 D of the report) where he said this is not a mechanical exercise but requires the painting of a picture from the accumulation of detail:

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v. Sinnett (*1986) 60 T.C. 150, 164:
>
> > "It is in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one

> case in the light of all the facts may not be compelling in the context of another case.""

149. At 217A to B, notwithstanding his reservations, he examined the factors listed by Cooke J to see where that led. He noted that HMRC relied on the facts that the production company controlled the time, place and duration of each programme, Mr Lorimer did not provide any of his own equipment, he hired no staff, he ran no financial risk apart from the risk of bad financial debts and of being unable to find work, he had no responsibility for investment in or management of the work of programme making and consequently he had no opportunity of profiting from the manner in which he carried out individual assignments. He noted, at 217C, that the Special Commissioner did not fully accept the validity of these points as a matter of fact in all cases, where he said the following (as set out at 217C to D):

> "[The taxpayer] provides no equipment (i.e. he has no tools) he provides no "work place" or "workshop" where the contract is to be performed, he provides no capital for the production, he hires no staff for it. No; he does not. But that is not *his* business. He has his office, he exploits his abilities in the market place, he bears his own financial risk which is greater than that of one who is an employee, accepting the risk of bad debts and outstanding invoices and of no or an insufficient number of engagements. He has the opportunity of profiting from being good at being a vision mixer. According to his reputation so there will be a demand for his services for which he will be able to charge accordingly. The more efficient he is at running the business of providing his services the greater is his prospect of profit."

150. It was noted, at 217E, that it was submitted that not much significance should have been attached to the risk of having no engagements because, as was pointed out in the *Lee Ting Sang* case, this is a risk faced by casual employees who move from one job to another. Nolan LJ agreed that was the case but said that "the risk of bad debts and outstanding invoices is certainly not one which is normally associated with employment". He also noted, at 217F, that the income and expenditure accounts revealed that Mr Lorimer incurred very substantial expenditure in the course of obtaining and organising his engagements and as an incident of carrying them out; in a fourteen month period the expenses for travel and running his office amounted to £9,250 against fees received of £32,875 (thought it may be that the figure for fees included some reimbursement of expenses). He noted that it was not disputed that these amounts were tax deductible if the taxpayer was taxable on the basis that he was self-employed and said "in any event they would seem to me to be quite different in nature and scale from those likely to be incurred by an employee".

151. He continued, at 217G to H, that more generally, the features specified in HMRC's list would be found in the case of many individuals who exploit their talents in the theatrical, operatic, orchestral, sporting fields but who are nonetheless independent contractors. He rejected the submission that the fundamental distinction between a contract of employment and a contract for service is that "in the former the contracting party sells his skill or labour; in the latter he sells the product of his labour. In one case the employer buys the man; in the other he buys the job". He said, at 217H to 218A, that would have provided a short and simple answer in the earlier cases. In any event, at 218A, he found that distinction "very hard to apply in the case of a professional man":

> "Surely the self-employed barrister advising in his chambers or the doctor advising in his surgery is selling his skill and labour and not its product. If the scene shifts to the court or to the operating theatre can the client or patient really be said to be buying the product which may be disastrous in spite of the best efforts of the advocate or the surgeon in the litigation or operation?"

152. He continued, at 218C to E, that the question, whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation. For example, a "self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business". He suggested that:

> "there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular pay master for the financial exploitation of his talents may well be significant. It is, I think, in any event plain that Cooke J…..was not intending to lay down an all purpose definition of employment. For example, his test does not mention the duration of the particular engagement or the number of people by whom the individual is engaged. Cooke J. said…. that he took account of the fact that the lady concerned was free to work as an interviewer for others but added that there was no finding that she did so. This is of little assistance in the present case of which the most outstanding feature to my mind is that Mr. Lorimer customarily worked for 20 or more production companies and that the vast majority of his assignments……lasted only for a single day."

153. In rejecting the argument that the Commissioner erred in law in placing reliance on the decision in *Davies v Braithwaite*, he agreed with Sir John Pennycuick's explanation of that decision in *Fall v Hitchen* (at page 295) "as another helpful statement carrying general weight in the consideration of problems of this kind".

Later case law on mutuality of obligation

154. As set out by Briggs J in *Weight Watchers*, at, [22] and [23], MacKenna J's reference to the need for mutuality of obligation for there to be a contract of employment has been interpreted by the courts as serving "one or both of two distinct purposes"; to determine whether there is a contractual relationship at all between the parties and, if so, "whether the mutual obligations are sufficiently work-related."

155. The requirement for mutuality has been looked at extensively by the courts in assessing whether individuals, who work on a casual from time to time basis, can benefit from certain statutory protections for workers or employees which may depend on an employment relationship being in place for a certain period of time. For that purpose, an individual may seek to show that there is an "umbrella", "global" or "overarching" contract of employment which exists throughout the relevant period (referred to as an "**umbrella contract**"). In that context the courts have repeatedly referred to the need for an "irreducible minimum of obligation on each side" for there to be a contract of services although precisely what satisfies that test, in terms of obligations as to work and pay, has been put in different terms. On the other hand, it is established that where there is no such umbrella contract, it may be that each individual assignment/engagement comprises an employment contract, even if of short duration.

156. Lord Justice Stephenson set out the often-quoted irreducible minimum test in *Nethermere (St Neots) v Gardiner* [1984] ICR 612, at 623, in the context of deciding if there was an umbrella contract as regards individuals who worked at home sewing garments. Kerr LJ described this minimum, at 629, as requiring that "the alleged employees…must be subject to an *obligation* to accept and perform some minimum, or at least reasonable, amount of work, for the alleged employer". Dillon LJ said, at 634, that he accepted that "an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service".

157. In *Clark v Oxfordshire Health Authority* [1998] IRLR 125, it was held that a "bank" nurse, who had no fixed or regular hours but was offered work by the health authority from time to time, was not engaged under a single continuing umbrella contract. Sir Christopher Slade held that, on the authority of *Nethermere*, no contract of employment "can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period". He noted that the authority "was at no relevant time under any obligation to offer the applicant work nor was she under any obligation to accept it". He accepted, however, that the mutual obligations required to found a global contract need not necessarily and in every case consist of obligations to provide and perform work:

> "To take one obvious example, *an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice*. In my judgment, however, as I have already indicated, the authorities require us to hold that some mutuality of obligation is required to found a global contract of employment. In the present case I can find no such mutuality subsisting during the periods when the applicant was not occupied in a "single engagement"." (emphasis added)

158.In *Carmichael v National Power plc* [1999] ICR 1226, the House of Lords similarly rejected the argument that there was a single global contract which subsisted during the gaps between periods of work undertaken by guides, who took members of the public around certain power stations on a "casual as required" basis as set out in a written letter to the guides and the company. Lord Irvine of Lairg, who gave the leading judgment, at 1230 G-H rejected the proposition that the appeal turned exclusively on the true meaning and effect of letters to the guides but said that if it did:

> "I would hold as a matter of construction that no obligation on the [the company] to provide casual work, nor on [the guides] to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service".

159. In *Usetech Ltd v Young* (2004) 76 TC when considering the mutuality test in an IR35 context, at [57] and [58]:

> (1) Park J concluded from cases such as *Clark* and *Carmichael* that, if the relationship is one under which the putative employer "can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done….there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella

contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment".

(2) However, he noted that this "leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment". This was the concept he thought the Special Commissioner had in mind as covering this case although he thought the case was not really of that nature on the particular facts (given the engagement lasted for 17 months, on the individual's own evidence he worked for an average of 58 hours a week and it was found that "he was, as a rule, expected to work the "core" hours from 8am to 5pm").

160. At [60] he accepted that it is an "over-simplification" to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the required kind of mutuality. He noted that mutuality of some kind exists in every situation where someone provides a personal service for payment, "but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free-lance services". At [64] he suggested that something more is required, beyond the mere requirements for there to be a contractual relationship, for a contract of employment to exist such as:

> "*a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment*. See especially the *Clark* and *Stevedoring & Haulage* cases…." (emphasis added)

161. In the decision in the Employment Appeal Tribunal ("**EAT**") in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J drew together the various strands in the cases and drew a distinction between mutuality in the sense of whether there is a contract at all and, if so, if, as he put it, there is a "wage-work bargain".

162. At [23] he referred to a decision by Elias J (as he then was) in the EAT in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 where, in summary, Elias J said the following at [11] to [14]:

(1) At [11] and [12] Elias J said that the significance of mutuality is that it determines "whether there is a contract in existence at all" and of control that "it determines whether, if there is a contract in place, it can properly be classified as a contract of service". He noted that the first issue arises most frequently where a person works for an employer, but only on a casual basis from time to time and it is often necessary to show that the contract continues to exist in the gaps between periods of employment under an umbrella contract. Without some mutuality, amounting to "what is sometimes called the "irreducible minimum of obligation", no contract exists."

(2) At [13] he said that, on the other hand, the question of mutuality poses no difficulties during the period when the individual is actually working. In that case a contract must exist and for that duration "the individual clearly undertakes to work and the employer in turn undertakes to pay for the work

done". This is so, even if the contract is terminable on either side at will unless and until the power to terminate is exercised.

(3) He concluded, at [14] that:

> "the issue of whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not."

163. Lagstaff J concluded, at [47] and [48], in effect that the mutuality test extends to examining the nature of the contract and whether there is a "wage-work bargain" (as was cited with approval in *Drake v Ipsos MORI*) at [33]:

> "Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is. If it is a contract of employment, consequences will follow of the greatest significance…..*These matters are determined by the nature of the mutual obligations by reference to which it is to be accepted that there is a contract of some type…..*
>
> *It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must also necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wage-work bargain*"". (emphasis added)

164. At [49] Langstaff J noted that it was submitted that the obligations which identify a contract as one of employment are flexible and differ according to the context relying on the judgment of Buckley J in *Montgomery v Johnson Underwood* Ltd [2001] ICR 819 at [23] where he said:

> "Clearly as society and the nature and manner of carrying out employment continues to develop so will the Court's view of the nature and extent of "mutual obligations" concerning the work in question and "control" of the individual carrying it out…"

165. He continued that later in that case Buckley J referred to the *Ready Mixed Concrete* test as permitting a tribunal "appropriate latitude in considering the nature and extent of mutual obligations in respect of the work in question and the control an employer has over the individual". Buckley J said that although it was accepted that there is room for the obligation resting upon an employer to vary, as between the provision of work, payment for work, retention upon the books, or the conferring of some benefit which is non-pecuniary:

> "we cannot see that such elastic as there may be in the idea of mutuality of employment obligations can be stretched so far that it avoids the necessity for the would be employee to be obliged to provide his work, personally. The old fashioned description of a contract of employment as one of service……puts "service" (ie the obligation to work, personally, for another) at the heart of the relationship."

166. At [54] Langstaff J said that as "mutuality of obligation" may be used in different senses it is important to know precisely what is being considered under that label and for what purpose. He continued, at [55], that there was concern that

tribunals misunderstood something further which characterises the application of mutuality in the sense of the "wage/work bargain", namely, that:

> "*it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it*. Stephenson LJ in Nethermere put it as "… an irreducible minimum of obligation …" (emphasis added)

167. He noted that Stephenson LJ made these comments in the context of a case in which a home worker refused work when she could not cope with any more. She worked in her own time. He considered that "it is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some". The tribunal had accepted evidence (see 619B-C) that home workers such as she could take time off as they liked. He noted that although Kerr LJ dissented in the result, he too expressed agreement with the above principle. He referred to the comments of Dillon LJ at 634G-H including the following:

> "..I would accept that an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service. But the mere facts that the outworker could fix their own hours of work, could take holidays and time off when they wished and could vary how many garments they were willing to take on any day or even to take none on a particular day, while undoubtedly factors…to consider in deciding whether or not there was a contract of service, do not as a matter of law negative the existence of such a contract."

168. In the later decision in the EAT in *James v Greenwich* Elias J took a very similar approach to that set out in the *Delphi Diesel Systems* case. He noted at [16], that "sometimes, the employer's duty is said to be to offer work, sometimes to provide pay" but, in a succinct statement of the applicable principles, the critical feature is that:

> "the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as *Carmichael* makes clear; *if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker*, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment." (emphasis added)

169. I note, however, that in the later decision of the Court of Appeal in *Stringfellow v Quashie* [2013] IRLR 99 at [13], Elias LJ (as he had then become) in referring to his similar comments in *Delphi Diesel Systems* at [11] to [14], thought that on reflection the final sentence at [14] was too sweeping and that control is not the only issue as there indicated:

> "Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place

> even during an individual engagement. *O'Kelly* and *Ready Mixed* provide examples."

170. The decision in *Cornwall County Council v Prater* [2006] ICR 731 provides authority that each separate assignment undertaken by a person may constitute an employment notwithstanding the lack of on-going obligations to offer or accept further work under an umbrella contract. In that case, the Court of Appeal upheld the tribunal's decision that (a) there was the required mutuality for there to be an employment relationship between the council and a teacher as regards each of a number of individual assignments to tech pupils out of school which were of varying duration undertaken over a ten year period and (b) the times between the assignments when the teacher undertook no work for the council could be treated as periods of employment under the relevant statutory provisions (under the Employment Right Act 1996 ("**ERA**")). This was sufficient to establish the required continuity of employment for Mrs Prater to have the relevant employment rights she claimed she had.

171. The Court of Appeal set out, at [21], that the tribunal based their conclusion that the mutuality test was satisfied on the fact that the teacher was committed to teaching a pupil for as long as was necessary under an open ended arrangement as follows (at [14] of their decision):

> "…..having agreed to take on a pupil the claimant regarded herself as committed to deliver teaching to that pupil for as long as was necessary or until the arrangement was brought to an end for particular reasons. The respondents had a similar view of the situation. The matter was subject to regular review, as might have been expected, but was not re-negotiated on a week by week or month by month basis. It simply rolled on for as long as was necessary….."

172. The passage cited included the tribunal's comment that there was an important difference between the teacher's situation and that of the individuals in the cases of *Carmichael* and *Clark*; in those cases "the periods of work were short and known to be so from the outset" whereas in the teacher's case "the arrangement was very much more open-ended…"

173. At [39] and [40] Mummery LJ agreed with the tribunal's conclusion. He thought it clear that, had Mrs Prater been engaged to teach the pupils in a class, collectively or individually, at school under a single continuous contract to teach, she would have been employed under a contract of service. He said that it made no difference to the legal position that she was engaged to teach them out of school on an individual basis under a number of separate contracts running concurrently or successively nor that:

> "*… after the end of each engagement, the Council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the Council was under an obligation to pay her for teaching the pupil made available to her by the Council under that contract*. That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service. Section 212 took care of the gaps between the individual contracts and secured continuity of employment for the purposes of the 1996 Act." (emphasis added)

174. At [42], Longmore LJ rejected the submission that in this context mutuality had to be understood in a special sense of "an on-going duty to provide work and an on-going duty to accept work". He said, at [44], that the absence of such obligations would no doubt mean that there was no long-term global contract but that was not the argument; Mrs Prater was saying only that the individual engagements, once entered into, constituted contracts of employment. He had concluded, at [43], that there was mutuality in each engagement, namely, that the council agreed to pay Ms Prater for the work which she, in turn, agreed to do.

175. HMRC also referred to the later decisions, made in an IR35 context, in *Revenue and Customs Commissioners v Larkstar Data Ltd* [2009] STC 1161 and *Island Consultants Limited v Revenue and Customs Commissioners* [2007] STC (SCD) 700. In those cases it was held, in each case relying on the decision in *Prater*, that the fact that there was no right to renew successive contracts did not indicate that the relevant relationship was one of self-employment:

(1) In *Larkstar* Sir Donald Rattee held, at [32], that the Commissioners were wrong to hold that the absence of an obligation to offer further work to the individual in each of five successive agreements of six months indicated that he would not have been employed by the client under the assumed contract. The relevant question was "whether [the individual] would have been employed by [the client] during the two and a half years of the hypothetical contract or contracts between them". The decision in *Prater* clearly indicated that the fact "that [the client] would have been under no obligation to offer further work outside the terms of these contracts, is irrelevant to the question in issue".

(2) In *Island Consultants Ltd* the tribunal formed a similar conclusion in relation to a series of three (or in two cases, six) months contracts for the provision of an individual's services, with no obligation on either party to continue, but which were in fact entered into continuously for the three year period under appeal (and for periods before and after). The tribunal said, at [11], that:

(a) the lack of an obligation to renew each contract "may be relevant to determine whether someone is employed during breaks in work, as in [*Carmichael*], where it was not in issue that the guides were employed while working";

(b) however, as in the *Prater* case "it is sufficient that within each contractual period there was an obligation on [the client] to provide work and pay the agreed rate… the reality was that this was a five-year project" for a new computerised billing system for the client and "there was plenty of work requiring [the individual's] continuing services. [The client] was obliged to and did provide and pay for work during each separate contract period".

176. These cases have been somewhat superseded by the later decisions of the Court of Appeal in *Stringfellow v Quashie* and *Windle v Secretary of State for Justice* [2016] ICR 721. In both of those cases it was accepted essentially that the absence of an ongoing obligation to provide and accept work for pay under an umbrella agreement may in itself indicate that short-term assignments undertaken are in the nature of a contract for services rather than a contract of service:

(1) In *Stringfellow* the question was whether a lap dancer who worked intermittently over a period of 18 months had employment rights. Elias LJ acknowledged, at [10], that there "is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration" (referring to the decision in *Prater* and that of the Court of Appeal in *Meechan* v *Secretary of State for Employment* [1997] IRLR 353). At [12] he said that:

> "whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee….."

(2) In *Windle* the question was whether individuals who provided interpreter services were appointed under a contract personally to do work. Underhill LJ held, at [23], that the employment tribunal had not misdirected itself in holding that the absence of an umbrella agreement was a relevant factor in assessing the nature of short-term assignments:

> "….the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances."

177. In *Weight Watchers*, in considering the mutuality test at [30] to [32], Briggs LJ summarised the position as established in the cases as being that arrangements may, at least in theory, fall into three categories: (a) "a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work", (b) "a series of discrete contracts, one for each period of work, but no over-arching or umbrella contract" or (c) a "hybrid, class… of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work".

178. He said that in the hybrid case, depending on the nature of the dispute, it may be "sufficient if either the over-arching contract or the discrete contracts are contracts of employment". He added that "it is clearly sufficient" if there is "either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods" during which the relevant individual's work is carried out.

179. He continued, at [31], that where reliance is placed on discrete contracts for periods of work it is necessary to show that: "the requisite irreducible minimum of

mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done". He thought that this clearly arose from the analysis in *Clark*. He gave an example where a discrete contract may be made for a series of separate events, such as a series of one hour, monthly or weekly meetings. The discrete contract may itself last for the whole period of the series, which may be for as long as a year. In such cases he considered that Sir Christopher Slade's "'relevant period' during which the mutuality of obligation must subsist is the whole of the period of the discrete contract" (see *Clark* above).

Right of substitution

180. As noted, it was recognised in *Ready Mixed Concrete* that the right to provide a substitute to carry out work is inconsistent with the provisions of personal service. It was held in *Usetech*, at [53], that the existence of a right to substitute is not determinative of self-employment and, correspondingly, in the *Professional Contractors Group* case, at [48v], that the absence of a right to provide a substitute may suggest employment, but it is not determinative.

Control

181. It has long been recognised that, as set out in *Ready Mixed Concrete* itself and *Market Investigations*, control is a necessary feature of an employment contract but not necessarily sufficient of itself to indicate that there is such a contract. It is also long established that absence of control as to the detailed way in which work is performed is not inconsistent with the employment of a skilled person (see for example *Davies v Braithwaite* and *Morren v Swinton and Pendlebury Borough Council* (at 582A-B) as referred to in *Market Investigations*).

182. A similar point was made by Vinelott J in *Walls v Sinnett* [1987] STC 236 at page 246c as regards the "modest degree of control which in practice was exercised by the governors and the principle of a college" over a professional singer who lectured in music at a technical college:

> "In some contexts the degree of control exercised may be very important in deciding whether someone is an employee or servant, but in the case of a senior lecturer at a college of further education, more particularly one who like the taxpayer came into teaching from active work as a singer, it is not surprising to find that he was given a very wide degree of latitude in the organisation of his work and time."

183. In *Montgomery v Johnson Underwood Ltd*, at [19], Buckley LJ noted that in *Ready Mixed Concrete* MacKenna J had "well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential". There are many examples "from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent". In many cases the employer may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However:

> "some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment."

184. He noted that MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which he referred to the first few lines:

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

185. He continued, at [23], that as society and the nature and manner of carrying out employment continues to develop, so will the court's view of the nature and extent of "mutual obligations" and "control". However, he thought it desirable that a clear framework or principle is identified and kept in mind and, in his view, the quoted passage from *Ready Mixed Concrete* was still the best guide. He considered that whilst the approach in that case permits tribunals "appropriate latitude" in considering the nature and extent of mutual obligations and control it does not "permit those concepts to be dispensed with altogether" but rather directs tribunals "to consider the whole picture to see whether a contract of employment emerges. It is though important that "mutual obligation" and "control" to a sufficient extent are first identified before looking at the whole".

186. HMRC referred to the case of *White and another v Troutbeck SA* [2013] IRLR 286 as support for their view that it is the right to overall control or a framework of control which matters rather than day to day control. In that case the EAT held that individuals who were engaged to look after a substantial estate for the largely absent owners, were employees of the owners for the purposes of ERA. Richardson J noted, at [40] that:

> "The key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work."

187. He expanded on this, at [41] and [42], as follows:

> "….in modern conditions many workers - especially the professional and skilled – have very substantial autonomy in the work they do, yet they are still employees. But this has, I think, always been the case…There would be concerning what was, after all, their property. It does not follow that, because an absentee master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them….
>
> …all aspects of control are relevant to this question. It was once thought that for a contract of employment to exist the master must be empowered to direct not only what is to be done but also the manner in which it is to be done. However, many kinds of employee - such as the surgeon, the captain and the footballer discussed by Somervell LJ in [*Cassidy v Ministry of Health*] at 579 – are engaged to exercise their own judgment as to how their work should be done."

188. He concluded that on the facts of the case, whilst the individuals had substantial day to day responsibility, the owners retained a sufficient right of control. Essentially the Court of Appeal agreed with the EAT on the control point in *White and another v Troutbeck SA* [2013] EWCA 1171 (see [41]).

189. HMRC also referred to (a) *Various Claimants v Catholic Child Welfare Society & Ors* [2012] UKSC 56 where it was held, at [36], that the significance of control is that the employer can direct what the employee does, not necessarily how he does it and (b) *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938 where, at [76], Ward LJ said that the question of control is not merely about the legal power to control, but that it should be viewed more in terms of accountability and supervision by a superior. That was said in the context of vicarious liability of the Church for sexual abuse by priests. In my view Ward LJ was not suggesting here that the legal power to control was less important.

190. Mr Maas referred to *Matthews and another v HMRC* [2012] UKUT 229 (TCC). In that case the Upper Tribunal upheld the tribunal's decision that two entertainers who provided entertainment on various cruises were engaged under contracts for services with the various cruise lines they contracted with. The Upper Tribunal recorded that the tribunal's findings included (a) that on average the length and number of the engagements was 4 and 13 days and 38 and 16 per year respectively (b) the cruise line expected the highest standards of behaviour, (c) the appellants complied with the directions of the cruise director (for example, as regards some aspects of content of their act, timing and taking part in additional activities) and (d) they were treated more like crew than passengers and were, for example, expected not to occupy a bar stool if a passenger was standing, and not to occupy places in the hot tub when passengers were waiting and were expected to assist passengers finding their way round the ship.

191. The Upper Tribunal set out that, at [12] of its decision, the tribunal held that the level of control was the determining factor on the basis that "much of this is required by the context of a cruise ship" and it was:

> "to be expected that the staff will be closely controlled so as to achieve the cruise line's objective because the staff are in the public eye at all times. This factor seems to us to have less bearing on the employment status of the staff than might be the case if the context were different. It is not the case that self-employed have complete freedom over what they do. An actor can discuss points of interpretation with the director as an equal but in the end the director's wishes will prevail...."

192. At [13] the tribunal held that the appellants did not have a series of "posts" but earned their living under a series of separate engagements in a similar way to an actor as in *Davies v Braithwaite*. They concluded, at [14], that in this context it was right to give more weight to this point than to control. In the Upper Tribunal, in rejecting the argument that the tribunal gave insufficient weight to control, Mann J said, at [18], that the conclusion on control was "entirely justifiable":

> "….the requirement of a certain degree of behaviour when "off duty" and not performing is not control over the employment activities and the performer. It is a degree of control which is required because the performers are part of a community confined on a ship for days on end and in which the ship has its own standards. It is not really related to the engagement as a performer at all. The requirement to comply with the ship's regulations is probably a requirement imposed on all people on the ship; crew, passengers, entertainers and all others."

Other factors

193. As HMRC noted he third condition in MacKenna J's test is a negative condition, such that if the first two are satisfied, the contract will be a contract of employment unless there are other provisions of the contract which are inconsistent with that conclusion and of sufficient importance that the tribunal can conclude that the contract is not one of service: *Ready Mixed Concrete* at 516 to 517; *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J (as he was) at [41] to [42] and [111].

194. The parties also referred to *Dragonfly Consulting Limited* [2008] STC 3030 as demonstrating the relevance of the parties' stated intentions. At [53], Henderson J (as he then was) said that whilst "it is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other" on the basis of *Ready Mixed Concrete* at 513B and *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 (CA) "in the majority of cases, however, such statements will be of little, if any, assistance". He said, at [55], that he would not go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties (as there is no actual contract by reference to which they have intentions):

> "If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

Submissions

195. Mr Maas accepted that the mutual obligation test is satisfied but disputed that the other tests indicate an employment relationship. He referred to *Massey v Crown Life Assurance* where Lord Denning said the following repeating what he had said in *Stevenson Jordan & Harrison Ltd v McDonald and Evans* [1952] 1 TLR 101:

> "It is often easy to recognise a contract of service when you see it but difficult to say where the difference lies. A ship's master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services."

196. In Mr Maas view' Mr Holmes is in the same position as a newspaper contributor, not a reporter. Mr Maas noted that Mr Holmes carries on many of the activities of his profession as a broadcaster in his own name and is taxed on such income as a person carrying on a profession. Had he entered into a personal contract with ITV, he would have done so as part of his self-employment. In his view, the decisions in *Davies v Brathwaite* and *Hall v Lorimer* show that individual engagements have to be looked at in the context of the worker's business activities as a whole; what at first sight might appear to be an employment, may simply be an incident of the worker's overall professional activities.

197. On the control test, he noted that every contract for services has an element of control. The question is whether ITV could control Mr Holmes in a sufficient degree as to make ITV his master. If a person engages a painter to paint his house, he

determines where the work is to be carried out, when it is to be done, what colour to use, how many coats of paint and many other things. Although in a sense these are matters of control, they are in reality simply the framework within which the service is to be performed.

198. Mr Maas said that the fact that ITV had greater bargaining power did not mean that it had dictated the contractual terms between the parties. Mr Holmes nevertheless had a choice but as the weaker party he chose to contract on that basis notwithstanding that he may not have liked some of the terms. That one party complies with agreed terms does not demonstrate an exercise of control by the other party. In complying, the party is simply performing mutually agreed tasks. Control such as to make ITV master must comprise control over the performance of the duties themselves; setting the contractual framework within which the duties are to be performed is not control over their performance.

199. Mr Maas continued that the essence of the contract with ITV is that Mr Holmes is required to attend ITV's studio at a specific time and to participate in the show at that time. The main service he is engaged to provide does not begin until he goes on air. It is, therefore, unrealistic to say that as ITV choose the time and place, so they must control Mr Holmes. The nature of the service to be provided under the contractually agreed terms determines when and where it is to be provided.

200. Mr Maas said that ITV does not have control over Mr Homes of the required kind by virtue of the facts that This Morning is its show, ITV decides (amongst other things) what to include, the order in which items are broadcast, what guests to invite on the show and when to have advertising breaks. The role of Mr Holmes is to take ITV's ingredients and create an entertainment from them. This situation is akin to that where a person hires a chef to prepare a meal using ingredients the hirer provides. The chef is not hired to provide the meal but to cook the meal. The hirer can legitimately complain to him about the cooking but not about the ingredients. In the same way as a chef may try to alter some of the ingredients he is given, Mr Holmes may tell ITV if he does not feel that the "ingredients" they put forward for the programme can be made into an entertainment. However, the fact that ITV may reject his suggestions does not demonstrate control of the required kind; that is not control over what Mr Holmes is engaged to do. Whatever persuasion he seeks to exert with the show's producer over the show's "ingredients" is irrelevant to that question.

201. Mr Maas referred to Lord Denning's comments in *Bank voor Handel en Scheepvaart NV v Slatford*, that, "the test of being a servant does not rest nowadays on submission to orders; it depends on whether the person is part and parcel of the organisation". In Mr Maas' view, Mr Holmes is clearly not part and parcel of ITV.

202. He referred also to the comments of Buckley J in *Montgomery v Johnson Underwood Ltd* as regards the changing nature of the control test, the comments of Mann J in *Matthews v HMRC,* where he accepted that control was not the primary factor and Nolan LJ's discussion of *Davies v Braithwaite* in *Hall v Lorimer*. He said that similarly to the actress in the *Davies* case, Mr Holmes' engagement with ITV for one morning a week is merely the undertaking of a series of engagements in the course of exercising his profession (in the same way as are his daily engagements on Sunrise or other television engagements).

203. Mr Maas noted that the length of the engagements in *Davies v Braithwaite* are not reported but they were engagements to appear in stage plays, so must have spanned weeks or months. The vision mixer in *Hall v Lorimer* carried out a lot of very short-term engagements, most for a day or half a day, which seems like Mr Holmes' series of engagements. He asserted that the two hours a week Mr Holmes appeared on This Morning was a very small part of his overall work.

204. He added that the Special Commissioner in *Hall v Lorimer* rejected that there was control of the required kind due to the ability to dictate where the work was carried out as follows:

> "The Crown's representative suggests that the production company has extensive control over Mr Lorimer. It dictates the hours to be worked, where he shall work, the date he shall work. He has no discretion in these matters … I cannot see that control of the kind adumbrated helps very much towards solving the problem. If you accept an engagement for your services as a vision mixer, you must be provided with details of date, time and place and of the period of time you are likely to be required. If you are part of a team to produce a show, it is inevitable that someone must organise it… In the production of a play, you must pay attention to the stage directions or to the producer's directions. That applies to the leading actors and actresses, but they do not for that reason become "employees". The independent contractor posited by the Crown's representative could hardly exist in the context of the production of a programme in conjunction with other people".

205. He referred to Nolan LJ's comments that the extent to which the individual is dependent upon, or independent of, a particular paymaster for the financial exploitation of his talents may well be significant and that the most outstanding feature of that case was that "Mr Lorimer customarily worked for 20 or more production companies and that the vast majority of his assignments…lasted only for a single day". Whilst he accepted that it can be dangerous to seek to transpose the facts of one case to another, he thought that Mr Holmes' position is similar to that of Mr Lorimer and that what Nolan LJ said in that case is equally applicable to Mr Holmes.

206. He noted that where the circumstance do not support a finding that there is unambiguously an employment contract, a statement that the parties do not intend to create an employment, tips the balance to a finding that it is not an employment contract. In this connection he referred again to the *Massey* case where Lord Denning said:

> "...On the other hand if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them."

207. Finally Mr Maas made a number of submissions on the contractual terms:

(1) It would not be necessary to include in an employment contract requirements such as those for RWG to procure that Mr Holmes worked on such dates as may be agreed, for Mr Holmes to be as flexible as possible and to provide his services in a first class manner in full and willing cooperation with requests made.

(2) Mr Holmes was required to provide creative input and to promote the show but that it was as much in his interests and those of ITV for him to do so. In his view this says nothing about the nature of the relationship.

(3) The statement that Mr Holmes participation is integral to the Programme is very odd in the context of an employment. This statement demonstrates how important the appointment was to ITV.

(4) The payments to be made to RWG are referred to as fees and not salary.

(5) The provisions relating to the option to renew and the assignment of copyright are not really relevant to determining the employment relationship.

(6) The following terms are inconsistent with an employment relationship; the requirement for ITV to pay Mr Holmes' travel expenses, the VAT and billing arrangement, the numerous warranties, the agreement to provide a screen credit for Mr Holmes (which is of importance to him as a self-employed presenter) and the right to suspend the contract in certain circumstances.

(7) The remainder of the terms do not point towards an employment relationship.

(8) There are no provisions regarding holidays, sick pay, pension or training, no references to the staff manual or to first aid or fire marshalls.

208. Mr Tolley submitted that in all the circumstances the requirements of mutual obligation and personal service and control are plainly satisfied. The other terms of the hypothetical contract (in particular, the length of each contract and the restrictions upon Mr Holmes' outside activities) are consistent with a contract of employment; there are certainly no features inconsistent with a contract of employment. Stepping back from the detail of the contract, the picture that emerges of the hypothetical contract is one of regular, predictable and substantial part-time employment.

209. As regards the mutuality test, Mr Tolley said that the fact that Mr Holmes was engaged under a series of contracts and at the end of each one there was no obligation to offer further work (albeit that ITV did have an exclusive option to enter into a further contract for the provision of Mr Holmes' services on substantially the same terms) is not a relevant consideration (referring to the *Larkstar* case). In his view, it is in any event sufficient that there was mutuality of obligation during the term of each contract on the basis of the decision in *Island Consultants Ltd*.

210. He continued that ITV had a sufficient contractual right of control over what Mr Holmes did when performing his services and when and where he provided them, to indicate an employment relationship. As regards the manner of the provision of his services, in his view it suffices that, to the extent practically possible in a live broadcast environment, ITV had the contractual right to control how Mr Holmes performs his duties, even if in practice that right may not be capable of being enforced until after a programme had finished (and notwithstanding that the right was not normally enforced in practice because it did not need to be).

211. Mr Tolley noted that HMRC do not question Mr Holmes' talents as a presenter or that when presenting, Mr Holmes had to use his individual judgment, for example, as to what to say when conducting live interviews. Given the practical realities of a live broadcast environment there is no sensible means by which ITV could determine the words that Mr Holmes would say before he said them. However, it is perfectly

feasible for such a skilled person to be an employee. As the examples of the surgeon and footballer given in the case law demonstrate, a practical inability to control the decisions of a person at the moment of delivery of the skilled work is not inconsistent with employment. Indeed, the limits of ITV's practical control in respect of Mr Holmes at the point of delivery are the same as they would be in relation to an employed presenter. If this prevented a person being an employee, it would simply not be possible for a presenter to be an employee which cannot be the case.

212. Mr Tolley submitted that what matters is where the *right* of control lies and not whether that right is in fact enforced (see *Autoclenz*) and whether there is a sufficient framework of control. He said that the right of control would undoubtedly lie with ITV under the hypothetical contract. The actual contracts contained express clauses granting editorial control to ITV and requiring RWG to procure that Mr Holmes would cooperate with instructions from ITV. Such clauses are consistent with ITV's need to control its output in order to comply with Ofcom's guidelines.

213. Mr Holmes is simply incorrect, as a matter of contract, to say that he is "answerable to no one but myself", and to imply that he has complete control over the show. No doubt ITV produces This Morning in a spirit of collaboration and avoiding conflict where possible and may often listen to the suggestions of Mr Holmes in view of his experience. However, as ITV is ultimately responsible for the output, it necessarily has the right to reject any editorial suggestions made by Mr Holmes as to which stories to run or people to interview.

214. Moreover, the work that Mr Holmes did was in the context of a team environment in which the presenter is only one part, albeit an important part and the face to the public. Mr Holmes was not producing by himself a "thing" or an "output", but rather providing his personal service to ITV to play his part in delivering the show. The contention that success and ratings can be linked to Mr Holmes' participation in the show, even if accepted in full, does not prevent him from being an employee.

215. Mr Tolley noted that Mr Holmes stated that he is available to work for all print and broadcast outlets and does so if the projects and conditions are right. RWG did provide Mr Holmes' services as a presenter to other broadcasters during the relevant tax years (although the contract for This Morning was RWG's main source of income). However, the carrying out of such other work was subject always to the requirement for Mr Holmes to seek ITV's permission to enter into new Commercial Activities. Mr Holmes was also subject to a number of other restrictions on his activities.

216. Further, even if Mr Holmes would be regarded as self-employed when working on one-off shows through RWG, his long-term engagement for regular work on This Morning lacked any of the normal indicia of self-employment. In that context, Mr Tolley noted that one of the factors to be taken into account in determining whether a person is in business on his own account is whether he takes financial risk in the sense of the ability to make a loss or earn a profit from how the work is performed. He referred to *Global Plant Ltd v Secretary of State for Social Security* [1972] 1 QB 139 where Lord Widgery held, at 152, that he thought that what Cooke J had in mind was that if a man agrees to perform an operation for a fixed sum and thus stands to lose if

the work is delayed, and to profit if it is done quickly, on the face of it he appears to be an independent contractor working under a contract for services.

217. Mr Tolley said that in this case, however, there was no means for RWG to increase its profit from this engagement, nor was there any realistic possibility of making a loss; there was no requirement to invest in equipment or staff; and there was no (or no significant) variability in the amount of work to be provided and paid for. Mr Holmes claimed expenses from ITV and had a clothes allowance and was covered by ITV's insurance.

218. Mr Tolley noted that Mr Holmes' contentions on control are very similar to those advanced by Ms Christa Ackroyd in *Christa Ackroyd Media Limited v HMRC* [2018] UKFTT 0069 (TC). However, in that case, the tribunal found that the BBC retained the contractual right of control, consistent with employment (see [168]) notwithstanding that the tribunal accepted her contentions as to the importance of her role and the degree of autonomy she had.

219. Mr Tolley said that the circumstances in this case are not at all akin to those applicable to Mr Lorimer in *Hall v Lorimer*. Mr Holmes did not enter into a series of short engagements with ITV as regards This Morning; he entered into a series of contracts (which were in fact renewed) for a minimum number of appearances on This Morning in the contracted period. Whilst there was no guarantee that the contracts would be renewed, it is clear from *Lee Ting Sang* that the risk of finding further work is simply one faced by all casual employees. It is clear from *Fall v Hitchen* (as referred to with approval by Nolan LJ in *Hall v Lorimer*) that the fact that a skilled professional, such as a journalist and presenter, may be regarded as self-employed as regards some of his engagements does not necessarily of itself mean that another particular engagement forms part of that self-employment business if as a matter of fact that engagement has the hallmarks of employment. In this case, for the reasons set out above, Mr Holmes' substantial and regular work for ITV on This Morning plainly constitutes a part time employment. In any event, it is not clear that Mr Holmes was operating on a self-employed basis as regards his other main activity, in presenting the news for Sky.

220. Mr Tolley continued that Mr Maas' views on the application of the control test are wholly out of kilter with the case law. It is clear from the cases that it is the very essence of the test that whether a person has control over the individual of the required kind for there to be an employment relationship is to be determined from the written terms of the contract. It cannot simply be asserted that provisions on control are meaningless because the parties are merely acting in accordance with agreed terms. As regards the example of the painter or the chef, those are situations where a there is a different form of contracting arrangement, namely, for the production of the finished product (in the form of the painted room or the meal). In this case, as noted, Mr Holmes was not engaged to provide the output of the programme but to provide his services in playing his part in producing that content as part of a team. Mr Maas has simply not addressed HMRC's points on the control test in the context of skilled professionals as set out above.

221. Mr Tolley asserted that the "part and parcel" test provides little meaningful guidance in this context (referring to the comments of MacKenna J on the difficulties

of applying the test). A person can have several employments even though he is not part and parcel of any one organisation.

222. Finally, as regards the particular terms of the contract which Mr Maas referred to, Mr Tolley submitted that the final test set out in *Ready Mixed Concrete* is a negative one (as acknowledged in that case and *Weight Watchers*). It is a case of examining whether there are any terms which are inconsistent with employment status. In his view, that is plainly not the case. He said that it is not at all uncommon in a modern working environment for employers to operate flexibly and on a collaborative basis and terms suggesting such an approach are not out of kilter with an employment relationship. He did not think that the absence of terms relating to benefits (such as holiday and sick pay) was relevant (as set out in further detail in the conclusions below). In his view the assumed contracts would not contain VAT and invoicing provisions corresponding to those in the actual agreements; these provisions are peculiar to the fact that the actual agreements were between two companies on the basis that RWG provided services to ITV which attracted VAT.

Application of employment/self-employment test

223. On the basis of the caselaw set out above, I have concluded that there was sufficient mutuality and at least a sufficient framework of control to place the assumed relationship between ITV and Mr Holmes in the employment field. On that basis and, having regard to all other relevant factors, my view is that overall, throughout all relevant tax years, the assumed relationship between ITV and Mr Holmes was one of an employment rather than self-employment. For convenience, in these conclusions, I refer to the assumed contracts as though they were actually in place between ITV and Mr Holmes. Except where stated otherwise, references to the terms of the actual agreements are to those terms as they apply under the assumed contracts.

Mutuality of obligation

224. As set out in *Cotswold*, "mutuality of obligation" may be used in different senses and "it is important to know precisely what is being considered under that label and for what purpose". In this case, in effect, IR35 requires me to assess whether the income generated under the arrangements with RWG is properly taxable as employment income on the basis that, if ITV and Mr Holmes had contracted directly, their relationship would have been one of employment. The assessment has to be made by reference to the income generated in each tax year under the arrangements in place in that year. In that context, the starting point as regards mutuality must be to focus on the nature of each assumed agreement under which income is assumed to be generated (albeit that the overall context of the on-going relationship may be relevant to the overall analysis). Where such a contract is under consideration, as set out in *Weightwatchers*, mutuality must exist throughout the term of the contract and not merely during each period of work.

225. Under the assumed agreements (as based on the actual agreements (as set out at [23])), Mr Holmes was to provide his services to ITV on the specified days and, in the later agreements, such Mondays to Thursdays as ITV requested at its sole discretion and, in all agreements on "such other dates and locations as notified…. in advance by [ITV] at [its] sole discretion", in each case for a fixed fee per programme (and, in the case of the first agreement, a fixed fee per weekend recording link). It

was stated that Mr Holmes understood and acknowledged that the necessities of production may require ITV to change and/or reschedule the dates specified and that he "shall be as flexible as possible in this regard". Where ITV cancelled any dates and were unable to reschedule for reasons other than Mr Holmes' unavailability (or for reasons set out in the termination provisions), he was entitled to payment in full for any cancelled dates. Mr Holmes said that insisting on payment in those circumstances would be disruptive. However, the fact that in practice, for the sake of maintaining a good working relationship, Mr Holmes may have decided not to enforce his contractual rights, does not detract from the existence of that right.

226. Therefore, ITV was required to provide work on at least the specified dates on payment of the fixed fee and Mr Holmes was required to work on those dates in return for that fee. On that basis the mutuality test is satisfied throughout the term of each assumed contract in both of the senses set out in *Weight Watchers*, namely, that there was a binding contract in place and that the mutual obligations created under the contract are sufficiently work-related or, as put in *Cotswold*, there was a "work/wage bargain".

227. The fact that, in practice, days of work (other than the particular dates specified in the agreements) may have been agreed between ITV and Mr Holmes on a collaborative basis does not affect this conclusion. As set out in the *Cotswold* case, the fact that a person can refuse to work on a particular day or can take holidays when the person chooses does not prevent there being mutuality; what matters is that the person is required to perform at least some work in return for pay as well as that there are corresponding obligations on the client/employer. For the reasons already set out, that is plainly the case here. The fact there was no guarantee of each assumed contract being renewed does not of itself affect the fact that there was mutuality during the term of each applicable agreement but, on the basis of the decisions in *Stringfellow* and *Windle*, it is a factor to be considered in the overall assessment as set out below.

Control

228. As regards control, to recap, the relevant provisions of the assumed agreements (in addition to those set out at [225]), as based on the actual agreements, are as follows:

> (1) As set out in full at [23], [29] and [30], Mr Holmes services "as a first class presenter" were to be provided in full and willing cooperation with requests made…from time to time by the executive producer" including not only (a) appearing as a presenter in live or pre-recorded episodes of This Morning based in the studio (and, in respect of the first agreement, recording additional links for the weekend episodes of This Morning) but also (b) in attending production meetings and rehearsals, providing creative input into the programme's production and participating in a number of promotional and other activities and (c) in providing such other services as are usually rendered by a first class television presenter. He was required to provide all such services "conscientiously and in a competent manner as a first class presenter as and where required and in full willing co-operation with such persons as [ITV] may require".

(2) Mr Holmes was required to comply with health and safety guidelines and to obtain knowledge of and comply with all rules and regulations for the time being in force where Mr Holmes provided his services, and of the television programme guidelines laid down by Ofcom including without limitation regarding undue prominence (see [29(3)]). He agreed not to wear branded items and not to advertise or endorse any products, services or refer to any charity during the show. Mr Holmes expressly acknowledged that ITV had absolute discretion and control over the editorial content of This Morning and to the product of his services (see [27]).

(3) As set out in full at [28] and [29], Mr Holmes was subject to a number of restrictions in respect of his other activities including that (a) he would not enter into any professional or other commitments or undertake work for any third party which would or might conflict with the full and due rendering of his services and observance of his obligations under the relevant agreement, (b) he would disclose to ITV all his Commercial Activities, and (c) he would not "enter into any new contract or arrangement for his participation in or authorisation of any Commercial Activities unless it is approved by [ITV] in advance in writing" (as set out in further detail in [29]). There were also restrictions on his leisure activities and provisions relating to the state of his health.

(4) The circumstances in which the agreement could be terminated included where Mr Holmes acted in breach of his obligations under the agreement and where he did or omitted to do anything which brought or was intended to bring Mr Holmes, the programme, ITV, any of its group companies or the broadcaster into public disregard or involved ITV or the broadcaster in conflict with Ofcom (see [33]).

229. The fact that, in practice, (a) the arrangements were operated flexibly and co-operatively and (b) there were practical constraints on ITV's ability to enforce their contractual rights during the live show, does not detract from the fact that the provisions set out above gave ITV the contractual right (i) to control where and when Mr Holmes performed his services, (ii) to some extent to control how he performed his services and (iii) to some extent to restrict his other activities.

230. As set out above, it was held in *Autoclenz* that the fact that a right in a contract is not exercised or is not enforced does not necessarily negate the existence of that right as a term of the contract. In each case the tribunal must assess what the true agreement was between the parties. In relation to agreements of the kind in place between RWG and ITV (as deemed to form the basis of the assumed agreements), where there is a disparity in the bargaining position of the parties, the tribunal must take a robust approach to this question. On the authority of that case, provisions in a contract may in effect be disregarded as having no impact on the true nature of the relationship between the parties if the evidence demonstrates that they are inserted as a matter of form only and do not genuinely reflect what might realistically be expected to occur. However, in my view that is plainly not the case here as regards any of the relevant provisions.

231. As regards ITV's ability to control what Mr Holmes did and when and where Mr Holmes provided his services:

(1) It is apparent from the evidence set out above that, as Mr Holmes accepted, the parties had a good working arrangement with ITV such that dates of work (other than those specifically identified in the agreements) and any non-studio broadcasts and work beyond presenting (such as promotion activities) were agreed flexibly and collaboratively (see [57] and [86]). In my view, that does not of itself suffice to evidence that the relevant provisions did not genuinely reflect what might realistically be expected to occur. Whilst there was no reason for ITV to seek to enforce its strict contractual rights where matters could be agreed collaboratively, it is reasonable to suppose that ITV would have sought to do so if the collaboration broke down in order to ensure that the show took place or was promoted as ITV intended.

(2) Mr Holmes was insistent that ITV did not have the right to require his attendance to present the show on a particular day. This seemed to be based on the view that if he chose not to attend, ITV could not physically make him do so (see [86]). However, Mr Holmes did not suggest that this is what had ever happened in practice or that there was an occasion on which he refused to present a show when ITV insisted he should do so. In any event, even on an *Autoclenz* approach, the parties' own understanding of the intended operation of these provisions, as expressed after the period in question, does not inform the required objective contractual analysis.

(3) There was no specific stipulation as to how and where Mr Holmes was to prepare for the broadcast of the show. However, I consider that it is inherent in the general provisions relating to the requirements for Mr Holmes to provide his services as a first class presenter that he was required to spend sufficient time preparing to enable him to present on This Morning as such a presenter would. It follows that the fees due under the agreements were due for all such required services, including time spent preparing for the show, and not just for his actual appearance on air. This accords with how the parties' described the relationship as working in practice. As recorded in the meeting notes the editor said that "there was nothing prescriptive" as regards the creative input required from Mr Holmes but it "would be a cause for concern if Mr Holmes was not considered to be self-efficient in his role" and whilst he arrived at the studio with little time to spare before he went on air he was expected to have done all that was required of him as a first class presenter (see, in particular [62] and [64]).

(4) I note that Mr Holmes attended de-brief meetings and that ITV expected him to do so (unless he had another commitment) but he was not required to attend production meetings and rehearsals (see [65] and [66]). Again, I do not consider that the fact that ITV did not enforce their contractual rights as regards Mr Holmes' attendance at such meetings and rehearsals detracts from their existence as binding obligations. It is plain that ITV did not consider it necessary to require Mr Holmes to attend such meetings due to his considerable experience and particular level of expertise in live presenting of this kind. ITV trusted Mr Holmes to prepare in his own way given his vast experience and unique presenting style. That does not mean that they would not have sought to enforce these provisions should that trust have broken down.

232. ITV had overall control over deciding the thing to be done and, in a broad sense, over the manner in which it was done in that (a) ITV determined the nature of This

Morning and its format and (b) ITV had ultimate editorial responsibility for the content of the programme (as Mr Holmes expressly acknowledged in the assumed contracts) and (c) Mr Holmes was required to comply with the guidelines set out by Ofcom. Within that framework, in practice, Mr Holmes had considerable autonomy in how he prepared for and presented the programme due it seems to ITV's high regard for his skills and to the nature of the live environment in which he had to present the show.

233. To recap, as set out in full at [51] to [86], ITV producers researched the programme and provided a brief to Mr Holmes the day before the relevant show and discussed the programme with him. As regards a show on Friday, the show was two thirds prepared by the Wednesday before the show and Mr Holmes was usually first contacted on Thursday. Mr Holmes emphasised that, although the briefs he was provided with could be helpful, he was not obliged to follow them, he carried out his own research and chose his own questions for interviewees. Mr Holmes arrived at the studio generally only half an hour before the show or sometimes only minutes before he was due to go on air and, although ITV would like him to arrive sooner, they had confidence that he would have done all required for him to perform as a first class presenter. He was given a freer rein than other presenters due to the editor's trust in him to do the job.

234. Mr Holmes did not accept that he was required contractually to comply with requests made by the executive producer of This Morning. He said that he had the power to say "yes" or "no" as to whether he undertook projects, such as to cover a royal wedding. He later accepted, however, that such matters were agreed on a consultative and collaborative basis. Similarly, he initially said that he had a right of "veto" over stories and interviewees. From his later comments, however, it appears that he also accepted that such matters were agreed collaboratively; in practice, any objection he had was listened to and may well prevail given that ITV acknowledged that he was usually right due to his experience and skill set.

235. Ultimately, Mr Holmes accepted that ITV had the right to decide what stories to cover and interviewees to include and had responsibility for the content of the show. He accepted that ITV had this right of editorial control because they "pay the bills, they have the right to do things" and that it was necessary for them to have that control in order to comply with their obligations under the Ofcom. In the meeting notes the editor is recorded as stating that "ultimately the final say" on such matters was his albeit that Mr Holmes was asked for his input and that ITV had dropped guest/topics when Mr Holmes had voiced concerns and the position was negotiated flexibly.

236. Mr Holmes emphasised that he did not generally follow the autocue or scripts used to link items (at any rate not in a word for word sense) although he appeared to accept that he would do so if the script was sensitive and to accept that he used the prompts at least 10% of the time. He said that, in practice, he can dictate the tone of the programme and "what is on it", at any rate in the sense of how it is presented. He stressed that no-one could control him in the sense of controlling what he said; he was engaged for his talent in choosing the right words to make the show entertaining.

237. ITV are recorded in the meeting notes as acknowledging the considerable latitude which Mr Holmes had in this respect. The comments recorded include that more than

any other presenter on This Morning Mr Holmes did his "own thing", that he structured "as he likes", that he was "creative with autocue" and that overall his personality "drives the show". It was also noted that whilst it "would be great if Mr Holmes did as he was told" the reality was that he is popular due to his personality. He is prepared to ask awkward questions of guests and "is allowed to go with it". The show is very much personality driven-presenter lead. The editor did not believe that Mr Holmes had ever been overruled.

238. In the meeting notes it is also recorded that once Mr Holmes asked a question it was too late for the editor/producer to do anything about it. However, the editor plainly saw himself as having an editorial right of control in that he is recorded as stating that he would intervene if Mr Holmes "strays into anything which might have legal repercussions or the guest is uncomfortable" albeit that, in practice, Mr Holmes often ignored this. Otherwise, the gallery team did not give Mr Holmes' direction through the earpiece; given his vast experience he did not need to be fed questions or information (see [64]).

239. In the meeting notes ITV are recorded as acknowledging that if there were a legal issue as a result of Mr Holmes' actions, the editor would be responsible in his capacity as such; ITV as the broadcaster would also be held responsible. It was recorded that ITV said that if Mr Holmes consistently ignored the editor/ITV then it is possible that it would affect other work being offered (see [76]). As regards his performance, whilst there was no appraisal system, audience feedback and figures would indicate if something was wrong which would then be discussed. Mr Holmes noted that it was him who got reported to Ofcom if there was a problem. If he asked an inappropriate question, he regarded that as his fault although he accepted that ITV could be fined. He said that ultimately the sanction was that he would "get the sack" if there was an issue. In his view, ultimately the general public decide whether he stays on the television or not (see [73] and [74]).

240. It also appears that ITV were prepared to operate the commercial activities provisions flexibly and that, in practice, Mr Holmes did not always ask for the required permission. Mr Holmes accepted that he had to have permission from ITV as regards his advertising services in relation to the deed poll service (on the basis that consent was not to be unreasonably withheld) but he did not think he had asked for permission on this occasion. He did not ask unless it was something that could bring ITV into disrepute. As recorded in the meeting notes ITV considered there was no problem with Mr Holmes working on programmes that did not conflict with This Morning or producing work in print. They plainly regarded the restrictions as very real ones, however, as necessary to protect Mr Holmes' impartiality and neutrality as a presenter on This Morning and to prevent conflict with programme sponsors or reputational damage. It was recorded that they said that there would be repercussions if brought ITV into disrepute and that they may have to terminate the relationship if he chose to continue with an inappropriate commercial relationship (see, in particular, [89]).

241. For similar reasons as set out above in relation to ITV's right to control where and when Mr Holmes' services were provided, the fact that ITV exercised its rights of editorial control over the stories to be covered and interviewees flexibly and on a collaborative basis, in acknowledgement of Mr Holmes' considerable experience and expertise, does not affect the existence of that right. In practice, there was no reason

for ITV to insist on overruling Mr Holmes, given they valued his judgment on such matters, but it is reasonable to suppose that ITV would have exercised their editorial control had the relationship of trust broken down in order to ensure the programme was aired as they wished it to be. Similarly, there is no reason to suppose that ITV would not have sought to insist on Mr Holmes' compliance with requests made by the executive producer if they considered it necessary.

242. I fully accept that, in light of Mr Holmes' evidence as supported by the views of ITV as recorded in the meeting notes, Mr Holmes plainly has a substantial input into the tone and style of the programme and that he was engaged by ITV for his individual skill base in doing so. In view of that skill base and due to the nature of the live show, in practice, it was largely left to him and his co-presenter to use their own personal judgment and skill in conducting the live show. However, that does not detract from the fact that Mr Holmes was contractually obliged to act in accordance with ITV's editorial remit. In my view, the practical difficulties as regards ITV's lack of ability to interfere with Mr Holmes' actions during a live broadcast do not render the relevant obligations and ITV's right to overrule Mr Holmes any less contractually binding. Clearly, ITV could not physically prevent Mr Holmes from saying what he wanted live on air and could not impose any sanction for failing to comply with ITV's editorial direction until after the event. However, had Mr Holmes failed to comply, for example, by repeatedly failing to adhere to requests from ITV, ITV would be entitled to terminate the relevant agreement on the basis that he was in material breach of the contractual terms. I cannot see that the binding effect of contractual provisions is affected by the fact that (as must be the case in very many situations) a contracting party cannot take physical or pre-emptive action to prevent the other party acting in breach of contract.

243. Similarly, I do not consider that the binding legal effect of the restrictions on Mr Holmes' other activities (in particular as regards his commercial activities) is affected by any failure on the part of ITV to enforce these provisions strictly. It is entirely realistic to suppose that ITV would have sought recourse to these provisions where it considered it necessary given the evident importance of the requirements to ITV (see, in particular, [89]).

244. In my view it is not relevant to the analysis that Mr Holmes considered that (a) he did not work to the terms of the agreements and that the agreements were not worth the paper they were written on or (b) the above contractual restrictions on what he could do outside his work on This Morning were simply what he would expect and did not cause him any problem (see [79] and [88]). For the reasons set out above, I take Mr Holmes comments as regards the lack of impact of the contractual provisions on him as confirmation simply that, in practice, the contractual terms were not enforced in a number of respects. Moreover, even on the robust approach advocated in *Autoclenz*, Mr Holmes' own perceptions, as expressed some time after the relevant periods, as to his reasons for abiding by the provisions or not doing so are not material to the required contractual analysis.

245. Nor does the fact that there are industry wide standards under the Ofcom code negate the existence of the relevant contractual obligations. The fact is that, in this case, the obligation to comply with the relevant standards was made a contractual requirement.

Significance of control

246. It is established in the case law, as set out in detail above, that the absence of control over the precise manner in which an individual carries out his work is not usually determinative that the person is self-employed where the very nature of the work and specialist skills and expertise required are not of a type which the client can control as is the case in many professions. In my view, Mr Tolley was right to say that any lack of control by ITV over the manner in which Mr Holmes exercised his skills in presenting This Morning is analogous to the situation where, for example, a football club lacks control over its players during a game or a hospital lacks control over a surgeon carrying out an operation. The level of autonomy Mr Holmes had was due to the nature of the programme and ITV's confidence in him as a highly skilled and experienced presenter.

247. On that basis, that ITV lacked the ability, in an immediate sense, to control Mr Holmes' actions during a live broadcast, does not of itself mean that the assumed relationships cannot be categorised as employment contracts. For a contract to be in the employment field, what matters "is lawful authority to command so far as there is scope for it" and there "must always be some room for it, if only in incidental or collateral matters" (per Mackenna J in *Ready Mixed Concrete*). As Buckley J put it in the *Johnson Underwood Ltd* case that means that even as regards skilled workers at least "some sufficient framework of control must surely exist". As he said, the question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether "ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions". Similarly, in *Trout v Whitebeck* the court held that whilst many workers, especially those who are professional and skilled have substantial autonomy in the work they do, they may still be employees where the client retains "the right to step in and give instructions". It was noted that the key question is not whether in practice the worker has day-to-day control of his own work and that all aspects of control are relevant.

248. The decision in *Matthews* demonstrates that in determining whether such a sufficient framework of control exists, the practical realities of the context of the working relationship are relevant. As Buckley J noted in *Montgomery*, there is sufficient flexibility in the approach set out in the case law for the view of the courts and tribunals on what suffices as control (and mutuality) to develop over time as society and methods of working change provided that the court keeps in mind "a clear framework or principle" as to which he thought the often quoted passage from *Ready Mixed Concrete* was still the best guide.

249. With these principles in mind, in my view, having regard to the particular context in which Mr Holmes was working and the nature of his skilled specialist presenting work, as a result of the combination of contractual rights set out above, ITV had a sufficient framework of control over him to place their assumed relationship with him in the employment field.

250. I do not accept Mr Maas argument that, ITV did not have a sufficient framework of control of the required kind on the basis that in complying with the agreed terms of the agreements Mr Holmes was simply performing "mutually agreed tasks" and that

ITV thereby, in effect, had control only over the "ingredients" which went into the programme and not over the performance of Mr Holmes' services in turning those "ingredients" into an entertainment.

251. It is established in the case law set out above that it is contractual control, as usually found in the written terms of the contract, which is relevant to the analysis of the relationship between the parties as one of employment or self-employment (see, in particular, the comments in *Ready Mixed Concrete* set out at [131] above). The very point of the exercise is to assess the nature of the rights and obligations created under the contractual arrangements in that respect (as well as in all other relevant respects). For the reasons already given, the fact that ITV could not in all circumstances effectively exercise its contractual editorial rights of control due to the inherent practical difficulties in doing so in a live show, does not prevent those rights from being real binding rights which, together with the other relevant rights, give ITV ultimate authority over Mr Holmes in the performance of his services.

252. In effect Mr Maas' argument involves the suggestion that, like the painter in the example he gave, Mr Holmes was selling a product to ITV, in his case, in the form of the "entertainment" he created from their "ingredients" (and in the painter's case in the form of the finished painted room). I note, however, that in *Hall v Lorimer*, Nolan LJ rejected the submission that the fundamental distinction between a contract of employment and of self-employment is that in the first case the contracting party sells his skill or labour and in the second he sells the product of his labour. He said, that would have provided a short and simple answer in the earlier cases and he found that distinction "very hard to apply in the case of a professional man": He thought that surely "the self-employed barrister advising in his chambers or the doctor advising in his surgery is selling his skill and labour and not its product".

253. In my view, similarly, it is difficult to see that Mr Holmes can be viewed as selling a product to ITV in the form of an entertainment he creates. This is not akin to a situation where an independent production company provides a broadcaster, such as ITV, with a finished product in the form of a television programme. Whilst in presenting the show Mr Holmes may well make his own mark on what is aired to the public due to his own particular presenting style and use of his own words and deciding on his own questions for interviewees, ultimately he operated as part of a team. He did not provide all that was required to produce the show but rather provided his personal services to ITV to play his part in the teamwork required to deliver the show to the public. In doing so, he was subject to ITV's control albeit that there were practical constraints upon how certain aspects of that control could be exercised.

254. Unlike in *Matthews*, the various restrictions and requirements imposed on Mr Holmes, whether as regards ITV's editorial control or as regards his ability to undertake other activities, were directly related to the performance of his services for ITV. By their nature it is clear that they were expressly aimed at ensuring he was perceived to be impartial and not aligned with any commercial interests which could cause a conflict for ITV in its commercial relationships thereby ensuring that he was an appropriate person to present This Morning on ITV. In *Matthews*, on the other hand, Mann J noted that the relevant controls largely related to matters unrelated to the entertainers work on the cruise ship as entertainers.

255. I note Mr Maas' point that the fact that ITV had the contractual right to decide the time and place where Mr Holmes was to perform the services is not relevant on the basis that the time and place was dictated by nature of his work; necessarily he had to present the show at the time it was scheduled to be broadcast from the studio. I accept that in that context the rights are of limited relevance. However, ITV's rights extended beyond that. Under the assumed contracts, ITV could decide on what particular days Mr Holmes was required to present the show and could require him to attend other locations outside the studio. Whilst these rights are not of themselves determinative, they are to be taken into account, in combination with the other contractual rights ITV had, in building up the bigger picture.

Overall conclusion

256. In conclusion, bearing in mind this is not a mechanistic exercise but one of looking at all factors in the context of the provision of Mr Holmes' highly skilled presenting services in the live broadcasting of This Morning, I consider that the overall picture is that the assumed relationships between him and ITV were ones of employment for the reasons set out below and on the basis of the conclusions on mutuality and control set out above.

257. Under the assumed arrangements, Mr Holmes was engaged by ITV to provide his presenting and related services over a period of four years (barring the gaps in the arrangements in each year except the first of around six weeks from mid July to early September) under a series of assumed contracts made on very similar terms. Overall, as at the time of the hearing, Mr Holmes had presented the show for at least 12 years (and on his evidence for 15 years).

258. Under each assumed contract Mr Holmes was required to work on a minimum number of shows and was entitled to receive payment if a show was cancelled and could not be rescheduled (unless that was due to his unavailability or the events set out in the termination provisions). In each assumed contractual period, there was in fact a regular and consistent pattern of Mr Holmes appearing on a substantial number of shows on Fridays and Mondays to Thursdays at times such as school holidays (see [45] to [48]). As set out above, Mr Holmes was subject to ITV's ultimate right of control in the performance of his services on this regular and consistent basis and was subject to restrictions on his other activities.

259. In *Montgomery v Johnson Underwood Ltd* (as cited in *Cotswold*) Buckley J recognised that there is flexibility in how the mutuality and control test can be interpreted in the light of changing conditions in society and the nature and manner of carrying out employment. However, he said that such "elastic" as there is cannot be stretched so far that it avoids the need for work to be provided personally; "service", meaning the obligation to work, personally, for another, remains "at the heart" of the employer/employee relationship. In this case, it is clear that it was key to the arrangements that Mr Holmes was obliged personally to provide his services to ITV. It was expressly stated in the agreement that Mr Holmes' participation in the programme throughout the term (in the manner set out in the agreement) was integral to the programme and a material term of the agreement (see [23(8)]). Mr Holmes was not permitted to assign or subcontract his obligation under the agreements (see [34]). ITV had to the right to terminate (or suspend) the agreements due to Mr Holmes' inability personally to render the services as set out at [33]. Mr Holmes recognised

that ITV wanted him personally to provide his services and, in the meeting notes, ITV are recorded as confirming that RWG was not able to substitute any other party if Mr Holmes was unavailable (see [56]).

260. I do not consider that the significance of the above factors is affected materially by the fact that, whilst ITV had an option to renew the agreement Mr Holmes had no guarantee that ITV would exercise the option, that he considered each renewal negotiation was painful and that there was in each year (except the first) a gap in the contracting arrangements with RWG:

(1) In *Lee Ting Sang* (as referred to by Nolan LJ in *Hall v Lorimer*) the court noted that the risk of finding further engagements is one faced by all casual employees. I note that individuals treated as employees employed under longer term contracts would be in a similar position if the contract is subject to termination on short notice.

(2) It is established in *Windle* and *Stringfellow* that, whilst the focus must be on the nature of the relationship during the period when work is being done, the absence of mutuality outside that period may shed light on the character of the relationship within it. The fact that a person supplies services on an assignment by assignment basis may tend to indicate a degree of independence or lack of subordination that is incompatible with employment status and/or demonstrate that periods when mutuality is in place are casual, sporadic or occasional only and, therefore, in the nature of self-employment. Its relevance will depend on the particular facts of the case; but it should not be excluded from consideration at all.

(3) In my view, the regular gap in this case in the contractual arrangements of around six weeks does not of itself indicate that those arrangements were in the nature of self-employment. The fact remains that Mr Holmes worked on This Morning during a series of relatively lengthy contractual periods of 12 months, as regards the first year and, 10 to 11 months in the other years, that the mutuality requirement was satisfied throughout these periods and that he in fact worked on the show during these periods on a regular and consistent basis in return for substantial amounts of income. In these circumstances, the relatively short gap in the contractual periods, which was regular in the sense of occurring at more or less the same time in each relevant year, does not affect the quality of the relationship during the contractual periods; it can hardly be said that such a short and regularly times gap renders the engagements during the contractual periods as casual, occasional or sporadic.

(4) Moreover, I note that it appears that in fact Mr Holmes did present on the show in these gaps under an arrangement with a different PSC. I do not have details of that arrangement or why it was entered into. However, it does cast the gap in the arrangements with RWG in a somewhat different light that a pattern of work in fact continued during that time.

261. It seems to me that overall this pattern of engagement on the terms highlighted above has the quality and characteristics of a part time employment rather than, as Mr Maas argued, an engagement carried out as part of or as an incident of a broader self-employed business.

262. It is plain from *Davies v Braithwaite* as interpreted in *Fall v Hitchen* and approved in *Hall v Lorimer*, that an engagement undertaken by a person who carries on some self-employed activities may be a "post" or "employment" if it has the necessary quality as such. It is not the case, as Mr Maas seemed to suggest, that a person who carries on a profession such as, in *Davies v Braithwaite* as an actress or here, as a presenter and journalist, at least some of which are accepted to be carried out on a self-employed basis necessarily carries out all engagements as an incident of that business. Whether a particular engagement falls to be regarded as part of such a business is to be determined by an analysis of its precise nature. In that context, I agree with Mr Tolley's view that whether Mr Holmes was "part and parcel" of ITV is of no real assistance when assessing whether he had a part time employment or self-employment with ITV (see [221]).

263. My view is that, in applying that approach in the context of assessing the nature of the assumed relationships, the tribunal must take account of all other activities which Mr Holmes carried out, whether he did so through RWG (or another PSC) or in his own name as though he provided all such services himself direct to the client. Otherwise assessing whether a person is in business on his own account is unworkable in this context. However, even taking account of the full range of other activities Mr Holmes carried out, including his work on Sunrise, there are a number of problems with viewing his work on This Morning as part of a wider self-employed business activity:

(1) Whilst HMRC appear to accept that income from limited or one-off engagements which Mr Holmes undertook were properly to be taxed as income from a self-employment, they did not accept that it was established that the income from Sunrise was of that nature. The tribunal was not presented with sufficient information to make any assessment as to the true nature of that relationship for tax purposes.

(2) As acknowledged in *Hall v Lorimer*, it is difficult to apply the test as to whether a person is in business on his/her own account in the context of a person providing professional skilled services. For that reason Nolan LJ said that, "there is much to be said" in such cases, for bearing in mind "the traditional contrast between a servant and an independent contractor" and that the "extent to which the individual is dependent upon or independent of a particular pay master for the financial exploitation of his talents may well be significant". In that context, whilst Mr Holmes was not entirely dependent on ITV for his income it is relevant that RWG/Mr Holmes received a substantial proportion of its/his income from Mr Holmes work from This Morning on a consistent basis throughout the relevant period.

(3) In any event, for the reasons set out below, Mr Holmes did not display any of the characteristics of being in business on his own account as regards his work for ITV.

264. I note that the hallmarks of self-employment as regards a professional person's activities may not accord entirely with those applicable to tradesmen. A professional's ability to profit from his work may be restricted to the ability to earn more by working better or faster or enhancing his reputation. In *Hall v Lorimer*, Nolan LJ appeared to accept that factors indicating that Mr Lorimer was a self-employed vision mixer were

that he had an office, he exploited his expertise in the market place and bore his own financial risk (greater than that of an employee) in accepting the risk of bad debts and outstanding invoices and had the opportunity of profiting from being good at being a vision mixer. He also noted that Mr Lorimer incurred substantial expenditure in the course of obtaining and organising his engagements which was deductible on a self-employed basis and that the most "outstanding feature" was that he "customarily worked for 20 or more production companies and that the vast majority of his assignments…lasted only for a single day".

265. In this case Mr Holmes' appearance on This Morning may have increased his marketability as a presenter/journalist in a general way but no specific evidence was produced to support any such contention. Otherwise, given he received a fixed fee for his work on the show, Mr Holmes had no real ability to increase his profit from that work (except in the sense that he may be likely to be re-engaged assuming he continued to do a good job) and did not have any real economic risk in relation to it. He did not have a risk of bad debts as regards ITV akin to the risk faced by an individual working, as in Mr Lorimer's case, for multiple clients on multiple short-term assignments. During the term of each contractual engagement, it appears that ITV paid him consistently throughout as invoiced under invoices produced by ITV on RWG's behalf. There is no evidence that he/RWG incurred significant expenditure in relation to his work for ITV. He used his own earpiece but otherwise he purchased no other equipment. His travel and clothing expenses were covered by ITV as was insurance. He had the benefit of the provision of a car by ITV to bring him to and from the studios. He/RWG no doubt incurred fees charged by his agent but presumably that would be the case whether he was engaged on a part time self-employed or employed basis. Mr Maas did not point to any other expenditure attributable to Mr Holmes' work for ITV.

266. Moreover, I do not accept that, as Mr Maas argued, Mr Holmes was in the same or a similar position as Mr Lorimer on the basis that he undertook a series of short engagements for ITV on which he worked typically for only two hours per week (when he presented the show on Fridays):

(1) For the reasons set out above, Mr Holmes' was contractually required in effect to prepare for each programme so that he could present the show as a first class presenter would albeit that it was largely left to him how and where he prepared. He, therefore, clearly spent more than two hours in total in preparing for and presenting each show.

(2) More importantly, unlike Mr Lorimer, Mr Holmes was not engaged to work for ITV on This Morning under a series of separate arrangements for each show; he was engaged under on-going assumed contracts which remained in place for 12 or nearly 11 months at a time to provide his services during that time on at least the minimum number of shows specified (so that the mutuality requirement was met throughout the contractual period) (and see the comments at [260]).

267. I regard ITV's rights to terminate and suspend the assumed contracts as consistent with an employment relationship. I note that in *Market Research* Cooke J said (at 187A) that an appointment to do a specific task at a fixed fee is not inconsistent with a contract being a contract of service. He also considered in effect

that there is no material distinction between rights to terminate for breach in a contract of service and that for services except that in the first case "the master's right is spoken of as a right of dismissal - a peculiarity of words which makes no difference to the substance" (see 187D).

268. I note that the assumed contracts do not provide for Mr Holmes to receive any benefits, such as sick or holiday pay or pension benefits. I do not agree with HMRC's view that this is of no relevance on the basis that, under the actual arrangements in place, such matters would be dealt with as between RWG and Mr Holmes (under an implied employment contract) and not between ITV and RWG. As set out above, I do not accept that there was an implied employment contract between RWG and Mr Holmes. In any event, whether that is the case or not, I can see no reason why ITV could not have agreed with RWG to provide such benefits to Mr Holmes; the fact that Mr Holmes not a party to the actual contract is no bar.

269. However, I do not consider the absence of provision for benefits in the assumed contracts a material consideration pointing against employment. As HMRC pointed out, under a direct contractual relationship with ITV Mr Holmes would have the statutory rights applicable to workers in relation to some of these matters. I agree that this must be equivocal given that a person can be a worker whether employed or self-employed. I cannot see that, under the principles set out in caselaw, the provision of any additional enhanced benefits, in excess of the statutory minimum, is an integral part of an employment relationship. In my view, the fact that a putative employer has chosen not to provide such benefits does not of itself indicate that a relationship is not one of employment where the other substantive legal rights and obligations of the parties evidence the contrary.

270. In my view none of the other provisions of the assumed contracts are inconsistent with an employment relationship. I note the following as regards the points made by Mr Maas at [207]:

(1) I do not agree with Mr Maas' view that the provisions requiring Mr Holmes to work on certain dates, for Mr Holmes and to be as flexible and to provide his services in a first class manner in full and willing cooperation with requests made and the numerous warranties would not be required in an employment contract on the basis that an employee would have to behave in the specified way in any event. It seems to me that in what is essentially a contract for the provision of services on a part time basis it is entirely consistent with an employment relationship, as viewed in a modern flexible environment, for such provisions to be included.

(2) The VAT and billing arrangement reflects that the stated intention set out in the agreements was that the arrangement was one of self-employment. However, as set out in *Dragonfly*, the parties stated intentions as regards the status of the relationship is rarely relevant. I cannot see any reason for attaching any weight to that statement in this case.

(3) The fact that it may well have been as much in Mr Holmes' interests to provide creative input and to promote the show does not detract from the fact that he was subject to binding contractual obligations to do so.

(4) I do not consider the statement that Mr Holmes participation is integral to the Programme to be odd in the context of an employment. As set out above,

this statement demonstrates how important Mr Holmes' personal services were to ITV.

(5) I cannot see that a screen credit as regards the show would be of importance to Mr Holmes only as a self-employed person. A screen credit is surely as helpful as regards finding other engagements whether he is engaged by ITV on a part time basis under a self-employment or an employment.

Conclusion

271. For all the reasons set out above, I have concluded that IR35 applies to the arrangements in place in each relevant tax year such that RWG is in principle liable to income tax and NICs under those provisions. Accordingly, the appeal is dismissed in principle.

272. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 21 FEBRUARY 2020