Neutral Citation: [2025] UKFTT 56 (TC)

Case Number: TC09408

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

Taylor House

Appeal reference: TC/2022/06597

*INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – contract between an end–user and a personal services company relating, inter alia, to the provision of services by an individual (the actual contract) – was all of the consideration payable under the actual contract subject to income tax and national insurance contributions as income from employment under the legislation relating to intermediary personal service companies (IR35) – no, to the extent that that consideration related to image rights granted under the actual contract – as regards the balance of the consideration, consideration given to what would have been the terms of a hypothetical contract between the end–user and the individual providing the services, such terms' being constructed out of the terms of the actual contract and the circumstances in which the actual contract was executed, and then to whether that hypothetical contract would have been a contract of employment – case law in relation to the contrast between contracts for services and contracts of employment considered – application of that case law to the facts – conclusion that, in this case, the hypothetical contract would have been a contract of employment and therefore the balance of the consideration was subject to income tax and national insurance contributions as income from employment – appeal allowed in part*

**Heard on:** 19, 20, 21 and 22 November, 2024
**Judgment date:** 20 January 2025

**Before**

**TRIBUNAL JUDGE TONY BEARE**

**Between**

**BRYAN ROBSON LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

| | |
|---|---|
| For the Appellant: | Mr James Rivett KC and Mr Quinlan Windle, of counsel, instructed by Ernst & Young LLP |
| For the Respondents: | Mr Christopher Stone KC and Ms Georgina Hirsch, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs |

# DECISION



## INTRODUCTION

1. This decision relates to the following appeals made by the Appellant:

   (1) an appeal under Regulation 80(5) of The Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") and Section 31 of the Taxes Management Act 1970 (the "TMA 1970") in relation to determinations to income tax made under Regulation 80 of the PAYE Regulations for the tax years ended 5 April 2016, 5 April 2018, 5 April 2019, 5 April 2020 and 5 April 2021 (together, the "Determinations" and, each, a "Determination"); and

   (2) an appeal under Section 11 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (the "ToFA") in relation to decisions made under Section 8 of the ToFA in respect of primary and secondary class 1 national insurance contributions ("NICs") for the tax years ended 5 April 2016, 5 April 2017, 5 April 2018, 5 April 2019, 5 April 2020 and 5 April 2021 (together, the "NICs Decisions" and, each, an "NICs Decision").

2. The Determinations and the NICs Decisions relate to payments made by Manchester United Football Club ("MUFC" or the "club") under contracts relating to the ambassadorial role played for MUFC by Mr Bryan Robson, a former professional football player and manager who played for MUFC from 1981 to 1994 (captaining the club between 1982 and 1994) and for England from 1980 to 1991 (captaining the national team from 1986 to 1991). Prior to joining MUFC, Mr Robson played for West Bromwich Albion Football Club ("WBA") from 1975 to 1981. After leaving MUFC, Mr Robson was player–manager of Middlesbrough Football Club ("Middlesbrough") from 1994 to 1997 and continued to manage Middlesbrough

in a non–playing capacity until 2001. Thereafter, he managed Bradford City Football Club from 2003 to 2004, Sheffield United Football Club from 2007 to 2008 and the Thailand national team from 2009 to 2011. He was also assistant manager of England between 1994 and 1996.

3. The Appellant was incorporated on 2 June 1981 and is Mr Robson's personal services company. Mr Robson and his wife, Mrs Denise Robson, are the sole directors and shareholders of the Appellant. Since the Appellant's incorporation, Mr Robson has generally used the Appellant to contract for his commercial work, which is to say his work other than as a football player or manager.

4. Mr Robson has acted as an ambassador for MUFC for many years under a series of ambassador agreements. The initial ambassador agreement was dated 18 March 2008. That agreement was extended on 1 June 2009 and then again on 5 January 2011. In this decision, I will refer to that agreement and the two extensions of it as the "First Personal Ambassador Agreement". On 9 September 2011, Mr Robson and MUFC entered into a replacement ambassador agreement (the "Second Personal Ambassador Agreement"). On 15 August 2012, the Second Personal Ambassador Agreement was replaced by a further ambassador agreement between Mr Robson and MUFC. That agreement was varied on 17 March 2016. In this decision, I will refer to that agreement and the variation of it as the "Third Personal Ambassador Agreement", to the First Personal Ambassador Agreement, the Second Personal Ambassador Agreement and the Third Personal Ambassador Agreement together as the "Personal Ambassador Agreements" and to each of the First Personal Ambassador Agreement, the Second Personal Ambassador Agreement and the Third Personal Ambassador Agreement as a "Personal Ambassador Agreement".

5. A peculiar feature of the Personal Ambassador Agreements was that, as the defined terms suggest, they were executed by Mr Robson personally and not by the Appellant, even though it is common ground that Mr Robson has generally used the Appellant to contract for his commercial work, as noted in paragraph 3 above. Although it is strictly unnecessary for the purposes of this decision for me to understand why that was the case, I would note in passing that I have seen no coherent explanation for it. In his testimony, Mr Robson said that this was simply a mistake and that, until that mistake was discovered in 2019, both he and MUFC had always proceeded on the assumption that the party contracting with MUFC in the Personal Ambassador Agreements was the Appellant and not Mr Robson himself. However, that explanation sits rather oddly with the fact that the payment clause in each Personal Ambassador Agreement expressly contemplated that sums payable by MUFC to Mr Robson under the relevant agreement were to be made to an account in the name of the Appellant and expressly acknowledged that payment of any amount by MUFC to the Appellant would be a good and effective discharge of the obligation to pay that amount to Mr Robson.

6. Be that as it may, the recognition that the relevant contracting party should have been the Appellant and not Mr Robson himself led, on 3 December 2019, to:

(1) the termination of the Third Personal Ambassador Agreement;

(2) the execution of a new ambassador agreement between MUFC and the Appellant (the "Ambassador Agreement"); and

(3) the execution of a new guarantee agreement between MUFC and Mr Robson, pursuant to which Mr Robson guaranteed the obligations of the Appellant to MUFC under the Ambassador Agreement (the "Guarantee Agreement").

7. At the time when they were made, the Determinations and the NICs Decisions were made on the basis that income tax and NICs should have been payable pursuant to the intermediaries

legislation (the "IR35 legislation") in respect of the monies paid to the Appellant pursuant to the Personal Ambassador Agreements and the Ambassador Agreement. However, in their statement of case relating to the appeals, the Respondents conceded that, because the Personal Ambassador Agreements had been entered into by Mr Robson himself and not by the Appellant, the IR35 legislation could have no application to those contracts. Accordingly, they agreed that:

(1) the appeal against the Determinations insofar as the Determinations related to the tax years ending 5 April 2016, 5 April 2018 and 5 April 2019 should be allowed;

(2) the appeal against the NICs Decisions insofar as the NICs Decisions related to the tax years ending 5 April 2016, 5 April 2017, 5 April 2018 and 5 April 2019 should be allowed;

(3) only sums paid in the part of the tax year ending 5 April 2020 which fell on or after 3 December 2019 should be taken into account in calculating the quantum of the Determination relating to the tax year ending 5 April 2020; and

(4) only sums paid in the part of the tax year ending 5 April 2020 which fell on or after 3 December 2019 should be taken into account in calculating the quantum of the NICs Decisions relating to the tax year ending 5 April 2020.

8. Accordingly, the conclusions set out in this decision apply in relation to;

(1) the appeal against the Determinations only insofar as the Determinations related to the tax years ending 5 April 2020 and 5 April 2021 and, in the case of the first of those tax years, only to sums paid on or after 3 December 2019; and

(2) the appeal against the NICs Decisions only insofar as the NICs Decisions related to the tax years ending 5 April 2020 and 5 April 2021 and, in the case of the first of those tax years, only to sums paid on or after 3 December 2019.

9. Following discussions between the parties prior to the hearing, it was agreed that I would not address in this decision any questions relating to quantum but would instead confine my decision to determining the issues in the appeals as matters of principle, leaving questions of quantum to be determined by the parties by mutual agreement in the light of my decision or, if necessary, following a further hearing at a subsequent date.

10. Shortly before the hearing, the Respondents made an application to the First-tier Tribunal (the "FTT") to increase the quantum of the Determinations and the NICs Decisions. In the light of the agreement referred to in paragraph 9 above, I decided to defer my decision in relation to the application until it became necessary for me to address quantum.

**THE RELEVANT LEGISLATION**

11. At the time relevant to the appeals, the relevant part of the IR35 legislation was set out in Chapter 8 of Part 2 to the Income Tax (Earnings and Pensions) Act 2003 (the "ITEPA") (so far as income tax is concerned) and Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (the "NICs Regulations") (so far as NICs are concerned).

12. The relevant part of Section 49 of the ITEPA provided as follows:

"49 Engagements to which this Chapter applies

(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 contracts forming part of the arrangements under which the services are provided…."

13. The relevant part of Regulation 6 of the NICs Regulations provided as follows:

"6.—(1) This Part 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 performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and
>
> (c) 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….".

**THE QUESTIONS TO BE ADDRESSED**

14. In this case, it is common ground that, on and after 3 December 2019, there was no direct contract between MUFC and Mr Robson and that, instead, there was a contract – namely, the Ambassador Agreement – between MUFC and the Appellant relating to Mr Robson's role as an ambassador for MUFC. The parties disagree on how much of the consideration which was payable under that contract falls to be taxed under the IR35 legislation. In broad terms, there are two areas of dispute in this context and these are as follows:

> (1) first, the Appellant submits that all, or at least some, of the consideration which was paid by MUFC to the Appellant under the Ambassador Agreement fell outside the potential ambit of the IR35 legislation because it was attributable to the agreement on the part of the Appellant to allow MUFC to exploit Mr Robson's image rights and not attributable to an obligation on the part of Mr Robson personally to perform services for MUFC. In contrast, the Respondents submit that the fact that the Appellant agreed in the Ambassador Agreement to allow MUFC to exploit Mr Robson's image rights does not prevent all of the consideration which was payable under the Ambassador Agreement from falling within the ambit of the IR35 legislation. In the rest of this decision, I will refer to this dispute as the "Image Rights Issue"; and
>
> (2) secondly, the Appellant submits that, even if some or all of the consideration which was paid by MUFC to the Appellant under the Ambassador Agreement was attributable to an obligation on the part of Mr Robson personally to perform services for MUFC and therefore potentially fell within the ambit of the IR35 legislation, that consideration did not in fact fall within the ambit of the IR35 legislation because, had the arrangements between MUFC, the Appellant and Mr Robson taken the form of a direct contract between MUFC and Mr Robson, Mr Robson would not be regarded for income tax purposes as an employee of MUFC or for NICs purposes as employed in employed

earner's employment by MUFC. Thus, the condition set out in Section 49(1)(c) of the ITEPA in relation to income tax and Regulation 6(1)(c) of the NICs Regulations in relation to NICs is not satisfied on the facts of the case. In contrast, the Respondents submit that Mr Robson would be so regarded and that therefore all of the consideration which was attributable to the obligation on the part of Mr Robson personally to perform services for MUFC fell within the ambit of the IR35 legislation. In the rest of this decision, I will refer to this dispute as the "Employment Issue".

15. The Image Rights Issue involves the consideration of arguments which have not apparently been canvassed before other tribunals in the context of the IR35 legislation.

16. In contrast, the Employment Issue is one which is common to a number of recent cases in relation to the IR35 legislation. It involves identifying the terms of a hypothetical contract between the client (in this case, MUFC) and the worker (in this case, Mr Robson) and then determining whether, had that hypothetical contract taken the form of an actual direct contract between the parties, the worker would be regarded for income tax purposes as an employee of the client and for NICs purposes as employed in employed earner's employment by the client.

17. It is common ground that, pursuant to Section 50(6) of the TMA 1970, the burden of proving that the Determinations should be discharged is on the Appellant and that, pursuant to Regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 (as amended by paragraph 65 of Schedule 2 to The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009), the burden of proving that the NICs Decisions should be discharged is on the Appellant.

**THE WRITTEN EVIDENCE**

## Introduction

18. The written evidence with which I was provided comprised, inter alia:

(1) the Ambassador Agreement;

(2) the Guarantee Agreement;

(3) the Personal Ambassador Agreements; and

(4) schedules setting out the income of the Appellant in the tax years which are the subject of this decision and the period immediately prior to those tax years.

19. I was also provided with other written material at the hearing including:

(1) email exchanges between Mr Robson and MUFC personnel;

(2) invoices from the Appellant to MUFC; and

(3) extracts from sponsorship agreements between MUFC and a number of its sponsors

but I have taken the terms of those documents into account in my summary of the witness evidence in paragraph 28 below and will not summarise them in this part of my decision.

## The Ambassador Agreement

20. The most important part of the written evidence was the Ambassador Agreement. For the purposes of this decision, it suffices to describe the following provisions of the agreement:

(1) the recitals to the agreement noted that:

(a) Mr Robson was a recognised former professional football player and football icon;

(b) the Appellant had the authority to licence Mr Robson's image and to procure that Mr Robson fulfilled commercial obligations; and

(c) the Appellant was willing to grant MUFC the rights and to procure that Mr Robson fulfilled obligations on the terms set out in the agreement;

(2) the first clause of the operative part of the agreement was headed "Use of Ambassador's Image" and contained the grant of a licence by the Appellant to MUFC to use and exploit Mr Robson's image, in both a personal and a club context, throughout the world and "for any purpose" for the term of the agreement;

(3) in terms of Mr Robson's image rights, this licence was supplemented by:

(a) a non–exclusive right to receive advertising and promotional opportunities on Mr Robson's media channels and the non–exclusive right to exploit the content of Mr Robson's media channels within any club–related media product, service or channel (clause 3);

(b) a provision specifying that the personal endorsement deals into which Mr Robson could enter could not be such as to restrict the rights of the club under the agreement to use Mr Robson's image, and, in particular, use by the club for the promotion of the club's sponsors and partners. (In this decision, I will refer to the club's sponsors and partners together as the "sponsors" and to any one of them as a "sponsor") (clause 4.3);

(c) a warranty to the effect that no one else had been granted the right to use Mr Robson's image during the term of the agreement and an undertaking to the effect that no one else would be granted such rights during the term of the agreement except pursuant to a "personal endorsement deal" (as defined in paragraph 20(6) below) which complied with the agreement (clause 4.4);

(d) a provision specifying that:

(i) on the termination of the agreement, MUFC would be able to carry on using promotional materials and licensed products featuring Mr Robson's image to the extent that such promotional materials and licensed products existed, were in the course of production or were required to satisfy outstanding orders, in each case at the termination date; and

(ii) MUFC would have the right in perpetuity to use Mr Robson's image in relation to licensed products provided that such use was of Mr Robson's image when he played for the club and such use was to recollect or represent the history of the club or Mr Robson's history with the club

(clause 7.5);

(e) a provision specifying that all intellectual property rights in any material which included Mr Robson's image and was created pursuant to the agreement would vest in MUFC (clause 8); and

(f) a warranty to the effect that the Appellant was the sole owner of Mr Robson's image and had the right to grant, and ability to perform, its obligations under the agreement (clause 9.1);

(4) the second clause of the operative part of the agreement required the Appellant to procure that Mr Robson made personal appearances for any purpose required by MUFC in accordance with the club's reasonable instructions including as to:

(a) time, date and location;

(b) clothing, footwear and accessories to be worn; and

(c) activities to be undertaken

and to autograph merchandise in accordance with the club's reasonable instructions;

(5) as regards Mr Robson's personal appearances, the agreement:

(a) specified that he would make personal appearances on a minimum of 35 days (the "minimum commitment") in each six–month period and then set out detailed rules for determining, in the case of each personal appearance, the number of days on which he was to be treated as having made the personal appearance – for example:

(i) for personal appearances in the United Kingdom, if the personal appearance was for less than four hours, then this amounted to half a day whereas, if the personal appearance was for eight hours or more, then this amounted to one–and–a–half days; and

(ii) for personal appearances outside the United Kingdom, travel days counted as days on which a personal appearance was made

(clause 2.4);

(b) specified that, as long as adequate notice was given and Mr Robson had not already fulfilled the minimum commitment in the relevant six–month period, he was required to undertake personal appearances in accordance with MUFC's instructions unless he was prevented from doing so for medical reasons, exceptional personal circumstances beyond his control or had a pre–existing commitment which had been notified to the club (clause 2.7);

(c) specified that MUFC would be responsible for arranging and paying for Mr Robson's travel and accommodation (clause 2.8) and would reimburse Mr Robson for his other reasonable expenses provided that they were agreed in advance of being incurred and the Appellant submitted an invoice for them with supporting receipts (clause 2.9); and

(d) contained a warranty to the effect that Mr Robson had not granted anyone else the right to require him to make personal appearances or to endorse products during the term of the agreement and an undertaking to the effect that no one else would be granted such rights during the term of the agreement except pursuant to a personal endorsement deal which complied with the agreement (clause 4.4);

(6) clause 4 of the agreement provided that Mr Robson could enter into any sponsorship, marketing or promotional activities (together, "personal endorsement deals" and, each, a "personal endorsement deal") as long as MUFC's prior written approval to the relevant personal endorsement deal had been obtained (such approval's not to be unreasonably withheld or delayed). It went on to stipulate that, without prejudice to the club's general right of approval, no personal endorsement deal could involve, inter alia:

(a) Mr Robson's endorsing a competitor of any sponsor;

(b) Mr Robson's making use of his association with the club without the club's permission; and

(c) Mr Robson's entering into a personal endorsement deal which in any way restricted the rights given to the club under the agreement;

(7) clause 5.1 of the agreement imposed obligations on the Appellant to procure that Mr Robson:

(a) observed high standards of behaviour and did not do anything which could damage the club's reputation;

(b) observed all lawful and reasonable requests made by a club official; and

(c) provided all reasonable facilities and opportunities for taking images of him as reasonably required to enable the fulfilment of the rights granted under the agreement;

(8) clause 6 of the agreement provided that MUFC would pay the Appellant the sum of £150,000 (excluding VAT) for each six–month period during the term of the agreement. The clause did not apportion those payments between the various obligations of the Appellant under the agreement and made no provision for any refund of the fees already paid in the event that Mr Robson failed to satisfy the minimum commitment in any six–month period. Payment in respect of each six–month period was required to be made within 28 days of the start of the relevant six–month period. A peculiar feature of the clause is that it purported retrospectively to provide that payments made under the Personal Ambassador Agreements on and after 1 July 2012 had in fact been made under the Ambassador Agreement instead;

(9) clause 7 of the agreement provided that, unless terminated by either party with immediate effect because of certain specified events of default, it would continue until terminated by either party on six months' notice. The Appellant's potential events of default included, inter alia:

(a) Mr Robson's declining to make a personal appearance on three or more occasions during any year (other than doing so after he had made 70 or more personal appearances during the relevant year or if he had received insufficient notice of the request); or

(b) Mr Robson's doing anything which, in the club's reasonable opinion, brought himself, the club or any sponsor into disrepute.

The clause went on to provide for a pro–rata refund in the event that, at the point of termination, MUFC had not enjoyed the rights for which a payment had been made;

(10) clause 10 of the agreement provided that a failure on the part of either party to fulfil its obligations under the agreement because of force majeure would not constitute a breach of the agreement;

(11) clause 13.8 of the agreement provided that the agreement comprised the entire agreement between the parties in relation to its subject matter and that any amendment to it had to be in writing;

(12) clause 13.9 of the agreement provided that it was a contract for the provision of services and not a contract of employment; and

(13) the agreement contained no provisions:

(a) entitling Mr Robson to receive holiday pay, sick pay or pension contributions;

(b) dealing with performance management – for example, reviews;

(c) requiring Mr Robson to comply with any employment guidelines or policies; or

(d) (unsurprisingly, given the nature of the agreement) allowing the Appellant to provide a substitute for Mr Robson.

**The Guarantee Agreement**

21. The Guarantee Agreement contained, inter alia:

(1) a warranty and undertaking from Mr Robson to the effect that the Appellant had the right to use his name and image and to enter into all of the obligations on the part of the Appellant which were contained in the Ambassador Agreement; and

(2) a guarantee by Mr Robson of the Appellant's obligations under the Ambassador Agreement. Mr Robson's liability under the guarantee was expressed to be that of primary obligor and to remain in force notwithstanding any defect, illegality or unenforceability of any obligation of the Appellant under the Ambassador Agreement.

**The Personal Ambassador Agreements**

22. Each of the Personal Ambassador Agreements was in materially similar terms to the Ambassador Agreement, after taking into account the fact that they were with Mr Robson personally as opposed to the Appellant.

23. The key points to note in relation to them are that:

(1) each agreement referred in its recitals and its operative clauses to the fact that MUFC was being given the right to use Mr Robson's image and to utilise the services of Mr Robson in an ambassadorial role;

(2) each agreement required Mr Robson:

(a) to carry out his personal appearances in accordance with the club's reasonable instructions and directions; and

(b) to observe high standards of behaviour;

(3) each agreement provided for the payment of a fixed fee and stipulated that payments of the fee to the Appellant would discharge the club from its payment obligation to Mr Robson;

(4) each agreement stipulated that it represented the entire agreement between the parties and could be amended only by an agreement in writing between the parties;

(5) each agreement stipulated that it was not intended to create an employer/employee relationship between the parties;

(6) the First Personal Ambassador Agreement did not provide for a minimum number of personal appearances but stipulated that the club would be entitled to terminate the agreement if Mr Robson was unable or unwilling to make a personal appearance on three or more occasions during the term whereas the Second Personal Ambassador Agreement and the Third Personal Ambassador Agreement did provide for a minimum number of personal appearances and, although they contained a similar termination right to the one set out in the First Personal Ambassador Agreement, that right was stated not to apply in circumstances where Mr Robson had reached his minimum number of personal appearances; and

(7) the First Personal Ambassador Agreement stipulated that Mr Robson could not enter into a personal endorsement deal with any competitor of the club or a sponsor without the prior written consent of the club whereas the Second Personal Ambassador Agreement and the Third Personal Ambassador Agreement went further than that and stipulated that Mr Robson could not undertake any personal endorsement deal at all without the prior written approval of the club, such approval's not to be unreasonably withheld or delayed.

**The income schedules**

24. The schedules setting out the income of the Appellant in the tax years which are the subject of this decision revealed the following:

(1) in the period from 3 December 2019 to the end of the tax year ending 5 April 2020, the aggregate income of the Appellant was £171,500 of which approximately 87% was the fixed fee instalment payable under the Ambassador Agreement, approximately 12% was attributable to work for sponsors and approximately 1% was attributable to work for MUTV; and

(2) in the tax year ending 5 April 2021, the aggregate income of the Appellant was £319,000, of which approximately 94% was the fixed fee instalments payable under the Ambassador Agreement, approximately 1% was attributable to work for MUTV and approximately 5% was attributable to work for persons unrelated to MUFC or sponsors.

25. The schedules setting out the income of the Appellant in the tax years immediately preceding the tax years which are the subject of this decision – which showed the sums paid under the Third Personal Ambassador Agreement as income of the Appellant despite the fact that the fixed fee instalments payable under that agreement were expressed to be payable to Mr Robson personally and were merely directed by Mr Robson to be paid to the Appellant – revealed the following:

(1) in the tax year ending 5 April 2017, the aggregate income of the Appellant was £425,000, of which approximately 70% was the fixed fee instalments payable under the Third Personal Ambassador Agreement and at least 80% was attributable to work for MUFC and sponsors;

(2) in the tax year ending 5 April 2018, the aggregate income of the Appellant was £379,500, of which approximately 79% was the fixed fee instalments payable under the Third Personal Ambassador Agreement and at least 90% was attributable to work for MUFC and sponsors; and

(3) in the tax year ending 5 April 2019, the aggregate income of the Appellant was £462,000, of which approximately 65% was the fixed fee instalments payable under the Third Personal Ambassador Agreement and 90% was attributable to work for MUFC and sponsors.

**FINDINGS OF FACT AND THE WITNESS EVIDENCE**

26. At the hearing, I heard the testimony of two witnesses – Mr Robson and Mrs Alison Edge, the former director of alliances and partnerships at MUFC. Mrs Edge's department was responsible for managing the relationship between the club and sponsors and for co–ordinating the pool of players, managers, former players and former managers in that process. (In this decision, I will refer to the club's players, managers, former players and former managers together as "former players" and to any one of them as a "former player").

27. I found both witnesses to be honest, credible and keen to assist me in finding the facts which would be relevant to this decision. Moreover, with one exception – to which I allude in paragraph 28(35) below, where I make a finding in relation to the relevant disputed fact – there was no dispute between the parties in relation to the facts themselves. Instead, their differences related to the inferences and conclusions which I should draw from the facts, Accordingly, in this part of my decision, I will simultaneously set out my findings of fact for the purposes of this decision and, in so doing, summarise the evidence of Mr Robson and Mrs Edge on which those findings of fact are based.

28. The findings of fact, together with the evidence on which they are based, are as follows:

*MUFC and its ambassadors*

(1) MUFC have two categories of former players which it uses for promotional purposes. These are:

(a) global ambassadors, each of whom has a contract with the club pursuant to which, inter alia, the ambassador is required to make a specified minimum number of personal appearances for the club and/or sponsors in return for a fixed fee; and

(b) legends, who do not have such long–term contracts but instead make *ad hoc* appearances by agreement with the club from time to time.

At the time relevant to this decision, MUFC had only five or six ambassadors of whom Mr Robson was one;

(2) ambassadors are selected on the basis of their long–standing connection with the club as either player or manager. They are people whom fans and sponsors associate closely with the club and who are therefore useful to the club in generating and maintaining sponsorship and partnership deals and fostering the relationship between the club and its fans. Ambassadors are particularly useful in this regard because, unlike current players, they are available to travel and many of the sponsors are located overseas;

(3) Mrs Edge's former department is responsible for building and maintaining relationships with sponsors. Whilst the ambassadors are not themselves responsible within the organisation for the club's relationship with sponsors, they are an important tool in that regard because the club uses its ambassadors to fulfil its contractual obligations to sponsors to provide personal appearances by former players. The agreements with many of the sponsors contain provisions which require the club to make available former players – who can be ambassadors – for personal appearances on a specified number of occasions during the term of the contract. The club knows at all times the number of personal appearances which will be required both to fulfil those obligations and to fulfil its own needs, including for personal appearances on match days and for merchandising and media;

(4) one of the roles of the department in which Mrs Edge worked is to match those requirements with the ambassadors and legends who are available to make the personal appearances. However, Mrs Edge explained that it was always made clear to sponsors that, whilst the club would attempt to fulfil any request made by the relevant sponsor for a personal appearance by a specific ambassador, it had no way of ensuring that that would be the case. Mrs Edge said that, although the club did not feel that it could compel an ambassador to attend a particular event which was being held by a sponsor, on a rare occasion where the club considered that a special effort to meet a request for the personal appearance of a specific ambassador merited it and the ambassador in question declined the request, someone senior at the club might call the relevant ambassador to ask if the ambassador could change his mind and alter his plans to accommodate the request but that was not always successful;

*Mr Robson's role as an ambassador*

(5) after making some trial appearances as an ambassador at the request of Mr David Gill, the chief executive officer of MUFC at the time, in the 2006/7 season, Mr Robson entered into the First Personal Ambassador Agreement in March 2008 and has acted in an ambassadorial role for MUFC ever since, initially pursuant to the successive Personal Ambassador Agreements and, more recently, pursuant to the Ambassador Agreement;

(6) although the terms of the Ambassador Agreement are not identical to the terms of each Personal Ambassador Agreement which preceded it, not least because of the change in the contracting parties, those terms have been the same in all material respects throughout the period since March 2008;

(7) Mr Robson continued to act as an ambassador under the First Personal Ambassador Agreement while he managed the Thai national team between 23 September 2009 and 8 June 2011. Over that period, he lived full–time in Thailand and returned to the UK on only one occasion. He said that, over that period, the club were willing to allow him to fulfil his ambassadorial role by making personal appearances in Asia and writing a column in the match day programme;

(8) the process which led to the execution of the Ambassador Agreement (and each Personal Ambassador Agreement before that) was that Mr Robson would reach an oral agreement with a senior executive at the club as to the terms of the arrangement – in the case of the Ambassador Agreement, Mr Richard Arnold, the group managing director at the time – and then the club would present him with the written agreement. Although, in general, Mr Robson occasionally solicited the assistance of his accountant, Mr Tony Price, in connection with contracts for his more long–term commercial engagements, he did not ask Mr Price or any lawyer to review the terms of the Ambassador Agreement or any of the Personal Ambassador Agreements. Instead, he essentially trusted the club to produce documents which accorded with the oral agreement he had reached with its representative and relied on his own reading of the more important clauses in the documents. He said that, in the case of the Ambassador Agreement, those important clauses were essentially the amount of the fixed fee to which the Appellant would become entitled and the minimum number of personal appearances that he would be required to make;

(9) Mr Robson confirmed that he had had no legal training himself but said that his manner of working with the club had remained the same throughout his period as ambassador. His understanding was that the reason why the Third Personal Ambassador Agreement had been replaced by the Ambassador Agreement was simply to ensure that the relevant contracting party from his side was the Appellant and not himself;

(10) Mrs Edge noted that Mr Robson was "so closely associated with the history of the club [that] … it is almost impossible to dissociate [him] from MUFC". However, she added that, like Sir Bobby Charlton and George Best, Mr Robson's image was such that, in some ways, he transcended the club. He was a "generational talent" and she had noticed that people who were not MUFC fans or even England fans were drawn to him because of his reputation. Mr Robson's evidence was largely consistent with that. He accepted that, to some degree, he was indelibly associated with the club in the minds of the public but added that he was also connected, by virtue of his former playing and management careers, to England, WBA and Middlesbrough. On this issue, I find as facts that:

(a) although Mr Robson has a stature which transcends his connection to MUFC, there is a strong connection between Mr Robson and MUFC;

(b) that connection is referable to Mr Robson's illustrious and lengthy playing career with the club and pre–dated Mr Robson's ambassadorial role; and

(c) indeed, MUFC wanted Mr Robson to become an ambassador precisely because of that pre–existing connection;

(11) Mrs Edge and her team had no involvement in the drafting of the Ambassador Agreement. That was managed by the club's in–house legal team and general counsel who also dealt with the contracts between the club and the sponsors. However, Mrs Edge said that she and her department did have an interest in those terms of the agreement:

(a) which prevented Mr Robson from undertaking activities that could be seen as an endorsement by the club of any sponsor's competitor, that involved the use of the club's intellectual property rights or that could give rise to reputational damage to the club or a sponsor;

(b) which entitled the club to use Mr Robson's image and required Mr Robson to sign merchandise;

(c) which set out Mr Robson's obligation to satisfy the minimum commitment in each six–month period; and

(d) which set out the amount which the club was required to pay to Mr Robson in each six–month period;

*Personal appearances*

(12) Mr Robson's personal appearances were determined in the light of the requirements of the club, requests made by sponsors and Mr Robson's schedule;

(13) when requesting that Mr Robson make a personal appearance, the relevant MUFC representative would outline the nature and requirements of the personal appearance, given the number of different types of personal appearance which could be requested. For example, the request might relate to Mr Robson's acting as host on match days, participating in press conferences, stadium tours and events days for the club or sponsors or travelling overseas. When the club asked Mr Robson to make a personal appearance, whether to fulfil its own requirements or the requirements of a sponsor, the request was made in an email from MUFC to Mr Robson. In many cases, that email set out the parameters of the relevant request in a pro–forma table headed "Request details", with boxes describing, inter alia, the date and time of the event, the type of event and activity involved and the ambassadors or legends requested;

(14) when Mr Robson made a personal appearance for a sponsor, the parameters for the relevant event were laid down by the sponsor in question and then relayed to Mr Robson through MUFC in the manner described above. There was limited direct contact between Mr Robson and the relevant sponsor. Sometimes, someone at the relevant sponsor might telephone Mr Robson in advance just to see if he might be available on a particular date but, generally, the process of securing Mr Robson's personal appearance involved communications between the sponsor and MUFC and then MUFC and Mr Robson. The process was the same regardless of whether Mr Robson's personal appearance fell within the parameters of the minimum commitment in a six–month period or was in addition to that minimum commitment – as to which, see paragraphs 28(33) to 28(39) below. If the club considered that an event wasn't appropriate for Mr Robson, then it would not suggest it to him even if the sponsor had requested him;

(15) notwithstanding the express terms of the Ambassador Agreement, in practice, neither party conducted itself on the basis that Mr Robson was ever compelled to accept a request for him to make a personal appearance. This was consistent with the view expressed by Mrs Edge as described in paragraph 28(4) above to the effect that the club always told its sponsors that it could not guarantee that an ambassador who had been specifically requested would be made available;

(16) instead, in response to a request from the club to make the relevant personal appearance, Mr Robson would either say that he could make it or would decline. Neither the MUFC representative making the request nor Mr Robson considered that it was necessary for Mr Robson to provide a reason for declining a request. In some cases, he did give a reason – for example, because he was away on holiday or had another pre–existing engagement – but, in other cases, he simply said that he could not make it;

(17) Mr Robson did not always respond to a request for a personal appearance with a simple "yes" or "no" answer. On occasion, an iterative process was followed in which Mr Robson negotiated the details of his personal appearance. For example, in email exchanges taking place outside the period which is relevant to this decision but typifying the manner in which the relationship was conducted in practice:

(a) in October 2021, Mr Robson was asked for his availability over a two–week period to conduct a club interview and selected a date that suited him;

(b) in October 2022, Mr Robson was offered a choice of dates to attend a trade show and chose one of them; and

(c) in January 2023, Mr Robson initially declined a request to do a film for UEFA but was then asked if there was another day in the relevant week that he could do instead and selected one of those other days;

(18) in a case where a sponsor was involved, the iterative process described in paragraph 28(17) above involved MUFC's standing between Mr Robson on the one hand and the relevant sponsor on the other. For example, the sponsor might request Mr Robson's personal appearance at an event and Mr Robson might be willing to attend in principle but subject to there being no media. In that case, the MUFC representative would act as intermediary in the iterative process, communicating with both Mr Robson and the relevant sponsor to see if both parties' wishes could be accommodated;

(19) despite believing that he was free to decline any request, Mr Robson knew that he was required to make at least the minimum number of personal appearances in each six–month period and bore that requirement in mind when deciding how to respond to a request. He said that:

(a) although he felt free to decline any request and regularly did so if it was inconvenient for any particular reason – for example, because he planned to be away – he liked to "get my 35 days in the bank early so I can have a comfortable time later in the year". For that reason, he always tried to attend the club's pre–season tours if he could because each day of the tour (including travel days) counted for this purpose;

(b) in practice, with the exception of the pandemic year, as to which see paragraph 28(32) below, he always satisfied the minimum commitment in each six–month period and also received payments from MUFC for additional personal appearances, as described in more detail below. In fact, he was usually able to complete his 70 days for each year by March; and

(c) on one occasion, he had belatedly realised that he had agreed to make a personal appearance on the same day as he had another engagement and the club had been very accommodating in replacing him with another ambassador;

(20) it was doubtless because Mr Robson always satisfied the minimum commitment in each six–month period that Mrs Edge testified that she did not think anyone at the club

tracked or monitored how many requests Mr Robson turned down. In short, the relationship between the club and Mr Robson was founded on mutual respect and trust;

(21) in practice, approximately 25 of Mr Robson's minimum number of contracted 70 days of personal appearances each year were made on home match days, when Mr Robson would spend time with sponsors (and their guests) either in corporate boxes or at pitch–side. Except when he was away on holiday, Mr Robson would generally attend every home game and, apart from two matches a season when he would take his family and be off–duty, he would generally be acting as host in his capacity as an ambassador at those games;

(22) as for Mr Robson's personal appearances outside match days, it was up to the club to determine the occasions on which it would request Mr Robson to make a personal appearance. The club would make that decision after taking into account a number of factors including whether or not a sponsor had specifically requested that Mr Robson attend the event in question, the aptitude of Mr Robson for an event of that type, the types of events that Mr Robson preferred to attend and the club's anticipated requirements for Mr Robson's future personal appearances. The personal appearances could be in the UK or abroad and different rules applied in calculating the number of days for personal appearances abroad;

(23) some of Mr Robson's personal appearances could be quite brief. For example, in email exchanges taking place outside the period which is relevant to this decision but typifying the manner in which the relationship was conducted in practice, he was asked to attend, inter alia:

> (a) a ninety–minute question–and–answer session with photographs on 4 December 2018;
>
> (b) a fifteen–minute video interview with another former MUFC player for a coffee company on 5 February 2021; and
>
> (c) a one–hour photo shoot at Old Trafford on 7 August 2021.

In addition, at the hearing, Mr Robson referred to a retirement presentation which took just fifteen minutes;

(24) when making a personal appearance on match days, Mr Robson was required to wear club–branded attire. As for other personal appearances, Mr Robson sometimes wore club–branded attire, sometimes wore sponsor–branded attire and sometimes wore his own unbranded clothing. For example, the events involving sponsors fell within two broad categories as follows:

> (a) events which were effectively joint events involving both the club and the sponsor, such as a golf day; and
>
> (b) events where the club was less involved and which were simply for the sponsor itself, such as a leadership course or training for its staff.

Mr Robson would generally attend the first category of events in club–branded attire and the second category of events in attire bearing the brand of the sponsor or in his own unbranded clothing;

(25) when Mr Robson made a personal appearance on match days, he was required to follow the reasonable instructions of the club personnel as to the lounges to visit and the people to meet. As for other personal appearances for the club, control over how the event unfolded on the day, such as the time, date and location and the running order,

would be primarily in the hands of the relevant club representative attending the event. In the case of a personal appearance for a sponsor, control over how the event unfolded, such as the time, date and location and the running order, would be primarily in the hands of the personnel attending from the sponsor – there could be between five and eight of them – but Mr Robson would be informed of those requirements through the club and would be accompanied at the event in question by a representative of MUFC who would act as liaison with the sponsor during the event;

(26) Mrs Edge said that the reason for the attendance of the MUFC representative at events for sponsors was primarily:

(a) to provide support to Mr Robson (and any other ambassadors or legends who were attending) to ensure that the event went smoothly; and

(b) to build the relationship between the club and the key decision–makers at the sponsor.

It was not primarily to ensure that Mr Robson (or those ambassadors or legends) did what was required by the sponsor;

(27) with one exception (when he agreed to do a video advert), Mr Robson's personal appearances were not scripted. He would often be given some background information on the attendees and some helpful prompts or briefing notes – for example, key messages which the club or host sponsor wished to impart or questions which Mr Robson could expect to be asked – but it was up to Mr Robson to determine what he said. Sometimes, the request contained no more than the time and date of the event in question along with the generic activity involved, such as a question–and–answer session, photos or a stadium tour;

(28) although Mr Robson developed his own personal relationship with some of the personnel at the sponsors, he recognised that his personal appearance at their events was in his role as an ambassador for MUFC and that he was representing MUFC in so doing. Consistent with that view, Mrs Edge observed that Mr Robson's personal appearance at the events run by sponsors was designed to deepen the relationship between the club and the sponsors in the hope that they would renew their contracts with, or even increase their financial support for, the club;

(29) although MUFC had agreed to meet all of the travel and hotel expenses that Mr Robson incurred in making his personal appearances, on occasions where the event in question was in Manchester or nearby, the Appellant did not seek reimbursement of expenses. However, the fact that the club generally met the relevant expenses and also provided Mr Robson's attire for many of the personal appearances meant that there was no meaningful prospect of the Appellant's making a loss in respect of its activities under the Ambassador Agreement;

(30) although the Ambassador Agreement contained no provision for a formal performance review, Mr Robson thought that it would be reasonable for a sponsor who was unhappy with the manner in which he had conducted himself to provide feedback on that to the club and that, if the club agreed that his performance was unacceptable, for the club to let him know. However, this was hypothetical as it had never happened;

(31) although the Ambassador Agreement set out detailed rules for calculating the number of days which a personal appearance took up, in practice the parties did not apply those rules, adopting a swings and roundabouts approach. Mr Robson said that, because the club had always been really fair with him in treating any personal appearance, no matter how short, as counting as one day, he did not claim that a personal appearance in

the UK that lasted over eight hours should count as one–and–a–half days, as he was entitled to do under the terms of the Ambassador Agreement;

(32) things were a little different in relation to personal appearances for part of the period to which this decision relates because of the pandemic. In the absence of matches, the MUFC commercial team had to be creative in terms of finding ways to support the sponsors. The activities which were undertaken as a result were slightly different from the usual ones – for example, virtual hospitality and meet–and–greets on Teams, cookery lessons, fitness classes and community outreach. Consequently, Mr Robson was able to make around 61 of the 70 personal appearances which he was required to make in that year and the outstanding balance was carried forward to the following year;

*Personal appearances for additional payments*

(33) although there was no provision in the Ambassador Agreement which entitled the Appellant to receive anything more than the £150,000 (excluding VAT) for each six–month period that was set out in clause 6 of the agreement, the Appellant sometimes received additional fees from MUFC in respect of Mr Robson's personal appearances. Those fees were paid in one of two circumstances – either:

(a) because Mr Robson had already satisfied the minimum commitment for the six–month period at the relevant time; or

(b) because Mr Robson's presence had been requested by a sponsor and the club did not wish that personal appearance to count towards the minimum commitment for the relevant six–month period;

(34) I find that, despite the absence of express provision for them in the Ambassador Agreement, those fees were contractual in nature and were not gratuitous. I say that because Mr Robson's evidence was that he would not have been prepared to make the relevant personal appearance in the absence of the additional fee and Mrs Edge's evidence was that the club was willing to pay the additional fee in order to secure the relevant personal appearance;

(35) there was some dispute between the parties as to how such payments were quantified. Mr Rivett, on behalf of the Appellant, pointed out that they varied in amount depending on the nature and length of the personal appearance in question. In that regard he took me to some invoices from February to May 2016 in which the fee charged for Mr Robson's personal appearance was £3,500 (excluding VAT). However, on the basis that:

(a) the vast majority of such invoices were for £5,000, or a multiple thereof, (excluding VAT);

(b) Mr Robson said in his testimony that £5,000 (excluding VAT) was his daily rate – Mr Robson described the amount of such payments as "pro rata of the £300,000" and as his "individual fee for a day's work" and agreed with the proposition put to him by Mr Stone, on behalf of the Respondents, that it was "what a day of Bryan Robson time is worth";

(c) Mrs Edge, in her testimony, agreed with the proposition that Mr Robson received "pro–rata payment" for his additional personal appearances; and

(d) the Appellant's income schedules referred to in paragraphs 24 and 25 above revealed that the Appellant received a great number of fees in the amount of £5,000 or multiples thereof (excluding VAT),

I find that, whilst there may have been some exceptions, Mr Robson generally charged a fee of £5,000 (excluding VAT) for each personal appearance that he made over and above the minimum commitment in any six–month period;

(36) in a case where Mr Robson made a personal appearance in return for an additional fee:

(a) if Mr Robson was making his personal appearance either in the course of enabling MUFC to meet its contractual obligation to a sponsor to provide a former player or solely for the purposes of the club (by which I mean a case where no sponsor was involved or, in one or two rare cases, where the club wished to make Mr Robson available to a sponsor free of charge and other than pursuant to its contractual obligation to the relevant sponsor), then the club paid the additional fee to the Appellant and received no matching payment from a sponsor; and

(b) if Mr Robson was making his personal appearance at the request of a sponsor and other than in the circumstances described in paragraph 28(36)(a) above, then the club paid the additional fee to the Appellant and received an equivalent amount plus a mark–up from the relevant sponsor. Mrs Edge was not sure about the percentage mark–up which applied when the club invoiced a sponsor.

In both cases, the Appellant invoiced MUFC for the relevant personal appearance and then, in circumstances falling within paragraph 28(36)(b) above, the club invoiced the relevant sponsor. There was no separate written contract which dealt with the fees for additional personal appearances, either between the Appellant and MUFC or between the Appellant and any sponsor;

(37) Mr Robson's personal appearances were often made alongside other former players, who might be fellow ambassadors or legends. In circumstances falling within paragraph 28(36)(b) above – which is to say, in circumstances where the former players were receiving payments for making the personal appearances and the sponsor was paying for the personal appearances – the former players who were legends would sometimes charge the sponsor for their personal appearances directly and, at other times, would be billed through the club in the same way as Mr Robson;

(38) in response to the question of whether, when more than one ambassador attended the same event for a sponsor, each ambassador would be the subject of a separate invoice by the club to the relevant sponsor, Mrs Edge initially answered in the affirmative but subsequently said that she did not know. I therefore find as facts that, when more than one ambassador attended the same event for a sponsor, the sponsor was invoiced by the club for each ambassador but that it is unclear whether each ambassador was the subject of his own invoice or whether the ambassadors were invoiced collectively by the club;

(39) on one occasion falling outside the period which is relevant to this decision but typifying the manner in which the relationship was conducted in practice, in December 2022, the club gave Mr Robson the choice of attending a match day which would count toward the minimum commitment for the relevant six–month period (and therefore give rise to no additional fee for the Appellant) or going to an event for Sportsbreaks, a sponsor, in Philadelphia on the basis that an additional fee would be paid, and he chose the latter;

*Image rights*

(40) there has been no written assignment of Mr Robson's image rights by Mr Robson to the Appellant. However, each of MUFC, the Appellant and Mr Robson has at all times proceeded on the basis that, at the time when the Ambassador Agreement was executed,

the Appellant owned those image rights and was entitled to license the image rights to MUFC under the Ambassador Agreement;

(41) no valuation of Mr Robson's image rights has ever been carried out and there was never any discussion between the club and Mr Robson as to the value of such rights. However, Mrs Edge testified that, given Mr Robson's stature and importance to MUFC, the image rights had considerable value to the club. It enabled the club to create licensed products bearing Mr Robson's image and was also vital in terms of building the MUFC brand. In her evidence, Mrs Edge cited many examples of successful promotional campaigns for sponsors in which, in her view, the use of Mr Robson's image was valuable. I was also shown a licence agreement of 8 March 2022 between the Appellant and Panini pursuant to which the Appellant granted Panini a non–exclusive world–wide licence to use Mr Robson's name, nickname, likeness, photograph and image on autographed trading cards for a fee of up to $30,000, which is indicative of the value of Mr Robson's image. In summary, without reaching any conclusions in relation to the precise value of Mr Robson's image, I find that it has considerable value, particularly to MUFC given Mr Robson's history with the club;

(42) notwithstanding the provisions in the Ambassador Agreement requiring the Appellant to provide MUFC with opportunities in relation to ambassador media channels, Mr Robson did not use social media very much. He said that he had tried it for six months at MUFC's request before deciding that it was not for him and the club had not asked him since then to post promotional material on social media;

*Personal endorsement deals*

(43) in practice, Mr Robson did not obtain the prior written consent of the club before entering into personal endorsement deals;

(44) in terms of keeping the club informed of his other activities, as far as Mr Robson was concerned, there was a distinction between his work for England – when he was free to promote a competitor of one of the sponsors which was an England sponsor – and his other work, when he was under an obligation not to promote a competitor of any sponsor;

(45) in the former case, he considered that he could go ahead without telling the club. Examples of that were engagements which he had carried out, in the context of his working for England, for Vauxhall in 2015 and 2017 and Budweiser in 2016. Both of those organisations were sponsors of the Football Association and, as a former England captain, he was often asked to do promotions for England. Although Vauxhall was a competitor of Chevrolet and Budweiser was a competitor of Singha, and both Chevrolet and Singha were sponsors, the fact that the engagement was being carried out in the context of England meant that he did not consider that he was prevented from doing the work or required to tell MUFC about it;

(46) in the latter case, he would exercise his own judgment as to whether or not to tell the club about it and, if he considered that it would not conflict with the interests of the club or a sponsor, then he would go ahead without telling the club. However, Mr Robson mentioned work which he had done for Carling in 2015 and 2018. Although he had not told MUFC about that work, he recognised that the club could justifiably have claimed that he had acted in breach of contract in doing so because of the club's sponsorship by Singha at the relevant time. He also accepted that, whilst he was free to promote a competitor of a sponsor in the context of working for England, he would be in breach of his obligations to the club if he were to promote any such competitor outside that context;

(47) Mr Robson said that, that having been said, the club had never spoken to him about his personal endorsement deals;

(48) Mrs Edge said that she knew that, as a contractual matter under the terms of the Ambassador Agreement, the club had the right to control Mr Robson's personal endorsement deals in all circumstances. She noted that, because of Mr Robson's close links to the club and the paucity of ambassadors, any personal endorsement deal into which Mr Robson entered potentially affected the club. In her view, the concern was not so much that a relationship might be created between Mr Robson and a competitor of a sponsor but more that the activities of Mr Robson with that competitor might be seen as MUFC's endorsing that competitor. For that reason, the club did not want Mr Robson to be using MUFC materials or intellectual property rights or to wear MUFC attire when working for a sponsor's competitor. Nevertheless, she added that:

(a) the messaging given to sponsors was that the club could not control the activities of its ambassadors or the use by its ambassadors of their personal brands; and

(b) in practice, the club chose to exercise its contractual rights of control over Mr Robson's personal endorsement deals judiciously. For instance, it would not stand on its contractual rights to prevent personal endorsement deals except in a case where Mr Robson's use of club materials, intellectual property rights or attire in the course of his activities for a sponsor's competitor gave rise to the concern mentioned above;

(49) as regards services and activities carried out by Mr Robson other than for MUFC or the sponsors, Mr Robson:

(a) does not play a similar ambassadorial role for either WBA or Middlesbrough although he does carry out the occasional engagement for those clubs – particularly charity events – and he also carries out engagements promoting England;

(b) has worked for, inter alia, Carlsberg (but not since 2006), the Co–op (but not since 2010), SuperSport (but not since 2012), the Royal Mail (but not since 2013), Mastercard (but not since 2013), the BBC (but not since 2014), Sky (but not since 2014) and Tesco (but not since 2015);

(c) has acted as a columnist for the Daily Mail, the Daily Express and the Sunday Star (but not since 2003);

(d) has written two autobiographies, one in 1984 and the other in 2007;

(e) has attended corporate and sporting dinners and awards and presentations ceremonies, played in charity football matches and five–a–side tournaments and autographed cards for Futura and Panini;

(f) attended promotional events for Vauxhall, Carling and Budweiser in 2015 to 2018, as noted in paragraphs 28(45) and 28(46) above; and

(g) has worked, and continues to work, for ESPN and MUTV;

(50) Mr Robson accepted that, over the tax years to which this decision relates, he had done very little work for anyone apart from the club, the sponsors and MUTV. He said that this was due in part to personal choice. Following his recovery from illness in 2011, he had made a conscious decision to devote more time to his friends, family and hobbies and did not like to spread himself too thinly. He added that he had given up working for the BBC because he got tired of travelling down to London and wanted to spend more

time with his family. His role as an ambassador meant that he had the flexibility to visit his daughter in Australia as well as being engaged with MUFC and its fans, for whom he has a great deal of affection. However, he also pointed out that the period in question coincided with the pandemic, when working opportunities were limited; and

(51) looking at the evidence in relation to Mr Robson's working life as a whole, I am not inclined to attribute the limited number of engagements for anyone apart from the club, the sponsors and MUTV organisations over the tax years to which this decision relates to the pandemic because a similar pattern is apparent from the income schedules relating to the three tax years preceding those tax years. However, I accept that the absence of other engagements was attributable to Mr Robson's personal choice – which is to say a decision based on work/life balance – and not to a shortage of opportunities to work for others.

**DISCUSSION – AN INTRODUCTION**

29. This case has some unusual features in the context of the IR35 legislation.

30. The first is that, so far as I can tell, it is the first time that an appellant in an appeal relating to the IR35 legislation has raised the issue that at least some part of the consideration which was paid to the intermediary by the client was attributable to the grant of intellectual property rights and not to services which were required personally to be performed by the worker and therefore falls outside the ambit of the IR35 legislation.

31. This may be a tribute to the ingenuity of the Appellant and its advisers but it is also a reflection of the peculiar circumstances of this case. By that I mean that, whereas the other cases relating to the IR35 legislation primarily related to the personal performance of services by the worker in question, a feature of this case is the significance that has been attached by both the club and Mr Robson to Mr Robson's image rights. In those other cases, the reason for the contract between the client and the intermediary was primarily to secure the particular services that the worker in question was offering to perform. Whilst the relevant contract between the client and the intermediary may well have contained a provision to the effect that ownership of the intellectual property which arose from those services would vest in the client, that provision was very much merely an adjunct to the personal performance of the services in question. In contrast, in this case, the licence to use Mr Robson's image was central to the contract between MUFC and the Appellant. Its significance can be seen in the terms of the Ambassador Agreement – for example, the reference in the recitals to the licence of image rights and the detailed provisions in relation to image rights and intellectual property in the operative part of the agreement, as mentioned in paragraphs 20(2) and 20(3) above.

32. This difference informs another peculiarity in this case, which is that, leaving aside the licence to use Mr Robson's image and focusing solely on the services which the Appellant was obliged to procure that Mr Robson personally performed, those services were slightly different in nature from the services which have typically been provided in cases in which the IR35 legislation has been in point. By that I mean that the reason why MUFC wished to engage Mr Robson personally to perform the services in question was not because of any great complexity or unusual level of technical skill involved in the nature of the services in question but was instead because of Mr Robson's identity and reputation and his historic connection with the club.

33. Whilst I do not think that this prevents Mr Robson's personal appearances from amounting to the personal performance of services for the purposes of the IR35 legislation, it does have a bearing on the analysis of both of the issues which I need to consider in this decision. For example:

(1) when the Image Rights Issue falls to be addressed, it is necessary to consider whether all of the consideration which relates to Mr Robson's personal appearances can be said to relate to an obligation personally to perform services or whether some part of that consideration should properly be said to relate to something else, such as Mr Robson's image rights; and

(2) when the Employment Issue falls to be addressed, it is necessary to consider what weight should be given in this case to the long–standing principle applicable in cases under the IR35 legislation to the effect that an inability on the part of the worker to provide a substitute is a factor which is indicative of a contract of employment, given that the essence of the contract in this case is the identity and reputation of the worker himself and therefore the personal appearance of the worker is fundamental to the service that is obliged to be provided.

34. Related to the above point is the fact that the connection between MUFC and Mr Robson long pre–dates his role as an ambassador because it is attributable to his role as a player for the club and, far from being the result of his ambassadorial role, is actually the reason why he was appointed as an ambassador in the first place. One of the factors which may be considered to be relevant in any case under the IR35 legislation is the extent to which the worker can be said to be "part and parcel" of the client's organisation because the authorities suggest that this can, in some circumstances, be a factor which is indicative of a contract of employment. In carrying out that exercise in this case, the origins of Mr Robson's connection with the club may be relevant in determining the extent to which Mr Robson was "part and parcel" of the club and the significance of that factor in determining the Employment Issue.

35. I will return to these issues in the course of this decision.

**DISCUSSION – THE IMAGE RIGHTS ISSUE**

## Introduction

36. I will start my analysis of the issues in this case by addressing the Image Rights Issue first because, in his submissions, Mr Rivett suggested that this was logically prior to the Employment Issue. For reasons which will become plain in due course, I think that the two issues could just as easily be addressed together but I first need to explain the reason why Mr Rivett approached the two issues in the way he did and the submissions which he made in relation to the Image Rights Issue.

## The parties' submissions

### *Introduction*

37. Mr Rivett made four points in relation to the Image Rights Issue. I will deal with the fourth point in due course, as it is more appropriately addressed in the context of the Employment Issue, but his first three points are summarised in the paragraphs which follow.

### *First point – exclusion from the IR35 legislation of the entire consideration*

38. Mr Rivett's first and primary submission in relation to the issue was that, because the Ambassador Agreement was a composite agreement, which included a licence of image rights and did not relate solely to the personal provision of services, it was properly to be characterised as an image rights agreement and therefore fell outside the IR35 legislation altogether. In support of that argument, Mr Rivett relied on the fact that:

(1) the first instance decisions in *Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443 ("*Sports Club*") and *Hull City AFC (Tigers) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 227 (TC) ("*Hull City*") were authority for the proposition that a contract for the licence or sale of intellectual property rights did not give rise to employment income; and

(2) the language used in Section 49 of the ITEPA and Regulation 6 of the NICs Regulations meant that the IR35 legislation applied only to contracts providing for the personal performance of services and not to composite contracts which provided for both a licence or sale of intellectual property rights and the personal performance of services.

39. Mr Stone submitted that there was no legal definition of an image rights agreement and that the applicable legislation simply required that the rights and obligations arising under the Ambassador Agreement be considered without regard to labels. Section 49(1)(a) of the ITEPA and Regulation 6(1)(a) of the NICs Regulations raised a simple factual question, which was whether Mr Robson personally performed, or was under an obligation personally to perform, services for MUFC. On the facts of this case, that question could be answered only in the affirmative. There was no requirement in the section that those services needed to be the sole, or even the dominant, feature of the contract between the client and the intermediary before the relevant legislation applied. It therefore did not assist the Appellant to label the Ambassador Agreement an image rights agreement. Once the language in the relevant statutory provisions was satisfied, which it was in this case, then the IR35 legislation was in point.

40. Mr Stone added that an equivalent approach to statutory construction had been adopted by Megaw J in *Amalgamated Engineering Union v Minister of Pensions and National Insurance* [1963] 1 WLR 441, where a composite contract contained both provisions relating to employment and provisions unrelated to employment and it was necessary to determine whether the contract was a "contract of service" for the purposes of Schedule 1 to the National Insurance (Industrial Injuries) Act 1946. The judge in that case had held that that question was not to be answered by identifying the dominant part of the contract. Instead, as long as the contract included terms providing for a contract of service, it fell within the definition.

***Second point – exclusion from the IR35 legislation of the consideration attributable to image rights***

41. Mr Rivett's second point was that, in the alternative, even if the element of personal services for which the Ambassador Agreement provided meant that the IR35 legislation was potentially engaged because the terms of Section 49(1)(a) of the ITEPA and Regulation 6(1)(a) of the NICs Regulations were satisfied, to the extent that the consideration payable under the Ambassador Agreement was attributable to the image rights which the Appellant had licensed to MUFC under that agreement, that consideration was not for the personal performance of services by Mr Robson and therefore fell outside the ambit of those provisions.

42. In response to that point, Mr Stone said that the onus was on the Appellant to show that at least some part of the consideration paid pursuant to the Ambassador Agreement was attributable to the licensed image rights and the Appellant had signally failed to discharge that burden. The agreement itself contained no apportionment of the consideration and the evidence showed that:

(1) no valuation of the image rights had ever been carried out; and

(2) the parties had never discussed the value of the image rights.

Moreover, Mr Robson's testimony was that, before executing the Ambassador Agreement, he had reviewed the provisions of the agreement which he considered to be important. In that context, he had mentioned the fixed fees and the minimum number of personal appearances which he would be required to make but had not said anything about his image rights, what value he thought they had or what consideration he wanted to receive in return for licensing them.

43. Moreover, the fact that the contract between the client and the intermediary in this case made some provision for image rights did not make this case unique. All of the cases under

the IR35 legislation in relation to TV personalities had included provisions dealing with intellectual property rights. This was to be expected because, in each case, the client wanted to control the worker's image rights while the worker was working for the client.

44. By way of example, Mr Stone pointed me to the Upper Tribunal ("UT") decision in *The Commissioners for His Majesty's Revenue and Customs v S & L Barnes Limited* [2024] UKUT 262 (TCC) ("*Barnes*") where the contract between Sky and Mr Barnes's personal services company had provided for the intellectual property rights in the product of the services which were obliged to be performed under the agreement by Mr Barnes to vest in Sky. Mr Stone pointed out that no apportionment of the consideration payable under the agreement between Sky and the personal services company had been made in that case by reference to the provision dealing with intellectual property rights.

45. Similarly, in *PD & MJ Limited v The Commissioners for His Majesty's Revenue and Customs* [2024] UKFTT 00038 (TC), Sky had been granted the exclusive right in a specified territory to use Mr Thompson's image rights to advertise and promote Sky's programmes and it had not been suggested by the FTT in that case that any of the consideration which had been paid by Sky to Mr Thompson's personal services company should fall outside the IR35 legislation because it related to image rights.

46. Mr Stone said that, whilst the image rights in this case might well have been more valuable than in those (and other such) cases, that was a difference in degree and did not make this case fundamentally different in principle.

47. Mr Rivett said that he did not need to answer that submission. He had not been involved in the cases referred to and did not know whether the point in relation to intellectual property rights had been raised in argument by the appellants in those cases.

48. By way of further response to Mr Rivett's second point, Mr Stone said that the additional fee of £5,000 (excluding VAT) charged by the Appellant for a personal appearance made by Mr Robson outside the minimum commitment for a six–month period was, broadly speaking, equal to the aggregate annual fees under the Ambassador Agreement of £300,000 (excluding VAT) divided by the 70 personal appearances comprising the aggregate over each year of the minimum commitments in the two six–month periods making up that year. (That came to roughly £4,300 (excluding VAT) but was close enough to make no difference). The fact that the annual fees under the Ambassador Agreement were in fact less than the result of multiplying £5,000 by 70 meant that MUFC could not have been according any value to the image rights in determining the amount of the consideration payable under the Ambassador Agreement.

49. In response to that submission, Mr Rivett said that it was inappropriate to extrapolate from the fact that the additional fee charged by the Appellant for Mr Robson's personal appearances outside the minimum commitment in a six–month period was greater than the aggregate annual fees under the Ambassador Agreement of £300,000 (excluding VAT) divided by the 70 personal appearances comprising the aggregate over each year of the minimum commitments in the two six–month periods making up that year to conclude that the whole of the consideration which passed under the Ambassador Agreement must be referable to the obligation on the part of the Appellant to procure Mr Robson's personal appearances.

50. That was because the basis on which those additional fees were paid did not answer the question of the basis on which the consideration payable under the Ambassador Agreement had been paid. The relevant question in this case was whether any part of the consideration payable under the Ambassador Agreement was attributable to the image rights and, in that regard, the fact that the consideration payable was not apportioned between the various obligations undertaken by the Appellant under the agreement meant that, by definition, it must

be referable to all of those obligations. As long as at least some part of the consideration was attributable to the image rights, that part of the consideration fell outside the IR35 legislation and the appeal would need to be allowed to that extent. It would then be necessary to consider how much of the consideration was so attributable in determining quantum at a later stage in the proceedings.

***Third point – exclusion from the IR35 legislation of part of the consideration attributable to personal appearances***

51. Mr Rivett's third point was that, in any event, even if the IR35 legislation was potentially engaged to the extent that the consideration payable under the Ambassador Agreement was attributable to the obligation to procure that Mr Robson made personal appearances, the context in which that obligation appeared – which is to say, the terms of the Ambassador Agreement taken as a whole, including the license of the image rights – meant that at least some part of Mr Robson's activities in making those personal appearances did not involve the personal performance of services of the type at which the IR35 legislation was aimed but were merely adjuncts to the image rights which had been licensed. As he put it, those activities were simply a mechanism to enable MUFC better to enjoy those licensed image rights. As such, that part of the consideration should also be regarded as falling outside Section 49(1)(a) of the ITEPA and Regulation 6(1)(a) of the NICs Regulations. In this regard, Mr Rivett relied on the explanation for the purpose of the IR35 legislation given by Robert Walker LJ in *R (on the application of Professional Contractors Group Ltd and others) v Inland Revenue Commissioners* [2001] EWCA Civ 1945 ("*Professional Contractors*") at paragraphs [9] to [15].

52. By way of an example to elaborate his point, Mr Rivett referred to a case where the club or one of the sponsors requested Mr Robson's personal appearance at an event wholly or partly in order to take photographs of Mr Robson either to post them on social media or in some other way thereby to commoditise Mr Robson's connection with the club or the relevant sponsor. He said that, in that case, to the extent that Mr Robson was agreeing to allow the photographs to be taken and used by the club or the relevant sponsor, Mr Robson's personal appearance did not involve the personal performance of services which potentially fell within the ambit of the IR35 legislation because that activity on the part of Mr Robson was no more than an adjunct to the licensed image rights and fell to be treated in the same way as the licensed image rights.

53. In response, Mr Stone said that Mr Rivett's reliance on the dicta of Robert Walker LJ in *Professional Contractors* was misplaced. In the paragraphs cited above, Robert Walker LJ had simply pointed out that the IR35 regime was restricted to situations where the worker, if contracted directly to the client, would have been regarded for income tax purposes as an employee of the client. That much was self–evident and it left at large the question of whether, had the worker been contracted directly to client, he would have been regarded as an employee of the client. That question had to be determined on the ordinary principles established by case law – see *Professional Contractors* at paragraph [12] – and it shed no light whatsoever on which services that the worker was obliged personally to perform fell within the IR35 regime.

**Conclusion**

***Exclusion from the IR35 legislation of the consideration attributable to image rights***

54. I agree with the basic proposition advanced by Mr Rivett that consideration which can properly be said to have been paid for a licence of image rights as opposed to the personal performance of services is not subject to tax as employment income. The two authorities for that proposition which were provided to me – the decisions in *Sports Club* and *Hull Tigers* – were not binding on me because they were both at first instance but I agree that both of those

decisions proceeded on the basis that that basic proposition is correct and I did not understand Mr Stone to demur from it.

55. In *Sports Club*, the appellant had entered into promotional agreements allowing it to use and exploit the image rights of two of its employees. The Special Commissioners (the "SCs") held that the monies paid under the promotional agreements were not emoluments of employment. The agreements were genuine commercial arrangements under which the appellant, as the person making payment under the agreements, obtained promotional rights which were distinct from the services rendered by each employee by reason of their employment.

56. The SCs held that the agreements gave rise to "a series of contractual obligations both positive and negative; positive in the sense that the player would, if called upon to do so, do certain things like endorsing products or going to photoshoots and negative in the sense that he could not undertake such activities for others." Those rights had a value to the appellant which was reflected in the amounts paid for them and therefore those amounts did not constitute a benefit for either employee. In short, the agreements had a genuine independent value and were not merely a smokescreen for paying additional disguised emoluments to the employees in question. Referring to the decision of Megarry J in *Pritchard v Arundale* 47 TC 680 and the judgment of Viscount Simonds in *Hochstrasser v Mayes* 38 TC 673, the SCs noted that the payments made under the agreements were not in return for the performance of services. Instead, they were for something quite distinct from the performance of services – namely, the rights to exploit the reputations of the individuals in question – see *Sports Club* at paragraphs [96] to [101].

57. Although *Hull City* was decided the other way, that was because, viewing the facts realistically, the FTT in that case concluded that none of the consideration which had purportedly been paid for the image rights had been so paid. In *Hull City*, the appellant had entered into an agreement with an offshore company under which it was granted the right to exploit the overseas image rights of one of its employees in return for payments to the company. The FTT held that, in order to decide whether the payments made by the appellant to the company were a reward for the employee's services as an employee or consideration for the right to exploit the employee's overseas image rights, the payments needed to be viewed realistically by reference to their substance and not their form.

58. Having regard to the evidence as a whole:

(1) the appellant did not:

(a) have any clearly–defined plan to exploit the employee's overseas image rights;

(b) obtain any valuation of those rights;

(c) have any real interest in commercially exploiting those rights;

(2) there was little, if any, prospect of the appellant's exploiting those rights;

(3) those rights had never been commercially exploited; and

(4) the appellant had not adduced any evidence to show that those rights had had any commercial value.

59. On that basis, viewed realistically, the payments in question had been made in order to secure the employee's services as an employee and not to obtain the right commercially to exploit the employee's overseas image rights. The agreement in question was not a sham in that it really did grant the appellant the right to exploit the employee's overseas image rights but those rights did not have any commercial value and therefore, in reality, the payments were a reward for the employee's services as an employee.

60. In this case, the Ambassador Agreement was a single agreement providing for both a licence of image rights and personal appearances by Mr Robson. In contrast, both *Sports Club* and *Hull City* were cases where the image rights in question were the subject of an agreement which was separate from the agreement dealing with the personal performance of services. However, the principle on which both cases proceeded – which is that consideration that, viewed realistically, can properly be regarded as having been paid for image rights and not for the personal performance of services is not employment income – is equally applicable in a case where both the personal performance of services and the licence of the image rights are dealt with in the same agreement.

61. In that case, it seems to me that the correct approach in the absence of any apportionment of the aggregate consideration passing under the agreement between the various obligations to which the agreement gives rise is to apportion the consideration between them on an appropriate basis.

62. Having said that, I agree with Mr Stone that the mere fact that the Ambassador Agreement was a composite agreement which included the licence of image rights in addition to the obligation personally to perform services does not take the arrangements outside the scope of the IR35 legislation altogether. There is no requirement in Section 49(1)(a) of the ITEPA or Regulation 6 of the NICs Regulations that the obligation personally to perform services needs to be the sole, or even the dominant, feature of the contract between the client and the intermediary. All that is needed in order for that section to apply is that there exists, within the contract, an obligation on the part of the intermediary to procure the personal performance of the relevant services. At that stage, the IR35 legislation is engaged and it is necessary to construct a hypothetical contract between the client and the worker based on the terms of the actual contracts between the client and the intermediary and, where relevant, the intermediary and the worker, and the circumstances in which the worker carried out the services in question.

63. I will go on to address in the section of this decision when I deal with the Employment Issue the way in which I believe the hypothetical contract in a case like the present one is to be constructed.

64. Although I prefer Mr Stone's approach to construing the IR35 legislation and agree with him that, notwithstanding the composite nature of the Ambassador Agreement, the provisions of Section 49(1)(a) of the ITEPA and Regulation 6 of the NICs Regulations were met in this case, I do not agree with him that the consequence of that conclusion is that none of the consideration that was payable under the Ambassador Agreement should be regarded as having been paid for the image rights which were licensed to MUFC pursuant to that agreement. I say that because the agreement itself contained no apportionment of that consideration and I agree with Mr Rivett that the consideration should therefore be regarded as having been paid for all of the rights which were acquired by MUFC under the agreement.

65. I would add that the evidence shows that:

(1) Mr Robson's image rights had considerable value to MUFC;

(2) the club had a genuine interest in exploiting those rights; and

(3) the club did in fact exploit those rights.

Thus, even though no valuation of the rights was carried out and the parties did not discuss the value of the rights before the Ambassador Agreement was executed, this is not a case like *Hull City* where, when the transaction is viewed realistically, those rights can simply be disregarded. Apart from the absence of a valuation, none of the features described in paragraph 58 above in relation to the rights in *Hull City* was present in this case.

66. Mr Stone made various submissions as to why the Appellant had failed to discharge the onus of proof on this point – as to which see paragraphs 42 to 50 above – but, in my view, the fact that the image rights had considerable value and that there was no apportionment within the contract of the aggregate consideration means that the Appellant has done enough to satisfy the burden of showing that, viewed realistically, at least some part of the consideration which passed under the Ambassador Agreement was referable to Mr Robson's image rights.

67. On that subject, even though the additional fee charged by the Appellant for a personal appearance by Mr Robson above the minimum commitment in a six–month period was greater than the aggregate annual fees under the Ambassador Agreement of £300,000 (excluding VAT) divided by the 70 personal appearances comprising the aggregate over each year of the minimum commitments in the two six–month periods making up that year, I do not see why that leads inexorably to the conclusion that no part of the consideration payable under the Ambassador Agreement was referable to the licence of the image rights. The additional fees were paid solely for Mr Robson's personal appearances outside the scope of the minimum commitment in a six–month period, unlike the consideration paid under the Ambassador Agreement, which was paid for all of the rights which MUFC acquired under the agreement. Whilst, when the question of quantum falls to be addressed in due course, the Respondents might well wish to argue that the basis on which the additional fees were calculated means that only a small part of the consideration under the Ambassador Agreement should be allocated to the licensed image rights, it is not a knock–out blow at this point in the proceedings. Moreover, it will be seen from paragraphs 72 to 80 below that, in my view, it is not clear to me at this stage that all of the consideration paid under the Ambassador Agreement which was allocable to the Appellant's obligation to procure that Mr Robson made personal appearances was in fact referable to the obligation personally to perform services and that it is perfectly possible that some of it may also have been referable to the licensed image rights.

68. It follows from the above that, whatever conclusions I may reach in relation to the Employment Issue, the Appellant is entitled to succeed in part on the Image Rights Issue and at least some part of the consideration which was paid under the Ambassador Agreement falls outside the IR35 legislation because it related to the licensed image rights.

69. Quite how much of the consideration which was paid under the Ambassador Agreement related to the licensed image rights is a matter which will need to be determined only at the stage in the proceedings when quantum falls to be addressed. However, I would make the following observations in passing in relation to the determination of that amount:

(1) at the hearing, Mr Rivett submitted that any part of the consideration payable under the Ambassador Agreement which was attributable to the limitations placed on Mr Robson under the agreement as regards his personal endorsement deals was referable to the licensed image rights, whilst Mr Stone said that those limitations were imposed on Mr Robson in order to protect the respective brands of MUFC and the sponsors and not in order to protect the value of Mr Robson's image itself. Mr Stone pointed out that, if Mr Robson were to agree to promote a sponsor's competitor, then that would be unlikely to have a detrimental impact on the value of Mr Robson's image itself. Indeed, it might well enhance that value.

Whilst I do not decide this point conclusively until hearing the submissions in relation to quantum, I am presently inclined to think that, even if Mr Robson's promotion of a sponsor's competitor would not have had a detrimental impact on the value of Mr Robson's image itself, the value to MUFC of the licence of that image might well have been reduced by such activities and therefore the limitations might well have been included in order to protect the value to the club of the licensed rights which it had

acquired. In effect, those limitations were equivalent to the negative contractual obligations to which reference was made by the SCs in *Sports Club* mentioned in paragraph 56 above. If that is right, then, to the extent that any part of the consideration passing under the Ambassador Agreement was attributable to the Appellant's agreement to those limitations, that part should properly be seen as relating to the image rights; and

(2) a similar point can be made in relation to the obligations which were set out in the Ambassador Agreement as regards Mr Robson's general conduct. Whilst I do not decide this point conclusively until hearing the submissions in relation to quantum, I am presently inclined to think that, if Mr Robson were to have brought himself into disrepute by virtue of his conduct, then that would have had a detrimental impact on Mr Robson's image and thus the value to the club of the image rights which were being licensed to it under the agreement. If that is right, then, to the extent that any part of the consideration passing under the Ambassador Agreement was attributable to the Appellant's agreement to those obligations, that part should also properly be seen as relating to the image rights.

70. I have reached the conclusions set out in paragraphs 64 to 69 above notwithstanding my considerable doubts over whether the Appellant was in fact the owner of Mr Robson's image rights when the Ambassador Agreement was executed. This was not something on which Mr Stone relied in his submissions but which has troubled me in thinking about this question. Those doubts arise because:

(1) Mr Robson's evidence was that there had been no assignment in writing of those image rights by him to the Appellant; and

(2) each Personal Ambassador Agreement was drafted on the basis that Mr Robson's image rights were owned by him and not the Appellant at the date when the relevant Personal Ambassador Agreement was executed and it seems unlikely to me that ownership of those rights would have passed from Mr Robson to the Appellant without Mr Robson's being aware of it between the date when the Third Personal Ambassador Agreement was executed and the date when the Ambassador Agreement was executed.

71. However, I ultimately do not think that anything turns on this in deciding the Image Rights Issue for the following reasons:

(1) first, regardless of whether Mr Robson's image rights as at the date when the Ambassador Agreement was executed remained vested in Mr Robson or had been assigned to the Appellant, it is apparent from the terms of the Ambassador Agreement and the Guarantee Agreement that each of MUFC, the Appellant and Mr Robson was proceeding on the basis that the rights in question were vested in the Appellant and that the Appellant was in a position to license the relevant rights to MUFC;

(2) secondly, even if the Appellant did not own the relevant rights, Mr Robson was obliged by virtue of his obligations under the Guarantee Agreement to ensure that MUFC obtained the benefit of the licensed image rights and therefore MUFC became entitled to the licensed image rights as a result of the contractual arrangements as a whole;

(3) thirdly, even if, contrary to the second point, the effect of the Ambassador Agreement and the Guarantee Agreement was not to confer on MUFC the benefit of the licensed image rights, that does not detract from the fact that some part of the consideration which MUFC paid under the Ambassador Agreement was referable to the benefit of the licensed image rights. That was what MUFC was paying for, even if it may have been mistaken in thinking that that was what it was getting in return for the payment; and

(4) finally, if I am right in my conclusion in paragraphs 117 to 121 below that all of the terms of the Ambassador Agreement (including those which are referable to the licensed image rights) are to be taken into account in constructing the hypothetical contract between the club and Mr Robson, then the position under that hypothetical contract should be the same as if the club and Mr Robson had entered into a composite agreement directly on the same terms as that hypothetical contract and therefore the hypothetical contract is to be treated as including a licence of the image rights from Mr Robson to the club.

***Exclusion from the IR35 legislation of part of the consideration attributable to personal appearances***

72. I now turn to the question raised by Mr Rivett's third point – which I consider to be the most difficult matter arising out of the Image Rights Issue – and would make the following observations.

73. First, I do not agree with Mr Rivett's general underlying proposition – a theme to which he returned repeatedly throughout his submissions at the hearing – that the Ambassador Agreement was essentially about Mr Robson's image rights and that the Appellant's obligation pursuant to the agreement to procure that Mr Robson made personal appearances was merely ancillary to the licence of those image rights. In my view, that amounts to a misconstruction of the agreement. The agreement was just as much about the Appellant's obligation to procure that Mr Robson made personal appearances as it was about the licensed image rights and it would be as wrong to disregard the former element as it would be to disregard the latter element. It is simply a composite agreement in which two distinct things – personal appearances and a license of image rights – were dealt with.

74. Secondly, I do not agree with Mr Rivett that an obligation on the part of the intermediary to procure the personal performance of services by the worker is any less of an obligation potentially falling within the IR35 legislation simply because the reason, or a large part of the reason, why the services are being sought by the client is the identity of the person who is to perform the services rather than the unique skills which that person will deploy in the performance of the services.

75. By way of expanding on this point, as I mentioned in my preliminary remarks, an unusual feature of this case is that, with all due respect to Mr Robson, a large part of the reason why MUFC wanted him to make personal appearances for it and the sponsors was not his unique skills as, for example, a speaker, football pundit or golf player but because of who he was. Simply by making a personal appearance at a particular event, Mr Robson sprinkled some gold dust on the event which would enhance the respective brands of MUFC and the sponsors. However, the fact that this was a significant reason why MUFC wished Mr Robson to make personal appearances does not make the obligation on the part of the Appellant to procure those personal appearances any less of an obligation to procure the personal performance of services than if the reason why Mr Robson's personal appearances were desired was solely attributable to his unique skills as a speaker, football pundit or golf player. As such, I do not accept the proposition that the Appellant's obligation in that respect was any less of an obligation to procure the personal performance of services potentially falling within the IR35 legislation than, say, the obligation of the personal services company of a television or radio presenter to procure that the relevant presenter does his or her shows.

76. This bring me on to my third point, which is that I agree with Mr Stone that there is nothing in the *Professional Contractors* decision which advances the consideration of this question in any way. All that Robert Walker LJ was saying in that case was that consideration paid in return for the personal performance of services that would, on general principles,

ordinarily lead the person performing the services to be regarded as an employee were the person performing the services to have contracted directly with the recipient of the services is also liable to tax as employment income under the IR35 legislation where the person performing the services has provided those services through a personal services company as intermediary. Robert Walker LJ was saying nothing about which obligations personally to perform services should be regarded as employment obligations and which obligations personally to perform services should not be so regarded.

77. Having said that, the fourth point which I would make in this context is that, although it is ultimately a matter which needs finally to be determined only at the stage in the proceedings when quantum falls to be addressed, I have some sympathy for Mr Rivett's submission to the effect that some part of the consideration that was paid to the Appellant in return for the Appellant's agreement to procure that Mr Robson would make personal appearances was not attributable to Mr Robson's obligation personally to perform services, as such, but was instead attributable to the fact that, in making those personal appearances, Mr Robson's image would be captured on camera and could then be used by the club and the sponsors on social media and the like to enhance their respective brands.

78. I do not decide the point conclusively at the present stage in the proceedings because I do not need to but I can foresee that, in any debate on quantum, Mr Rivett might wish to submit that, to the extent that the consideration which passed under the Ambassador Agreement was attributable to Mr Robson's willingness to allow his photograph to be taken when he made his personal appearances, that consideration falls outside the ambit of the IR35 legislation because it was part and parcel of the Appellant's agreement that MUFC was entitled to use his image and was therefore inextricably linked to the image rights licence and not part of the personal provision of services involved in Mr Robson's personal appearances.

79. In that regard, I note in passing that, in paragraphs [50] and [60] of *Sports Club*, there is a suggestion that the image rights licence pertaining to one of the players in that case may have included obligations to make personal appearances, attend photo shoots and make speeches, and, if so, this tends to support the proposition set out in paragraphs 77 and 78 above. Conversely, at the hearing, Mr Stone submitted that Mr Robson's allowing himself to be photographed and to be used in creating on–line content was not the driving force behind his personal appearances and that he was being paid just for being himself and sprinkling stardust on the relevant occasion. That may well prove to be the case.

80. Ultimately, as with the disputed points outlined in paragraph 69 above, these are matters which will need to be addressed when quantum falls to be determined.

***Conclusion***

81. For the reasons set out above, I have concluded that, regardless of the outcome in relation to the Employment Issue:

> (1) the appeal against the Determination in respect of the tax year ending 5 April 2020 should be allowed to the extent that the consideration passing under the Ambassador Agreement on or after 3 December 2019 was attributable to the licensed image rights;
>
> (2) the appeal against the NICs Decision in respect of the tax year ending 5 April 2020 should be allowed to the extent that the consideration passing under the Ambassador Agreement on or after 3 December 2019 was attributable to the licensed image rights;
>
> (3) the appeal against the Determination in respect of the tax year ending 5 April 2021 should be allowed to the extent that the consideration passing under the Ambassador Agreement was attributable to the licensed image rights; and

(4) the appeal against the NICs Decision in respect of the tax year ending 5 April 2021 should be allowed to the extent that the consideration passing under the Ambassador Agreement was attributable to the licensed image rights.

82. In each case, the part of the consideration which was attributable to the licensed image rights was not attributable to the obligation personally to perform services and therefore does not fall to be taxed under the IR35 legislation. How that part of the consideration should be taxed is outside the scope of this decision. All that is relevant for present purposes is that it is not taxable under the IR35 legislation and therefore the appeals should be allowed to that extent. Quite how much that part of the consideration was is something that will need to be determined by agreement between the parties or following a further hearing in relation to quantum.

83. To the extent that the consideration was not attributable to the licensed image rights, it does potentially fall within the ambit of the IR35 legislation because it related to an obligation on the part of the Appellant to procure the personal performance of services by Mr Robson, but that is of course subject to the determination of the Employment Issue, to which I now turn.

**DISCUSSION – THE EMPLOYMENT ISSUE**

84. On the basis that at least some of the consideration which passed under the Ambassador Agreement was attributable to the obligation on the part of the Appellant to procure the personal performance of services by Mr Robson, it is necessary to consider whether, had those services been performed by Mr Robson pursuant to a contract directly between him and MUFC, he would properly have been regarded as an independent contractor or would instead properly have been regarded as an employee of MUFC.

85. In addressing this issue, it is common ground that Section 49(1)(c) of the ITEPA (and Regulation 6(1)(c) of the NICs Regulations) require the following three–stage process to be followed:

(1) Stage 1 – find the terms of the actual contracts (between MUFC and the Appellant, on the one hand, and between the Appellant and Mr Robson, on the other) and the relevant circumstances in which Mr Robson worked;

(2) Stage 2 – ascertain the terms of the hypothetical contract (between MUFC and Mr Robson) by reference to the terms of the actual contracts and the relevant circumstances; and

(3) Stage 3 – consider whether the hypothetical contract would be a contract of employment.

86. In this decision, I will describe the above stages as "Stage 1", "Stage 2" and "Stage 3" respectively. In addition, in what follows:

(1) as I have not been provided with any evidence of an actual contract between the Appellant and Mr Robson, references to the "actual contract" are, except where the context requires otherwise, references to the contract between the club and the Appellant; and

(2) references to the "hypothetical contract" are to the contract determined at Stage 2 by reference to the actual contract and the relevant circumstances.

87. Finally, since there was no disagreement between the parties as to the relevant law – their dispute stemmed entirely from disagreements as to how the relevant law applied to the facts – in each section of the analysis which follows, I will start by setting out the relevant law before

going on to summarise the parties' submissions and my conclusions in relation to those submissions.

**STAGE 1**

**The relevant law**

88. As regards Stage 1, in its decision in *The Commissioners for Her Majesty's Revenue and Customs v. Atholl House Productions Limited* [2022] EWCA Civ 501 ("*Atholl House CA*"), the Court of Appeal (the "CA") held that ordinary principles of contractual construction should apply in determining the terms of the actual contract. Sir David Richards said that the wider approach to contractual construction adopted by the Supreme Court (the "SC") in *Autoclenz Ltd v. Belcher* [2011] UKSC 41, [2011] ICR 1157 ("*Autoclenz*") and *Uber BV v. Aslam* [2021] UKSC 5 had no relevance in circumstances such as these where the question in issue is not one of statutory interpretation – see *Atholl House CA* at paragraph [156].

89. It follows from this that, in this case, the terms of the actual contract need to be determined by reference to well–established rules on the interpretation of contracts in general and without regard to the fact that the contractual arrangements relate to the context of employment.

**The parties' submissions**

90. In this case, there was no dispute between the parties in relation to either the terms of the actual contract or the relevant circumstances in which Mr Robson worked.

91. As regards the former, the parties agreed that the terms of the actual contract were those set out in the Ambassador Agreement and there was no dispute between them as to the meaning of those terms. At one stage in the hearing, it appeared that Mr Rivett might be about to advance the argument that some of the terms of the Ambassador Agreement were unenforceable on the basis of promissory estoppel or estoppel by convention but that argument had not been trailed in the Appellant's grounds of appeal or his skeleton argument and, when challenged by Mr Stone to develop it, he declined to do so.

92. As regards the latter, it was common ground that the actual contract, the Ambassador Agreement, was executed at a time when Mr Robson had been acting as an ambassador for the club for more than ten years and that the manner in which the parties had conducted themselves in practice in relation to that role, and continued to conduct themselves in practice following the execution of the Ambassador Agreement, was not consistent with the terms of the Ambassador Agreement in various respects on which I will expand when I come to deal with Stage 2.

**Conclusion**

93. In the absence of any compelling argument supported by authority to the effect that some of the terms of the Ambassador Agreement were unenforceable on the basis of promissory estoppel or estoppel by convention, I have concluded that the terms of the actual contract in this case were the terms of the Ambassador Agreement and that all of those terms were enforceable in law.

94. I have also concluded that, as is common ground, the way in which Mr Robson carried out his duties as an ambassador, both under the Ambassador Agreement and under the Personal Ambassador Agreements, in practice was not entirely consistent with the express terms of those agreements.

**STAGE 2**

## The relevant law

95. Stage 2 is crucial to the determination of any appeal under the IR35 legislation because it involves the creation of a hypothetical contract between the client and the worker and the terms of that hypothetical contract are of crucial importance when it comes to the analysis at Stage 3.

96. The CA in *Atholl House CA* had very little to say about Stage 2. That is because, in the CA:

(1) the grounds of appeal by the Respondents related solely to the manner in which the UT in that case had approached Stage 3; and

(2) the "Respondent's notice" served by the taxpayer related solely to:

(a) the application of the decision in *Autoclenz* at Stage 1; and

(b) if the taxpayer succeeded on that ground, the manner in which the UT in that case had approached Stage 3.

97. Thus, the way in which Stage 2 was to be approached – and, in particular, the interaction between Stage 2 and Stage 1 – was very much left at large by the CA decision. However, those matters were addressed in some detail by the UT in *The Commissioners for Her Majesty's Revenue and Customs v. Atholl House Productions Limited* [2021] UKUT 37 (TCC) ("*Atholl House UT*"). At paragraphs [8], [9], [43] and [54] to [56] in *Atholl House UT*, the UT held as follows:

(1) in determining the terms of the hypothetical contract, Sections 49(1)(c) and 49(4) of the ITEPA refer to the "circumstances" in which the services are provided and stipulate that those "circumstances" "include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided";

(2) it follows that the terms of the actual contracts forming part of the arrangements will generally be highly material in determining the terms of the hypothetical contract but will not be determinative of them;

(3) whereas the terms of the actual contracts should be determined by reference to the ordinary canons of contractual interpretation, those ordinary canons will not, of themselves, determine the contents of the hypothetical contract;

(4) in addition, it is not necessary to defer all analysis of the hypothetical contract at Stage 2 until all of the terms of the actual contracts have been comprehensively determined at Stage 1. It might often be appropriate, in the iterative way identified by Lord Hodge JSC in *Arnold v. Britten* [2015] UKSC ("*Arnold*") at paragraph [77], to construe the terms of the actual contracts whilst considering at the same time how the actual contracts would work in determining the content of the hypothetical contract;

(5) when determining the terms of an actual contract, the parties' subjective beliefs as to the meaning of the contract or ignorance of the contract's terms will typically be irrelevant. Similarly, unless giving rise to a variation or some form of waiver or estoppel, the manner in which the actual contract is performed is typically irrelevant to its construction. However, those matters should not be regarded as being necessarily irrelevant in determining the terms of the hypothetical contract and are, in the view of the UT, matters that can appropriately be taken into account. This is because they are part of the "circumstances" which are required to be taken into account in determining the terms of the hypothetical contract. The UT observed that:

"The process of synthesising the hypothetical contract out of the actual contracts in fact agreed involves additional considerations, and not merely the usual processes of interpretation."

As such, the parties' subjective beliefs and conduct are relevant circumstances which need to be considered in determining the terms of the hypothetical contract at Stage 2, even if they do not affect the identification of the terms of the actual contracts at Stage 1;

(6) it is not correct to construct the hypothetical contract simply by reference to the understanding by one of the parties of the terms of the actual contracts. That would be to place too much weight on matters not necessarily relevant to the construction of the hypothetical contract. Instead, the appropriate way to approach the task of constructing the terms of the hypothetical contract is to conduct a "counterfactual" exercise – in other words, to consider what the terms of the contract would have been if the client had contracted directly with the worker. In doing so, where the intermediary is under the control of the worker, the terms of the actual contract between the intermediary and the client is a safe starting point because that is what the client agreed with the intermediary and what the intermediary (which is controlled by the worker) agreed with the client;

(7) in many cases, the worker and the client will have enjoyed a harmonious working relationship in which the precise terms of the actual contracts do not feature prominently as there will be no need for either party to insist on enforcing the strict terms of the actual contracts between the parties. It is therefore helpful in constructing the terms of the hypothetical contract to consider what might have happened in the event of certain hypothetical potential "flashpoints" – which is to say, postulating circumstances where one of the parties might have wished to stand on its rights as set out in the actual contracts against the wishes of the other party and then to consider what might then have occurred; and

(8) these principles are as applicable in the case of the NICs legislation as they are in the case of the income tax legislation notwithstanding the fact that Regulation 6 in the NICs Regulations does not contain an equivalent to Section 49(4) of the ITEPA – which expressly directs attention to the terms of the actual contracts – because the provisions deal with similar and overlapping subject matter.

98. A similar exposition of the process is set out in the UT decision in *The Commissioners for His Majesty's Revenue and Customs v RALC Consulting Limited* [2024] UKUT 99 (TCC) at paragraph [37].

99. Of particular significance in the context of this case is the interaction of:

(1) the general principle of contract law to the effect that, if a contractual right exists, it does not matter that it is not used. It nevertheless remains a term of the contract – see *Autoclenz* at paragraph [19] and *White v. Troutbeck* [2013] IRLR 286 ("*Troutbeck*"), at paragraph [44]; and

(2) the principles explained in paragraphs 97(5) to 97(7) above to the effect that the parties' subjective beliefs and conduct can, but will not necessarily, inform the terms of the hypothetical contract.

**Preliminary points**

***Introduction***

100. There was considerable dispute between the parties in relation to this stage of the process.

101. Two preliminary points arose in determining the terms of the hypothetical contract. The first of them was attributable to the fact that the Ambassador Agreement had been preceded by

the Personal Ambassador Agreements and the second of them was attributable to the composite nature of the Ambassador Agreement.

***First preliminary point – relevance of the Personal Ambassador Agreements***

*The parties' submissions*

102. Mr Stone submitted that, contrary to the usual position in cases of this nature, where there would have been no actual contract between the client and the worker before the contract between the client and the intermediary was executed, in this case, prior to the execution by MUFC and the Appellant of the Ambassador Agreement, MUFC and Mr Robson had been operating for a number of years on the terms of the Personal Ambassador Agreements. Mr Stone said that:

(1) each Personal Ambassador Agreement stipulated that it set out the entire agreement between the parties and that no amendment could be made to it other than in writing;

(2) in giving his evidence, Mr Robson had said that he did not consider that the replacement of the Third Personal Ambassador Agreement with the Ambassador Agreement had effected any change in the relationship between him and the club and had merely involved a change in the legal mechanics relating to his rights and obligations to reflect the fact that the Ambassador Agreement was with the Appellant and not with him; and

(3) it followed that the hypothetical contract in this case should be regarded as having precisely the same terms as the Third Personal Ambassador Agreement.

103. Mr Rivett did not really engage with this submission beyond pointing out, quite fairly I might add, that it was inconsistent with Mr Stone's allegation that fees received by the Appellant from MUFC in addition to the fixed fees in clause 6 of the Ambassador Agreement should be regarded as having been paid pursuant to the hypothetical contract – as to which see paragraphs 147 to 164 below.

*Conclusion*

104. My conclusion in relation to the first preliminary point is as follows.

105. My task in relation to Stage 2 is to identify the terms of the hypothetical contract in this case from the terms of the actual contract – the Ambassador Agreement – and the circumstances in which the services were provided. The fact that, in this case, the Ambassador Agreement was preceded by the Personal Ambassador Agreements and that it was designed to replace the Third Personal Ambassador Agreement is one of the circumstances (and of course a very significant circumstance) to be taken into account in carrying out this exercise but it is not determinative of the terms of the hypothetical contract any more than are the terms of the Ambassador Agreement itself. It is simply something that needs to be taken into account as a relevant circumstance when seeking to identify the terms of the hypothetical contract.

106. In determining the impact on that exercise of the terms of the Personal Ambassador Agreements themselves, I do not attach any significance to Mr Robson's testimony to the effect that he did not see the execution of the Ambassador Agreement as giving rise to any material change in the terms of his relationship with the club. By his own admission, Mr Robson has had no legal training. Moreover, his evidence as a whole demonstrated very clearly that the way in which he and the club have conducted their relationship over the period in which he has acted as an ambassador did not accord with the express terms of the Ambassador Agreement (or, for that matter, the Personal Ambassador Agreements) in various respects which I will shortly consider. It follows that the way in which he and the club conducted their relationship during the currency of each Personal Ambassador

Agreement was similarly out of kilter in certain respects with the express terms of those agreements.

107. It follows from the above reasoning that, in my view, it would be incorrect to conclude that the terms of the hypothetical contract in this case should simply follow the express terms of the most recent Personal Ambassador Agreement, namely the Third Personal Ambassador Agreement. Instead, I need to identify the terms of the hypothetical contract by starting with the terms of the Ambassador Agreement and then considering, in the light of all the relevant circumstances, including the fact that the Ambassador Agreement replaced the Third Personal Ambassador Agreement, how those terms should be reflected in the terms of the hypothetical contract. When put like that, and taking into account Mr Robson's testimony to the effect that there was no change in the way in which he and the club conducted their relationship when the Third Personal Ambassador Agreement was replaced by the Ambassador Agreement, it becomes apparent that there is nothing in Mr Stone's submission on this issue. The terms of the Third Personal Ambassador Agreement are no more determinative of the terms of the hypothetical contract than are the terms of the Ambassador Agreement itself.

***Second preliminary point – effect of the image rights licence on the terms of the hypothetical contracts***

*The parties' submissions*

108. The second preliminary point is one that follows on from the Image Rights Issue and was Mr Rivett's fourth point in connection with that issue, as trailed in paragraph 37 above.

109. Mr Rivett submitted that, even if he was wrong to say that the inclusion within the Ambassador Agreement of the image rights licence took the arrangements completely outside the ambit of the IR35 legislation, those terms of the Ambassador Agreement which related to the grant of the image rights, including any restrictions placed on Mr Robson for the purpose of protecting the value of those rights to the club, should not be regarded as forming part of the hypothetical contract.

110. Mr Rivett said that the structure of the IR35 legislation supported this submission in that:

(1) Section 48 of the ITEPA, which was the introductory section describing the scope of the IR35 legislation, stipulated that the IR35 legislation applied to "the provision of services through an intermediary";

(2) Section 49 of the ITEPA, which described the engagements to which the IR35 legislation applied, stipulated in Section 49(1) that it applied where the worker personally performed, or was under an obligation personally to perform, services for the client and in Section 49(5) that, in the IR35 legislation, an "engagement to which this Chapter applies" meant any such provision of services as was mentioned in Section 49(1); and

(3) Section 50 of the ITEPA, which described the consequences of receiving a payment in respect of an engagement to which the IR35 legislation applied, stipulated that, in that case, the worker was to be treated as receiving a deemed employment payment in respect of the relevant engagement.

111. It followed, said Mr Rivett, that, in creating the hypothetical contract for the purposes of applying Section 49(1)(c) of the ITEPA:

(1) the only terms of the actual contract between the client and the intermediary which were to be taken into account were the terms relating to the services referred to in Section 49 of the ITEPA that were required personally to be performed; and

(2) those terms of that actual contract which did not pertain to those services and instead related to something else, such as the licensed image rights, were not to be taken into account.

112. This meant that the restrictions imposed by the Ambassador Agreement on Mr Robson's personal endorsement deals and Mr Robson's conduct should be disregarded in determining the terms of the hypothetical contract because they were aimed at preserving the value of the image rights which had been licensed to MUFC under the Ambassador Agreement and were not aimed at ensuring that Mr Robson was better able personally to perform services falling within the ambit of the IR35 legislation.

113. Mr Stone's response to this point was threefold.

114. First, he said that, once the language in Section 49(1) (a) of the ITEPA was satisfied in relation to the Ambassador Agreement because it gave rise to an obligation on Mr Robson personally to perform services, then, even if the Ambassador Agreement also gave rise to obligations relating to the licensed image rights, all of the terms of the Ambassador Agreement were required to be taken into account in determining the terms of the hypothetical contract. There was no basis for excluding some of the obligations in the Ambassador Agreement on the basis that they did not pertain to the obligation personally to perform services but instead related to the licensed image rights.

115. Secondly, he said that the provisions referred to in paragraph 110 above did not assist Mr Rivett because they merely identified that an obligation personally to perform services under a hypothetical contract which would have been an employment contract was an engagement to which the IR35 legislation applied. To the extent that the consideration passing under that hypothetical contract was attributable to some obligation other than an engagement to which the IR35 legislation applied, then, as a result of the apportionment provisions of Section 54 of the ITEPA, it was not taken into account as employment income. However, the relevant obligation was still part of the terms of the hypothetical contract.

116. Finally, he said that, in any event, the restrictions which were imposed by the Ambassador Agreement on Mr Robson's personal endorsement deals were designed to protect the respective brands of MUFC and the sponsors from any adverse consequences that might result from them and were not designed to protect the licensed image rights. It followed that, on any view, the relevant restrictions should be taken to be included in the hypothetical contract.

*Conclusion*

117. I agree with Mr Stone that all of the terms of the Ambassador Agreement were required to be taken into account in determining the terms of the hypothetical contract. There is no reason to exclude some of the obligations in the Ambassador Agreement on the basis that they did not pertain to the obligation personally to perform services but instead related to the licensed image rights.

118. I can see no reason to adopt the approach to the construction of Section 49 of the ITEPA which was urged on me by Mr Rivett – which is to say that, in determining the terms of the hypothetical contract for that purpose, the provisions in the Ambassador Agreement to the extent that they related to the licensed image rights should be ignored.

119. Whilst I have already said in dealing with the Image Rights Issue that I agree with Mr Rivett that consideration which, when viewed realistically, was paid for something other than the obligation personally to perform services cannot fall within the ambit of the IR35 legislation, that is not because it is required to be ignored in creating the hypothetical contract. Instead, the correct approach in a case involving a composite agreement between a client and

an intermediary which includes an obligation personally to perform services is to create a hypothetical contract with terms reflecting all the terms of that agreement and the circumstances in which it was executed and then to treat as employment income of the worker such part of the consideration passing under the composite agreement (and, of necessity, the hypothetical contract) as is referable to the obligation personally to perform services (as long as the hypothetical contract would have been a contract of employment).

120. As such, I believe that the hypothetical contract in this case should take into account all of the terms of the Ambassador Agreement, including those relating to the licensed image rights, even though part of the consideration passing under that composite agreement – the part which was referable to the licensed image rights – was not attributable to the obligation personally to perform services and falls outside the terms of the IR35 legislation for that reason.

121. That conclusion means that Mr Stone's final submission on this point is moot but, for completeness, I should record that, for the reasons set out in paragraph 69 above, I am presently not persuaded that the consideration referable to the restrictions set out in the Ambassador Agreement on Mr Robson's personal endorsement deals and on Mr Robson's conduct did not relate to the licensed image rights and therefore potentially falls within the scope of the IR35 legislation.

**The terms of the hypothetical contract**

***The agreed terms***

122. Now that I have dealt with the two preliminary points in relation to the manner in which the hypothetical contract should be constructed, I will address more specifically the terms of the hypothetical contract.

123. Before I turn to those of the terms that are in dispute, I will set out the terms which are common ground. They are that the hypothetical contract:

(1) was for an indefinite term, subject to termination in accordance with the termination provisions of the actual contract and generally on six–months' notice;

(2) required Mr Robson to make sufficient personal appearances to satisfy the minimum commitment in each six–month period;

(3) required Mr Robson to perform the work in person and did not allow Mr Robson to provide a substitute;

(4) required MUFC to pay Mr Robson £150,000 (excluding VAT) for each six–month period;

(5) specified that MUFC was responsible for arranging and paying for Mr Robson's travel and accommodation when Mr Robson made a personal appearance and was required to reimburse Mr Robson for his other reasonable expenses provided that they were agreed in advance of being incurred and Mr Robson submitted an invoice for them with supporting receipts;

(6) stated that nothing in the hypothetical contract should be taken as establishing a relationship of employer and employee between MUFC and Mr Robson;

(7) did not require Mr Robson's work for MUFC to have priority over Mr Robson's other work;

(8) contained no obligation on the part of Mr Robson to comply with guidelines, policies and procedures, undergo training or attend any review or feedback session;

(9) contained no provisions entitling Mr Robson to receive holiday pay, sick pay or pension contributions; and

(10) contained no sanctions for a breach of the contract by Mr Robson apart from a right for MUFC to terminate the hypothetical contract – in other words, contained no provisions entitling MUFC to discipline Mr Robson by way of suspension, demotion or refusal to provide work.

124. The agreed terms set out above reflect the terms of the actual contract.

***The disputed terms***

*Introduction*

125. Whilst there was no dispute in relation to the terms set out in paragraph 123 above, there were three areas where one of the parties submitted that the terms of the hypothetical contract should not reflect the terms of the actual contract and the other disagreed. These were as follows:

(1) whether Mr Robson was compelled to accept all (or all but a small number of) requests for personal appearances made by the club – subject to limited exceptions such as there being prior arrangements previously communicated to the club, ill–health or exceptional personal circumstances, as set out in the actual contract (as the Respondents contended) – or whether Mr Robson was at liberty to accept only those requests for personal appearances made by the club which suited him (as the Appellant contended);

(2) whether Mr Robson could accept personal endorsement deals only with the prior consent of MUFC as required by the actual contract (as the Respondents contended) or whether Mr Robson was free to accept whatever personal endorsement deals he wished to accept without obtaining the prior consent of MUFC provided that he did not promote a competitor of the club or one of the sponsors outside of his ambassadorial role for England (as the Appellant contended); and

(3) whether the hypothetical contract included provision for Mr Robson to make personal appearances which did not count towards the minimum commitment in each six–month period, in return for additional fees (as the Respondents contended) or whether those additional personal appearances were instead made outside the terms of the hypothetical contract and pursuant to separate contractual arrangements between the Appellant on the one hand and MUFC or the relevant sponsor on the other hand (as the Appellant contended).

126. The last of the issues described above is unusual in cases of this nature and is relevant to this decision for reasons which I will explain in due course.

127. However, the first two issues give rise to questions that commonly arise in cases under the IR35 legislation, which is the extent to which the conduct of the parties should be taken to inform the legal rights and obligations of the parties under the hypothetical contract. It is common ground that those legal rights and obligations should be identified in accordance with the dicta of the UT summarised in paragraph 97 above and that this necessarily involves identifying so-called hypothetical "flashpoints" in which a conflict might have arisen between the parties in relation to a particular matter and how those hypothetical "flashpoints" would have been resolved. As regards those first two areas of dispute, a broad summary of the parties' respective positions would be that Mr Rivett submitted that the terms of the hypothetical contract should be taken to reflect the manner in which the arrangements worked in practice whereas Mr Stone warned me of the dangers inherent in constructing the hypothetical contract on that basis and urged me to give priority to the terms of the actual contract in constructing the hypothetical contract terms.

128. My task in this respect is made more difficult by the fact that, in this case, perhaps even more than in most of the other cases where this issue has had to be addressed, the relationship

between the worker and the client was extremely close and long–standing in nature. The degree of mutual respect between the parties meant that Mr Robson was always going to act professionally and with a view to doing as much as he could for the club and the club was always going to rely on that fact and not resort to a high–handed reliance on its rights under the actual contract. This makes identifying the outcome of the hypothetical "flashpoint" scenarios described by the UT quite a difficult process in this case.

*First area of dispute – the extent of Mr Robson's commitment*

*The parties' submissions*

129. As regards the first area of dispute, Mr Rivett said that it was quite clear from the arrangements between the parties that the hypothetical contract should be taken to have provided that:

> (1) as long as Mr Robson satisfied the minimum commitment in each six–month period, he was free to turn down any request to make a personal appearance for any reason and without providing any explanation, with the result that where he worked, what work he did and how he did the work was a matter to be agreed by the parties from time to time; and
>
> (2) MUFC was required to provide Mr Robson with enough offers of personal appearances to enable Mr Robson to satisfy the minimum commitment in each six–month period after taking into account Mr Robson's freedom of choice described in paragraph 129(1) above.

130. Mr Rivett said that the conduct of the parties demonstrated the first of these points and the second followed on from the first. If Mr Robson was to make the minimum number of personal appearances which were required by the hypothetical contract and to have the freedom to decline requests at will without being in breach of the hypothetical contract, then it followed that the hypothetical contract must have required MUFC to offer Mr Robson sufficient opportunities to satisfy the minimum commitment in each six–month period despite that freedom.

131. In reply, Mr Stone reminded me that the terms of each contract between MUFC and a sponsor required MUFC to make its former players available to the relevant sponsor for a specified number of personal appearances. The fact that MUFC had that obligation meant that it could not simply leave the availability of its former players at large without any formal contractual commitment from at least some of the former players. Instead, it needed to ensure that at least some of the former players – in other words, the ambassadors – were contracted to make themselves available for a minimum number of personal appearances. It could then supplement that pool of contracted personal appearances with *ad hoc* personal appearances by former players who were legends. That was the only way that the club could ensure that supply would match demand.

132. Mr Stone said that the fact that, in practice, the relevant personnel in Mrs Edge's team and Mr Robson adopted a relaxed approach to the fulfilment by Mr Robson of his obligation to make a minimum number of personal appearances in each six–month period did not mean that the legal department at MUFC would not have made sure that the hypothetical contract contained a legal mechanism to compel Mr Robson to make those personal appearances should it prove necessary. That was the only way that the club could be certain that it would be able to fulfil its commitments to the sponsors.

133. Mr Stone said that the relevant question to be asking in this context was, whether, in relation to a request by the club for Mr Robson to make a personal appearance before the minimum commitment in the relevant six–month period had been satisfied but after Mr Robson

had already refused a specified number of requests other than in one of the exceptional circumstances described in clause 2.7 of the actual contract, MUFC would have sought to compel Mr Robson to make the personal appearance or simply capitulated. He added that the specified number of refusals without due cause was likely to be three in any given year since the actual contract provided for the club to have a termination right in those circumstances. However, even if it was not three in each year but some greater number, he strongly objected to the propositions that:

(1) the hypothetical contract would have entitled Mr Robson to turn down as many requests as he wished;

(2) the hypothetical contract would have included an obligation on MUFC to offer Mr Robson sufficient opportunities to make personal appearances as would allow Mr Robson to satisfy the minimum commitment in each six–month period no matter how many requests he refused; or

(3) the parties had to agree to each personal appearance and therefore the hypothetical contract was no more than an overarching framework pursuant to which the parties could agree Mr Robson's personal appearances from time to time.

134. Mr Stone said that an arrangement of the nature described in paragraph 133 above was completely unworkable and would have left MUFC exposed to its obligations to the sponsors, even before taking into account its own requirements. As such, MUFC would never have agreed to those terms. Whilst MUFC had historically had enough guaranteed minima of ambassador appearances to satisfy demand by the sponsors, that might not always be the case. For example, MUFC might have decided to terminate the contracts for the services of one or more of its ambassadors in order to save money and it would then have needed to be able to ensure that it was left with a sufficient supply of personal appearances to satisfy demand.

135. Mr Rivett made two points in response to Mr Stone's submission, as follows:

(1) first, he said that the point set out in paragraph 134 above overlooked the fact that MUFC had access to legends as well as ambassadors in order to fulfil the demands of sponsors. It was therefore possible that the terms of the hypothetical contract might have included a provision which entitled Mr Robson to turn down as many requests as he wanted to without exposing the club to a potential overall personal appearances shortfall; but

(2) secondly, he appeared to accept that the point set out in paragraph 129(2) above might have been a slight over–reach on his part and that another way of formulating the point was that the hypothetical contract would have contained a term requiring the club and Mr Robson to work reasonably together in order to ensure that Mr Robson would be able to decline as many requests for personal appearances as he wished and still satisfy the minimum commitment in each six–month period.

*Conclusion*

136. In approaching this question, I have not simply relied on the fact that, in practice, the relationship between the club and Mr Robson was one of mutual co–operation. Instead, in order to determine the rights and obligations under the hypothetical contract in respect of the club's requests for Mr Robson to make personal appearances, I have considered how the club and Mr Robson would have reacted to the hypothetical "flashpoint" in which Mr Robson declined a request to make a personal appearance in circumstances where the club objected.

137. In conducting that exercise, I have concluded that the position is a bit more nuanced than either party submitted. In my view, taking into account both the terms of the actual contract and the circumstances in which the services were performed, the terms of the

hypothetical contract should be taken to have provided as follows in relation to Mr Robson's personal appearances:

(1) the club had no obligation under the hypothetical contract to make any requests of Mr Robson to make personal appearances or to work together reasonably with Mr Robson in order to ensure that Mr Robson was able to satisfy the minimum commitment in each six–month period;

(2) subject to the point set out in paragraph 137(3) below, the club had no remedy under the hypothetical contract in the event that Mr Robson chose to turn down any request for a personal appearance;

(3) the club was entitled to a remedy under the hypothetical contract if Mr Robson failed to satisfy the minimum commitment in any six–month period as a consequence of his declining one or more requests; and

(4) the club was not entitled to a remedy under the hypothetical contract if Mr Robson failed to satisfy the minimum commitment in any six–month period despite accepting all requests made of him by the club – in other words, solely because the club failed to request at least 35 personal appearances in the six–month period in question.

138. I have reached the conclusions set out above because the evidence and facts set out in paragraph 28 above suggest that:

(1) the club would not have accepted any kind of contractual obligation to make requests for personal appearances from Mr Robson or to work together reasonably with Mr Robson to enable Mr Robson to satisfy the minimum commitment in any six–month period. I say that because the club's obligation under the Ambassador Agreement was essentially to pay the annual fee in clause 6 of the agreement and not to take on any obligations as regards requests for Mr Robson to make personal appearances. That was a matter for Mr Robson to deal with in return for his fee. As Mr Stone fairly pointed out, the club would never have agreed to terms which required it to take on any obligation to make requests for personal appearances;

(2) subject to the point made in paragraph 138(3) below, the club would either not have sought to exercise its right under the actual contract – or would have backed down in the event that Mr Robson resisted the exercise of that right – to limit the number of occasions on which Mr Robson was entitled to decline requests. I say that because both Mr Robson and Mrs Edge were clear that Mr Robson was free to decline requests at will, subject only to his meeting the minimum commitment in each six–month period. I disagree with Mr Stone that the hypothetical contract would have contained any limitation on the number of requests that Mr Robson could turn down, whether it was three or a greater number, because, subject to the point that follows, the evidence suggests that MUFC would not have sought any contractual remedy simply because Mr Robson declined any number of requests to make personal appearances;

(3) however, the club would have sought to exercise its right under the actual contract – and Mr Robson would not have resisted the exercise of that right – to a contractual remedy if Mr Robson were to have failed to satisfy the minimum commitment in any six–month period as a result of refusing too many requests in the six–month period in question. I say that because the club needed Mr Robson's minimum number of personal appearances for its own purposes and to fulfil its obligations to the sponsors and Mr Robson was fully aware of his responsibilities in that regard. Mr Rivett's submission that the club had access to legends to satisfy its own requirements and to fulfil its obligations to the sponsors is not an answer to this point because the legends were not under contract

and were free to decline any request at will at any time. The whole reason for keeping Mr Robson and the other ambassadors on retainer was to ensure that a certain number of personal appearances by former players could be guaranteed; and

(4) in the event that Mr Robson accepted every request that was made of him but still failed to satisfy the minimum commitment in any six–month period because the club failed to make 35 requests in the relevant six–month period, then the club would either not have sought to exercise its right under the actual contract – or would have backed down in the event that Mr Robson resisted the exercise of that right – to a contractual remedy for that shortfall. That is because it is implicit in the terms of the actual contract that the club would ask Mr Robson to make at least 35 personal appearances in each six–month period and would not exercise any contractual remedy in respect of a failure by Mr Robson to satisfy the minimum commitment in any six–month period where he accepted every request that was made of him but was offered insufficient opportunities to satisfy that minimum commitment.

139. I do not consider that the conclusions set out above are in any way gainsaid by the events which occurred during the pandemic. As I have noted in paragraph 28(32) above, over that period, the parties worked together to try to ensure that Mr Robson was able to satisfy the minimum commitment in each six–month period and, when that did not occur, the club agreed to allow Mr Robson to carry forward his shortfall of personal appearances into the following year. However, that response to the exceptional circumstances in which the parties found themselves does not in my view shed any light on the rights and obligations of the parties under the hypothetical contract. That is because it was simply a sensible response to the unusual circumstances in which the parties found themselves. It is not evidence of a more general obligation on the part of the club to ensure that Mr Robson satisfied the minimum commitment in each six–month period or to work reasonably with Mr Robson to ensure that he was able to do so.

140. I would add that, although the parties did not focus on the force majeure clause in the Ambassador Agreement when they were making their submissions in relation to the terms of the hypothetical contract, I can see no reason why the terms of that clause in the actual contract would not have been mirrored in the hypothetical contract. On that basis, the pandemic would have been a force majeure which would have prevented either party from being in breach of contract and therefore their mutual response to the situation can shed no light on their rights and obligations under the hypothetical contract.

141. It follows from the above conclusions that:

(1) Mr Robson had no certainty as to the number of requests that the club would make pursuant to the hypothetical contract;

(2) Mr Robson knew that, if he were to fail to satisfy the minimum commitment in any six–month period by reason of having declined too many requests to make personal appearances, then he would be in breach of the hypothetical contract and MUFC would be entitled to a remedy for that breach; and

(3) therefore, whilst Mr Robson was not subject to any express limitations under the terms of the hypothetical contract as to the number of requests that he was entitled to decline, his freedom under that contract to decline requests was curtailed in practical terms to some extent by the knowledge that he might be in breach of contract if he were to fail to satisfy the minimum commitment in any six–month period by reason of having declined too many requests.

*Second area of dispute – limitations on other engagements*

*The parties' submissions*

142. As regards the second area of dispute, Mr Rivett said that it was quite clear from the arrangements between the parties that the hypothetical contract would have provided that:

(1) there were no restrictions whatsoever on Mr Robson's ability to enter into personal endorsement deals (because the restrictions in the actual contract relating to personal endorsement deals were all concerned with protecting the licensed image rights and therefore would not form part of the hypothetical contract); and

(2) in the alternative, if those restrictions should be regarded as being capable of forming part of the hypothetical contract, Mr Robson did not need the consent of MUFC before taking on any personal endorsement deal but was precluded from entering into a personal endorsement deal which:

(a) involved promoting a sponsor's competitor, other than in the course of working for England; or

(b) was otherwise contrary to the interests of MUFC.

143. In response, Mr Stone referred me to the similar circumstances in *Atholl House UT* where, at paragraphs [55] to [68], the UT concluded that the BBC's right in the actual contract in that case to restrict Ms Adams's other engagements in some circumstances formed part of the hypothetical contract in that case because, regardless of what had happened in practice, in the hypothetical situation where Ms Adams wanted to act in contravention of that right, the BBC would have elected to enforce the right and Ms Adams would not have forced the BBC to litigate. He submitted that, similarly, in this case, even though the club had not exercised its right to restrict Mr Robson's personal endorsement deals, it was apparent that that right was important to it. A hypothetical "flashpoint" would arise if Mr Robson wished to take on a personal endorsement deal to which MUFC objected and there was every reason to think that, in that scenario, the club would have sought to enforce its right to prevent that from happening and Mr Robson would have backed down.

*Conclusion*

144. In relation to this second area of dispute, I have adopted a similar approach to the one described in paragraph 138 above in relation to the first area of dispute.

145. Having done so, I have concluded from the circumstances in which Mr Robson worked that, notwithstanding the strict terms of the actual contract:

(1) the club would not generally have sought to exercise its right under the actual contract – or would have backed down in the event that Mr Robson resisted the exercise of that right – to require Mr Robson to obtain the club's prior consent to each personal endorsement deal; but

(2) except in circumstances where Mr Robson was acting in the course of working for England, the club would have sought to exercise its right under the actual contract – and would not have backed down in the event that Mr Robson resisted the exercise of that right – to prevent Mr Robson from entering into a personal endorsement deal which involved promoting a sponsor's competitor, particularly where the use of club materials, intellectual property rights or club attire in the course of such promotion might suggest that the club was endorsing the sponsor's competitor.

146. I have reached the conclusions set out in paragraph 145 above on the basis of the evidence and facts set out in paragraphs 28(11)(a) and 28(43) to 28(51) above – and particularly the evidence of Mrs Edge summarised in paragraph 28(48) above. They suggest that the club would

not have sought to enforce its wide–ranging rights under the actual contract – or would have backed down in the event that Mr Robson resisted the exercise of those rights – to restrict Mr Robson's personal endorsement deals except in the limited circumstances described in paragraph 145(2) above.

*Third area of dispute – additional fees*

*The parties' submissions*

147. The third area in which there was disagreement between the parties as to the terms of the hypothetical contract was whether those terms should be taken to have included a provision for MUFC to pay the additional fees which the Appellant received for those of Mr Robson's personal appearances which were not treated as forming part of the minimum commitment in any six–month period.

148. In that regard, Mr Rivett's position was that the hypothetical contract should not be regarded as having made provision for those additional fees because:

(1) in the case of those additional fees for which MUFC was reimbursed by the relevant sponsor, the proper contractual analysis was that the Appellant was contracting directly with the sponsor in question (and not the club) and the club was simply acting as broker or intermediary in that arrangement; and

(2) in the case of those additional fees for which MUFC was not so reimbursed, the proper contractual analysis was that the relevant fees were paid pursuant to a contract or contracts between MUFC and the Appellant that were entirely separate from the Ambassador Agreement and related to personal appearances which were additional to the minimum commitment in any six–month period.

149. In response to the first submission, Mr Stone said that the evidence showed that, when Mr Robson was making a personal appearance for a sponsor in return for an additional fee paid to the Appellant, he was still acting as an ambassador for MUFC and pursuant to a contract between the Appellant and MUFC. He was not acting pursuant to a contract between the Appellant and the sponsor. For example:

(1) it was up to MUFC to decide whether to put forward to Mr Robson the proposal to make the personal appearance in the first place;

(2) the requests were generally made through the club and it was the club that carried out any negotiations with Mr Robson in relation to the nature of the personal appearance;

(3) the way in which arrangements for the personal appearance were made was generally indistinguishable from the way in which arrangements were made for the personal appearances that formed part of the minimum commitment in each six–month period;

(4) the work which Mr Robson carried out pursuant to the requests was generally indistinguishable from the work which he carried out in making the personal appearances that formed part of the minimum commitment in each six–month period;

(5) Mr Robson had accepted in giving his testimony that he was acting as the club's ambassador in fulfilling those requests;

(6) MUFC benefited from the additional personal appearances as they served to deepen the club's relationship with the relevant sponsor; and

(7) when making the additional personal appearance, Mr Robson was accompanied by a representative of MUFC whose role was also to deepen the relationship between the club and the relevant sponsor.

150. As for the second submission, Mr Stone said that, although the Ambassador Agreement simply referred to a minimum number of personal appearances in each six–month period, the way in which the relationship worked was that the Appellant was entitled to an additional fee for any personal appearance which was not treated as forming part of the minimum commitment in any six–month period. That was a long–standing part of the arrangement between Mr Robson and the club and the fact that the Appellant sometimes received additional fees for personal appearances made by Mr Robson even before he had satisfied the minimum commitment for the relevant six–month period showed that it was part of the circumstances in which he worked and therefore one of the terms of the hypothetical contract.

*Conclusion*

151. The starting point in addressing this third area of dispute is to determine the question of whether the additional fees which the Appellant received from MUFC for Mr Robson's personal appearances for a sponsor in circumstances where MUFC was reimbursed for those additional fees by the relevant sponsor were paid pursuant to a contract between the Appellant and the relevant sponsor – with MUFC's acting merely as a broker or intermediary in relation to that contract in return for a fee – as the Appellant contends (the "first analysis"), or were instead paid pursuant to a contract between the Appellant and MUFC, with MUFC's having its own separate back–to–back contract with the sponsor, as the Respondents contend (the "second analysis").

152. Each of the two analyses set out above is consistent with the commercial end–result and, as I have been provided with no written contracts in relation to the arrangements in question, I have to determine the contractual analysis solely on the basis of the surrounding evidence. Although the position is therefore quite unsatisfactory and the answer is by no means free from doubt, I have concluded, on balance, that the evidence favours the second analysis, essentially for the reasons given by Mr Stone and set out in paragraph 149 above.

153. More particularly, the reasons for my conclusion on that question are as follows:

(1) first, on each occasion when the Appellant received an additional fee in return for Mr Robson's making a personal appearance for a sponsor and the relevant sponsor made a payment to MUFC for the personal appearance, it was up to MUFC to decide whether to put the proposal to Mr Robson in the first place, it was MUFC and not the relevant sponsor who wrote to Mr Robson to outline the terms and nature of the request and it was MUFC that then negotiated with Mr Robson as to the terms of the arrangement. In effect, as Mr Robson accepted in giving his evidence, there was no difference between the way in which he was engaged to make a personal appearance for a sponsor that fell within the terms of the minimum commitment in a six–month period under the Ambassador Agreement and the way in which he was engaged to make a personal appearance for a sponsor that gave rise to an additional fee to the Appellant;

(2) secondly, Mr Robson accepted that there was no difference between the nature of a personal appearance for a sponsor that fell within the terms of the minimum commitment in a six–month period under the Ambassador Agreement and the nature of a personal appearance for a sponsor that gave rise to an additional fee to the Appellant;

(3) thirdly, Mr Robson accepted that, when he attended the relevant sponsor's event, he was acting in his capacity as an ambassador for MUFC. He was not doing so as an individual divorced from that capacity;

(4) fourthly, MUFC's interest in Mr Robson's personal appearance for the sponsor went some way beyond that of an intermediary. The evidence of Mrs Edge was that Mr Robson's personal appearance served to deepen the relationship between MUFC and the relevant sponsor, a fact that was reinforced by the presence of a club representative at the event whose role was to do the same. This is more consistent with the club's playing a role as principal in the process;

(5) fifthly, the club was clearly acting as principal when it arranged for Mr Robson to make a personal appearance for the relevant sponsor pursuant to the relevant sponsor's rights under its sponsorship agreement. It would make sense for the same contractual structure to persist once the relevant sponsor had exhausted its rights under its sponsorship agreement and still required an additional personal appearance; and

(6) finally, the evidence suggested that Mr Robson was told by the club how much he was being offered to make the personal appearance and had no visibility over the charge that was made by MUFC to the relevant sponsor in return for that personal appearance. If the first analysis were to be correct, one might have expected Mr Robson to have negotiated his fee with the relevant sponsor and then to have agreed a commission with the club. But, instead, he appears to have negotiated his fee with the club and left the club free to negotiate its own fee with the relevant sponsor, at a mark–up.

154. In considering this question, I have taken into account the fact that Mr Robson often attended a sponsor's event with other ambassadors and legends and that, when he did so, the legends were sometimes paid directly by the relevant sponsor. This suggests that, on those occasions, at least so far as the legends were concerned, there might have been a direct contract between the relevant sponsor and the relevant legend. However, against that must be set the following:

(1) the very fact that there were multiple ambassadors and legends making a personal appearance for the relevant sponsor tends to support the fact that they were collectively being supplied to the relevant sponsor by the club and that the club was effectively acting as principal in the arrangement; and

(2) Mrs Edge's evidence was that no such direct payments were ever made to ambassadors, thereby suggesting that, even if there was a direct contract between the relevant sponsor and a legend attending the event, the same was not the case for any ambassador.

155. Overall, even if the possible existence of direct contracts between legends and the relevant sponsor could be said to support the first analysis so far as the ambassadors were concerned – and I would regard it as no better than neutral on that question – it is in my view insufficient to outweigh the points set out in paragraph 153 above.

156. Taking all of the above into account and recognising that, in the absence of any written agreements, both analyses are conceptually possible, I have concluded that the better view is that all of the additional fees that were paid to the Appellant by MUFC were paid pursuant to a contract or contracts between the Appellant and the club and that none of them was paid pursuant to a contract or contracts between the Appellant and the sponsors directly.

157. Having reached that conclusion, it is then necessary to determine how the contract or contracts between the Appellant and the club which gave rise to the payment of additional fees to the Appellant – by which I mean both additional fees for which the club was reimbursed by a sponsor as described above and additional fees for which the club was not reimbursed by a sponsor – should then be taken into account in determining the terms of the hypothetical contract to which the Ambassador Agreement gave rise.

158. My views on that question are as follows.

159. As the Ambassador Agreement made no provision itself for the additional fees and the Ambassador Agreement was expressed to be the entire agreement between the parties in relation to its subject matter, it is self–evident that the additional fees must have been paid pursuant to a contract or contracts between the club and the Appellant that were additional to, and separate from, the Ambassador Agreement. It follows that they must have been paid pursuant to an actual contract or actual contracts which were separate from the actual contract comprising the Ambassador Agreement.

160. Having reached that conclusion, it would ordinarily not be of much interest to determine whether that separate actual contract or those separate actual contracts gave rise to a separate hypothetical contract or separate hypothetical contracts from the hypothetical contract to which the Ambassador Agreement gave rise. However, in this case, the point has some significance because the Respondents' statement of case refers only to fees paid pursuant to the hypothetical contract to which the Ambassador Agreement gave rise. That drafting infelicity means that it is necessary for me to deal with this question.

161. In doing so, it seems to me that it would be totally artificial to treat the additional fees as being the subject of a hypothetical contract or hypothetical contracts which are distinct from the hypothetical contract to which the Ambassador Agreement gave rise. My reason for saying that is threefold:

(1) first, the deemed contracting parties are the same – namely, MUFC and Mr Robson – and the contracts relate to precisely the same activities conducted in precisely the same manner;

(2) secondly, as far as personal appearances are concerned, the terms of the Ambassador Agreement provided for both the payment of a fixed fee and a "minimum" number of 35 personal appearances in each six–month period. This implies that Mr Robson might make more than the minimum number of personal appearances in a six–month period under the Ambassador Agreement but in return for no additional fees. Since that is self–evidently not what MUFC and the Appellant actually agreed, this suggests to me that the terms of the hypothetical contract to which the Ambassador Agreement gave rise should be taken to have incorporated the terms of the separate actual contract or actual contracts pursuant to which the additional fees were paid, rather than treating that separate actual contract or those separate actual contracts as giving rise to a quite separate hypothetical contract or quite separate hypothetical contracts providing for the payment of the additional fees; and

(3) thirdly, the evidence shows that the personal appearances which gave rise to the additional fees were not simply those that occurred after Mr Robson had fulfilled the minimum commitment in the relevant six–month period. Instead, they were interspersed within the personal appearances that counted toward that minimum commitment. Mr Robson was often offered the chance to make a personal appearance in return for the payment of an additional fee to the Appellant before he had satisfied the minimum commitment for the six–month period in question or even – as in fact happened on at least one occasion – offered the choice between a personal appearance for which an additional fee would be paid to the Appellant or a personal appearance which would count toward the minimum commitment for the six–month period in question. Thus, the terms of the Ambassador Agreement and the other contract or contracts in question appear to me to have given rise to a single seamless and indivisible arrangement under which both MUFC and Mr Robson understood that some of his personal appearances would count toward the minimum commitment for a six–

month period and give rise to no additional fee, whilst others would not count toward the minimum commitment for a six–month period and would give rise to an additional fee. In those circumstances, it would be wholly artificial to treat that single seamless and indivisible arrangement as giving rise to more than one hypothetical contract between MUFC and Mr Robson.

162. For completeness, I should say that, even if I am wrong to have found as a fact that the additional fee which was paid to the Appellant for each additional personal appearance by Mr Robson was a fixed £5,000 (excluding VAT), and instead there was an element of variability in those payments as Mr Rivett contended, I do not think that that would prevent the provision for such variable additional fees from being part of the hypothetical contract. That is because it is clear from the CA decision in *Openwork Limited v Alessandro Forte* [2018] EWCA Civ 783 ("*Openwork*"), and the cases cited in *Openwork*, that uncertainty as to the amount of a payment which is to be made under a contract does not prevent the obligation to make the payment from being legally binding. In each case, the court should try if at all possible to give effect to a term which the parties to the contract intended to be legally binding, even if the contract is silent as to a material detail.

163. On the basis of the analysis set out above, I find that:

(1) the additional fees which were paid to the Appellant by MUFC for Mr Robson's personal appearances that did not count toward the minimum commitment in any six–month period were all paid pursuant to a contract or contracts between MUFC and the Appellant and that none of them was paid pursuant to a contract or contracts between the Appellant and a sponsor; and

(2) the terms of the hypothetical contract that arose from the Ambassador Agreement in this case included the provisions of that contract or those contracts which related to the additional payments. In short, as Mr Stone aptly put it, the additional payments were being paid for what was "effectively voluntary overtime … under the Ambassador Agreement".

The above conclusions should be taken into account by the parties in seeking to agree quantum following this decision and, in the absence of agreement by the parties, they are the basis on which I will approach the issue of quantum (and, in particular, the Respondents' application to increase quantum as mentioned in paragraphs 9 and 10 above).

*Conclusions in relation to the disputed terms*

164. By way of summarising the conclusions set out in paragraphs 125 to 163 above, I find that the hypothetical contract included the following terms in addition to those set out in paragraph 123 above:

(1) it specified that, without prejudice to his obligation to satisfy the minimum commitment in each six–month period, Mr Robson was free to decline any request for him to make a personal appearance that was made by the club;

(2) it did not contain any obligation on the part of the club to make sufficient requests for personal appearances to enable Mr Robson to satisfy the minimum commitment in any six–month period despite his declining requests to do so (or to work together reasonably with Mr Robson to enable Mr Robson to satisfy the minimum commitment in any six–month period) although it specified that, if the club failed to request Mr Robson to make personal appearances on at least 35 days in a six–month period, then Mr Robson would not be in breach of the obligation to satisfy the minimum commitment in the relevant six–month period;

(3) it did not contain an obligation on the part of Mr Robson to obtain the prior written consent of the club before entering into any personal endorsement deal but it provided that, except in circumstances where Mr Robson was acting in the course of working for England, Mr Robson was precluded from entering into a personal endorsement deal which involved promoting a sponsor's competitor, particularly where the use of club materials, intellectual property rights or club attire in the course of such promotion might suggest that the club was endorsing the sponsor's competitor; and

(4) it contained provisions entitling Mr Robson to receive additional payments for personal appearances for the club or sponsors which were requested by the club outside the terms of the minimum commitment in any six–month period.

**STAGE 3**

## Introduction

165. As regards Stage 3, it is common ground that another three–stage process – the one described by MacKenna J in *Ready Mixed Contract (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*") at 515 – should be adopted. That has recently been confirmed by the SC in *Professional Game Match Officials Limited v The Commissioners for Her Majesty's Revenue and Customs* [2024] STC 1682 ("*PGMOL*") at paragraphs [28] to [39]. In *RMC*, MacKenna J said that:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that 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."

166. MacKenna J went on as follows in *RMC*:

"I need say little about (i) and (ii).

As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. 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: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

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

"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." – *Zuijs v. Wirth Brothers Proprietary, Ltd*.

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 in the ordinary way by implication.

The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: *Amalgamated Engineering Union v. Minister of Pensions and National Insurance*.

I can put the point which I am making 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. 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 of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."

167. The above expression of the position in law shows that, in order for there to be a relationship of employer and employee:

(1) there must be mutuality of obligation (which I will call "Stage 3A");

(2) the putative employer must enjoy a degree of control over the putative employee (which I will call "Stage 3B"); and

(3) the other terms of the contract must be consistent with its being an employment contract (which I will call "Stage 3C").

**STAGE 3A**

**The relevant law**

168. Stage 3A and Stage 3B have together been described as a necessary but not sufficient condition of an employment contract – see *Fall v. Hitchin* [1973] 1 WLR 286 ("*Fall*") – and as the "irreducible minimum" which needs to be satisfied before considering the relevant factors at Stage 3C – see *Montgomery v. Johnson Underwood Limited* [2001] ICR 819 ("*Montgomery*").

169. As regards a hypothetical contract, the case law establishes the following principles in relation to Stage 3A:

(1) there are two aspects to the test at Stage 3A. The first relates to the nature of the putative employer's obligations and the second relates to the nature of the putative

employee's obligations. Satisfaction of both limbs of the test has been described in some of the authorities as the "wage–work bargain";

(2) in order for the putative employer limb of Stage 3A to be satisfied, the putative employer must either be obliged under the hypothetical contract to provide work to the putative employee or obliged under the hypothetical contract to pay a retainer to the putative employee – see *Clark v. Oxfordshire Health Authority* [1998] IRLR 125 at paragraph [41], *Usetech Limited v. Young* [2004] TC 811 at paragraph [64] and *Atholl House CA* at paragraph [73].

In this regard, it is important to note the distinction between:

(a) a contract under which the putative employer agrees to pay a retainer to the putative employee in return for which the putative employee agrees to do the work which the putative employer may provide (but the putative employer is not obliged to provide work for the putative employee); and

(b) a contract under which the putative employer agrees to make a payment to the putative employee if work is provided in return for which the putative employee agrees to do the work which the putative employer may provide (but the putative employer is not obliged to provide work for the putative employee) – for example, a piecework contract.

In the former case, the obligation on the part of the putative employer to pay the retainer is sufficient to satisfy the putative employer limb of Stage 3A – see *Turner v. Sawdon & Co* [1901] 2 KB 653 (CA) – whereas, in the latter case, the absence of the obligation on the part of the putative employer to provide work prevents that from being the case – see *Devonauld v. Rosser & Sons* [1906] 2 KB 729 and *Professional Game Match Officials Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2021] STC 1956 ("*PGMOL CA*") at paragraphs [120] to [124]. Sir David Richards highlighted this distinction in *Atholl House CA* at paragraphs [73] and [74]; and

(3) in order for the putative employee limb of Stage 3A to be satisfied, the putative employee "must be obliged to provide his own work and skill. Freedom to do a job 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 be" – see *RMC*, as cited in paragraph 166 above.

**The parties' submissions**

170. In relation to Stage 3A, Mr Stone maintained that the obligation on the club to make a fixed payment to Mr Robson every six months, coupled with Mr Robson's obligation to satisfy the minimum commitment in each six–month period, clearly gave rise to a "wage–work bargain" and satisfied the mutuality of obligation test. He said in that regard that, even if I were to find that the terms of the hypothetical contract allowed Mr Robson the freedom to refuse more than a specified number of requests to make personal appearances, that ability was constrained by Mr Robson's obligation to satisfy the minimum commitment in each six–month period and therefore did not negate the existence of mutuality of obligation. In *Cotswold Developments Construction Limited v Williams* [2006] IRLR 181 ("*Cotswold*"), at paragraph [55], the Employment Appeal Tribunal (the "EAT") had made it clear that the existence (and exercise) of a right to refuse work did not negate mutuality of obligation as long as there was an obligation to do at least some work.

171. Mr Rivett's primary position was that Stage 3A was not satisfied because the Ambassador Agreement related to the club's ability to exploit Mr Robson's image rights and therefore no hypothetical contract relating to the personal performance of services arose in the first place. In the alternative, he accepted that, if there was a hypothetical contract relating to

the personal performance of services, Mr Robson's freedom under the hypothetical contract to decline requests to make personal appearances (subject only to his satisfying the minimum commitment in each six–month period) meant that the hypothetical contract was simply an overarching or "umbrella" framework pursuant to which the parties could agree from time to time that Mr Robson would make personal appearances. As such, although he accepted that the hypothetical contract gave rise to mutuality of obligation, he said that that mutuality of obligation was weak and not meaningful.

**Conclusion**

172. I have dealt with Mr Rivett's primary submission in the context of identifying the terms of the hypothetical contract at Stage 2 – see paragraphs 95 to 164 above. In my view, the Ambassador Agreement did give rise to a hypothetical contract for the purposes of the IR35 legislation and the terms of that hypothetical contract included provisions relating to the personal performance of services by Mr Robson.

173. As for Mr Rivett's second submission, that relates to the extent of the mutuality of obligation to which the hypothetical contract gave rise rather than whether the hypothetical contract gave rise to mutuality of obligation at all. As such, it is a submission which is not relevant to Stage 3A and is more appropriately addressed when I come to consider Stage 3C.

174. However, at this stage, I will say only that I do not agree with Mr Rivett's characterisation of the hypothetical contract as being akin to an overarching or "umbrella" framework pursuant to which the club and Mr Robson could agree from time to time that Mr Robson would make personal appearances. To characterise the hypothetical contract in that manner is to overlook entirely the obligation that Mr Robson had under the hypothetical contract to satisfy the minimum commitment in each six–month period. Mr Robson could not decline requests to make personal appearances indefinitely. Sooner or later he would have to agree to a request if he was to ensure that he did not breach the hypothetical contract by failing to satisfy the minimum commitment. That is a crucial distinction between the facts in the present case and the facts in a case like *PGMOL*, where it was common ground that the overarching contract pursuant to which each engagement of a referee occurred was not itself a contract of employment, or *Carmichael and another v National Power plc* [1999] 4 All ER 897, where it was held by the House of Lords that the absence from the overarching arrangement of any obligation on the part of the putative employer to pay a retainer or provide work and any obligation on the part of the putative employee to accept work meant that the overarching arrangement was not a contract at all. The distinction means that, in this case, both mutuality of obligation and control are to be considered by reference to the terms of the hypothetical contract as a whole and not by reference to each personal appearance which Mr Robson agreed to make pursuant to those terms.

175. That being so, I agree with Mr Stone that Stage 3A is satisfied in this case. It seems to me that, under the terms of the hypothetical contract:

> (1) MUFC was obliged to pay Mr Robson a fixed amount of £150,000 (excluding VAT) every six months; and
>
> (2) Mr Robson was required, inter alia, to satisfy the minimum commitment in each six–month period.

176. That seems to me to be about as clear a case of what has been termed the "wage–work bargain" as one can get. In particular:

> (1) the fact that the hypothetical contract did not oblige the club to provide work is irrelevant because the hypothetical contract obliged the club to pay £150,000 (excluding VAT) every six months in any event – see paragraph 169(2) above; and

(2) the fact that the hypothetical contract allowed Mr Robson to refuse some requests to make personal appearances is irrelevant because the hypothetical contract obliged Mr Robson to satisfy, in person, the minimum commitment in each six–month period – as to which, see paragraph 169(3) above and the EAT in *Cotswold* at paragraph [55].

177. The conclusion set out above is sufficient to determine Stage 3A. That having been said, as I have noted in paragraph 173 above, the extent of the mutuality of obligation in each case is a matter to be taken into account when dealing with Stage 3C and I will address at that stage Mr Rivett's submission to the effect that the mutuality of obligation in this case was weak.

**STAGE 3B**

## The relevant law

178. Shortly stated, Stage 3B relates to the ability of the putative employer to have the power of deciding the thing to be done, the way in which it should be done, the means to be employed in doing it and the time when, and the place where, it should be done, or, as it has often been put, the "what, how, when and where" of the services to be provided. The case law establishes the following principles in relation to Stage 3B:

(1) in a case where the putative employee has a level of skill which is not susceptible to direction by anyone else in the organisation by whom he or she is engaged, control over the "what" is the most significant aspect of the test – see *Atholl House UT* at paragraph [93];

(2) in relation to the "what", the absence of a general right of redeployment in relation to the putative employee is a relevant factor although not determinative in and of itself – see *O'Kelly v. Trusthouse Forte plc* [1984] 1 QB 90 (*O'Kelly*") at 126 and *Atholl House UT* at paragraphs [97], [102] and [103];

(3) the fact that control over the "what" is the most significant aspect of this test does not mean that control over the "when" and the "where" are of no importance – see *Atholl House UT* at paragraph [93];

(4) it has long been acknowledged that the test for control over the "how" – which is to say the way in which the work will be carried out and the means to be employed when doing it – is less important than control over the "what, when and where" and that the "how" test should be focused more on ultimate authority than on close direction by actual supervision. That is because there are many examples, of which this is one, where the nature of the work required is such that direct control is necessarily absent – see *The Catholic Child Welfare Society and others v. Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 at paragraph [36].

In this regard:

(a) in *Montgomery*, at paragraph [19], Buckley J gave the examples of a master of a vessel, a surgeon or a science or technology expert and said that control over the "how" existed as long as there was "some sufficient framework of control" even though the level of knowledge and skill required to carry out the work meant that control exercised by actual supervision was impossible;

(b) in *PGMOL*, Lord Richards said that the phrase "sufficient framework of control" used by Buckley J in *Montgomery* had been adopted in subsequent authorities, including the FTT and the UT in *PGMOL* and that "[neither] party on this appeal sought to advance a more precise test of control, and I doubt that it is possible to do so" – see *PGMOL* at paragraph [66];

(c) in *Christa Ackroyd Media Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 326 (TCC) ("*Ackroyd*") at paragraphs [51] to [54], the UT considered the meaning of the same phrase and held that "what mattered in determining control was not the practical exercise of day–to–day control and whether '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'." In *Ackroyd*, the UT gave as an example the facts in *Troutbeck*, where the owner of an estate who left caretakers in charge of the day–to–day running of the estate but "retained the right to step in and give instructions concerning what was, after all, their property" was held to have retained control over the caretakers – see the decision of the EAT in *Troutbeck* at paragraphs [40] to [42];

(d) in *Ackroyd* at paragraphs [58] and [59], the UT went on to say that control which applies to employees and non–employees alike is nonetheless relevant to the determination of control for employment purposes; and

(e) in *PGMOL*, Lord Richards noted that developments in the patterns of work since *RMC* was decided in 1967 "have … increased the cases in which some or all of [the factors which would generally characterise a contract of employment] will be absent but where nonetheless it is appropriate to find the necessary degree of control" and cited with approval the following passage from the decision of the High Court of Australia in *Zuijs v Wirth Brothers Proprietary, Ltd* (1955) 93 CLR 561 ("*Zuijs*") which related to an acrobat in an itinerant circus:

> "The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. 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. Even if Mr Phillip Wirth could not interfere in the actual technique of the acrobatics and in the character of the act, no reason appears why the appellant should not be subject to his directions in all other respects",

concluding that what matters is "lawful authority to command so far as there is scope for it…if only in incidental or collateral matters" – see *PGMOL* at paragraphs [64] to [68]; and

(5) as is the case with the extent of mutuality of obligation, the extent of control exercised by the putative employer over the putative employee is not, by itself, decisive because of the other factors to be taken into account at Stage 3C – see *RMC* itself, *Market Investigations Limited v. Minister for Social Security* [1969] 2 QB 173 ("*Market Investigations*") at 183 and *Atholl House CA* at paragraph [82]. In *PGMOL* at paragraph [33], Lord Richards said that one consequence of not treating mutuality of obligation and control as largely determinative and according only a minor role for other considerations was that "the bar to the existence of control need not be set at an unduly high level".

**The parties' submissions**

179. Mr Rivett submitted that the terms of the hypothetical contract did not give rise to the type and degree of control which was required to satisfy Stage 3B.

180. His first point was that, under the hypothetical contract, there was a broad spectrum of things which Mr Robson might agree to do pursuant to a request by the club and the club could not compel Mr Robson to fulfil any particular request as long as Mr Robson satisfied the minimum commitment in each six–month period. As such, the hypothetical contract was no more than an overarching or "umbrella" framework pursuant to which the club and Mr Robson

could agree that Mr Robson would make a particular personal appearance. It followed from this that control was to be tested by reference to each personal appearance and only after Mr Robson had agreed to make the relevant personal appearance. This was implicit in the way in which MacKenna J had framed the test for control in *RMC* – control was to be tested only after the contract between the putative employer and the putative employee had been negotiated.

181. Mr Stone submitted that it was incorrect to approach the control test by seeing each personal appearance as a separate contract reached pursuant to the overarching or "umbrella" framework of the hypothetical contract. The hypothetical contract obliged Mr Robson to satisfy the minimum commitment in each six–month period and therefore Mr Robson could not decline requests for personal appearances indefinitely. In considering whether the club exercised control over Mr Robson, the fact that, sooner or later, Mr Robson had to agree to make a personal appearance meant that the club was exercising control over the "what", "where" and when".

182. Mr Rivett's second point was that, even though he accepted that there was some control over Mr Robson once Mr Robson agreed to make a particular personal appearance, that was not the type or degree of control which was indicative of employment. The type and degree of control in this case was no different from:

> (1) a case where A contracted with B for B to provide a boiler meeting certain standards; or
>
> (2) a case where C accepted a speaking engagement for D and D made the hotel and restaurant bookings for the period of his engagement.

183. In those cases, it was incorrect to see A as exercising control over B or D as exercising control over C. Instead, both A and D were simply entitled to enforce the bargain which they had made with B and C respectively. Once one treated each personal appearance as a separate agreement reached pursuant to the overarching or "umbrella" framework of the hypothetical contract, the relationship between the club and Mr Robson in this case was similar to that. Hiring someone to do what they agreed to do at the time when the agreement was reached did not amount to control. Since Mr Robson was free to refuse any request to make a personal appearance, he was in the same position as any independent contractor who agreed to undertake a particular job.

184. Moreover, in this case, unlike a radio or television presenter, Mr Robson was not generally provided with a script or required answers when he attended events. He simply received a briefing before the event as to what questions he might expect to be asked and was free to compose his own answers to those questions. Thus, even after Mr Robson had agreed to make a personal appearance, the club had very limited control over the "how".

185. Mr Stone said that this approach was misconceived. It was apparent from the UT decision in *Ackroyd* that the mere fact that the control exercised over the putative employee was the same as was exercisable over someone who was self–employed did not mean that the control test at Stage 3B was not satisfied in the case of the putative employee. This was because it was a necessary but not sufficient condition to establish the existence of an employment relationship that Stage 3B was satisfied and, once that was the case, it was then necessary to address Stage 3C in which all relevant factors, including the extent of the control, were required to be taken into account. Consequently, Stage 3B was not meant to distinguish between the type of control which was exercisable over an employee and the type of control which was exercisable over someone who was self–employed. That was a matter to be considered at Stage 3C. At Stage 3B, it was merely necessary to determine whether control existed. In this case, the ability of the club to control the "what", "where", "when", and "how" of Mr Robson's services was sufficient to satisfy Stage 3B.

186. Mr Rivett's third point was that the SC in *PGMOL* had expressly endorsed the decision in *RMC* and, in *RMC*, MacKenna J had held that Stage 3B was not satisfied even though the extent of the control which had been exercised over the putative employee considerably exceeded the extent of the control which had been exercised by the club over Mr Robson. In *RMC*, the putative employee had previously been an employee of the putative employer and was required:

(1) to have his vehicle painted in the company's colours and to wear a uniform prescribed by the putative employer;

(2) to make his vehicle available whenever and wherever required by the putative employer;

(3) to collect and carry such quantity of materials as might be required by the putative employer to the destination specified by the putative employer;

(4) to comply with the putative employer's rules and regulations;

(5) not to dispose of his vehicle without the putative employer's prior written consent; and

(6) to operate the vehicle every day apart from two weeks' holiday each year as agreed by the putative employer.

Despite all of those features, MacKenna J had held that the contract between the parties did not amount to a contract of service but was instead a contract of carriage. This showed that a contract could include an element of personal service without becoming a contract of employment.

187. In response, Mr Stone submitted that the SC's endorsement of *RMC* in *PGMOL* simply related to the three–stage approach outlined by MacKenna J in that case. It was not to be taken as an endorsement that the test for control adopted by a court in 1967 remained the same in 2024. On the contrary, it was apparent from *PGMOL* at paragraphs [30] to [34] and [61] to [88] that the SC was saying that control could take many forms and was advocating a flexible approach to this question that took into account evolving employment practices over time.

188. In short:

(1) Mr Rivett said that, since the "what", "where", "when" and "how" could be determined only after Mr Robson accepted a particular engagement, which he was not obliged to do, the features of control which existed were consistent with self–employment. The fact that, on one occasion, Mr Robson was given the choice between acting as a host on a match day or attending an event in Philadelphia showed the degree of autonomy which was afforded to him, as did the freedom which was given to him when he was living in Thailand but still acting as an ambassador of the club under the First Personal Ambassador Agreement; and

(2) Mr Stone said that the fact that MUFC could dictate the "what", "where", "when" and "how" of the work to be performed was indicative of employment and meant that Stage 3B was satisfied. For example, it was MUFC that determined which personal appearances Mr Robson was requested to make and whether a personal appearance that Mr Robson was requested to make would count toward the minimum commitment in a six–month period or would instead qualify for an additional fee. He rejected the suggestion that the choice offered to Mr Robson between attending a match day or going to an event in Philadelphia indicated that he was in business on his own account and simply agreeing to go to the event in Philadelphia in the course of carrying on that business. Instead, that choice was entirely consistent with his being under the control of

the club. Mr Robson had been offered the choice only because the club was happy for him to do either event and willing to give him the choice.

**Conclusion**

189. As I have already trailed in paragraph 174 above in dealing with mutuality of obligation at Stage 3A, I do not agree with Mr Rivett's characterisation of the hypothetical contract as being akin to an overarching or "umbrella" framework pursuant to which the club and Mr Robson could agree from time to time that Mr Robson would make personal appearances. To characterise the hypothetical contract in that manner involves a failure to give appropriate weight to the obligation that Mr Robson had under the hypothetical contract to satisfy the minimum commitment in each six–month period. As such, control is to be considered in relation to the hypothetical contract as a whole and not each personal appearance which Mr Robson agreed to make under the hypothetical contract.

190. On that basis, since, sooner or later, the club was ultimately entitled to determine the nature of the personal appearances that Mr Robson would be required to make, the overall form of those personal appearances, the location in which the personal appearances would be made and the timing of the personal appearances, the hypothetical contract conferred on MUFC ultimate control over the "what", "where" and "when" of Mr Robson's services. The fact that the hypothetical contract provided that, as long as he satisfied the minimum commitment in each six–month period, Mr Robson was entitled to decline requests to make personal appearances is a factor to be considered at Stage 3C in determining the extent of that control but it does not negate the existence of that control altogether.

191. As for the "how", it is true that the hypothetical contract gave Mr Robson some flexibility and autonomy in the manner in which he performed his obligations. For instance, with one exception, he was not given a script and was therefore free to reply to questions as he wished and to say what he wanted subject only to his obligation under the hypothetical contract not to damage the interests of the club or a sponsor. Having said that, Mr Robson's freedom over the "how" was not unlimited. How a particular personal appearance unfolded was planned in advance to a large extent. There was a timetable for the event to which Mr Robson was required to adhere. For example, in the case of a home match day personal appearance, it was the club and not Mr Robson who determined which boxes he visited and when he was to go down to the pitch for photographs. Although there was little that MUFC could do in real time if Mr Robson disobeyed the relevant instructions, the club had the ability to terminate the hypothetical contract in cases of breach.

192. On that basis, Mr Robson's position under the hypothetical contract as to how he performed his obligations was essentially no different from the examples given in *Montgomery* of a master of a vessel, a surgeon or a science or technology expert or the example given in *Zuijs* of an acrobat. In those examples, it was the particular level of knowledge and skill required to carry out the work which made control exercised by actual supervision in real time impossible whilst, in this case, it was more the nature of the work in question. However, the unifying factor is that, in each case, although there could be no actual supervision in real time, there was "some sufficient framework of control". As the High Court of Australia put it in *Zuijs*, there was "lawful authority to command so far as there is scope for it". As such, I believe that MUFC also had control over the "how" under the hypothetical contract.

193. Taking all of the above into account, I have concluded that Stage 3B is satisfied in this case.

194. For completeness, I should add that, even if I am wrong in saying that control needs to be addressed by reference to the hypothetical contract taken as a whole and not in relation to each personal appearance which Mr Robson agreed to make pursuant to the hypothetical

contract, and therefore control needs to be considered by reference to each personal appearance in isolation, I agree with Mr Stone that, in carrying out that process, at least so far as Stage 3B is concerned, the control test is not failed merely because the level of control which was exercisable by the putative employer is indistinguishable from the level of control which the putative employer would have had if the putative employee had been an independent contractor. In *Ackroyd* at paragraphs [58] and [59], the UT rejected the proposition that control exercised by the BBC over Ms Ackroyd under the BBC's editorial guidelines could be disregarded in determining control for the purposes of Stage 3B simply because those guidelines applied to employees and non–employees alike and the UT adopted the same approach in *Red White and Green v. The Commissioners for His Majesty's Revenue and Customs* [2023] UKUT 83 (TCC) ("*RWG*") at paragraph [55].

195. As the decision in *RMC* made clear, the control test at Stage 3B is a necessary but not sufficient condition of a contract of employment and, in order to satisfy that stage, it is merely necessary that the putative employer has control. There is no need for that control to be generically different from the level of control which the putative employer would have had over an independent contractor. Whether or not such a generic difference exists may well be a relevant matter to consider when weighing up the various factors at Stage 3C but, at Stage 3B, it is merely necessary to ask whether control exists. On that basis, even if my conclusion to the effect that the hypothetical contract was not simply an overarching or "umbrella" framework pursuant to which the parties to the hypothetical contract could agree on personal appearances by Mr Robson from time to time were to be wrong, that would not affect the conclusion in relation to Stage 3B.

**STAGE 3C**

**The relevant law**

196. It is clear from paragraphs [58], [86], [122] to [137], [163] and [167] to [171] in *Atholl House CA* that, in relation to Stage 3C, the question for the relevant court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged not by the subjective intentions of the parties but instead objectively, by reference to the terms of the relevant contract and the circumstances in which it was made. In other words, the court or tribunal is required to take into account not only the express or implied terms of the relevant contract, but also a broader range of factors – see *Market Investigations*, *Hall v. Lorimer* [1994] WLR 209 ("*Hall*"), *McGregor v. Edinburgh Leisure* [2007] UKEAT 0027/07/2908 (29 August 2007) and *Matthews v. The Commissioners for Her Majesty's Revenue and Customs* [2014] STC 297.

197. The authorities, including the CA in *Atholl House CA* and, most recently, the SC in *PGMOL* and the UT in *Barnes*, have set out various principles for determining Stage 3C in any particular case and those are as follows:

> (1) it is important not "to focus unduly on the issues of mutuality of obligation and control and to treat all other terms of the contract and the surrounding circumstances of the parties' relationship as of less significance". However, "[it] is not the case that once the pre–conditions of mutuality of obligation and control are satisfied, they drop out of the picture as relevant factors in the overall assessment of whether a contract of employment exists" – see Lord Richards in *PGMOL* at paragraphs [30] and [32];
>
> (2) there has historically been some debate as to whether, once each of Stage 3A and Stage 3B has been satisfied, there has to be a clear inconsistency in the other terms of the contract to displace the conclusion of employment or whether Stage 3C should be approached on the basis that the other terms of the contract need to be consistent with

employment in order to reach the conclusion of employment. However, in *Atholl House CA* at paragraph [75], Sir David Richards (as he then was) said as follows:

"Whether the third condition is one of consistency or inconsistency with a conclusion of employment strikes me as a largely arid debate. The court or tribunal will in any event have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment. Given that mutuality of obligation and control are necessary elements of employment, there will inevitably have to be factors pointing in the opposite direction, but it is, in my view, no more than that."

It follows that, when it comes to Stage 3C, the mere fact that Stage 3A and Stage 3B have been satisfied at the point when Stage 3C is being addressed does not mean that there should be a presumption of employment at the point when the various factors are being considered. The position should be approached without any presumption either way – see *Atholl House CA* at paragraph [75];

(3) nevertheless, the absence of any presumption either way does not mean that the court must address Stage 3C in a vacuum. The express or implied terms of the relevant contract are central to the enquiry and necessarily the starting point in that enquiry but the factors to which the court or tribunal is to have regard "are not confined only to the terms of the [relevant] contract and the effects of those terms" (see *Atholl House CA* at paragraph [61]). What is needed is a consideration of "the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances" – see *Troutbeck* at paragraph [41] and also *Atholl House CA* at paragraphs [122] and [130].

In *Barnes* at paragraph [60], the UT approved of the statement that had been made by the FTT in that case that "[the] focus at the third stage remains anchored to the contract in issue, but the angle of focus widens out to take in the context and circumstances in which the contractual relationship is created; the direction of perspective is to zoom out from the contract in issue" and, in paragraph [112], it held that the FTT had erred in law in failing to follow its own self–direction by focusing excessively on the circumstances in which the hypothetical contract had operated in practice at the expense of focusing on the terms of the hypothetical contract itself; and

(4) in approaching this issue:

(a) all aspects of the relationship between the putative employer and the putative employee need to be considered and no single factor is decisive – see *O'Kelly* at 104G and 124E;

(b) this is not a mechanical exercise of running through items on a checklist. It is about painting a picture from an accumulation of detail and then standing back to make an informed qualitative assessment from a distance. Thus, no exhaustive list can be compiled of the factors which should be taken into account and it is not possible to lay down strict rules as to the relative weight which such factors should carry in particular cases because each case turns on its own particular facts and all of the relevant factors need to be taken into account – see *Market Investigations* at 184 and *Hall* at 216;

(c) for a circumstance to be relevant in this context, it must be one which was known, or could reasonably be supposed to have been known, to both parties. As noted by Arnold LJ in *Atholl House CA*, the contract "should not be construed in a vacuum, but in the light of the admissible factual matrix" and, in that regard, the admissible factual matrix includes factual circumstances which were known by, or reasonably available to, both parties at the time when the contract was executed but not factual circumstances which were known by, or reasonably available to, only

one of the parties at that time – see Arnold LJ in *Atholl House CA* at paragraphs [170] and [171] and *Arnold* at paragraph [21] and see also Sir David Richards in *Atholl House CA* at paragraphs [123], [131] and [164]. However, in each case, the critical period to be addressed is the period covered by the engagement which is being considered. Whilst the court or tribunal should not shut its eyes to periods which precede that period, that is merely part of the surrounding circumstances and should not be the focus of attention – see *Atholl House CA* at paragraph [131];

(d) account must be taken of both terms which point in favour of employment and terms which point in favour of self-employment. There should not be an imbalance in favour of one category of terms over the other – see *Atholl House CA* at paragraph [130];

(e) in a case where the evidence shows that the worker tends generally to be engaged on a self–employed basis, it is wrong to approach the question by asking whether the particular engagement which is being considered is an exception to that general trend. Instead, the starting point should be the terms of the hypothetical contract relating to the particular engagement in question and the knowledge that the worker's other engagements are generally on a self–employed basis should be no more than one of the factors which is to be weighed in the balance – see *Atholl House CA* at paragraphs [126] to [137];

(f) asking whether the putative employee is acting in business on his or her own account may be a helpful way of determining the status of the hypothetical contract but that will not always be the case and the level of assistance that it provides depends on all the facts – see *Barnes* at paragraph [108(4)], citing the UT decision in *The Commissioners for His Majesty's Revenue and Customs v Basic Broadcasting Limited* [2024] UKUT 165 (TC) at paragraph [48];

(g) the FTT's task is to determine whether, taking into account the terms and effects of the hypothetical contract and the circumstances in which that hypothetical contract would have arisen insofar as they would have been known or were reasonably available to both parties, there would have existed an employment relationship between the worker and the client under the hypothetical contract; and

(h) in weighing up the various factors in order to reach that determination, taking into account factors which, as a matter of principle, are irrelevant or failing to take into account factors which, as a matter of principle, are relevant involves an error of law – see *Barnes* at paragraph [57]. In structuring the analysis, the best way for the FTT to avoid an error of law is to divide the material terms of the hypothetical contract and the surrounding circumstances between those which are consistent with employment, those which are not (and instead point toward self–employment) and those which are neutral – see *Barnes* at paragraph [108(3)].

198. Having set out in broad terms the principles for determining Stage 3C, I now turn to those factors which are potentially relevant to this decision and have been addressed specifically in the case law. Those are as follows:

(a) financial risk – the degree of financial risk which is undertaken by the putative employee is a relevant factor. The taking of financial risk is an indication of self–employment. In *Barnes*, the UT held that the limited financial risk taken by Mr Barnes in performing the engagement was an indication of employment – see *Barnes* at paragraph [117(5)]. However, "financial risk" does not include the risk of not being able to find alternative employment as that is a risk shared by all casual employees. To be a factor pointing towards independent contractor status,

the risk needs to be an ability to make a loss or a profit from how the work is performed – see *Global Plant Limited v. Secretary of State for Social Security* [1972] 1 QB 139 at 152 and *Lee Ting Sang v. Chung Chi-Keung* [1990] 2 AC 374 ("*Lee Ting Sang*") at 384;

(b) financial dependence – the extent to which the putative employee is dependent upon, or independent of, the putative employer for the financial exploitation of his or her talents is a relevant factor. The putative employee's ability to exploit his or her talents in the wider market and economic independence from any one paymaster is an indication of self–employment – see *Hall* at 218C, *Atholl House UT* at paragraph [113] to [115] and *RWG,* at paragraph [112].

In *Barnes* at paragraphs [95] to [98], the UT noted that, whilst financial dependence is a relevant factor as a matter of principle, "'financial dependency' is a somewhat elastic concept" and it went on to hold that the FTT in that case had been entitled to conclude that, even though Mr Barnes derived 60% of his income from Sky, the substantial demand for his services during the period in question meant that he was not financially dependent on Sky;

(c) time commitment – the time commitment which the engagement involves is a relevant factor. An engagement which does not require the putative employee to spend a significant part of his or her working time on the engagement is more likely to be one entered into in the course of self–employment – see *Atholl House UT* at paragraph [113] to [115] and *Atholl House CA* at paragraph [130]. However, the putative employee's opportunity to profit from an efficient use of time in his or her overall business is a neutral factor as it sheds no light on whether, in all the circumstances, the hypothetical contract would have been an employment contract – see *Barnes* at paragraphs [89] to [91];

(d) other engagements – the manner in which the putative employee generally carries out his or her working life is an important contextual circumstance to be taken into account in determining whether he or she should be regarded as an employee in relation to the particular engagement in question. The fact that the putative employee's working life generally involves entering into a series of engagements in the course of self–employment is a factor which points toward self–employment – see *Barnes* at paragraphs [85] to [88]. However:

> (i) it is not determinative – see *Synaptek Limited v. Young* [2003] ICR 1149 ("*Synaptek*") at paragraph [20]. Instead, it is merely a relevant factor to be taken into account in the process as a whole. In *Atholl House CA* at paragraph [124], Sir David Richards LJ noted that:
>
> "If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal";
>
> (ii) it therefore does not preclude the putative employee from being regarded as an employee in relation to one of those engagements if the terms of that one engagement are more consistent with the putative employee's being an employee; and

(iii) the focus should always be on the contractual terms and circumstances of the particular engagement which is being considered. It should not be on either:

(A) the activities involved in the putative employee's other engagements; or

(B) the contractual terms and circumstances of those other engagements;

(e) nature of activities – whether or not the putative employee performs similar services for others as an independent contractor "is a relevant fact, if known or reasonably available to the putative employer". The fact that the putative employee performs similar services for others as an independent contractor is a factor which points toward self–employment. However, "it goes no further than that". It is wrong to assume that, because the services performed by the putative employee as an independent contractor are similar to those performed by the putative employee under the engagement being considered, the putative employee must have been performing the services under the engagement being considered as an independent contractor – see *Davies v. Braithwaite* [1931] 2 KB 628 ("*Davies*") at 635, *Fall* at 295H and 298F, *Sidey v. Phillips* [1987] STC 87 ("*Sidey*") at 90-91 and *Atholl House CA* at paragraphs [128], [129] and [171];

(f) ownership of equipment – whether or not the putative employee uses his or her own equipment to perform the services is a relevant factor. The use of the putative employee's own equipment is a factor which points towards self–employment – see *Market Investigations* at 184 -185 and *Fall* at 293;

(g) length of relationship – the degree of continuity in the relationship between the putative employer and the putative employee is a relevant factor to be taken into account. An engagement which is short–term and where there is no obligation on the part of the putative employer to find something else for the putative employee to do after the putative employee has completed the allotted task is more likely to involve self–employment. In contrast, a long–term engagement, with the security that that entails, is more consistent with employment – see *Kickabout Productions Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2022] EWCA Civ 502 ("*Kickabout CA*") at paragraph [94] and *Barnes* at paragraphs [117(1)] and [121(2)];

(h) the "part and parcel" test – the question of whether the putative employee can accurately be described as being "part and parcel" of the putative employer's organisation can be a relevant factor depending on the context – see *RMC* at 524B, *Lee Ting Sang* at 388, *Hall v Lorimer* [1992] STC 599 (in the High Court) at 612g and *Kickabout CA* at paragraphs [98] to [101].

The test will not be relevant in all cases. In *The Commissioners for Her Majesty's Revenue and Customs v. Kickabout Productions Limited* [2020] UKUT 216 (TCC) ("*Kickabout UT*"), the UT had held that it did not think that "in the circumstances of this case, an impressionistic analysis of whether [the presenter] was "part and parcel" of Talksport's organisation would weigh heavily in the balance" and that such an analysis would "[add] little in this case" – see *Kickabout UT* at paragraph [95] – and the CA in *Kickabout CA* concluded that "[there] is no criticism that can properly be made of this analysis" – see paragraph [101].

However, the CA in *Kickabout CA* observed that, "[on] the particular facts of some cases, a decision–making court or tribunal may reasonably consider that it is a useful question to ask as part of the overall assessment" – see *Kickabout CA* at paragraphs [98] to [101] – and the UT in *Kickabout UT* accepted that, in some cases, "analysis whether someone is "part and parcel" of an organisation will be illuminating" – see *Kickabout UT* at paragraph [95].

The Privy Council in *Lee Ting Sang* held that there were two distinct strands in relation to this test.

The first of them relates to whether specified activities of the putative employee can be said to be integral to the activities of the putative employer or merely accessory to those activities – see *Lee Ting Sang* at 386 and 387– whilst the second of them relates to the quite different question of whether the putative employee can be said to be "part and parcel" of the putative employer in an organisational sense – see *Lee Ting Sang* at 387 and 388. The second strand, based on the dictum of Denning LJ in *Bank voor Handel en Scheepvaart N.V. v. Slatford* [1953] 1 Q.B. 248 at 295, was the one mentioned by MacKenna J in *RMC* at 524.

In *Lee Ting Sang*, the Privy Council in fact determined that neither of the two strands had any relevance on the facts of that case and that reliance on them had led the lower courts into error – see *Lee Ting Sang* at 388. However, that is not to say that either or both of those strands may not be relevant on the facts of another case;

(i) intellectual property rights – an ability on the part of the putative employee to exploit, in the course of other engagements, the work product that he or she has created in the course of the hypothetical contract is, in principle, a relevant factor and an indication of self–employment – see *Barnes* at paragraphs [74] to [77] and [118(1)];

(j) co–operative working relationship – whilst the mere existence of a co–operative working relationship is a neutral factor, a co–operative working arrangement in relation to the availability of the putative employee to carry out the work and the circumstances in which the putative employer will ask the putative employee to do so is "a pointer away from employment, in particular as it goes to the extent of control, which is a relevant circumstance at [Stage 3C]" – see *Barnes* at paragraphs [78] to [81];

(k) mutuality of obligation and control – as both Sir David Richards and Arnold LJ noted in *Atholl House CA* at paragraphs [76], [113] and [169], in addressing Stage 3C in each case, the relevant court or tribunal must not entirely divorce its evaluation of the relevant factors from the conclusions which it reaches in relation to Stage 3A and Stage 3B. Thus, even though it is axiomatic that, in reaching this stage, each of Stage 3A and Stage 3B will already have been satisfied, the extent of the mutuality of obligation and the extent of the control are relevant factors to be considered at Stage 3C.

In particular, when the evaluation for the purposes of Stage 3C is made, the fact that the putative employee is required to perform the services personally and cannot provide a substitute is a factor which points to employment status – see, for example, *Barnes* at paragraph [117(2)] – and the extent of the putative employer's control needs to be borne in mind in considering the putative employee's status – see, for example, *Augustine v. Econnect Cars Ltd* [2019] UKEAT 0231/18 (20 December 2019) ("*Augustine*") at paragraph [66].

The existence of a right of "first call" on the putative employee's time (which goes to the "where" and the "when" of the putative employee's activities under the engagement in question and is therefore part of the control test at Stage 3B) is a factor which points toward employment. In *Barnes*, the UT held that Sky's right of "first call" on Mr Barnes's services for a significant portion of each year was an indicator of Mr Barnes's employment status but that Mr Barnes's considerable latitude in stating his availability to fulfil that requirement was an indicator of his self–employment status – see *Barnes* at paragraphs [117(3)] and [118(2)];

(l) control over other engagements – except to the extent that it involves a right of "first call" (and therefore goes to the "where" and the "when" of the putative employee's activities under the engagement in question), the issue of control over the extent of the putative employee's other engagements is not a matter which is relevant to Stage 3B. That is because it does not relate to any of the "what", "where", "when" or "how" of the putative employee's engagement. However, it is a factor to be taken into account at Stage 3C.

In *Barnes*, the UT held that the fact that Sky had the exclusive right to Mr Barnes's services in the UK, that Mr Barnes could not provide his services to another broadcaster or radio or media organisation without Sky's written consent (not to be unreasonably withheld) and that Mr Barnes would need Sky's permission before engaging in any new commercial activities was an indicator of Mr Barnes's employment status – see *Barnes* at paragraph [117(4)];

(m) employee benefits – in the context of the hypothetical contract which is required to be constructed for the purposes of applying the IR35 legislation, the fact that the actual contractual arrangements involve two companies (the client and the intermediary) rather than a company (the client) and an individual (the worker) and therefore make no provision for holiday or sick pay, maternity leave or a pension entitlement should not be regarded as a significant factor in determining whether the hypothetical contract is an employment contract but it is not entirely irrelevant – see *Atholl House UT* at paragraph [74], *Kickabout CA* at paragraph [97] and *RWG* at paragraphs [125] and [126];

(n) contractual statements – whilst the understanding and intentions of the parties are relevant factors, "statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them". In a borderline case, such statements "may be taken into account and may help to tip the balance one way or the other" but, in the majority of cases, they "will be of little, if any assistance in characterising the relationship between them" – see *Dragonfly* at paragraphs [53] to [55], *Kickabout CA* at paragraph [95] and *RWG* at paragraphs [122] to [124]. In *Barnes*, the UT, having concluded that the case was not a borderline one, declined to take into account whether the hypothetical contract would have included such a provision – see *Barnes* at paragraph [124];

(o) fixed fees – the payment of a fixed fee irrespective of the number of days worked is a neutral factor as it is consistent with both employment status and self–employment status – see *Barnes* at paragraphs [71] to [73]; and

(p) reputational risk – the fact that the work carried out by the putative employee involves putting his or her reputation at risk is consistent with both employment status and self–employment status and is therefore not a relevant factor – see *Barnes* at paragraphs [92] to [94].

**The parties' submissions**

199. In relation to Stage 3C, it was common ground that:

(1) the indefinite nature of the hypothetical contract in this case was indicative of an employment relationship – see *Kickabout CA* at paragraph [94] and *Barnes* at paragraph [117(1)]; and

(2) unless the position was finely–balanced, which neither party considered it to be in this case, minimal weight should be given to the statement in the hypothetical contract to the effect that it did not give rise to an employment relationship – see *Dragonfly* at paragraphs [53] to [55].

200. However, apart from that, there was considerable disagreement between the parties as to which terms of the hypothetical contract, and which circumstances in which the hypothetical contract arose, were:

(1) indicative of employment;

(2) indicative of self–employment; or

(3) neutral or of marginal relevance either way.

201. Those areas where the parties disagreed on the categorisation of a term or circumstances may be summarised as follows:

(1) the length of the relationship between MUFC and Mr Robson – Mr Stone said that the fact that, at the time when the hypothetical contract arose, Mr Robson had been an ambassador since 2008 and had had a long relationship with the club prior to that date was indicative of an employment relationship – see *Kickabout CA* at paragraph [94] and *Barnes* at paragraph [121(2)]. The extent of the attachment between the club and Mr Robson made their relationship more likely to be one of employment.

Mr Rivett said that Mr Robson's association with MUFC was not a function of his ambassadorial role but instead a function of his history as a player for the club. This causation aspect was critical because the same association between Mr Robson and the club would have existed even if he had never been appointed as an ambassador and the hypothetical contract had never arisen. As such, it was not a relevant factor to be taken into account in determining the nature of the relationship under the hypothetical contract;

(2) mutuality of obligation – it was common ground that the decisions in *PGMOL* and *Atholl House CA* showed that the extent of the mutuality of obligation was a material factor to be considered when carrying out the exercise required by Stage 3C. In *Barnes*, the fact that Mr Barnes could not provide a substitute to perform the relevant services was held to be an indication of an employment relationship – see *Barnes* at paragraph [117(2)].

However, there was a dispute between the parties as to the extent of the mutuality of obligation in this case.

Mr Rivett submitted that the mutuality of obligation under the hypothetical contract was "of a thin amount", as he put it, because, under the terms of the hypothetical contract:

(a) the nature of the activities which Mr Robson might be asked to carry out from time to time was unspecific; and

(b) Mr Robson was entitled to refuse any request to make a personal appearance that was made by the club.

He said that these were features that tended to diminish the mutuality of obligation and would generally not be a feature of an employment contract.

In response, Mr Stone said that:

> (i) as regards the first point, the terms of the hypothetical contract required Mr Robson to make personal appearances "for any purpose required by [the club]". Whilst it was true that that was unspecific, the wide–ranging nature of the obligation was entirely consistent with a high degree of mutuality of obligation; and
>
> (ii) as regards the second point, even if Mr Robson was entitled to refuse some requests to make personal appearances, that did not diminish the mutuality of obligation under the hypothetical contract because that ability was constrained by Mr Robson's obligation to satisfy the minimum commitment in each six–month period. As could be seen by the decision in *Cotswold*, the right to refuse work did not negate mutuality of obligation as long as there was an obligation to do at least some work.

Mr Stone added that the fact that Mr Robson was precluded by the terms of the hypothetical contract from providing a substitute to provide the relevant services was indicative of the strength of the mutuality of obligation in this case.

Mr Rivett said that that was not the case – the inability to provide a substitute was a neutral factor given that the very nature of the ambassadorial role which Mr Robson was required to perform necessarily entailed making personal appearances himself. It was simply a function of the nature of the services to be provided under the engagement because it was of the very essence of a contract that required personal appearances to be made that the obligation to make those personal appearances could not be delegated.

Mr Stone said that just because the nature of the services to be supplied inevitably precluded Mr Robson from providing a substitute did not mean that that inability was neutral or could somehow be disregarded in this context. Instead, it served to reinforce the fact that personal service was of the essence of the hypothetical contract and thus to strengthen the conclusion that the hypothetical contract was an employment contract;

(3) control – similarly, it was common ground that the decisions in *PGMOL* and *Atholl House CA* showed that the extent of the club's control was a material factor to be considered when carrying out the exercise required by Stage 3C.

However, there was a dispute between the parties as to the extent of the club's control in this case.

Mr Stone said that Mr Robson was obliged to satisfy the minimum commitment in each six–month period and thus could not refuse requests to make personal appearances indefinitely, with the result that the club could ultimately dictate the "what", "where", and "when" of the work to be performed. Taken together with the framework of control which was exercised by the club when the personal appearances were made – which entailed control over the "how" the work was performed – there was a high degree of control in this case, which was consistent with employment.

Mr Rivett said that, since the "what", "where", "when" and "how" could be determined only after Mr Robson accepted a particular engagement, which he was always free to decline, the level of control was weak, which was consistent with self–employment.

Mr Rivett added that the fact that the hypothetical contract contained:

(a) no requirements to undergo training or to be subject to guidelines, policies or procedures or to be subject to formal reviews; or

(b) sanctions for breach of the contract apart from termination

were all indicative of weak control and therefore indicative of self–employment. In that regard, it was instructive to contrast the lack of such provisions in this case with the extensive disciplinary provisions which existed in relation to the referees in *PGMOL*.

Mr Stone said that the absence of those features was not inconsistent with an employment relationship, as *Ackroyd* had shown. Moreover, the right to terminate the hypothetical contract for breach was an effective sanction and entirely consistent with strong control;

(4) absence of financial risk – Mr Stone said that the fact that:

(a) the fixed fee for each six–month period was required to be paid come what may; and

(b) MUFC was responsible for arranging and paying for Mr Robson's travel and accommodation and meeting Mr Robson's other reasonable expenses

meant that Mr Robson enjoyed both certainty of payment and an absence of any financial risk and this was indicative of employment. In *Barnes*, the fact that Mr Barnes received a fixed fee regardless of the number of days that he worked and that Sky provided all the necessary equipment and discharged all the travel and accommodation costs meant that Mr Barnes was exposed to limited financial risk and this was held to be an indication of an employment relationship – see *Barnes* at paragraph [117(5)].

Mr Rivett said that, whilst this might point toward employment, it was not a very compelling point because many contracts for services also made provision for the reimbursement of expenses;

(5) restrictions on other engagements – Mr Stone said that the restrictions placed on Mr Robson's ability to enter into personal endorsement deals were indicative of employment. In *Barnes*, Mr Barnes was precluded from providing his services to another broadcaster or radio or media organisation without Sky's consent (such consent's not to be unreasonably withheld) and was required to seek permission from Sky before engaging in any new commercial activities and these were held to be indicative of an employment relationship – see *Barnes* at paragraph [117(4)].

Mr Rivett said that the fact that Mr Robson did not need the club's prior consent before entering into personal endorsement deals and that the restrictions on his doing so applied to only limited categories of personal endorsement deals were indicative of self–employment. He added that the work done for MUFC heightened Mr Robson's public profile and allowed him to build relationships with other potential clients in order to develop his business. The contracts with the sponsors were an example of that. This was indicative of self–employment.

Mr Stone said that the suggestion that Mr Robson's activities for the club enabled him to develop his relationship with the sponsors as an individual and separate from his role as ambassador was obviously incorrect. The evidence showed that, when Mr Robson received additional payments for making personal appearances for sponsors, he was doing so in his role as an ambassador for the club and those personal appearances were no different from the ones that counted toward the minimum commitment in each six–month period;

(6) financial dependence on MUFC – Mr Stone said that the fact that Mr Robson was financially dependent on MUFC was indicative of employment. In *Barnes* at paragraph [121(3)], the UT had noted that a putative employee's financial dependence on the putative employer generally pointed toward an employment relationship. Mr Stone explained that "financial dependence" in this context did not mean that the putative employee needed to be dependent on income from the putative employer in order to make ends meet. The fact that the putative employee might be of sufficient means not to need the relevant income did not mean that there was no "financial dependence". Instead, the critical issue was whether the putative employee was dependent on the putative employer for the exploitation of his or her talents. That was manifestly the case in the present proceedings given the extent to which the income of the Appellant derived from the club.

Mr Rivett said that Mr Robson was not financially dependent on the club simply because the majority of the Appellant's income derived from the club. That was because those circumstances had arisen as a result of Mr Robson's personal choice. Following his recovery from illness in 2011, Mr Robson had decided to spend more time with his friends and family and to pursue his hobbies but that did not mean that there was no demand for his services. Thus, he was not dependent on the club for the exploitation of his talents;

(7) the "part and parcel" test – Mr Stone said that Mr Robson's decision to engage almost exclusively with the club and the sponsors by virtue of the hypothetical contract was indicative of employment because it meant that he was "part and parcel" of the club. He was making his personal appearances as a representative of the club dressed in club apparel and doing the work of deepening the club's relationship with the sponsors and fans. He was one of a handful of ambassadors who were the name and face of MUFC. Although he had no responsibility within the hierarchy of the club for the relationship with the sponsors and fans, he was key to the deepening of that relationship and his role was in no way ancillary to that process. If he had wanted a smaller commitment to the club, he could have agreed to act as a legend instead of an ambassador. In that case, he would not have been subject to the degree of commitment and the restrictions contained in the hypothetical contract. But he had chosen not to do that.

Mr Rivett pointed out that the fact that the club told the sponsors that Mr Robson was not an employee and could not be compelled to make a personal appearance on request demonstrated that Mr Robson was not "part and parcel" of the club in an organisational sense. Mr Robson was his own agent who could decide for himself which personal appearances he wished to make;

(8) the image rights licence – Mr Stone said that the inclusion in the hypothetical contract of the exclusive image rights licence was indicative of employment. This was because it meant that Mr Robson was giving up control to the club of his image rights as opposed to saying to the club that he was happy to perform services but wanted to retain the ability to exploit his own image rights for the purposes of his own business.

Effectively, as Mr Stone put it, Mr Robson was "going all in with [MUFC]" and agreeing both personally to perform services and to give the club exclusive use of his image rights. This contrasted with the position of Mr Barnes, who had retained the right to reproduce elsewhere the opinions which he had given during a live broadcast for Sky, a fact which the UT in *Barnes* saw as being indicative of self–employment – see *Barnes* at paragraphs [77] and [118(1)].

Mr Rivett said that the provisions in the Ambassador Agreement in relation to the licensed image rights did not form part of the hypothetical contract for the reasons he had

outlined in dealing with the Image Rights Issue – see paragraphs 108 to 121 above – and therefore they could not be taken into account in determining the nature of the relationship between the club and Mr Robson at Stage 3C;

(9) the nature of the Appellant – Mr Rivett said that the longevity of the Appellant as a separate company and the variety of engagements performed by Mr Robson on behalf of the Appellant other than for MUFC or the sponsors were indicative of self–employment because it meant that there was spectrum and depth to the business carried on by the Appellant which did not exist in those cases under the IR35 legislation where a personal services company had been established with recent provenance;

(10) absence of "first call" – Mr Rivett said that the fact that there was no right of "first call" in the hypothetical contract – which is to say no provision to the effect that MUFC work would take priority over Mr Robson's other work – was indicative of self–employment.

Mr Stone said that a lack of an express provision in the hypothetical contract which conferred priority on the club was not inconsistent with an employment relationship if the terms of Mr Robson's engagement by the club, taken together with the terms of his other engagements, were such that, in practice, his work for the club would take priority;

(11) time commitment – Mr Rivett said that the fact that Mr Robson's obligations under the hypothetical agreement would have required a minimal time commitment was indicative of self–employment. In contrast to, say, the newsreaders and presenters who had previously been the subject of challenges under the IR35 legislation, Mr Robson had plenty of time to do other things. Moreover, a lot of his personal appearances under the hypothetical contract involved attending matches which he would have attended in any event even if he had not been engaged as an ambassador.

Mr Stone said that a minimal time commitment was not by itself inconsistent with employment. He pointed to the decision of the UT in *RWG* where the IR35 legislation was held to apply despite the fact that the taxpayer, the broadcaster Eamonn Holmes, only worked for between 45 and 92 weekdays per year over the relevant period, with 21 or 22 weekend links in one of the tax years during the relevant period. He also noted that a student who held a part–time Saturday job clearly had a relationship of employment with his or her putative employer despite the minimal time commitment that that involved; and

(12) impact of the pandemic – finally, Mr Rivett said that it was important to bear in mind the relevance of the pandemic when conducting the present exercise. It had meant that the usual sorts of activities in which Mr Robson might have engaged outside of his ambassadorial role for the club, such as after–dinner speaking, were closed off and inevitably led to a reduction in the income arising to the Appellant from sources other than MUFC or the sponsors.

Mr Stone pointed out that the Appellant's income statements for the tax year ending 5 April 2017 and the two following tax years suggested that Mr Robson had carried out very few engagements for people other than MUFC and the sponsors for a considerable period of time before the pandemic. As such, the pandemic had had no impact on Mr Robson's working life as a whole.

202. In conclusion:

(1) Mr Stone submitted that, stepping back and looking at the actual contract and the circumstances in which the actual contract was executed as a whole, the nature of the relationship between the club and Mr Robson, the way in which Mr Robson was required

to provide his services and the extent to which the income realised by Mr Robson from the provision of his services was provided by the club all pointed in the direction of an employment relationship; and

(2) Mr Rivett submitted that, stepping back and looking at the actual contract and the circumstances in which the actual contract was executed as a whole, if I did not agree with him that the IR35 legislation was not engaged at all because the actual contract was essentially a contract for the licence of image rights and any services for which it provided were simply ancillary to that licence, then the conspicuous absence of control over the way that the Appellant discharged its obligation to procure the performance of Mr Robson's services under the actual contract, taken together with Mr Robson's freedom to pursue his other engagements, all pointed in the direction of self–employment.

**Conclusion**

*Introduction*

203. Turning then to the practical application of the principles set out in paragraphs 197 and 198 above in the present case in the light of the parties' submissions, I have concluded, for the reasons which follow, that this is a case where the parties intended, when entering into the hypothetical contract, to create a relationship of employment.

204. It is clear from the body of case law summarised in paragraph 197 above that this question is to be determined by applying a multi–factorial test, taking into account the terms of the hypothetical contract and the circumstances in which the hypothetical contract arose and that, in carrying out that exercise:

(1) the terms of the hypothetical contract are central to the enquiry and necessarily the starting point in the enquiry but are not determinative in and of themselves. What is needed is a consideration of "the relationship between the parties recorded in the agreement in the setting of the surrounding circumstances" – see *Troutbeck* at paragraph [41] and also *Atholl House CA* at paragraphs [122] and [130];

(2) it is necessary to take into account relevant factors and to disregard irrelevant factors and to divide those terms of the hypothetical contract and the surrounding circumstances which are relevant between those which are consistent with employment, those which are not (and instead point toward self–employment) and those which are neutral – see *Barnes* at paragraph [108(3)]; and

(3) this must not be carried out as a mechanical exercise simply involving the enumeration of the various factors. Instead, it is necessary to paint a picture from an accumulation of detail and then to stand back to make an informed qualitative assessment from a distance – see *Market Investigations* at 184 and *Hall* at 216.

*The terms of the hypothetical contracts*

205. In line with the principles described above, the starting point must necessarily be the terms of the hypothetical contract.

*Features of the terms which are indicative of employment*

206. In my view, the following features of the terms of the hypothetical contract are indicative of employment:

(1) strong mutuality of obligation – I agree with Mr Stone that, far from diminishing the extent of the mutuality of obligation, the fact that Mr Robson could be required under the hypothetical contract to make his personal appearances "for any purpose required by [the club]" is something which points in favour of a strong mutuality of obligation

because it emphasises the extreme width of the activities which the club could require Mr Robson to perform.

I also do not see why the mere fact that the nature of the service to be provided under the hypothetical contract – which is to say making personal appearances – made the provision of a substitute impossible should be seen as a neutral factor or should be disregarded in assessing the strength of the mutuality of obligation in this case. On the contrary, I agree with Mr Stone that the fact that Mr Robson was the only person who could satisfy the relevant obligation to make personal appearances tends to emphasise the strength of the mutuality of obligation. In the phraseology of MacKenna J in *RMC*, Mr Robson was obliged to provide his own work and skill and had no freedom to do the job by another's hands – see *Barnes* at paragraph [117(2)].

I therefore consider that, notwithstanding the point made in paragraph 207(1) below, the mutuality of obligation in this case was strong and that Mr Robson's personal service was part of the essence of the hypothetical contract;

(2) strong control – I agree with Mr Stone that the terms of the hypothetical contract entitled the club to control the "what", "when", "where" and "how" of the services to be provided by Mr Robson.

Notwithstanding the point made in paragraph 207(2) below, Mr Robson could not continually refuse requests to make personal appearances indefinitely. If he was to satisfy the minimum commitment in each six–month period under the hypothetical contract, he would, sooner or later, have to accede to the club's requests to make personal appearances and, in so doing, he would be accepting the club's control of the "what", "when" and "where" of the services in question.

Moreover, in making a personal appearance following any such acceptance, Mr Robson would be acting under a framework of control exercised by the club so that the club had control over the "how". For the same reasons as I have given in dealing with this point in the context of Stage 3B at paragraphs 189 to 193 above, the framework of control was not diminished by the fact that the hypothetical contract allowed Mr Robson some autonomy and flexibility in the manner in which he performed his obligations;

(3) the indefinite term of the hypothetical contract – the hypothetical contract provided that it would continue indefinitely unless terminated by either party. As such, it provided security for Mr Robson in his role – see *Kickabout CA* at paragraph [94] and *Barnes* at paragraph [117(1)];

(4) absence of financial risk – the hypothetical contract provided for the payment of a fixed fee for each six–month period, come what may, and for MUFC to be responsible for arranging and paying for Mr Robson's travel and accommodation and meeting Mr Robson's other reasonable expenses. These obligations meant that Mr Robson was not exposed to any financial risk in connection with his activities under the hypothetical contract – see *Barnes* at paragraph [117(5)];

(5) the image rights licence – by granting the club the exclusive right to use his image during the term of the hypothetical contract, Mr Robson gave up the ability to exploit his image rights for the purposes of his own business in general. This contrasts with the position of Mr Barnes in *Barnes* – see *Barnes* at paragraphs [74] to [77] and [118(1)] – and is inconsistent with self–employment; and

(6) apparel – the hypothetical contract required Mr Robson to wear club apparel on most of his engagements. This emphasised his connection with, and importance to, the club and thus signalled the fact that he was "part and parcel" of the club. In addition, it

meant that he was not using his own equipment in providing his services, and the use of equipment provided by the putative employer has in the past been associated with self–employment – see *Market Investigations* at 184–185 and *Fall* at 293.

*Features of the terms which are indicative of self-employment*

207. In contrast, the following features of the terms of the hypothetical contract are indicative of self–employment:

(1) limitation on mutuality of obligation – as long as he satisfied the minimum commitment in each six–month period, Mr Robson was entitled to refuse requests to make personal appearances. This flexibility is unusual in a relationship of employment and is a factor which served to diminish to some extent the mutuality of obligation in this case;

(2) limitation on control – similarly, Mr Robson's ability to refuse requests to make personal appearances, albeit subject to his obligation to satisfy the minimum commitment in each six–month period, served to diminish to some extent the club's control over the "what", "when" and "where" of his activities. This is because, as noted by the UT in *Barnes* at paragraphs [78] to [81], a working agreement as to the putative employee's availability to perform the services goes beyond the mere existence of a co–operative working relationship and is, "as a matter of principle, a pointer away from employment".

A further limitation on the club's control over Mr Robson was the absence of terms in the hypothetical contract relating to training, guidelines, policies or procedures and formal reviews or sanctions for breach of contract apart from the right to terminate the hypothetical contract. In *PGMOL*, the referees were subject to an assessment and coaching system which both the CA and the SC considered to be relevant to the extent of control in that case – see *PGMOL* at paragraphs [84] to [88]; and

(3) absence of a right of "first call" and limited restrictions on personal endorsement deals – the fact that the hypothetical contract did not contain provisions giving the club the right of "first call", did not require Mr Robson to obtain the club's prior consent to each personal endorsement deal and contained only limited restrictions on Mr Robson's ability to enter into personal endorsement deals meant that Mr Robson was largely free to carry on business on his own account should he so wish. This freedom is generally indicative of self–employment and differs from the more extensive control over Mr Barnes's other engagements in *Barnes* which were regarded as an indicator of his employment status – see *Barnes* at paragraph [117(4)].

*Features of the terms which are neutral or of marginal weight*

208. There are also features of the terms of the hypothetical contract which I would regard as being neutral or of marginal weight. For example:

(1) the fees – even if the hypothetical contract had provided for the payment of fixed fees regardless of the number of days that Mr Robson worked, I would have seen that as a neutral factor in determining this question, as it was in *Barnes* – see *Barnes* at paragraph [73]. However, in fact, I have concluded in dealing with Stage 2 that the hypothetical contract did not say that. Instead, it required Mr Robson to satisfy the minimum commitment in each six–month period in return for the fixed fee for that six–month period and then provided for Mr Robson to receive additional fees for making personal appearances above the minimum commitment for the relevant six–month period. I do not see that the fee structure under the hypothetical contract, as so described, sheds any light on the issue which I am addressing;

(2) absence of terms conferring employee benefits – the absence of terms conferring employee benefits in the hypothetical contract is not entirely irrelevant but is not a significant factor in this process and therefore I have not accorded it much weight. The same approach was adopted by the UT in *Atholl House UT* at paragraph [74] and *RWG* at paragraphs [125] and [126] and by the CA in *Kickabout CA* at paragraph [97]; and

(3) statement in the hypothetical contract to the effect that the hypothetical contract was not intended to give rise to a relationship of employment – since I do not consider this to be a borderline case, for the reasons articulated in paragraphs 220 and 221 below, I see this statement as being of little assistance in characterising the relationship which existed under the hypothetical contract – see *Dragonfly* at paragraphs [53] to [55], *Kickabout CA* at paragraph [95] and *RWG* at paragraphs [122] to [124].

*Conclusion in relation to the terms*

209. Just pausing at that stage, and approaching this question, initially at least, solely by reference to the terms of the hypothetical contract and without regard to the circumstances in which the hypothetical contract arose, my view is that, on balance, the terms of the hypothetical contract as a whole tend to indicate that it was intended to be a contract of employment.

210. I say that because I think the factors set out in paragraph 206 above slightly outweigh the factors set out in paragraph 207 above and, to the extent that they point marginally in the direction of self–employment, paragraph 208 above.

211. By way of elaborating on that conclusion, in my view – leaving aside for the moment the two issues of mutuality of obligation and control – the long term nature of the hypothetical contract, the absence of financial risk, the exclusive licence of image rights and the obligation to wear club apparel when making most personal appearances are potent indicators of an employment relationship and outweigh the relative freedom which was given to Mr Robson to enter into personal endorsement deals, the absence of terms conferring employee benefits and the statement in the hypothetical contract to the effect that the hypothetical contract was not intended to give rise to a relationship of employment, particularly in the light of the limited weight that the authorities have said should be accorded to the latter two factors.

212. Turning then to the possible impact on that conclusion of the points set out in paragraphs 206 and 207 above in relation to mutuality of obligation and control, whilst I was initially attracted by the argument that Mr Robson's ability to refuse requests to make personal appearances might well be indicative that the terms of the hypothetical contract alone – before taking into account the circumstances in which the hypothetical contract arose – pointed to a conclusion of self–employment, I have, on reflection, concluded that that is not the case. My reasons for saying that are that, in my view:

(1) the obligation under the hypothetical contract to satisfy the minimum commitment in each six–month period substantially negated the impact of that flexibility. It meant that Mr Robson could not decline requests for personal appearances indefinitely and therefore that mutuality of obligation and control were still present to a considerable extent;

(2) whilst:

(a) a degree of autonomy in deciding whether or not to subject oneself to control, how often and when was recognised by the EAT in *Troutbeck* to be a factor which points in favour of self–employment; and

(b) the EAT in *Augustine* held that the Employment Tribunal in that case had made no error of law in concluding that there was no relationship of employment based, in part, on the autonomy which had been afforded to the putative employee

in deciding whether or not to subject himself to the high degree of control which existed when he did work,

it is apparent from the decision of the EAT in *Cotswold* that an ability on the part of the putative employee to refuse some work does not, of itself, negate the existence of an employment relationship;

(3) in fact, the decisions of:

(a) the EAT in *Airfix Footwear Limited v Cope* [1978] ICR 1210; and

(b) the majority of the CA in *Nethermere (St Neots) Limited v Gardiner and another* [1984] ICR 612

went further than the EAT in *Cotswold* in holding that there was an employment relationship despite the ability of the putative employees in those cases to arrange their own hours of work, their holidays and the amount of work they did; and

(4) there is some equivalence between Mr Robson's freedom to decline particular requests and the absence of day–to–day control of a property's caretakers by the property owner in *Troutbeck* and the latter did not prevent the EAT in that case from concluding that the caretakers were employed.

213. Similarly, I do not think that:

(1) the absence of terms in the hypothetical contract relating to training, guidelines, policies or procedures and formal reviews; or

(2) the absence of sanctions for breach of the hypothetical contract apart from termination

are sufficient to change my tentative conclusion in relation to Mr Robson's status based solely on the terms of the hypothetical contract. As regards the former, whilst it is true that the absence of terms of that nature is generally an indication of self–employment, such an absence can be consistent with a relationship of employment. In *Ackroyd*, the FTT had found that Ms Ackroyd had no line manager and was not subject to formal appraisals – see *Ackroyd* at paragraph [22(10)] – and yet this did not prevent the UT in *Ackroyd* from concluding that Ms Ackroyd was an employee. As regards the latter, I do not see why the right to terminate a contract for breach is any less of a sanction – and therefore confers on the putative employer a lower degree of control – than a right to impose a penalty which leaves the relevant contract on foot. In both cases, the threat of the sanction is the lever for the exercise of control.

214. Taking all of the above into account, I have decided that the matters discussed in paragraphs 212 and 213 above, whilst they are undoubtedly factors to be weighed up in the overall determination of this issue, are insufficient to reverse the conclusion set out in paragraph 209 above.

*The circumstances in which the hypothetical contracts would have arisen*

215. That conclusion in favour of employment status based solely on the terms of the hypothetical contract is reinforced when I turn to examine the circumstances in which the hypothetical contract arose.

*Features of the circumstances which are indicative of employment*

216. In my view, the following features of the attendant circumstances are indicative of employment:

(1) the length of the relationship between the club and Mr Robson – whilst it is true that Mr Robson's association with the club preceded his ambassadorial role, it is

nevertheless the case that, at the time when the hypothetical contract arose, Mr Robson had been acting as an ambassador for over ten years and that was an important part of the context in which the hypothetical contract arose.

Moreover, I am not persuaded that the fact that the relationship originated in Mr Robson's playing career with the club – as opposed to his ambassadorial role – and would have existed even in the absence of that role prevents this from being a factor which is indicative of an employment relationship. All that matters in this context is the strength and duration of the relationship and not its cause. I therefore agree with Mr Stone that this is an indication that the relationship was one of employment – see *Kickabout CA* at paragraph [94] and *Barnes* at paragraph [121(2)]; and

(2) the "part and parcel" test – the services provided by Mr Robson were demonstrably integral – and not simply accessory – to the business of the club. This is because those services were key to the deepening of the relationship between the club and the sponsors and fans. As such, Mr Robson was "part and parcel" of the club in the first sense of the phrase addressed in *Lee Ting Sang* at 386 and 387.

In addition, even though Mr Robson was not responsible within the hierarchy of the club for the relationship between the club and the sponsors and fans, and had some flexibility in relation to which particular personal appearances he undertook, with the result that the club had to make it clear to sponsors that any specific request for his personal appearance could not be guaranteed, when he did make a personal appearance, he was presented to the sponsors and fans as a representative of the club and was dressed in club apparel. As such, I think it is also the case that Mr Robson was "part and parcel" of the club in an organisational sense, which is the second sense of the phrase addressed in *Lee Ting Sang* – see *Lee Ting Sang* at 387 and 388.

Although the authorities show that the "part and parcel" test will not be relevant in all cases, both the UT in *Kickabout UT* and the CA in *Kickabout CA* held that there were cases where it might well be illuminating and a useful question to ask. I consider that this is one of those cases because of the significance to the club of Mr Robson's role in attracting and retaining sponsors and fans.

*Features of the circumstances which are indicative of self-employment*

217. In contrast, the following features of the attendant circumstances are indicative of self–employment:

(1) minimal time commitment – the fact that, at the time when the hypothetical contract arose, it was known to the parties from their experiences over the preceding ten years that Mr Robson's activities as an ambassador would involve a minimal time commitment. This meant that each party to the hypothetical contract knew that Mr Robson would be free to pursue other activities should he wish to do so; and

(2) the long–standing nature of the Appellant –at the time when the hypothetical contract arose, the Appellant was of long–standing and had not been recently created. Both the club and Mr Robson knew that the Appellant was the entity pursuant to which Mr Robson pursued his commercial interests in general and that that had been the case for a considerable number of years.

Although it is true that it was Mr Robson himself and not the Appellant who was party to the Personal Ambassador Agreements with the club, and no compelling explanation for that has been provided, the fact that the club was aware that the Appellant played that role was implicitly acknowledged by:

(a) the terms of the Personal Ambassador Agreements which specified that payments made by the club to the Appellant would discharge the club's payment obligations under those agreements;

(b) the decision to terminate the Third Personal Ambassador Agreement and replace it with the Ambassador Agreement when the mistake was discovered; and

(c) the terms of the Ambassador Agreement which purported retrospectively to provide that the payments made under the Personal Ambassador Agreements on and after 1 July 2012 had been made instead under the Ambassador Agreement.

The fact that the club was aware that the Appellant was the mechanism pursuant to which Mr Robson pursued his commercial interests in general is a feature of the attendant circumstances which is indicative of self–employment.

*Features of the circumstances which are neutral or of marginal weight*

218. There are also features of the attendant circumstances which I would regard as being neutral or of marginal weight. For instance:

(1) financial dependence on MUFC – although the absence of meaningful restrictions on Mr Robson's other activities meant that he was free to carry on business on his own account, he had chosen to let most of his other work fall away by the time when the hypothetical contract arose. As such, by that time (and during the tax years which are relevant to this decision), he derived almost all of his income from the club through his personal appearances for the club and the sponsors. The authorities suggest that this level of financial dependence on the club is indicative of an employment relationship – see *Hall* at 218C, *Atholl House UT* at paragraph [113] to [115] and *RWG*, at paragraph [112].

In saying that, I am not inclined to give any weight to the fact that, by virtue of the pandemic, the opportunities for Mr Robson to pursue other activities during a large part of period after the hypothetical contract arose would have been heavily circumscribed.

That is for two reasons.

First, the CA in *Atholl House CA* held that only facts which were known by, or were reasonably available to, both parties at the time when the hypothetical contract arose may be taken into account in this context – see *Atholl House CA* at paragraphs [123], [131], [164], [170] and [171]. In this case, the hypothetical contract arose on 3 December 2019, when the Ambassador Agreement was executed, and no evidence has been presented to me to suggest that, on that date, the fact that the pandemic was only a few months away was known by, or reasonably available to, either party.

Secondly, even if the imminent pandemic had been a circumstance which should be taken into account in this context, the evidence showed that the pandemic was not the reason why Mr Robson carried out very few engagements for people other than MUFC and the sponsors in the tax years which are relevant to this decision. That was his working profile for a considerable period of time before the pandemic – see paragraphs 25, 28(50) and 28(51) above.

It follows that I have discounted the pandemic in considering the significance of this factor.

Having said that, it is clear from *Barnes* at paragraphs [95] to [98] that the term "financial dependence" in this context is a "somewhat elastic concept". Whilst it is true that, at the time when the hypothetical contract arose, Mr Robson was doing very little work for anyone apart from the club and the sponsors, that was not due to a lack of demand for his services from elsewhere but was instead the result of a positive choice by Mr Robson

following his recovery from illness in 2011. The fact that there continued to be a substantial demand for Mr Robson's services at the time when the hypothetical contract arose suggests to me that the weight to be accorded to this factor is more limited than it would have been if that demand had not existed; and

(2) other engagements – the fact that Mr Robson carried out similar work for organisations other than MUFC and the sponsors, such as England, in the period before the hypothetical contract arose might be said to point in favour of self–employment – see *Barnes* at paragraphs [85] to [88]. However:

(a) the fact that the putative employee's working life generally involves entering into a series of engagements in the course of self-employment is merely a factor to be taken into account and is not in itself determinative – see *Synaptek* at paragraph [20] and *Atholl House CA* at paragraph [124];

(b) it is perfectly possible for a putative employee to enter into an employment relationship in the course of a working life which generally involves contracting as an independent contractor – see *Davies* at 635, *Fall* at 295H and 298F, *Sidey* at 90–91 and *Atholl House CA* at paragraphs [128], [129] and [171]. In each case, the focus should be on the particular engagement which is being considered and not on the activities or contractual terms of the putative employee's other engagements; and

(c) in any event, as noted in paragraph 218(1) above, by the time that the hypothetical contract arose, Mr Robson was choosing to do very little other work.

For this reason, I am disinclined to give meaningful weight to this factor.

*Conclusion*

219. In my view, when the circumstances in which the hypothetical contract would have arisen are taken into account, the preliminary conclusion set out in paragraphs 209 to 214 above to the effect that the club and Mr Robson intended in entering into the hypothetical contract to create a relationship of employment becomes even more compelling. In particular, even before taking into account Mr Robson's dependence on the club for almost all of his income, the length of the relationship between the parties and the fact that Mr Robson was key to deepening the relationship between the club and the sponsors and fans are strongly indicative of a relationship of employment and easily outweigh the minimal time commitment which the ambassadorial role involved and the fact that Mr Robson had historically used the Appellant to pursue other commercial engagements, particularly given that, by the time when the hypothetical contract arose, Mr Robson had chosen to step back from pursuing a meaningful number of other engagements through the Appellant.

220. Standing back, and painting a picture from the accumulation of detail in this case, as the authorities require me to do, I see a situation where Mr Robson, with very few, if any, engagements outside his engagement by the club, and with a strong historic connection to the club, was required, under a hypothetical contract with an indefinite term which gave rise to no financial risk for Mr Robson and pursuant to which Mr Robson licensed his image rights exclusively to the club, to make personal appearances for the club and the sponsors as representative of the club (in many cases wearing club apparel) in order to deepen the relationship between the club and the sponsors and fans and that, despite a degree of flexibility in relation to which particular personal appearances he undertook and the manner in which he conducted himself in making those personal appearances, he was required to make at least 35 personal appearances in each six–month period and to act in accordance with the directions of the club in making those personal appearances. In my opinion, that is a picture of an

employment relationship, albeit one where the employee was given a measure of autonomy in the way in which the services were provided.

221. For the reasons set out above, I consider that:

(1) the Respondents are entitled to succeed in relation to the Employment Issue;

(2) the appeal against the Determination in respect of the tax year ending 5 April 2020 fails to the extent that the consideration passing under the Ambassador Agreement was paid on or after 3 December 2019 and was attributable to the obligation personally to perform services and not attributable to the licensed image rights;

(3) the appeal against the NICs Decision in respect of the tax year ending 5 April 2020 fails to the extent that the consideration passing under the Ambassador Agreement was paid on or after 3 December 2019 and was attributable to the obligation personally to perform services and not attributable to the licensed image rights;

(4) the appeal against the Determination in respect of the tax year ending 5 April 2021 fails to the extent that the consideration passing under the Ambassador Agreement was attributable to the obligation personally to perform services and not attributable to the licensed image rights; and

(5) the appeal against the NICs Decision in respect of the tax year ending 5 April 2021 fails to the extent that the consideration passing under the Ambassador Agreement was attributable to the obligation personally to perform services and not attributable to the licensed image rights.

**DISPOSITION**

222. Taking all of the above into account, I hereby make the following determinations:

(1) the appeal against the Determinations insofar as the Determinations related to the tax years ending 5 April 2016, 5 April 2018 and 5 April 2019 should be allowed;

(2) the appeal against the NICs Decisions insofar as the NICs Decisions related to the tax years ending 5 April 2016, 5 April 2017, 5 April 2018 and 5 April 2019 should be allowed;

(3) the appeal against the Determination in respect of the tax year ending 5 April 2020 should be allowed to the extent that the consideration passing under the Ambassador Agreement was paid prior to 3 December 2019 or was attributable to the licensed image rights and should otherwise be dismissed;

(4) the appeal against the NICs Decision in respect of the tax year ending 5 April 2020 should be allowed to the extent that the consideration passing under the Ambassador Agreement was paid prior to 3 December 2019 or was attributable to the licensed image rights and should otherwise be dismissed;

(5) the appeal against the Determination in respect of the tax year ending 5 April 2021 should be allowed to the extent that the consideration passing under the Ambassador Agreement was attributable to the licensed image rights and should otherwise be dismissed; and

(6) the appeal against the NICs Decision in respect of the tax year ending 5 April 2021 should be allowed to the extent that the consideration passing under the Ambassador Agreement was attributable to the licensed image rights and should otherwise be dismissed.

223. The parties should now seek to agree the quantum of the Determinations and the NICs Decisions to the extent that the Determinations and NICs Decisions remain on foot in the light of the conclusions set out in paragraph 222 above and, if they fail to reach agreement, should return for a further hearing to resolve that question.

224. All that remains is for me to thank the representatives of both parties for the clarity and helpfulness of their submissions in connection with the appeals.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

225. 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.

**TONY BEARE**
**TRIBUNAL JUDGE**

**Release Date: 20th JANAURY 2025**