[2021] UKFTT 0091 (TC)

TC08074

INCOME TAX and NICs – decision that Appellant self-employed during period of engagement – whether relationship one of employment or self-employment – evidence supports conclusion that Appellant was self-employed – decision affirmed and appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/01433

BETWEEN

GARETH PHILLIPS **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
MOHAMMED FAROOQ

The hearing took place on 22 and 23 March 2021. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions resulting from the COVID-19 pandemic. The documents to which we were referred are described in the decision notice.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Ian Wadhams, Ingenhaag LLP, for the Appellant

Loretta McLaughlin, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Phillips appealed against a decision of HMRC dated 10 December 2015 (the "Decision") made under s8(1) Social Security Contributions (Transfer of Functions) Act 1999 ("SSCTFA 1999") that he was self-employed in respect of his engagement with City & General Direct (UK) Limited ("C&G") between 28 May 2010 and May 2013.

2. We heard evidence from Mr Phillips and HMRC called Ronnie Thompson, the managing director of C&G, as a witness (as well as HMRC's status inspector). On the basis of the evidence before us, and for the reasons set out below, we have concluded that the evidence strongly supports HMRC's conclusion that Mr Phillips was self-employed. The Decision is affirmed and Mr Phillips' appeal is dismissed.

BACKGROUND FACTS

3. Unsurprisingly given the nature of the dispute between the parties, there was significant disagreement as to the events, the meaning of email exchanges and the details of the relationship between Mr Phillips and C&G. We have made our reasoned findings of facts in relation to such matters under "Disputed Facts" below. We set out here the facts which were common ground – by which we mean either that they were acknowledged to be agreed, or no challenge was made to them. We have included within this section the involvement of HMRC (ie the timing of Mr Phillips' approach to HMRC for assistance with obtaining documentation from C&G and then the status enquiry).

4. C&G is a broker and provided niche bespoke insurance products to the market. The directors of the company are Mr Thompson and Peter Riley. C&G was authorised by the Financial Services Authority ("FSA") to carry out certain insurance business. (We are aware that the regulatory functions of the FSA were transferred to the Financial Conduct Authority in 2013, and there is thus an overlap with the period covered by the Decision. We refer throughout to the FSA, and note that there was no evidence from either party that the position they described changed at any time.)

5. Mr Thompson and Mr Phillips first came into contact in 2009 (and Mr Thompson was Mr Phillips' main contact at C&G during the engagement which is under dispute). An unrelated company, Premium Medical Protection ("PMP") was promoting a medical malpractice insurance product and Mr Phillips had been working with PMP to develop that product. At that time Mr Phillips was engaged by another broker, Integro. PMP was not authorised by the FSA and could not act as an insurance intermediary itself. C&G did have the required permissions with the FSA and acted as the authorised umbrella by which PMP's product could be delivered to the market.

6. That relationship between C&G and PMP came to an end around May 2010. The explanations for this differed. At that time C&G decided to try to provide a medical malpractice product into the market directly. This would involve identifying an insurer who was prepared to underwrite the scheme, and reach a binding authority agreement (referred to as a "binder") with that insurer as to the relevant terms. When a client (in this case the product was being marketed to surgeons) purchased a policy, C&G would receive a commission on that policy.

7. C&G did not have the contacts or experience themselves to identify potential insurers or negotiate the terms of a binder with them. It was in this context that they engaged with Mr Phillips, who had the contacts in the Lloyds insurance market and both experience and expertise.

8. The terms on which Mr Phillips was engaged were disputed. We address here an outline of the chronology of the working relationship (and the use of the terms engagement and working relationship should be read as neutral to the underlying issue of whether the relationship was employment or self-employment):

(1) C&G started working with Mr Phillips at the end of May 2010.

(2) Mr Phillips had identified Newline as an insurer interested in underwriting the scheme. He negotiated the terms of a binder with them over the course of several months. In November 2010 Mr Phillips told Mr Thompson that he had secured an agreement with Newline.

(3) Any finalised agreement needed to be signed by Mr Thompson on behalf of C&G. Mr Thompson only became involved once the terms were largely agreed. The terms which Mr Phillips presented to Mr Thompson as having been agreed with Newline included a key man clause, which provided that Newline had the right to terminate the contract if Mr Phillips ceased to be an employee or director of C&G. We heard differing evidence as to the origins of this clause and as to whether or not it was market standard. We address that in Disputed Facts below.

(4) No business was written under this binder with Newline. Mr Thompson referred to most surgeons having a renewal date of 1 April, from which we infer that he was not expecting that policies would be written immediately. However, in March 2011 Newline terminated the agreement.

(5) Mr Phillips engaged with another Lloyds broker, WT Butler, to see if they could help secure a scheme for C&G. This was around Summer 2011.

(6) Mr Phillips negotiated a binder with another insurer, AmTrust. Some business was written under that scheme, in that some policies were purchased by surgeons from C&G, and this generated commissions for C&G in early 2012.

(7) However, around May 2013 (at the latest) AmTrust terminated the agreement with C&G. It was at this time that C&G and Mr Phillips parted company.

9. There was no signed written contract between Mr Phillips and C&G, although possible relationships between the two parties were considered at various times. The hearing bundle included unsigned versions of both a Contract for Services and an Employment Contract.

10. Mr Phillips predominantly worked from home, at the Lloyd's Building in London or at the offices of the insurers with whom he was negotiating. C&G is based in Leeds. Mr Phillips did not have desk allocated for his use in the Leeds office, nor was he given a staff or office handbook.

11. C&G provided Mr Phillips with the following:

(1) a laptop and printer;

(2) a C&G business card which described him as "Sales Director"; and

(3) a C&G credit card issued by HSBC with a £500 limit.

12. Mr Phillips was not authorised or approved by the FSA in his individual capacity, nor did he hold professional indemnity insurance ("PII"). Reference was made by both parties to C&G having claimed on its own PII policy in respect of Mr Phillips' conduct on one occasion. However, there was no evidence before us as to the terms of that policy or the coverage provided.

13. C&G made payments of £77,500.00 to Mr Phillips during the period covered by the Decision. This includes one payment of £2,000 which had been made from an account of Mr Riley rather than that in C&G's name.

14. The Decision relates to the period from 28 May 2010 to May 2013. HMRC became involved relatively early on during this period of Mr Phillips' engagement with C&G. On 10 October 2011, Mr Phillips wrote to HMRC stating that he had experienced difficulty in obtaining his P60 from his previous employer (as he referred to C&G), which he needed to complete his self-assessment return.

15. HMRC wrote to C&G on 20 October 2011 stating that it had not provided Part 1 of form P45 in respect of Mr Phillips. On 31 October 2011, C&G responded to HMRC, stating that Mr Phillips had never been employed by them. They provided no additional information or explanation.

16. On 9 December 2011 HMRC sent a detailed letter to Mr Phillips. The letter advised that the matter had been passed to a "Status Inspector" to consider Mr Phillips' former employment status. That letter stated that C&G had denied employing him and asked for various information and set out various questions regarding the engagement with C&G.

17. On 7 February 2012 Mr Phillips called HMRC, speaking to Officer Hirons, and stated that he was due to have a meeting with C&G on 3 March 2012 to discuss some more work with them and he proposed to discuss his employment status from June 2010 to March 2011 at the meeting. Mr Phillips requested that HMRC suspended their enquiries until after the meeting took place. Officer Hirons said that would be fine.

18. On 12 March 2012 HMRC wrote to Mr Phillips and asked whether he wished for HMRC to determine his employment status for the period June 2010 to March 2011. On 14 March 2012, Mr Phillips emailed Officer Hirons and stated that the meeting with City & General had not materialised as he had hoped and he was finalising his response to HMRC's questions. That response was sent by Mr Phillips on 28 March 2012.

19. On 21 May 2012 Officer Hirons updated Mr Phillips and stated that C&G did not appear to have engaged him under a contract of employment, and that he would contact Mr Thompson to discuss the terms and conditions under which he was engaged. He also asked for further information about payments Mr Phillips had received.

20. There was further correspondence between Mr Phillips and Officer Hirons in June and July 2012, and in August 2012 Officer Hirons chased for information which had previously been requested.

21. On 3 September 2012, Mr Phillips confirmed that he was still undertaking work on behalf of C&G, although a new company had been set up with effect from 1 August 2012. Officer Hirons asked for further details on 29 October 2012. Nothing was received and on 6 February 2013 Officer Hirons told Mr Phillips that he intended to close his papers on the enquiry as the information requested had not been provided.

22. On 19 June 2013 Mr Phillips emailed Officer Hirons, explaining that the letter of 6 February 2013 had just been found unopened with his wife's papers, and apologised for not having responded.

23. The matter was re-opened within HMRC, and Officer Hirons sought information from C&G (on 2 July 2013, 2 August 2013 and 27 August 2013).

24. On 27 August 2013, Ian Wadhams of Ingenhaag LLP wrote to HMRC and advised that he had been appointed to act on behalf of Mr Phillips. We refer to the contents of this letter under Disputed Facts.

25. Officer Hirons responded on 29 August 2013. That letter referred to the fact that he was waiting for information from C&G.

26. On that same date C&G replied to Officer Hirons, re-iterating that Mr Phillips had been self-employed and enclosing the terms of the agreement dated 8 December 2010 that states that Mr Phillips would be paid on a tiered commission basis with no salary entitlement.

27. On 25 October 2013 Officer Hirons provided his informal opinion on the employment status of Mr Phillips and concluded that "based on the evidence and statements submitted by both parties to this working arrangement, I have come down on the side of self-employment as being the correct employment status for GP." That was sent to both C&G and Mr Wadhams.

28. On 21 November 2013 Mr Wadhams disagreed with Officer Hiron's status opinion, and stated Mr Phillips was due to attend his Employment Tribunal hearing against C&G.

29. Mr Phillips' claim against C&G was for unfair dismissal, breach of contract, holiday pay and unlawful deductions. That appeal was heard by the Employment Tribunal in December 2013. In its decision dated 20 January 2014 (the "Employment Decision") the Employment Tribunal struck-out Mr Phillips' claims. He was found to be neither an employee nor a worker of C&G.

30. Correspondence ensued between HMRC and Mr Wadhams. On 2 May 2014 Officer Hirons wrote to Mr Wadhams stating that he would be arranging meetings with Mr Thompson and Mr Phillips (separately) to obtain further information/clarification:

(1) HMRC (Mike Garcia) met with Mr Thompson on 30 July 2014; and

(2) on 15 December 2014, HMRC (Mark Jones) met with Mr Phillips and Mr Wadhams.

31. There was then further correspondence. On 31 March 2015 Officer Hirons informed Mr Wadhams that the interviews had given him no reason to change his opinion that the relationship was one of self-employment. After following HMRC's processes, on 10 December 2015, HMRC issued the Decision.

32. On 21 December 2015 Mr Wadhams appealed against the Decision and requested a review. On 5 January 2016, Officer Hirons provided HMRC's view of the matter letter and on 10 February 2016 HMRC set out the outcome of their statutory review, which upheld the decision.

33. On 7 March 2016 Mr Phillips gave notice of appeal to the Tribunal.

EVIDENCE

34. We had a hearing bundle of 367 pages, a bundle of authorities and both parties had provided us with a skeleton argument (that of Mr Phillips attached some additional evidence namely email correspondence, photocopies of his business card and credit card).

35. There were two witness statements on behalf of Mr Phillips – that of Mr Phillips himself, dated 16 August 2016, and one from Philip Armstrong dated 9 August 2016 who was described as a business producer with a Lloyd's Broker.

36. The witness statement from Mr Armstrong was very short and comprised mainly of some generic opinions based on meetings he had with C&G. Mr Armstong did not attend the hearing and could not be cross-examined on his evidence. We place no weight on this evidence.

37. Mr Phillips was cross-examined and answered questions from the Panel. We did not consider Mr Phillips to be a credible witness:

(1) Several of his assertions were completely unsupported by documentary evidence and contradicted by other witness evidence, eg:

(a) He said he provided daily updates of his activities by phone or email to Mr Thompson, and set out his plans for the week ahead. There was not a single example of such a daily update email, or reference to one, and the tenor of the correspondence before us did not support an inference that Mr Phillips and Mr Thompson were speaking regularly.

(b) When being asked about whether there was a written agreement of his employment, he said that he had not considered the draft provided by C&G (a two-page standard form) to be suitable so had drafted his own 14-page agreement based on that he had previously used at Aon and had provided this to C&G. The bundle not include any documentary evidence referring to this having been done (eg by referring to it in the context of rejecting other contracts provided by C&G, or chasing Mr Thompson for him to sign it and provide a copy to Mr Phillips). Furthermore, the existence of such a document was first mentioned by Mr Phillips when giving evidence before us – it had not been mentioned in the years of correspondence with Officer Hirons (which had included a detailed letter from Mr Phillips on 28 March 2012 which commented on the inadequacy of the draft employment contract provided by C&G), at the meeting with HMRC in 2014, there is no reference to it in the Employment Decision, and it is not mentioned in Mr Phillips' witness statement.

(2) We did not consider his explanation as to why he had re-engaged with C&G after they had told HMRC (in October 2011) that he had not been employed by them to be plausible. He stated that Mr Thompson had apologised for the mistake and that he (Mr Phillips) considered that Mr Thompson had rectified this (ie that C&G now agreed that he was an employee, was deducting PAYE, etc). This is completely unrealistic – the payments being made to Mr Phillips were not regular monthly payments, they were always multiples of £500 (whereas amounts of salary from which tax has been deducted generally leave an employee with odd amounts going into the pence), there were no payslips, there is no documentary evidence of him asking for payslips (or pension statements) and emails (eg in January 2012) continued to show differing proposals being made. It is not credible for Mr Phillips to maintain that he considered that his employment status was resolved (as an employee) between himself and C&G.

38. The consequence of this is that we have placed little weight on Mr Phillips' evidence save to the extent that it is corroborated by other evidence.

39. There were two witness statements from witnesses appearing on behalf of HMRC. We had a statement from Stuart Hirons, Status Inspector with HMRC, dated 8 July 2016. Officer Hirons attended the hearing. Mr Wadhams chose not to ask him any questions by way of cross-examination. We accept Officer Hirons' evidence.

40. We also had a witness statement from Mr Thompson dated 28 July 2017. Mr Thompson was cross-examined and answered questions from the Panel. We considered that Mr Thompson's evidence in his witness statement and given orally was consistent with the documentary evidence and preferred it to that of Mr Phillips.

41. The challenges from Mr Wadhams to Mr Thompson were as to whether C&G had asked Newline to remove the key man clause from the draft agreement and whether C&G had

a staff handbook at the relevant time. Mr Thompson acknowledged that although C&G now had a staff handbook he could not recall if they would have done so from 2010 to 2013, agreeing that C&G had mainly been family members at that time. He was adamant that Mr Phillips had not completed the "New/Amend Employee" form, had not sent him a draft employment contract at any time, had not asked him for payslips and had not provided daily updates. We accept Mr Thompson's evidence.

42. The hearing bundle included the Employment Decision, which had been issued in 2014 and found that Mr Phillips was not an employee or worker of C&G. HMRC submitted that this was highly persuasive. We do not know what evidence was before the Employment Tribunal, nor did we hear the cross-examination of the witnesses. Given that we heard evidence from those same witnesses, we have relied on the evidence they gave to us. The only regard we have had to the Employment Decision is when considering the consistency of explanations which have been provided (notably as to whether Mr Phillips sent a draft employment contract to C&G).

RELEVANT LEGISLATION

43. Section 2(1) of the Social Security Contributions & Benefits Act 1992 defines the phrases "employed earner" and "self-employed earner":

> "(1) (a) "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings; and
>
> (b) "self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)."

44. Section 8(1) SSCTFA 1999 (pursuant to which the Decision was made) provides:

> "(1) Subject to the provisions of this Part, it shall be for an officer of the Board-
>
> (a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,
>
> (b) to decide whether a person is or was employed in employed earner's employment for the purposes of Part V of the Social Security Contributions and Benefits Act 1992 (industrial injuries),
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,
>
> (d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,
>
> …"

45. The appeal right is then set out in SSCTFA 1999:

> "11. Appeals against decisions of Board
>
> (1) This section applies to any decision of an officer of the Board under section 8 of this Act or under regulations made by virtue of section 10(1)(b) or (c) of this Act (whether as originally made or as varied under regulations made by virtue of section 10(1)(a) of this Act).
>
> (2) In the case of a decision to which this section applies —

(a) if it relates to a person's entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay, statutory adoption pay, statutory shared parental pay or statutory parental bereavement pay, the employee and employer concerned shall each have a right to appeal to the tribunal, and

(b) in any other case, the person in respect of whom the decision is made and such other person as may be prescribed shall have a right to appeal to the tribunal.

12 Exercise of right of appeal

(1) Any appeal against a decision must be brought by a notice of appeal in writing given within 30 d y after the date on which notice of the decision was issued.

(2) The notice of appeal shall be given to the officer of the Board by whom notice of the decision was given.

(3) The notice of appeal shall specify the grounds of appeal."

46. Regulation 3 of the Social Security Contributions (Decisions and Appeals) Regulations 1999/1027 provides as follows:

"3 Decisions - General

(1) A decision which, by virtue of section 8 of the Transfer Act or Article 7 of the Transfer Order, falls to be made by an officer of the Board under or in connection with the Social Security· Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992 the Jobseekers Act 1995 or the Jobseekers (Northern Ireland) Order 1995 -

(a) must be made to the best of his information and belief, and

(b) must state the name of every person in respect of whom it is made and-

(i) the date from which it has effect, or

(ii) the period for which it has effect.

(2) Where an officer of the Board has resolved to make a decision of a kind referred to in paragraph (1), he may entrust to some other officer of the Board responsibility for completing the procedure for making the decision, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the decision on any person named in it.

(3) In the case of a decision to which section 11 of the Transfer Act or Article 10 of the Transfer Order applies, other than one which relates to a person's entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay, statutory shared parental pay or statutory adoption pay, each person who is named in the decision has a right to appeal."

PRINCIPLES FROM THE AUTHORITIES

47. Although the authorities give general guidance on the factors to be considered when deciding whether an earner is employed or self-employed, it is clear that the question can only be answered by examining all of the facts of the case. Nolan LJ in the Court of Appeal in *Hall v Lorimer* [1994] 1 W.L.R. 209 [at 216] specifically approved of the comments made by Mummery J in the same case in the High Court [1992] 1 W.L.R. 939 [at 944] where he said:

"This is not a mechanical exercise of running through items on a checklist 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."

48. Many of the cases take as their starting point the tests set out by Mackenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 2 QB 497 [at 515C-D] for the existence of a contract of service:

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

49. Other cases place more weight on the test suggested by Cooke J in *Market Investigations v Minister of Social Security* [1969] 2 QB 173 [at 184-185]:

> "… 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?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. 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 that factors, which may be of importance, are such matters as 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."

50. In *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, Buckley J considered at [19] the position of employees with a high degree autonomy:

> "19. MacKenna J made plain [in *Ready Mixed Concrete*] that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as to the existence of a contract of service can be answered. As to (ii) he 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. Society has provided 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 or controlling management 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. MacKenna J

> cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which I take the first few lines only:
>
> '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.'"

51. These cases set out the general approach which we must follow. We must look at the overall effect of all of the details and assess the picture which is painted by those details.

DISPUTED FACTS

52. In considering the factual questions in issue between the parties we have borne in mind the range of factors or indicators which are potentially relevant to the consideration of the question of employment versus self-employment. We make our findings of fact here and assess their significance in the Discussion.

Financial circumstances behind initial engagement

53. Mr Thompson stated that, following Mr Phillips' departure from Integro and at the very start of the working relationship with C&G, Mr Phillips had told him that he had financial difficulties. Mr Thompson's evidence was that this explains why C&G started making payments to Mr Phillips before any policies had been sold (and commissions received), why C&G provided him with a laptop and printer and the provision of a company credit card to help with cashflow for entertaining expenses.

54. Mr Phillips denied that he had told Mr Thomson that he was struggling financially (and also denied that he had been struggling). He explained the payments as being salary (an issue on which we make our findings under Remuneration), that he was provided with company equipment to enable him to use the C&G email address and logo, he had no need for a laptop from C&G otherwise as he still (at the time of the hearing) has his own personal laptop and that he was provided with a credit card as an employee to meet expenses on his employer's account.

55. We have already set out (under Evidence) our conclusions on the credibility of the witnesses. In the context of this particular issue, we consider that evidence as to the provision of a company credit card is neutral. As to the other explanations:

> (1) The first payment was made by C&G to Mr Phillips on 27 May 2010, for £3,000. Leaving aside at this stage the wider question as to whether this was salary or an advance on commission, neither witness gave any evidence that Mr Phillips had done any work for C&G before this time. The relationship between C&G and PMP was only just ending at this time. We infer from this that the payment was being made in advance of any performance by Mr Phillips. Signing-on payments are not uncommon in some industries; neither Mr Wadhams nor HMRC made any submissions as to whether this might have been such a payment. It is sufficient for us to find that this payment was made to C&G in advance of any performance by Mr Phillips.
>
> (2) It was common ground that C&G had provided the laptop and printer to Mr Phillips. However, we do not accept Mr Phillips' explanations of why this was done:
>
> > (a) He said he only needed this from C&G so that he could use his C&G email address and logo (and referred later in his evidence to this being able to be used by C&G to monitor his activities). That seems barely plausible – we would have expected that C&G could have provided software or security devices to enable Mr Phillips to use his own personal laptop for C&G business.

(b) Mr Phillips maintained that he had always had his own personal laptop, and still did at the time of the hearing. Yet in the meeting with HMRC on 15 December 2014, Mr Phillips had told HMRC that C&G had provided him with a laptop as his had broken.

56. We have concluded that C&G advanced money to Mr Phillips in May 2010, and provided him with a laptop and printer shortly afterwards, as they believed that Mr Phillips was struggling financially (irrespective of whether or not he was).

Mutual intention and negotiation of terms

57. We have considered the evidence in relation to the discussions and agreements reached in relation to the terms on which Mr Phillips would be engaged by C&G. This was addressed in the evidence of Mr Phillips and Mr Thompson and various documents and correspondence. We had a copy of an employment contract and a contract for services, both of which had been sent by C&G to Mr Phillips at different times. It was common ground that neither of these had been signed.

58. We set out first an overview of the arguments put by Mr Wadhams and Ms McLaughlin, before then considering the documentary evidence and witness evidence and making our findings of fact.

59. Mr Wadhams submitted that from the outset both C&G and Mr Phillips had intended that Mr Phillips be engaged as an employee – C&G emailed Mr Phillips on 11 August 2010 attaching a payroll form for him to complete, they sent him a draft employment contract, gave him a business card with the title of "Sales Director", they did not ask Newline to remove the key man clause (in November 2010) and no contract for services was provided until November 2011 (and that was not signed).

60. Mr Phillips evidence was that:

(1) When he had discussed the prospect of developing a medical malpractice insurance project with C&G, Mr Thomson had offered immediate employment and to pay him in advance of setting up the scheme.

(2) He completed the "New/Amend Employee" form to be added to C&G's payroll.

(3) He had been eager to finalise his agreement with C&G and had given an employment contract to Mr Thompson by hand when he was visiting London. That was not the two-page version in the bundle – that was not suitable, so he had drafted his own 14-page agreement based on that previously used at Aon. This was in August 2010.

61. Ms McLaughlin submitted that the expectation had been that Mr Phillips would be engaged as a consultant, and the terms that were agreed were set out in an email exchange from 8 December 2010 and that these terms were consistent with self-employment.

62. Mr Thompson's evidence was that:

(1) It was a battle from start to finish in terms of agreeing what Mr Phillips wanted.

(2) In the early stages he discussed a number of options with Mr Phillips about how he felt they could move forwards. These included (i) employed by C&G on a fixed salary, (ii) no salary, fixed percentage (about 30%) of commissions received by C&G, and (iii) hybrid, with part-salary, lower commission. As part of these discussions he had sent the payroll form.

(3) The option they discussed the most, which he considered most suitable, was option (ii). This was because the medical malpractice function was entirely dependant

on schemes being placed and commission being received. Mr Phillips wanted commissions as this would be more lucrative than a fixed salary.

(4) Mr Thompson had been exasperated by the process – C&G were setting out various options but Mr Phillips had been reluctant to commit to what he wanted.

(5) There were various emails in November 2010 about agreeing a contract of employment. The final email was from Mr Thompson on 17 November 2010, but Mr Phillips did not respond to this. He (Mr Thompson) then sent an email on 8 December 2010 putting forward a proposal. Mr Phillips agreed to this.

(6) As far as Mr Thompson was concerned, the terms in that email set out C&G's agreement with Mr Phillips. This was the agreement which C&G stuck to, paying Mr Phillips 33.33% of commissions received. No business had been written with Newline, and it was only once they secured the agreement with AmTrust that C&G started to receive commissions - they paid the agreed percentage to Mr Phillips in 2012, for three to four months.

(7) He had tried to formalise this in a written contract in November 2011 (sending a contract for services), but Mr Phillips did not sign this or respond. He had then tried again on 12 January 2012, presenting some options.

63. The early communications from C&G to Mr Phillips do support Mr Wadham's submission that the parties were intending that Mr Phillips become an employee and were negotiating an employment contract:

(1) On 16 June 2010 Mr Thompson emailed Mr Phillips saying:

> "We are looking forward to formalising your employment on the basis of say 30% of the commission on the medmal account. We are also prepared to agree an equivalent split on the value of the medmal business.
>
> …
>
> We will do our best to ensure costs are covered together with some income whilst we are finalising a scheme."

(2) On 11 August 2010 Mr Thompson sent an email to Mr Phillips with the subject of "Payroll", which attached a "New/Amend Employee" form:

> Enclose form in order to put you on our payroll. We have calculated that 41K would give you the 2.5K you require each month. Obviously we agreed to adjust this once the commission levels have covered mailer costs, commissions paid in advance etc. We would hope to have covered all these with circa 50 risks at 15k average premium.
>
> We need your NI Number and we assume the bank account details are same as the account we have previously used?

64. However, we have no documentary evidence of any responses from Mr Phillips. The oral evidence from Mr Phillips was problematic:

(1) Mr Phillips says that he completed the "New/Amend Employee" form and returned it to C&G but did not keep a copy. That would be plausible, but giving evidence he said he did this straight away in June, yet this form was only sent to him in August 2010. Upon being taken to this form again by the Panel he said that he had provided his bank details in June – yet he had first been paid in May 2010 so it has to be assumed that C&G already had his bank details in June 2010. We find that Mr Phillips did not complete and return this payroll form.

(2) He said that he had been eager to finalise his agreement with C&G and had given a 14-page employment contract which he had drafted to Mr Thompson by hand when he was visiting London. This was in August 2010. Yet not only did the bundle not include any reference to this having been done but also the existence of such a document was first mentioned by Mr Phillips when giving evidence before us – it had not been mentioned in the correspondence with Officer Hirons (notably there being no reference to this in the letter of 28 March 2012), there is no reference to it in the Employment Decision, and it is not mentioned in his witness statement. Ms McLaughlin challenged this evidence of Mr Phillips. Put simply, we do not believe him.

65. We are therefore not satisfied that there was any mutual intention that C&G employ Mr Phillips at this time.

66. There were then further emails in November and December 2010, which again start with C&G referring to entering into an employment contract but then widening out to cover more options. The key emails are as follows:

(1) On 16 November 2010 Mr Thompson emailed Mr Phillips with the subject "Contract" and the body of which was (leaving aside greetings):

> "As discussed we are thrashing out a contract of employment with effect from today's date with our accountant. Terms to be agreed within the next day or so but in the meantime you have our authority to sign the binder with Newline.
>
> Will report back with our initial terms regarding your contract on the basis of terms discussed verbally."

(2) He followed this up later that day with:

> "As discussed having had a lengthy meeting with our accountant we managed to arrive at the following options:
>
> 1) Employ you on a fixed salary to be agreed whereby we take the risk but we would take the profits once we had surpassed the agreed salary.
>
> 2) Agree 33.3% commission to you but include the 1st years operational costs to be deducted before we each in turn earn our commission split. We anticipate the costs to be roughly as follows:
>
> First 100k
>
> - 50k operating costs e.g rates, rent, telephone, postage, staffing, mailers, advertising etc
>
> - 10k FSA and PI costs
>
> - 20k salary to date
>
> left 20k @33.3% circa 7K
>
> Second 100k 33.3% (net of Company Tax/National Insurance)
>
> Third 100K 33.3% (net of Company Tax/National Insurance)
>
> Total 74k circa
>
> Therefore operational costs and salary to date are covered in first 100 cases where you earn roughly 25% of expected 300k commission turnover. After that it is a straight 33.3% (net of any company tax/National Insurance) paid on commissions received on a monthly basis paid through your salary. This process to be repeated each year.

3) Opt to take a flat percentage of 25% whatever the gross commission earned and have no involvement with the running costs. Basic salary imposed and commissions paid on receipt of premiums through salary.

4) Set up CGD Medical Ltd and go FSA regulated independently. This will require you to register individually with the FSA. There would be no guaranteed salary and you would be 33.3% shareholder and Director with the responsibilities equal to Peter and myself. The running costs would be incurred up front and commissions/salary would be set up when the company could afford it.

All the above options include a guarantee that if the Medical Malpractice account was ever sold you would receive 33.3% of the value. Also we will be awarding you a title of Sales Director on a Non Executive basis.

We suggest a guarantee of 2.5k net salary for 3 months whichever option you take and review the situation at the end of February."

(3) On 8 December 2010 Mr Thompson emailed Mr Phillips with the following proposal:

"Further to your proposed terms on agreeing a contract we are prepared to offer the following:

1) We have no objection to 33.3% up to 300k commission earned, 40% up to 500k and 50% on 500k and above.

2) You will be responsible for 33.3% of the operating costs all of which will be backed by documentation as to the proof of the costs.

3) Advanced commissions (currently standing at 15k) to be deducted from commissions on business written.

4) Any further advances to meet your immediate financial needs will only be paid if work is being carried out i.e. premium indications are being issued to CGD.

5) You maintain IPR until the end of the 3 months period and any further contractual arrangements will require those rights to be yielded to CGD.

6) Your responsibility will be to secure the best terms on applications to be put to Newline or QBE.

7) Your expenses will be covered upon the presentation of receipts."

(4) Mr Phillips responded by email that same day. He responded to all seven points, saying "Noted" or "Noted and Agreed" or adding an explanatory comment (such comment never being a disagreement). For 1 he said only "Noted and Agreed", on 2 "Agreed, which may I assume, would also include business expenses being added to the operating costs" and on 3 he said "Noted and Agreed but assume these are net costs". (That response includes an update on discussions with Newline (reviewing their rating, looking again at cases initially declined) and an apology for the frustration which has been encountered by C&G, noting that the success of the scheme is critical to everyone.)

(5) That response was acknowledged by Mr Thompson. There were then no further emails for several months.

67. There was no written evidence of any response from Mr Phillips to the emails of 16 November 2010. We consider that the first email contemplates employment, but the second email that day opens up a wider discussion. Mr Phillips' evidence was that his position was that option 1 applied – the other options could be considered in the future. However, Mr

Thompson stated that Mr Phillips did not commit to any option. We accept that evidence of Mr Thompson in the light of the absence of any documentary evidence supporting Mr Phillips' position that he agreed to the employment option.

68. We then consider the exchange of emails from 8 December 2010 set out above:

(1) C&G set out a proposal, in seven points, and Mr Phillips broadly agreed, which was then acknowledged by Mr Thompson.

(2) Mr Phillips said he agreed these terms proposed by C&G in addition to his salary, and they were not in isolation to a salary.

69. The difficulty is that the terms proposed by C&G are consistent with self-employment (commissions, bearing a share of operating costs, recovery of amounts already paid). Neither C&G's proposal nor Mr Phillips' response makes any reference to a regular salary, and there is no suggestion that this is only part of a wider proposal with additional terms agreed elsewhere. The email exchange reads as a self-contained whole. Furthermore, items 3 refers to advance commissions, currently standing at £15,000, to be deducted from commissions on business written. At that time, the evidence of amounts paid showed that C&G had paid around £15,000 or £16,000 to Mr Phillips. This would therefore have recouped all of the amounts which had been paid to him, an approach which is consistent with him receiving commissions only, but not consistent with any agreement that he receive salary plus commissions (which is what Mr Phillips was arguing that this email exchange agreed).

70. Whilst no written agreement was entered into at this stage, we have concluded that this email exchange set out the terms that were agreed between the parties. C&G agreed to pay Mr Phillips 33.33% of commissions, he would bear a share of the operating costs and C&G would deduct from amounts paid the advances already made.

71. We have considered whether there is any evidence that the intention of the parties changed after 8 December 2010. We bear in mind that Mr Phillips approached HMRC in October 2011, and that C&G were aware of this as HMRC asked them for Mr Phillips' P45.

72. On 18 November 2011 Mr Thompson emailed Mr Phillips, with the subject "Service Contract" as follows:

> "Draft contract for you perusal. We need to agree commission splits on the various aspects of business introduced (for example business written by IFA1s produce less net commission that our own leads)."

73. There was an attachment to that email, labelled (on the face of the email) "Contract for Services Agreement.doc". The hearing bundle then included a copy of an unsigned Contract for Services Agreement. That agreement has the parties as C&G and Mr Phillips and is said to be for insurance mediation services. The terms of that draft contract are consistent with a contract for services.

74. There was no documentary evidence of any response from Mr Phillips. There was no submission, or evidence, that this contract for services had been signed.

75. We have referred to the title of the document, including the labelling of the attachment as set out on the print-out of the email, as in his letter to HMRC of 27 August 2013, Mr Wadhams referred to this email "together with" a draft employment contract, stating that although it had not been signed this showed the clear intention that Mr Phillips be employed by C&G. We did not have a copy of the attachments as sent to HMRC by Mr Wadhams at that time. However, in his skeleton argument he again referred to this email and said that the two-page employment contract had been attached. We have concluded that, at best, he was mistaken when he wrote to HMRC in August 2013 and in his skeleton, which Mr Wadhams

implicitly acknowledged when he argued, in closing, that the first time C&G sent a contract for services to Mr Phillips was in November 2011. The attachment sent by Mr Thompson to Mr Phillips on 18 November 2011 was a draft contract for services.

76. On 12 January 2012 there was then an email from Mr Thompson to Mr Phillips which set out three options – salary, commission, or set up a limited company in which Mr Phillips would be a 33.33% shareholder.

77. On 15 January 2012 Mr Phillips responded:

> "Thank you for your suggestions, however, at present I am looking at all the options available to me and am therefore unable to answer matters at this precise moment.
>
> I will come back to you as soon as I can."

78. Giving evidence, Mr Phillips said that he had spoken to a friend of his (a lawyer) and wanted to speak to him further to discuss options. At this time, they had lost Newline and he was talking to another broker who had negotiated access for another insurer to continue the product.

79. Considering these emails from November 2011 and January 2012, it is remarkable that, if at this time Mr Phillips believed he was an employee with an employment contract with an entitlement to a fixed salary plus commissions that he did not say so. These emails do support an impression that C&G was continuing to seek to formalise a detailed written agreement with Mr Phillips, but we cannot discern any agreement in principle to move away from the agreement which had been reached in December 2010.

80. The responses from Mr Phillips (which are confined solely to his agreement to the 8 December 2010 proposal and his email stating that he was considering his options on 15 January 2012) are even more startling when we factor in his correspondence which was ongoing with HMRC:

(1) Having sought HMRC's assistance in obtaining his P60, Mr Phillips was told by HMRC on 9 December 2011 that C&G had denied ever employing him.

(2) He asked HMRC to suspend their enquiries in February 2012 pending a meeting scheduled for the following month.

(3) From March 2012 correspondence with HMRC resumed (slowly).

(4) Officer Hirons stated he intended to close his papers on 6 February 2013 as detailed information he had requested had not been provided. Nothing was received from Mr Phillips in response to this, until an email of 19 June 2013 stating that the letter had just been found, unopened, with his wife's papers.

81. If it were the case that Mr Phillips had considered that he had been employed by C&G, and this belief persisted until October 2011 (when he wrote to HMRC), then we would have expected to see push-back on the options being proposed by C&G which set out self-employment options with commission. There is no such evidence.

82. When we assess the intentions of the parties, we have concluded that one option offered to Mr Phillips was an employment relationship. C&G would have been prepared to proceed on that basis. However, Mr Phillips has not established that he accepted that offer. Instead, the only point at which C&G and Mr Phillips appeared to reach agreement was on 8 December 2010. Neither of them seemed to have regarded that as set in stone – C&G sent a draft contract for services in November 2011, and when they did not receive a response then reverted to proposing the full range of options again, to which Mr Phillips responded that he

was looking at all the options. We consider that was indicative of Mr Phillips' approach throughout.

Remuneration

83. It was agreed that C&G made payments of £77,500.00 to Mr Phillips during the period covered by the Decision. Payments were made by C&G (and, on one occasion, by Mr Riley) to Mr Phillips between 27 May 2010 and 30 April 2013 (generally monthly, sometimes twice in a month), with amounts varying from £1,000 to £4,000, but always a multiple of £500. No payments were made in August 2010, October 2010, April 2011, June to October 2011, January 2012 or March 2013.

84. Mr Wadhams submitted that Mr Phillips had asked for a salary which would give him a net pay of £2,500 per month, referring to the email dated 11 August 2010. Giving evidence, Mr Phillips:

(1) did not accept that the payments which he had received from C&G from May 2010 onwards were advance commission payments – he said that they were his salary, which was to be paid in addition to his share of the commissions which he generated; and

(2) said that he did challenge the differing payments which he had received (and did so on a regular basis), and when he didn't receive any payments for six months.

85. Ms McLaughlin submitted that the agreement was that Mr Phillips would be paid commission. The payments made from May 2010 onwards were advance payments of commission. Mr Thompson's evidence was that:

(1) Mr Phillips told him that he was struggling financially after he stopped working for PMP. C&G decided they were prepared to make advance payments to Mr Phillips on the understanding that, once commission payments came in from the scheme, C&G would recoup this money from him.

(2) C&G continued to make payments to him to help with monthly bills on the understanding that they would be recouped. C&G had to hope that Mr Phillips could deliver on reaching agreements with insurers, as this was the only way they could recoup the payments made.

(3) It was only once they secured the agreement with AmTrust that C&G started to receive commissions, and they paid the agreed percentage (33.33%) to Mr Phillips in 2012, for 3-4 months, and started recouping the advance payments.

86. We have already found that C&G advanced money to Mr Phillips in May 2010 as they believed that Mr Phillips was struggling financially (irrespective of whether or not he was).

87. The only evidence that potentially supports Mr Phillips' statement that he was paid a salary is the email of 11 August 2010 (which was considered in the context of the intention of the parties as it attached the "New/Amend Employee" form). However, there is stronger evidence to the contrary:

(1) Mr Phillips' evidence is directly contradicted by that of Mr Thompson, and we found Mr Thompson to be a credible witness.

(2) There is not one email in the hearing bundle in which Mr Phillips questions the amount of a payment made to him or challenges the non-payment of any amounts from June to October 2011 (or any of the other gaps).

(3) The email exchange of 8 December 2010 not only does not refer to salary, but also refers at point 3 thereof to the payment of advance commissions and the recovery of these amounts.

(4) Once business started to be written under the AmTrust binder, C&G produced commission statements (dated 22 February 2012, 31 March 2012 and 24 April 2012) setting out policies taken out each month which calculated his share of the commission, made deductions for the advance commission which had been paid and set out the net amount payable to Mr Phillips.

88. Mr Phillips has not established that he was receiving a salary from C&G. We consider that he was being remunerated on the basis of commissions generated, and had received advance payments on account of future expected commissions.

Control and accountability to C&G

89. Mr Wadham submitted that Mr Phillips was working under the direction of C&G, in particular Mr Thompson.

90. Ms McLaughlin submitted that there was no such control and direction over Mr Phillips' activities.

91. The relationship between Mr Thompson and Mr Phillips was primarily addressed in their witness evidence. Our findings of fact below are based on all of the evidence before us:

(1) Mr Phillips was responsible for his own diary – he controlled his own working hours, in the light of what was necessary to meet with potential insurers and clients. This included arranging meetings himself, and deciding whether it was appropriate to work from home or travel to London on any given day. There were a few occasions where C&G would arrange for Mr Phillips to attend particular meetings – eg attending a trade fair in Liverpool.

(2) Mr Phillips did not work for or on behalf of anyone other than C&G during the period covered by the Decision. However, there was no evidence that he was precluded from so doing (other than by the lack of available time).

(3) Mr Phillips negotiated the terms of the binders with Newline and with AmTrust. This was his area of expertise. C&G did not and could not direct him as to how to conduct those negotiations, as Mr Thompson had no experience in the medical malpractice environment. Mr Thompson would only attend a meeting with the insurer once the terms of the binder had been finalised.

(4) To the extent that Mr Phillips reported to anyone, it was to Mr Thompson. However, whilst Mr Phillips' evidence was that he would update Mr Thompson daily (sometimes twice daily) on his activities and he would set out his plans for the week ahead, we do not accept that. Mr Thompson denied receiving such daily or weekly reports and, moreover, Mr Phillips' evidence was that this was sometimes by phone, sometimes by email and yet there was not a single piece of documentary evidence to confirm this. There were no update emails, no emails arranging a time to speak. We find that any reporting to Mr Thompson was irregular.

(5) C&G did not monitor the emails sent by Mr Phillips on the laptop which had been sent to him by C&G. Mr Phillips gave evidence that the provision of a laptop by C&G enabled Mr Thompson to see who he was communicating with and what he was doing, but that he had not taken steps to grant access rights to Mr Thompson. We find that Mr Thompson did not monitor Mr Phillips' emails in this way, nor was it plausible to consider that he would be so doing.

Regulatory requirements

92. Mr Phillips maintained that his engagement with C&G had been as an employee from the outset. He stated that this was a regulatory requirement (of the FSA). For him to speak to and negotiate with insurers, he needed to be authorised or registered. It would be time-consuming and expensive for him to register in his individual capacity. The only practical way to be registered was to be employed by an insurance intermediary (such as C&G).

93. Ms McLaughlin challenged this. Ms McLaughlin pointed out that there is no reference in the Employment Decision to it being a requirement of the FSA that he be an employee of C&G. She relied on the evidence of Mr Thompson that individuals who are not themselves authorised can negotiate on C&G's behalf with insurers to procure a scheme. The agreement must, however, be entered into between an insurer and a registered broker – and this was the case here as C&G entered into the agreements with Newline and AmTrust.

94. The parties thus made competing submissions as to whether regulatory approvals, permissions or registrations were required for the activities of Mr Phillips, and as to whether or not he could benefit from the umbrella of C&G's approval if he were not an employee of C&G. Such submissions were made without any reference to any provisions of the FSA rulebooks. No such material was included in the bundle before us. We are thus left in the position where we need to make a finding as to whether or not Mr Phillips was, on the balance of probabilities, only able to conduct his activities in accordance with FSA requirements if he were an employee of C&G (it being common ground that Mr Phillips did not hold any authorisations, permissions or registrations in his individual capacity) without the most obvious and helpful source being made available to us, namely the FSA rules.

95. Mr Phillips has not satisfied us that he was required to be employed by C&G for regulatory reasons:

(1) Mr Phillips' evidence was directly contradicted by Mr Thompson.

(2) We also find that Mr Phillips had not been employed by Integro prior to his engagement with C&G in May 2010. Mr Thompson gave evidence of this, which on its own would be fairly weak. However, Mr Phillips' own explanation (given in the context of financial risk) was that he didn't want to go through the process such as that which had happened when he left Integro again. This had been out of his control and, he said, was as a result of a breakdown in the relationship between Mr Thompson and PMP. Mr Phillips went on to explain that he had been expecting a written employment contract starting from July 2010 (with Integro) but never got that because of Mr Thompson's actions. If Mr Phillips had been able to negotiate medical malpractice insurance products whilst not employed by Integro, we were not given any explanation as to why the position might be different if he were not employed by C&G.

(3) The bundle included an email from Mr Thompson to Mr Phillips dated 29 June 2010 with the subject "Appointed Representative". The email then reads:

> "Enclose copy of AR form. You don't need to sign it so we can go through the form together and we can forward to FSA from here."

The bundle did not include an attachment. However, we infer from the context that the form was to appoint Mr Phillips as an appointed representative of C&G. The panel takes judicial notice of the fact that appointed representatives can conduct specific regulated activities without themselves being authorised by the FSA to do so. There was no evidence adduced which would enable us to conclude that only an employee of C&G could be an appointed representative of C&G.

Key man clause in binder

96. It was common ground that the binder with Newline included a key man clause, stating that the agreement only remains in force providing Mr Phillips remains an employee or director of C&G and that Newline have the right to cancel the agreement if he is no longer an employee or director.

97. Mr Phillips stated that this was a market standard clause, and Mr Wadhams relied on this as evidence that Mr Phillips had been employed by C&G.

98. Mr Thompson's evidence was that this is not a market standard clause, and it is no concern of the insurer as to how C&G conducted itself. He considered that Mr Phillips had persuaded his contact at Newline to insert this clause into the binder, and explained that he did not ask for the clause to be deleted as he had not been involved in the contractual negotiations and thus had no relationship with the Newline team.

99. At the outset, we note that the bundle did not include the binder which had been agreed between C&G and Newline. We just had one page which included the key man clause and were told by both Mr Phillips and Mr Thompson that this was from the Newline binder. We have little choice but to accept that evidence.

100. Mr Phillips had identified Newline as an insurer which may be interested in underwriting the product to be offered by C&G as early as May 2010. The email exchanges in the bundle included emails between Mr Phillips and Newline on 12 November 2010, which referred to the key man clause to be included in the agreement. The implication is that the clause was being added at that time, after several months of negotiations, and had not been in the draft agreement from the outset. Mr Thompson was not part of the negotiations and cannot have direct knowledge as to who requested the inclusion of this clause. However, Mr Phillips has not established that this clause is market standard as we consider that such a clause would have been included from the outset if this were the case.

IP rights in the product

101. It was common ground that Mr Phillips retained the IP rights in the medical malpractice insurance product on which he was working. Both parties referred to this as having been confirmed in the agreement reached on 8 December 2010. We found that exchange of emails to be somewhat cryptic:

(1) Mr Thompson's proposal was:

> "You maintain IPR until the end of the 3 months period and any further contractual arrangements will require those rights to be yielded to CGD"

(2) Mr Phillips then responded:

> "That position was always the intention but we need to go through the trial period as much for "our" benefit, but also for us to see how Newline respond and develop their approach to this scheme bearing in mind this style of business is new to them and our future success depends largely on their reactions to our demands"

102. Giving evidence, Mr Phillips denied that he wanted to hold the IP rights in order to be able to offer the product to other brokers. He explained that he had wanted to retain the IP rights so that he could modify and add to the product, bringing in a risk-managed approach. Such changes would be introduced at a later stage once the product had gained traction in the sector.

103. We do not understand and do not accept that explanation. Mr Phillips did not need to own the IP rights in order that the product could be modified and enhanced. He could still

work on developing it further for C&G if C&G owned the IP rights, provided his relationship with them continued.

Financial risk

104. Mr Wadhams submitted that any financial risk to Mr Phillips was solely loss of income.

105. Ms McLaughlin submitted that Mr Phillips was at financial risk in respect of his engagement with C&G.

106. HMRC primarily relied on an explanation which Mr Phillips had provided to HMRC in his letter of 28 March 2013 in response to the question, "Was there any possibility of you losing out financially from this engagement with CGD? If yes, please explain how this could have happened?". Mr Phillips had responded:

> Yes in as much finding alternative employment would have been difficult especially as my previous positions were based upon the amount of brokerage I would generate to my employer. Here, we had a new product and facility, which had not yet secured traction and so there was no stable commission flow. Accordingly, if I had not been able to establish the facility, my employment would have been terminated.

107. We consider that Ms McLaughlin was placing undue weight on the fact that Mr Phillips had started his response with the word, "yes", without having regard to the explanation set out thereafter. The risk which Mr Phillips identified (and which we accept in the light of the other evidence) was that as this was a new product there was no stable commission flow and, if the product was not established or unsuccessful, his arrangement with C&G would be terminated.

108. A risk of not making as much money as might have been hoped for is different from having invested capital which might be lost or needing to pay out costs in excess of income.

109. The exchange of emails of 8 December 2010 did contemplate that Mr Phillips would bear a share of C&G's operating costs. There was no evidence as to what those costs might have been in the set-up phase – it was apparent from Mr Thompson's evidence that no other C&G employees were working on this product. We infer that the only direct costs initially would have been those which Mr Phillips was charging to the company credit card. The commission statements produced by C&G in 2012 showed the deduction of advance payments which had been made to Mr Phillips from his share of the commission, but no other allocation of a share of costs.

110. On the basis of the evidence before us, we consider that the only financial risk to Mr Phillips was exposure to a fluctuating level of income.

Benefits

111. Mr Phillips' evidence was that he was entitled to holiday pay (and was paid holiday pay) and expected to be enrolled in C&G's pension scheme. He had not focused on sick pay as he was healthy.

112. HMRC relied on the evidence of Mr Thompson that C&G did not enrol Mr Phillips into a pension scheme with C&G, or make any employer contributions. He did not have any entitlement to holiday pay or sick pay.

113. We expect that a written agreement would have set out any entitlements to benefits. The email exchange of 8 December 2010 was silent on pensions, holidays and benefits. Mr Phillips accepted that he had not received any pension statements from a C&G pension scheme, nor was there any documentary evidence that he had asked for such statements. His

oral evidence as to his entitlement to holiday pay was contradictory – he referred to five weeks at one point, then later to four weeks.

114. On the basis of the evidence before us, we are not satisfied that C&G agreed to enrol Mr Phillips in a C&G pension scheme, or to pay him holiday pay. The question of Mr Phillips' entitlement would thus depend on his statutory rights (if any) rather than contract.

DISCUSSION

115. HMRC have notified Mr Phillips of their decision that he was self-employed during the period from 28 May 2010 to May 2013. The burden of proof is on Mr Phillips to establish, on the balance of probabilities, that he was employed by C&G during the relevant period and was not self-employed.

116. Having made our findings of fact, we need to assess the picture we have painted by so doing and bear in mind the guidance set out in the case law (including the approach set out in *Ready Mixed Concrete*).

117. We bear in mind that Mr Phillips had expertise and experience in the insurance industry, and in developing medical malpractice insurance products. This context leads us to place little or no weight on certain factors when assessing his employment or self-employment status. These are:

(1) his place of work being other than C&G's office in Leeds, and his not having a desk allocated to him in that office,

(2) the absence of staff or office handbook,

(3) the provision of laptop and printer for his use, and

(4) provision of a company credit card.

118. We have assessed in some detail the evidence in relation to the negotiation of terms, considering the terms proposed by C&G at various times and the responses (or lack thereof) from Mr Phillips. We were seeking to ascertain both what might have actually been agreed, but also what we might infer from the negotiations as to the intentions of C&G and Mr Phillips. On the basis of the facts as we have found them:

(1) C&G were prepared to offer an employment contract to Mr Phillips, and this was certainly the case in August 2010, but he did not accept that and discussions as to possible terms of engagement continued with other options being discussed.

(2) The email exchange of 8 December 2010 contains the terms which were agreed between the parties, and those terms (commissions, bearing a share of operating costs, recovery of amounts already paid, retention of IP rights) are consistent with self-employment.

(3) That agreement did not include Mr Phillips having a separate or additional right to salary on top of these commission arrangements.

(4) The possibility of an employment contract was put back on the table by C&G a year later, in January 2012, but Mr Phillips responded that he was looking at all the options.

119. We conclude that Mr Phillips was reluctant to commit to any option. He did not take any steps to confirm that his preferred option was to be employed by C&G – he did not complete and return the payroll form, accept option 1 which was put to him in November 2010, reject the terms proposed in December 2010 or respond re-iterating that any commissions should be a bonus on top of a salary, or confirm in January 2012 that he wanted

the employment option. This latter exchange of emails is significant as by this time Mr Phillips knew that C&G had told HMRC that they had never employed him. C&G had put this option on the table just a few months after this exchange with HMRC and yet even then Mr Phillips did not rush to accept this proposal.

120. In the context of activities in the insurance industry, we consider that the requirements of the FSA would be highly relevant. If the day-to-day activities of Mr Phillips were such that he was required to be authorised or approved by the FSA and, in the absence of being authorised in his own right, could only operate under the umbrella of C&G's authorisation if he were an employee of C&G, then that would be a significant indicator that he had been employed by C&G. However, as noted above, whilst we had competing submissions on this issue we did not have the benefit of the sight of any relevant FSA rules. In these circumstances, Mr Phillips has not satisfied the burden of establishing that the FSA rules effectively required that he be employed by C&G. We thus leave this out of account in our deliberations.

121. Against this background, the factors which we consider support HMRC's decision that Mr Phillips was self-employed are:

(1) Mr Phillips was left to his own devices to identify potential insurers and seek to engage their interest in underwriting the scheme, with very little reporting back to C&G to account for his time – certainly not daily or even weekly, rather at intervals. We do note that the facts as we have found them do support other aspects of a lack of control by C&G which HMRC relied upon, namely:

(a) Mr Phillips' ability to set his own working hours, arrange appointments with insurers and potential clients;

(b) Mr Phillips was responsible for negotiating the terms of the binders with insurers, and did this with both Newline and AmTrust.

However, we regard these aspects as less significant, and consider they are consistent with the level of Mr Phillips' expertise and experience, which were both recognised by Mr Thompson.

(2) Mr Phillips was remunerated on the basis of commissions generated, and had received advance payments on account of future expected commissions. He did not receive regular payments by way of salary, or any payslips.

(3) Mr Phillips retained the IP rights in the insurance product.

(4) There was no documentary evidence of Mr Phillips being contractually entitled to holiday pay or to join the C&G pension scheme. However, we place little weight on this point.

122. There are, nevertheless, some factors which could support a conclusion of an employment relationship:

(1) Mr Phillips did not work for anyone other than C&G during this period.

(2) Although HMRC submitted that Mr Phillips bore financial risk we consider this was misconceived. HMRC could not explain how he was at risk other than of receiving reduced income. In that light, "financial risk" is nothing more than saying he was exposed to a fluctuating income. He was not at risk of a loss.

(3) The binder between C&G and Newline included a key man clause requiring that Mr Phillips be an employee or director of C&G. However, the provisions of a contract between C&G and Newline cannot dictate or override the actual relationship between

C&G and Mr Phillips. We were not shown any documentary evidence that the binder with Newline was signed, but HMRC and Mr Phillips both proceeded on the basis that it had been. There may well have been potential problems for C&G with Newline if Mr Phillips were not an employee, but that was never tested as no business was entered into under that binder, and it may well have been that C&G were seeking to fudge the "employee or director" requirement by awarding Mr Phillips the title of Sales Director (albeit that he was not a director of the company). We note that Mr Phillips was awarded that title on 16 November 2010, which is shortly after the key man clause was drawn to Mr Thompson's attention.

(4) Mr Phillips did not have PII in his own right – however, he appeared to be within the scope of that of C&G and we had no evidence as to the terms of C&G's coverage. We thus place little weight on this factor.

123. Taking all of these factors together, we have concluded that the evidence strongly supports HMRC's decision that Mr Phillips was self-employed. We place particular weight on the email exchange of 8 December 2010, the payments of a share of commissions (notwithstanding that such payments were made in advance from the outset in order to help with cashflow), that Mr Phillips had freedom to decide which insurers and clients to approach, and his negotiation of the right to the IP rights in the product. These outweigh the indicators to the contrary and support the conclusion that Mr Phillips was performing his activities as a person in business on his own account.

DISPENSATION

124. The Decision is affirmed and Mr Phillips' appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

125. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 31 MARCH 2021