DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Blackpool First-tier Tribunal dated 6 November 2017 under file reference SC064/17/00395 does not involve any material error of law. The decision of the First-tier Tribunal stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A summary of this decision

1. This appeal is about the Appellant's entitlement to tax credits for the 2016/17 tax year. The underlying issue at stake is this: how should a total of £16,000 paid in instalments to the Appellant by his now ex-employer be characterised for calculating that entitlement? In short, was it employment income, as the First-tier Tribunal found, agreeing with Her Majesty's Revenue and Customs ('HMRC')? Or was it capital, being no more and no less than a lump sum compensatory payment to settle employment tribunal proceedings, as the Appellant ('Mr H') contends?

2. My conclusion is that the payments constituted employment income and so HMRC and the First-tier Tribunal ('FTT') were correct to decide that those receipts counted as income for the purposes of assessing Mr H's entitlement to tax credits. Although the FTT made two (relatively minor) errors of law, these did not materially affect the outcome of the appeal. I therefore dismiss Mr H's appeal to the Upper Tribunal.

The oral hearing before the Upper Tribunal

3. I held an oral hearing of this appeal at the Manchester Civil Justice Centre on 14 November 2018. Mr H appeared in person; Mr Paul Skinner of Counsel appeared for HMRC. I am grateful to them both for their submissions, whether before, at or indeed after that hearing. I gave Mr H the opportunity to make further comments in writing after the hearing, which led to a further round of submissions, as I was concerned he should be able to respond fully to Mr Skinner's arguments on behalf of HMRC.

The settlement of the employment tribunal proceedings

4. Mr H brought proceedings in the employment tribunal in 2015 against his employer, an NHS Trust ('the Trust'). In January 2016 ACAS, in its role as conciliator, acknowledged receipt of a copy of Mr H's claim. In due course a 'draft COT3 Terms of Settlement' document was drawn up. This draft agreement ('the first COT3') provided for the Trust, without any admission of liability, to pay Mr H the sum of £16,000 within 14 days in full and final settlement of all claims. The first COT3 was not signed by the parties; that is a finding of fact by the FTT which is unassailable.

5. Subsequently a very different type of agreement, but also headed 'draft COT3 Terms of Settlement' was drawn up ('the second COT3'). This latter agreement provided for the Trust, again without any admission of liability, to "pay to the Claimant

salary payments for the period July 2014 to July 2015 and employ the Claimant on a fixed term contract" on terms further set out in the document. The Trust accordingly agreed to "reimburse the Claimant for salary deductions that were made during the period July 2014 to July 2015" by way of two payments of £3,000, the first payment due on or before 1 August 2016 and the second in March 2017.The fixed term contract itself was to run from 1 August 2016 to 31 March 2018. The Trust further agreed to pay Mr H £500 a month for the duration of the fixed term contract.

6. The final version of the second COT3 is headed "Settlement reached on (04/05/2016) as a result of conciliation action". Elsewhere the settlement agreement is said to be dated 6 May 2016, but nothing turns on the precise date. The copy on the appeal file is signed and dated by Mr H, but not by the Trust. That is not to say the Trust did not sign a copy of the document. It is clear, in any event, that the Trust regarded itself as bound by the terms of the second COT3. There is no dispute but that the itemised payments by instalments due under that agreement were duly made, subject to the event described in the next paragraph, which was not known to the FTT that heard this appeal.

7. A year or so later, following further correspondence, the Trust wrote to Mr H on 19 July 2017 proposing that the fixed term contract created by the second COT3 be terminated by mutual consent. The Trust proposed to pay Mr H the sum of £4,500 "which represents the remaining sum due under the COT3 Agreement dated 6th May 2016" (clause 2). The Trust's letter also included the following passage:

> "9. Finally, you have asked the Trust to confirm the circumstances surrounding the original settlement of your Employment Tribunal claim. I therefore confirm as follows:
>
> > The Trust and yourself originally agreed terms of settlement in respect of your Employment Tribunal claims against the Trust … under which the Trust agreed to pay you £16,000 in settlement of those claims. However, HM Treasury refused permission for the Trust to make this payment to you. The parties remained committed to the idea of settling their differences rather than litigating the case in the Employment Tribunal. Accordingly, the Trust made a proposal to you whereby the Trust agreed to employ you on a fixed term contract, for a period of 20 months, to assist with a specific project. You were to be paid £500 per month in respect of these duties. In addition the Trust agreed to reimburse you £6,000 that it had deducted from your salary in the period July 2014-July 2015. By these two methods, the Trust agreed to pay a total of £16,000 to you. Finally, I can confirm that, in this role, you attended the Trust for one meeting with the Project Manager … Thereafter, your further duties were undertaken from home."

8. While Mr H may dispute some of the details of that account, it is undoubtedly the case that the fixed term contract was brought to a premature end a year early by mutual agreement and on the revised terms as proposed in the Trust's letter of 19 July 2017. As noted above, that letter was not before the FTT. There has been no objection to its subsequent inclusion in the appeal file.

The original HMRC decision

9. Mr H had originally made a claim in 2016 for tax credits for himself, his wife (who was in qualifying remunerative work) and their two children. On 16 June 2016 HMRC made an initial decision (under section 14 of the Tax Credits Act 2002) on Mr H's entitlement to tax credits for the 2016/17 tax year. The award was based on an estimated joint annual income of £19,500 (being his wife's earnings). The tax credits

award was £6,110.10 in child tax credit ('CTC') and £443.70 in working tax credit ('WTC').

10. On 1 July 2016, following Mr H report's that their joint income was £18,000, HMRC issued a revised award notice (under section 16 of the Tax Credits Act 2002). The CTC award was the same but the WTC award increased to £1,058.70.

11. On 9 January 2017 HMRC decided that Mrs H's earnings were £17,176 and Mr H's income was £6,125. This had the effect of reducing the CTC award to £4,995.40 and withdrawing the WTC entitlement altogether.

12. On 16 January 2017 Mr H wrote to HMRC stating that "the amount of £6,125 which you have calculated … represents the sum of instalments being paid as income to replace an award which the Trust was unable to pay in the form of a lump sum."

13. On 26 January 2017 HMRC wrote to Mr H asking if he had any further information he wished to be considered in the mandatory reconsideration of the decision of 9 January 2017. Mr H replied, attaching a copy of the second COT3, along with a covering letter from ACAS which, he argued, "confirms beyond doubt that a settlement was behind the monthly income and fixed term contract".

14. On 8 February 2017 HMRC then wrote to the Trust in the following terms:

> "Mr H is on your payroll and received £3,062.50 on 26 August 2016, he has also received £500 monthly since this date. Please can you confirm if Mr A is currently working for [the Trust] via a fixed term contract where he is required to work one session a week for this employer and therefore gets paid the income of £500 a month for this employment. Alternatively, if this payment of £500 is not due to employment or work carried out by Mr H, please confirm this."

15. On 14 February 2017 the Trust's payroll department sent HMRC the following handwritten response: "I can confirm Mr H is in receipt of £500 per month and did receive the stated amount in August, he is contracted to work 1 session per month". In fact, the fixed term contract under the second COT3 provided for one session per week, not one session a month.

16. On 22 February 2017 HMRC issued a further amended tax credits award notice for 2016/17. This altered Mr H's income to £9,500, being the two separate lump sums of £3,062.50 each and the aggregated sum of the £500 monthly payments. This had the effect of confirming the WTC entitlement as nil and further reducing the CTC award to £3,611.65. The total tax credits award was accordingly about £3,500 less than the amount specified in the award of 1 July 2016. HMRC explained its reasoning in the mandatory reconsideration notice for 2016/17 (dated 21 February 2017). This stated that both the lump sums and the monthly payments of £500 had been counted as employment income.

17. On 24 February 2017 Mr H sent HMRC a letter detailing the background to the payments in question from the Trust. In particular, he explained as follows:

> "The Trust intended to pay me £16,000 in settlement, the Treasury did not allow them to pay more than £10,000, and I was advised that the only method of payment in those circumstances is to arrange for the whole payment to be paid in instalments over 20 months as employment income. There was no employment at the Trust at the time of the settlement."

18. On 27 February 2017 Mr H filed his notice of appeal with the FTT. He set out his grounds in some detail but in essence they were that "the pay contract represents the settlement award and therefore cannot be considered as true employment income".

19. On 28 April 2017 HMRC filed its response to Mr H's appeal. In summary, this argued that Mr H's annual income had been correctly assessed at £9,500 for 2016/17 "due to the settlement amount being taxable income".

The First-tier Tribunal's proceedings and decision

20. On 11 June 2017 Mr H provided his own carefully indexed bundle of some 60 pages. On 21 June 2017, in the light of that development, the FTT adjourned the hearing of Mr H's appeal to enable HMRC to make a further written response to the appeal.

21. On 26 June 2017 HMRC filed its supplementary response stating that, having reviewed the further information provided, "HMRC proposes to the Tribunal to amend the income for Mr H for the tax year 2016-17 to £6,124.00. This figure was the two lump sum payments of £3,062.50 which was reimbursement of salary that should have been paid to Mr H during 2014-15… The monthly payments of £500 will not be included in the income for 2016-17 or 2017-18" (emphasis added).

22. On 8 July 2017 Mr H replied, setting out his reasons why the sum of £6,124 should likewise not be treated as income. On 17 July 2017 HMRC filed a further supplementary response indicating that, in its view, no further change was needed.

23. On 6 November 2017 the FTT dismissed the Mr H's appeal, stating it was confirming HMRC's decision of 9 January 2017 (or technically the decision on mandatory reconsideration, i.e. that both the two lump sum payments and the monthly salary amounted to employment income). The FTT accordingly did not give effect to HMRC's modified proposal as set out in the 26 June 2017 supplementary submission (see paragraph 21 above). The FTT's decision notice stated as follows:

> "Under an agreement dated 06/05/16 Mr H withdrew a claim against his former employer on terms that the employer would (1) reimburse deductions made from his salary between July 2014 and July 2015 and (2) employ him on a fixed term contract between 01/08/16 and 31/03/18.
>
> The reimbursement of salary was to be made in two instalments each of £3,000 on or before 01/08/16 and after 01/03/17 but before 31/03/17. Those payments were made and taxed as income in 2016/17 although they related to 2014/15. Those payments were earnings and not compensation. Mr H was employed and paid in accordance with the agreement, £500 per month. That income was taken into account for year 2016/17."

24. On 28 November 2017 a District Tribunal Judge refused the Appellant's application for the FTT's decision to be set aside. On 7 February 2018 she also refused Mr H's application for permission to appeal, the FTT in the meantime having issued its statement of reasons.

25. In its statement of reasons, the FTT reviewed the documentary and other evidence. It noted that the first COT3 was to the effect that the Trust would, without admission of liability, pay Mr H £16,000 in return for the employment claim being withdrawn. However, the FTT found that the second COT3 was "in very different terms to the draft agreement", as it made provision for the Trust to "pay to the

Claimant salary payments for the period July 2014 to July 2015 and employ the Claimant on a fixed term contract" with the various payments to be made by instalments as noted above. In essence, the FTT found that Mr H was still due to receive a total of £16,000 but on very different terms, under which the instalments were employment income.

The Upper Tribunal proceedings and the parties' written submissions

26. On 26 March 2018 I gave Mr H permission to appeal, observing that "the core point in this case seems to be the proper characterisation of the agreement (and its implementation) between the Appellant and his employer to compromise the ET proceedings. Is this a case in which the First-tier Tribunal needed to focus more on the substance of that agreement than the form?"

27. On 8 May 2018 the Respondent filed a written response, prepared by Mr I. Ahmed of HMRC's Solicitor's Office and Legal Services, which resisted the appeal. Mr Ahmed submitted that all the payments in question constituted employment income and so were properly included as income when assessing Mr H's tax credits entitlement. Accordingly, he argued, the appeal ultimately turned on questions of fact, which the FTT had correctly analysed. There followed several further written submissions, in the course of which I directed HMRC to deal with two specific points.

28. The first was the significance of HMRC's supplementary submission dated 26 June 2017 (see paragraph 21 above). I asked whether the FTT had erred in law by apparently failing to address that submission in either its decision notice or statement of reasons. In summary, Mr Ahmed's response was that (i) HMRC had in fact been wrong to put forward the suggestion (in the supplementary submission of 26 June 2017) that the monthly payments of £500 should be disregarded; (ii) the FTT may have erred in law in failing to provide adequate reasons expressly dealing with that issue; but (iii), and in any event, any such error was not material as in the final analysis the monthly payments of £500 bore all the hallmarks of earnings from an employer and so were properly taken into consideration when calculating the tax credits award.

29. The second point was my inquiry as to whether the section 16 decision under appeal to the FTT had since been overtaken by events in the form of a final decision under section 18 of the Tax Credits Act 2002. Mr Ahmed confirmed that no such section 18 decision had been taken in Mr H's case, but that one would follow in the process of HMRC implementing the Upper Tribunal's decision in the present proceedings.

30. Mr H made several points by way of reply in a written submission; these are subsumed in the discussion that follows below.

The Upper Tribunal hearing and the parties' oral submissions

31. Mr H presented his case clearly and forcefully at the oral hearing. His argument has been consistent throughout. He contended that the monies paid to him by the Trust derived directly from the settlement of the employment tribunal proceedings. He said the agreed figure of £16,000 was an arbitrary amount, and had not been based on any specific calculation referable to his employment with the Trust – he had argued for £20,000, the Trust had offered £10,000, and they had settled on £16,000. It was intended to be a tax-free lump sum. He had signed and returned the first COT3, but the Trust had then come back to him and said they were unable to make a one-off payment as envisaged. Mr H said he was effectively pressurised into accepting a different payment arrangement. He had been advised by the British Medical Association (the BMA) to accept the alternative method of payments and had

done so in good faith. He had no idea it might affect his tax credits entitlement, and nor did either the Trust or the BMA.

32. Mr H submitted that neither the £6,000 paid by way of two instalments nor the £500 monthly should be considered as his employment income. As to the former, he did not accept the Trust's assertion that the £6,000 was unpaid income from a previous tax year – his employment with the Trust had already ended. The reality, he argued, was that this was part and parcel of a payment of compensation. As to the latter, he did not accept that the 20 payments of £500 a month truly represented contractual income. In summary, there was no job for him at the Trust, there was no work carried out by him and in any event the contract under the second COT3 was terminated early.

33. In short, Mr H's contention was that the £6,000 and the £10,000 were both compensatory payments arising directly out of the agreed settlement of the employment tribunal litigation. He argued that the Upper Tribunal should look at the reality of the arrangement and not the artificial cloak of the second COT3, which purported to be a refund of unpaid salary and ongoing monthly payments under what was in effect an artificial fixed term contract with no real substance. It was, he said, unfair that his tax credits should be reduced simply because, for the convenience of the Trust, a different payment mechanism other than a capital lump sum was deployed.

34. Mr Skinner for HMRC expanded at the oral hearing on the submissions set out in his helpful skeleton argument. He began by drawing attention to paragraph [21] of the FTT's statement of reasons:

> "[21] [Dr H] described his employment by the Trust as artificial. He has not been required to carry out any work. At the end of the hearing he said that reality was more important than the written agreement. The Tribunal did not agree, and the wording of the signed agreement must determine the outcome of the appeal. The payments made to [Dr H] by the Trust had to be taken into account when calculating entitlement to Tax Credits."

35. Mr Skinner submitted this passage could be read in either of two ways, but both of which involved an error of law on the part of the FTT. The first was by way of an absolute statement that the reality could never prevail over any written agreement. If so, Mr Skinner argued, such a reading was plainly wrong as a matter of law. The second way (and, Mr Skinner contended, the better reading) was as a conclusion that *on the facts of this case* the FTT did not accept that the reality overrode the written agreement. Such a construction, in his submission, was legally permissible. In those circumstances Mr Skinner conceded that the FTT's reasoning on this point was deficient. However, he argued, the error of law was not material as the FTT had come to the correct conclusion and indeed the only possible proper outcome on the facts, namely to dismiss the appeal.

36. Mr Skinner emphasised that the issue before the FTT was whether the payments amounted to "earnings from an … employment" within the relevant statutory definition. This form of words had been broadly interpreted by the courts. In order to avoid that conclusion, Mr H had to show that the fixed term contract agreement was a 'sham', i.e. that both parties had a common intention that the contract of employment was not intended to create legal rights and duties (see further *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] ICR 1157, or *Autoclenz*). Thus, the fundamental issue was what was agreed by the parties, and not what was actually done by them. In any event, Mr Skinner argued, what was subsequently

done was in fact consistent with a contract of employment between the parties. Mr Skinner acknowledged that Mr H felt there had been an injustice done, but a mistake of law did not mean that one could escape the legal obligations into which the parties had objectively entered.

37. By way of reply, Mr H reiterated that the second COT3 had been devised as a means of paying the agreed compensation and not to create a contract of employment. The intention was to pay a sum to settle the litigation and not to employ him. He reminded me that the case law is often fact sensitive. He further contended, as he had argued in his written submissions, that the first COT3 was never cancelled but rather had transmuted into the second COT3, so the two documents had to be read together.

Did the First-tier Tribunal err in law?

38. As noted above (see paragraph 35), Mr Skinner for HMRC conceded at the hearing that the FTT's decision involved an error of law in that the reasoning to support the conclusion at paragraph [21] of its statement of reasons was said to be deficient. I accept that concession so far as it goes. For good measure I also consider that the FTT erred in law in its failure to address the HMRC's late change of position as regard the status of the monthly payments of £500 and their treatment for tax credit purposes (see paragraph 28 above). It follows that the potential avenues of decision open to me are effectively as follows, namely: (i) to find the FTT's decision does not involve any material error of law, and so to dismiss Mr H's appeal; or (ii) to find the FTT's decision does involve a material error of law. If the latter, I must then decide whether to set aside the FTT's decision and, if so, and in allowing the appeal, whether to re-make the decision under appeal or to remit the case to a fresh FTT for re-hearing (see further section 12 of the Tribunals, Courts and Enforcement Act 2007).

39. Starting at what may seem to a perfectionist to be the wrong end of those options, I sensed no enthusiasm from either Mr H or Mr Skinner for the matter to be remitted to a new FTT for re-hearing. That lack of appetite was entirely understandable, given that it is unlikely any new relevant evidential material will emerge. At the oral hearing the parties effectively re-argued the case on its merits before me. I propose to consider those arguments in some detail before returning to see how far my findings and conclusions align with those of the FTT.

The Upper Tribunal's analysis of the legal principles involved in this appeal

Introduction

40. This analysis falls into four parts. The first part sets out the legislative framework governing the concept of employment income. The second deals with the case law relevant to that framework. The third part is concerned with some elementary legal principles to be applied when interpreting contracts. The fourth concerns the legal test for identifying a 'sham' agreement.

The legislative framework

41. Section 7(1) of the Tax Credits Act 2002 provides that "the entitlement of a person … to a tax credit is dependent on the relevant income". Regulation 3 of the Tax Credits (Definition and Calculation of Income) Regulations 2002 (SI 2002/2006; "the 2002 Regulations") provides that a person's income is calculated by aggregating different income streams, one of which is said to be "employment income (as defined in regulation 4)" (see Step 2 in regulation 3(1)). "Employment income" in turn is defined to include various payments, the first of which comprises "any earnings from an office or employment received in the tax year" (regulation 4(1)(a), as amended). That statutory definition originally referred to the term "emoluments", rather than

"earnings", but the old expression was rendered largely obsolete by the enactment of the Income Tax (Earnings and Pensions) Act 2003 (known as 'ITEPA'). Helpfully, regulation 2(2) of the 2002 Regulations provides that "'earnings' shall be construed in accordance with section 62 of ITEPA". Section 62(2) of ITEPA itself provides that:

> "'earnings', in relation to an employment, means—
> (a) any salary, wages or fee,
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
> (c) anything else that constitutes an emolument of the employment."

42. This is, on any reckoning, a very broad definition. So, the word "earnings" is not simply a synonym for "salary" or "wages"; the term extends to include those other types of payment or benefit which fall within the much wider parameters set by section 62(2)(b) and (c). The true breadth of that statutory definition can only be understood by considering the case law from the revenue jurisdiction.

The case law relevant to the legislative framework

43. The old revenue case law turned on statutory language which was expressed in slightly different terms, but it is accepted that these precedents remain instructive under the new legislative regime. Thus section 19 of the Income and Corporation Taxes Act (ICTA) 1988 (and its predecessors) taxed "emoluments" from an office or employment under what was then known as Schedule E. The expression "emoluments" encompassed "all salaries, fees, wages, perquisites and profits whatsoever" (ICTA 1988, section 131(1)). The well-known authorities include *Hochstrasser v Mayes* [1960] A.C. 376, *Shilton v Wilmhurst* [1991] 1 A.C. 684 and, rather more recently, *Kuehne and Nagel Drinks Logistics Ltd v Commissioner for HMRC* [2012] EWCA Civ 34; [2012] STC 840.

44. The issue in *Hochstrasser v Mayes* concerned the tax treatment of a housing costs compensation package available to ICI employees. At the time ICI operated a scheme whereby, if an employee was transferred to another location, the company would buy his house at a fair valuation and also reimburse any capital loss on the sale. Mr Mayes was duly compensated following such a transfer. At first instance Upjohn J, finding for the taxpayer, expressed the statutory test as referring to "something of a reward for services past, present or future", a formulation broadly approved by the House of Lords, which likewise held that the housing payment was not taxable. The decision demonstrates that while Mr Mayes may not have received the payment had he not been an ICI employee that was not enough, in itself, to make it taxable. It was only taxable "if it has been paid to him in return for acting as or being an employee" (*per* Lord Radcliffe at 392). As Viscount Simonds said of ICI's housing scheme, "there is nothing express or implicit in the agreement which suggests that the payment is a reward for services" (at 389). Similarly, Lord Denning held that the housing payment was not a profit from the taxpayer's employment "for the simple reason that it was not a remuneration or reward or return for his services in any sense of the word" (at 397).

45. The question in *Shilton v Wilmhurst* was the tax treatment of a sum paid to the professional footballer Peter Shilton in 1982 by his previous club (Nottingham Forest) to induce him to agree to a transfer to his new club (Southampton). The House of Lords, reversing the Court of Appeal, reinstated the ruling of the General Commissioners that the payment was an emolument of his employment with Southampton and so chargeable to income tax. The key passage in the reasoning is in the opinion of Lord Templeman (at 689C-E):

> "The result is that an emolument "from employment" means an emolument "from being or becoming an employee." The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived "from being or becoming an employee" on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received "from the employment." The task of determining whether an emolument was paid for being or becoming an employee or was paid for another reason, is frequently
> difficult and gives rise to fine distinctions."

46. More recently, in *Kuehne and Nagel Drinks Logistics Ltd v Commissioner for HMRC* a group of employees had been paid £4,800 each on the transfer of the employer's business. The question was whether the payments were earnings "from" employment for the purposes of ITEPA and liability for national insurance contributions. The First-tier Tribunal found as a fact that the payments were made and received both to compensate for the loss of pension scheme benefits and as an incentive to head off the prospect of strike action by the employees. The Court of Appeal upheld the Tribunal's finding that the latter was sufficient for the payments to be characterised as being in relation to employment services and so emoluments from employment. According to Mummery LJ, "The sovereign words are in the statute and not in the judicial exposition of it. Of all the judicial discussions of the statutory provisions and their ancestors which have been cited nothing has bettered the words of Upjohn J blessed by those judicial giants, Viscount Simonds and Lord Reid" (at paragraph 42). As to the facts, Mummery LJ concluded as follows (at paragraph 46) that the Tribunal Judge:

> "had already answered the statutory question by his finding that the threat of industrial action was a substantial cause of the payments. The sufficiency of that finding of necessary relevant connection or link between the emolument and the employment is not cancelled out or diminished by the finding of the presence of another factor, such as the pension compensation for loss of a right unrelated to an emolument from employment."

47. In the present appeal Mr H's central argument, of course, was that the payments he received did not in fact amount to earnings or emoluments from his employment. He submitted that the fixed term employment contract between the Trust and himself was a fiction. So, he contended, it was not a 'real' or 'true' contract of employment at all but rather (to use the legal terminology) a 'sham' agreement. We must therefore turn to consider the legal principles governing the construction of contracts.

The legal principles to be applied when interpreting contracts

48. Mr Skinner, in his detailed skeleton argument, set out the following propositions derived from the Supreme Court's decision in *Autoclenz* (references in square brackets are to paragraphs in the Supreme Court's judgment):

> "14.1. Express contracts can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any additional oral terms to it, then those written terms will, at least prima facie, represent the whole of the parties' agreement ([20]).

14.2. Ordinarily, parties are bound by the terms of the contract where he has signed it ([20]).

14.3. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.

14.4. A contract may not accurately reflect the true agreement of the parties because of a mistake or because it is a sham.

14.5. A sham is an act done or a document executed by the parties which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (of any) which the parties intend to create. For there to be a sham, all the parties thereto must have the common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

14.6. Labelling a contract as a particular type of contract to avoid the legal consequences of another result is not effective to avoid that result ([24]).

14.7. The question in every case is what is the true agreement between the parties ([29]).

14.8. Where there is a dispute about the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations ([31]).

14.9. Ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded ([32]).”

49. I agree with that analysis of the principles to be applied. It follows, as Mr Skinner further submitted in his skeleton argument, that “the starting point is that a signed written agreement represents the whole agreement between the parties to it. However, if it is proved – and the burden will be on someone that seeks to go behind the written terms – that the written agreement does not reflect the true common intention between the parties at the time the contract was entered into, the court may make findings about what was objectively agreed between the parties to the contract.”

50. Thus, in *Autoclenz* Lord Clarke (at paragraph 32) both reaffirmed the importance of identifying what were the actual legal obligations of the parties and also approved of the warning by Aikens LJ in the Court of Appeal’s decision in the same case, namely “against focusing on the ‘true intentions’ or ‘true expectations’ of the parties

because of the risk of concentrating too much on what were the private intentions of the parties." Aikens LJ had added (at paragraph 91 of the Court of Appeal's decision):

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

The legal test for identifying a 'sham' agreement

51. The starting point is the famous passage by Diplock LJ in *Snook v. London & West Riding Investments Ltd* [1967] 2 QB 786, 802, echoed in Mr Skinner's summary drawn from *Autoclenz* (see paragraph 48). In that passage, Diplock LJ said this:

> "As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co.* v. *Maclure* ((1882) 21 Ch D 309); *Stoneleigh Finance, Ltd.* v. *Phillips* ([1965] 1 All ER 513,[1965] 2 QB 537), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

52. On that basis, the question is whether Mr H, to adopt the terminology of *Snook*, can show that the second COT 3 as agreed by the parties was "intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". In other words, can Mr H demonstrate that there was "a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating"?

The Upper Tribunal's analysis: applying those legal principles to this appeal

53. In the light of those principles, the two central issues arising for determination on this appeal are as follows. First, and assuming for the present that the second COT3 reflects what the parties agreed to, did the payments made under that agreement constitute "earnings from an … employment" (within regulation 4(1)(a) of the 2002 Regulations)? Second, did the second COT3 truly reflect what the parties objectively agreed and, if not, what did they agree?

Were the payments made under the second COT3 "earnings from an … employment"?

54. I reiterate that this part of my analysis is based on the premise that the second COT3 reflects what the parties agreed to. As previously noted, the second COT3 itemised two different payment mechanisms.

55. The first was in clause 2, headed "Salary", which recorded that:

> "2. The Respondent shall reimburse the Claimant for salary deductions that were made during the period July 2014 to July 2015 as follows:
> 2.1 a payment of £3,000 on or before 1 August 2016;
> 2.2 a payment of £3,000 after 1 March 2017 but on or before 31 March 2017."

56. The second was in clauses 3-8, headed "Fixed Term Contract", the material provisions of which read as follows:

> "3. Subject to the Claimant's strict compliance with the terms of this agreement, the Respondent agrees to employ the Claimant under a fixed term contract ("Fixed Term Contract").
> 4. The Fixed Term Contract will commence on 1 August 2016 and will automatically terminate 31 March 2018.
> 5. Under the Fixed Term Contract the Claimant will be:
> 5.1 required to work for one session per week;
> 5.2 paid £500 per month;
> 5.3 required to report to the Director of Clinical Governance ("DCG") and work on the development of a clinical effectiveness website alongside the Respondent's IT professionals;
> 5.4 able to liaise with the DCG and work from home once he has undertaken an initial briefing at the Trust with the DCG."

57. The remainder of the second COT3 dealt with taxation (clauses 9-14), the employment tribunal claims (clauses 15-18), potential other claims (clauses 19-21) and miscellaneous matters (clauses 22-26). It is noteworthy that clause 10 records the parties' belief that the two types of payments mandated by clauses 2.1, 2.2 and 5.2 "come within the Claimant's personal allowance for tax and can therefore be paid tax free". Mr H was required to notify the Trust if he received any other taxable income (clauses 11 and 12). He accepted responsibility for "any tax and employee's National Insurance contributions due" in respect of the various payments (clause 10) and indeed agreed to indemnify the Trust for any such payments (clause 22). Mr H also acknowledged that the payments were also "in full and final settlement of all potential claims he may have against the Respondent *arising from his employment under the Fixed Term Contract*" (clause 19, emphasis added).

58. Taken at face value, the salary payments paid under clauses 2.1 and 2.2 can be nothing other than "earnings from an … employment". The same is surely true of the monthly payments of £500 made under the fixed term contract and in accordance with clause 5.2. Clauses 3 and 4 specifically obligated the Trust "to employ the Claimant under a fixed term contract" for the specified period, subject to the admittedly rather skeletal terms and conditions in clause 5. However, the case law discussed in paragraphs 43-46 above demonstrates the breadth of the relevant statutory definitions. Realistically the only way to escape from the conclusion that the payments fell within the statutory definition is if Mr H can show that the second COT3 was a sham, applying the *Snook* test. So that takes us to the second key question.

Did the second COT3 reflect what the parties objectively agreed?

59. It is important to consider this question separately in the context of each of the two different payment mechanisms provided for in the second COT3.

60. As regard the two lump sum payments of £3,000, Mr H's submission was simple. He did not accept they represented a refund of previous unpaid salary. He argued that if this were the case, it should have been paid during his original employment with the Trust, but that employment had already ended. Furthermore, the payments were not accompanied by any interest payments. The reality, he contended, was that this was no more than (as Mr H put it) a "nominal labelling exercise" and that the total of £6,000 was part and parcel of the employment tribunal settlement. It was, accordingly, a capital compensatory payment and not employment income.

61. The onus is on Mr H to make out his case (see *Snook* and *Autoclenz*). The ordinary position is that parties are bound by the terms of a contract where it has been signed (see *Autoclenz* at paragraph 20). Here the Trust had agreed to refund past deductions from salary and Mr H had agreed to accept such repayments. As Mr Skinner noted, it is not uncommon for (former) employers to make such payments to their (ex-) employees after the employment in question has ended, so the timing of the payments is not in point. Nor does the absence of any interest payment take Mr H's argument any further – that would typically be a matter of contractual negotiation, rather than any strict legal entitlement. There are no other terms in the second COT3 which are in any way inconsistent with the obligation imposed on the Trust by clause 2. The question is what term did the parties objectively agree, and not what Mr H might have subjectively believed he had agreed. Here, the parties objectively agreed that the Trust would reimburse Mr H for £6,000 in previous salary deductions. On that basis those two payments were plainly "earnings from an … employment".

62. As regard the fixed term contract, the position requires more detailed consideration. As previously noted, Mr H argued that the Trust had no intention of employing him under a fixed term contract, as evidenced by the facts that (i) there was no job; (ii) he did no work; and (iii) the contract was terminated early. On closer inspection, none of these arguments supports his primary contention.

63. First, Mr H argued there was, in reality, no job – there had been no advertisement, he did not apply for any post, there had been no shortlisting process, he was not interviewed, there was no job description and, in any event, it was not his area of work, as he was a clinician and the job was in IT. None of these arguments is persuasive. In what is a relatively (as compared with many other European legal regimes) unregulated labour market, plenty of individuals are employed in jobs which have not been advertised or even applied for. Shortlisting, interviewing and a clear job description may well be good human resources and personnel practice, but they are not legal preconditions for a valid contract of employment. Nor were Mr H's protestations about his unsuitability for the work at all convincing – he was not being asked to be an IT professional, rather he was employed to work with such staff but providing input on clinical matters (see clause 5.3 of the second COT3 and paragraphs 7 and 56 above).

64. Second, Mr H claimed that he did no actual work. By his own admission, however, this was not strictly true. He conceded that he had been to the Trust for a single meeting with the relevant manager (as per clause 5.4 of the second COT3). But thereafter, he said, no work had been provided and he had done none from home (albeit he had been signed off as not fit for work by his GP for much of this period). He had not been trained by the Trust in his new role or introduced to the team. He said he had contacted the Trust by telephone about the absence of work – as he put it, "I was not expecting anything but just in case". Leaving aside the issue of the initial meeting, the difficulty with Mr H's argument is it presupposes one must be working or at least (in lay terms) 'doing something for the employer' on a day-to-

day basis in order to be employed under a contract of employment. However, the position in law is that a contract of employment does not require actual service by an employee; rather, it presupposes that the employee is ready and willing to serve, as shown by *Cresswell v Inland Revenue Board* [1984] ICR 508. It is also axiomatic that the fundamental question in contracts for personal service is "what legal obligations bound the parties rather than by asking how the contract was actually carried out" (*Autoclenz*, paragraph 24). Moreover, any reader of the business and financial pages of the broadsheets, let alone the law reports, will be familiar with the concept of "gardening leave", whereby an employee may be required to serve out a period of notice at home (typically for restraint of trade purposes) without reporting for work or doing any work at home (or indeed any gardening). But such an individual remains an employee under a contract of employment until their contract expires. So too Mr H.

65. Third, Mr H pointed out that what he regarded as the fictional contract of employment was terminated early. However, rather than supporting Mr H's case, this argument undermines it. As Mr Skinner put it in a written submission after the hearing, if the second COT3 "did not truly reflect the parties' intentions it would not be necessary to have such a termination agreement. It is unquestionably predicated on the assumption that the [second COT3] does reflect the parties' true objective agreement". The parties to any fixed term employment contract may mutually agree to end the relationship early. On the face of it, this is precisely what happened here. Presumably the early termination suited both parties – Mr H saw the balance of the remaining monies owed under the second COT3 paid upfront and for its part the Trust could close the file on what may have been a difficult and time-consuming personnel dispute. The Trust's letter of 19 July 2017, written by the Head of HR (Operational) (see further paragraph 7 above), was explicit (emphasis added):

> "5. I understand that *you agree to the termination of your fixed term contract of employment* on these terms, and that you accept the payment referred to in paragraph 2 above is made in full and final settlement of any claims arising from your employment by the Trust under the fixed term contract or its termination."

66. For all those reasons I am satisfied that Mr H was engaged under a fixed term contract of employment with the Trust pursuant to the second COT3. Those reasons are sufficient in themselves to dispose of the sham argument. There is, however, another problem for Mr H to overcome. In order to go behind the express terms of the second COT3, the *Snook* test requires Mr H to show there was "a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating". Whatever Mr H's subjective intention, the evidence points to the Trust's intention being that a fixed term contract of employment was created. This is demonstrated by the fact that the Trust included Mr H in his new capacity on its payroll run, it reported the payments as salary in the normal way to HMRC and, in response to an enquiry from HMRC, confirmed the existence of the employment contract (even if the terms were misquoted on a point of detail: see paragraph 15 above). The Trust's letter of 19 July 2017 is also entirely consistent with the conclusion that the Trust saw itself as bound to a fixed term employment contract from which both parties had now agreed to be released. I have not overlooked the rather skeletal nature of the terms of employment, as set out in the second COT3, or the Trust's desultory approach to the performance of the contract, but these are insufficient to satisfy the *Snook* test (see further paragraphs 50 and 64 above).

67. There is yet another difficulty that Mr H needs to surmount. Mr Skinner did not dispute that the second COT3 and the contract of employment arose from the

compromised employment tribunal proceedings. But, he argued, insofar as the payments under the second COT3 were made in order to settle those proceedings, that was an *additional* reason and not the *exclusive* reason. In this context the revenue case law is instructive, and especially the decision in *Kuehne and Nagel Drinks Logistics Ltd v Commissioner for HMRC*. That case demonstrates that where there are mixed reasons for a payment, one of which is employment-related, then that is sufficient for the payment to count as "earnings from an … employment". The point was put in this way by Patten LJ in the Court of Appeal's decision:

> "54. The judge in this case set out the reasons for the payment in paragraph 34 of his judgment and we cannot go behind them. He said they were indissociable (para 35) and they were in the sense that the loss of pension rights was what sparked the dispute and had to be compensated for. But it was the consequences of the possible dispute which caused the payment to be made. This was a substantial cause of the payment (see para 103).
>
> 55. The criticism of the judge is that he did not decide what was the dominant cause of the payment or, in the language of s.9, whether it was from the employment and HMRC has responded to this with their arguments to the effect that a contributing cause which is more than marginal but which is an employment-based cause can bring the payment into charge even if there are other substantial non-employment causes.
>
> 56. I do not accept that this is a correct statement of the law but it does not, I think, arise on a proper reading of the judgment in this case. Mr Sykes criticised the judge for treating the loss of pension rights and the threat of industrial action as equal causes. I am not satisfied that on a fair reading of his judgment this is what the judge did. The highest that Judge Hellier put it was that a payment can be from employment even though there are other reasons for it: see para 103 of his judgment. This is obviously right. In all the cases I have referred to there are competing causes. Obvious examples are *Laidler v Perry* (staff Christmas bonuses) and *Cooper v Blakiston* [1908] 3 TC 343 (an incumbent's Easter offerings). In each case the payments were in part motivated by feeling of generosity towards the recipient. Employment does not have to be the sole cause but it does have to be sufficiently substantial as to characterise the payment as one from employment."

68. Mr H's argument is that the revenue cases are different on their facts, as they do not relate to monthly salary payments, unlike his case, and so do not support HMRC's case. In legal terms he says the cases can be distinguished. It is undoubtedly the case that the three principal authorities relied upon by HMRC do not involve monthly payments. There is a simple reason for that – in such a case there is typically no dispute but that the payments are employment-related, so the point is never litigated. *Hochstrasser v Mayes*, *Shilton v Wilmhurst* and *Kuehne and Nagel Drinks Logistics Ltd v Commissioner for HMRC* are on their facts atypical cases arguably at the margins, which is precisely why they were litigated. But the legal principles they stand for are of universal application, irrespective of such factual differences. Mr H further contends that the onus is on HMRC to produce a comparable precedent "whereby a person earned a regular salary over a significant period of time for zero work done". I disagree, for the reasons identified at paragraph 64 above.

69. In summary, *Kuehne and Nagel Drinks Logistics Ltd v Commissioner for HMRC* shows that payments made by the employer for mixed reasons (there both by way of compensation for loss of future pension rights and to avert industrial action) are

taxable as earnings. Applying the legal test encapsulated in the final sentence of paragraph 56 of Patten LJ's judgment, the payments under the COT3 were payments from the employment. The compensation (and non-employment) context of the payments in the present case may arguably have loomed rather larger than in *Kuehne and Nagel Drinks Logistics Ltd*, but one still cannot say that the linkage between the two types of payments under the second COT3 and the employment were other than "sufficiently substantial as to characterise the payment as one from employment."

The Appellant's remaining grounds of appeal to the Upper Tribunal

70. I originally gave Mr H permission to appeal primarily on the question of the proper construction of the second COT3 (see paragraph 26 above). However, Mr H's total of 14 sub-grounds of appeal were divided into four broad categories: A1-A6 ("wrong decision"), B1-B2 ("procedural irregularity"), C1-C3 ("bias") and D1-D3 ("miscellaneous errors"). In the grant of permission, I stated as follows: "Although I am giving general permission to appeal, I am not at this stage persuaded that there is much mileage in grounds (B) and (C) (or indeed D3), not least given the broad discretion that the First-tier Tribunal judge has in relation to case management matters." For completeness I should address these remaining grounds, albeit in varying degrees of detail.

A1-A6: "Wrong decision"

71. Grounds A1-A6 are to a large extent subsumed by the analysis above, as they concern the true nature of the agreement reached between Mr H and the Trust in the second COT3. Framed in this way, Mr H's primary submission was that the FTT "was wrong in deciding that the sum was contractual and not compensatory", as its conclusion was based on what Mr H contended was the erroneous assumption "that the original settlement agreement was not effective or was obsolete, and that the only effective agreement was the one in relation to the contract and 2 lump sum payments that followed the original agreement".

72. However, Mr H's primary submission that the payments were "contractual and not compensatory" is itself based on a false dichotomy. As Mr Skinner put it in his skeleton argument, "the proper distinction for the purposes of the 2002 Regulations is whether the sums payable under the Settlement were earnings from an employment or not. That is the question the Judge correctly asked himself." Mr H's further argument that the FTT was proceeding on an erroneous assumption is likewise flawed. Mr H seeks to persuade me that the first and second COT3 agreements co-existed. However, the terms of the two COT3 documents are mutually inconsistent one with the other, as they imposed very different rights and duties on the respective parties. The only logical inference is that the parties did not finalise a binding agreement in accordance with the first COT3 and instead, and whatever the reason for the changes, entered into a fundamentally different type of agreement on the very different terms of the second COT3 ─ even if the net result remained the payment of £16,000 to Mr H.

B1-B2: "Procedural irregularity"

73. Ground B1 is that the Tribunal Judge at the hearing had denied Mr H the opportunity to make out his case. However, the conduct of the hearing is very much a matter for judicial discretion. This was a case in which there were extensive written submissions. Having doubtless reviewed the appeal file before the hearing, it was a matter for the Tribunal Judge as to how he conducted the hearing. As Mr Skinner observes, the judge was not required to permit Mr H "to simply make a speech". The record of proceedings shows that the FTT hearing lasted for just under an hour and

most of that record is a summary of Mr H's answers and submissions. There was no procedural irregularity.

74. Ground B2 is not truly a procedural point at all. Instead, it is a complaint that the FTT "wrongly revoked" HMRC's "decision" that the monthly £500 payments should not impact on his tax credits entitlement. There are two answers to that argument. The first is that strictly speaking HMRC had not made any decision to that effect, but rather a submission in its supplementary response as to how the FTT should address the point in resolving Mr H's appeal. It was certainly open to the FTT to reject that proposal. The second is that while it would undoubtedly have been better for the FTT to address the point head on, its omission to deal with the HMRC concession did not amount to a material error of law for the reasons already identified by Mr Ahmed (see paragraph 28 above). I note in passing that it appears the HMRC concession may have been withdrawn at the hearing, although in truth the Tribunal Judge's handwritten record of proceedings is rather difficult to decipher on the point.

C1-C3: "Bias"

75. Mr H argues that the Tribunal Judge showed bias in three ways, namely (i) in allowing the HMRC presenting officer to express their case freely while requiring Mr H to respond to a series of closed questions (C1); (ii) in making an opening remark to the effect that Mr H had 'thrown everything he could at the Trust' in the employment tribunal proceedings (C2); and (iii) in failing to detail an HMRC calculation error in the tax credits decision (C3).

76. These arguments do not even come close to making out a claim of bias (applying the 'fair-minded and informed observer' test laid down in *Porter v Magill* [2002] 2 A.C. 357). As for ground C1, this is flawed for the same reason as ground B1 above. As for ground C2, I am not persuaded that a fair-minded and informed observer would interpret a throwaway opening comment in quite the pejorative sense inferred by Mr H. Indeed, the FTT's careful and detailed statement of reasons is testament to the Tribunal Judge's thorough and unbiased approach to the appeal. As far as ground C3 is concerned, the FTT expressly noted that it had not been asked to check the tax credits arithmetical calculations.

D1-D3: "Miscellaneous errors"

77. Ground D1 and D2 concern the issues of the treatment of payments under the second COT3 for tax and national insurance purposes.

78. Ground D1 was that the FTT had wrongly referred to the payments as "taxed and taxable" (e.g. as "taxed" in the FTT's decision notice and "taxable" in the statement of reasons at [10]), whereas no tax was in fact deducted. This point does not assist Mr H. The fact that no income tax may have been deducted from the payments does not preclude them from being "earnings from an… employment", as the actual levying of income tax will depend on other factors, not least the personal allowances that an individual may be entitled to.

79. Ground D2 concerned employee's National Insurance contributions (NICs). Mr H argued that the FTT's reasons "refer to NIC deductions, those were reimbursed, consistent with the amounts being compensatory and not contractual". Again, this matter does not take Mr H's arguments any further forward. It is true that the Trust's letter of 19 July 2017 stated that the Trust would be responsible for any NICs payment due on the closing balance, following early termination of the arrangement (clause 3). The FTT found as a fact that the Trust had agreed to indemnify Mr H in respect of any NICs that were due (statement of reasons at [20]). While that may have been so for the final payment due on the mutual early termination of the

contract, it was not true of the various payments under the original COT3 (see clauses 10, 13 and 22 to the contrary effect; and see paragraph 57 above). However, if this was an error by the FTT, it had no material bearing on the outcome.

80. The thrust of ground D3 was that Mr H had not received assistance and guidance from ACAS and the BMA in the employment tribunal proceedings. Whether or not that was the case, it has no direct bearing on the construction of the COT3 documents.

81. It follows that none of the grounds of appeal is persuasive. It follows that neither of the FTT's errors of law identified at paragraph 38 above was material.

A coda

82. I recognise that Mr H has a strong sense that an injustice has resulted. He thought he had agreed with the Trust a settlement to the employment tribunal proceedings which would result in the (virtually) immediate payment of a tax-free lump sum of £16,000. However, for reasons that were apparently at the behest of the Trust, the actual agreement entered into was a very different arrangement on the face of which the payments amounted to employment income. As Mr Skinner acknowledged, the Trust and Mr H sought to structure that arrangement (and indeed did so lawfully and successfully) so as to avoid Mr H paying income tax on those payments. However, it would appear – perhaps understandably enough – that they did not give any consideration to the effect that the agreement would have on Mr H's tax credits entitlement. That unforeseen consequence may well be unfortunate if not galling, but it cannot affect the nature of what was agreed under the second COT3. As Mr Skinner observed in oral argument, to allow it to do so would be to put the proverbial cart before the horse.

83. It will be no consolation for Mr H to hear that others have found themselves in a not dissimilar situation as a result of the unforeseen and adverse legal consequences of steps taken to organise their financial affairs in what were thought to be the most cost-effective way. In earlier written submissions, Mr Ahmed gave the example of Commissioner's decision CTC/626/3001, in which a claimant took tax-efficient steps in his working partnership with his wife which had an adverse effect on the couple's family credit entitlement. Lawyers acting in a personal capacity as litigants in their own cases can end up in a not dissimilar situation when they do what they think is the 'right thing' to compromise proceedings (by way of a private consent agreement for child maintenance) but fail to appreciate the consequences of their actions in other areas of law with which they are not familiar (the paradigm case being *SJ v Secretary for Work and Pensions and CMcN (CSM)* [2014] UKUT 82 (AAC); [2014] AACR 32).

Conclusion

84. For all those reasons, I conclude the decision of the First-tier Tribunal does not involve any material error of law. The appeal to the Upper Tribunal is dismissed and the First-tier Tribunal's decision accordingly stands. The matter is remitted to HMRC for it to make a final section 18 decision on Mr H's entitlement to tax credits for the tax year 2016/17.

Signed on the original
on 8 January 2019

Nicholas Wikeley
Judge of the Upper Tribunal