Neutral Citation: **[2024] UKUT 262 (TCC)**

Case Number: UT/2023/000068

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice,
Rolls Building, London

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation – IR35 – personal service company – finding by the FTT that a contractual right of first call would be varied in the hypothetical contract – application of and approach to the third stage of the RMC *test of employment – appeal allowed*

Heard on: 24 and 25 April 2024
With further written submissions on
10 and 22 May 2024
Judgment date: 28 August 2024

Before

JUDGE THOMAS SCOTT
JUDGE MARK BALDWIN

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

S & L BARNES LIMITED

Respondent

Representation:

For the Appellants: Christopher Stone KC and Bayo Randle, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Collins, instructed by Markel Tax

DECISION

INTRODUCTION

1. Mr Stuart Barnes was a well-known rugby union player in the 1980s and 1990s. Around the time of his retirement from the sport in 1994, Mr Barnes began his career as a freelance writer and television presenter. He came to be known as "the voice of rugby".

2. Through his personal service company, S&L Barnes limited ("SLB"), Mr Barnes provided services in relation to rugby union to a number of media organisations. In the period between 6 April 2013 and 5 April 2019, SLB provided the services of Mr Barnes to Sky TV Limited[1] ("Sky") pursuant to two contracts. HMRC considered that the contracts fell within the intermediaries legislation (commonly known as "IR35"), with the result that Mr Barnes was taxable on his income from Sky as if an employee, and issued SLB with determinations in respect of income tax deductible through Pay As You Earn and notices of decision in respect of national insurance contributions ("NICs") for the tax years within that period.

3. SLB appealed against the determinations and decisions to the First-tier Tribunal (Tax Chamber) (the "FTT"). In a decision released on 20 January 2023 (the "Decision"), the FTT allowed SLB's appeal. HMRC now appeal against the Decision.

THE LEGISLATION AND THE ISSUE BEFORE THE FTT

4. The purpose of the intermediaries legislation was described by Robert Walker LJ (as he then was) in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51], as being:

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

5. The question whether the intermediaries legislation applies to any particular set of circumstances is determined by reference to sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). The equivalent provision for NICs purposes is Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000. The parties agree that in the circumstances of this appeal there is no material difference in the effect of the two sets of provisions. Therefore, as did the FTT, we focus in this decision on the provisions in ITEPA 2003.

6. Section 49 ITEPA 2003 provides as follows:

> (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

[1] Before February 2015 the company's name was British Sky Broadcasting Limited.

> (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.

7. It was common ground before the FTT that section 49(1)(a) and (b) were satisfied on the facts in relation to the contracts relevant to this appeal. Mr Barnes is "the worker", Sky is "the client" and SLB is "the intermediary". The only issue for the FTT was whether, if the services provided by Mr Barnes had been provided under contracts directly between Sky and Mr Barnes, Mr Barnes would have been regarded for income tax purposes as an employee of Sky.

THE APPROACH TO DETERMINING WHETHER THE INTERMEDIARIES LEGISLATION APPLIES

8. The contract postulated by section 49(1)(c) ITEPA 2003 has come to be termed the "hypothetical contract", and, like the FTT, we refer to it as such below.

9. In considering the application of the intermediaries legislation, the FTT should carry out a three-stage analysis. Somewhat confusingly, the third stage of that analysis itself entails the determination of another three issues, being those set out in relation to the identification of employment status in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*").

10. The three-stage analysis with which the FTT should begin has been summarised as follows by the Court of Appeal in *Kickabout Productions Ltd v HMRC* [2022] EWCA Civ 502 ("*Kickabout*") at [7]:

> (1) Stage 1: Find the terms of the actual contractual arrangements and the relevant circumstances in which the individual worked.
>
> (2) Stage 2: Ascertain the terms of the "hypothetical contract".
>
> (3) Stage 3: Consider whether the hypothetical contract would be a contract of employment or a contract for services.

11. At Stage 3, there is no statutory definition of employment in this context, but it is generally accepted that the test to identify whether a contract is a contract of service remains that set out by MacKenna J in *RMC* at page 515:

> I must now consider what is meant by a contract of service. 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.

12. These three criteria are generally referred to as mutuality of obligation, control and the "third stage".

13. We refer below to the three stages identified in *Kickabout* as Stages 1, 2 and 3, and to the three conditions identified in *RMC* as mutuality, control and the Third RMC Stage.

BACKGROUND FACTS

14. References below in the form FTT[x] are to paragraphs of the Decision.

15. The FTT made detailed and comprehensive findings of fact, at FTT[8]-[88]. Mr Barnes was called as a witness and was the subject of extensive cross-examination. The FTT found him to be a credible and reliable witness and accepted his evidence as to matters of fact: FTT[7]. In brief summary, relevant findings of the FTT included the following:

(1) Mr Barnes started working as a commentator on Sky Sports in 1994, and worked with them for 25 years. From 1993, he had built up a profile as a freelance writer, in particular as a columnist with the Times and the Sunday Times, and as a television presenter.

(2) In the period relevant to the appeal, SBL entered into two contracts with Sky for the provision of Mr Barnes' services as a sports broadcaster. The first covered the period 1 June 2013 to 31 May 2017 (the "First Contract"), and the second covered the period 1 June 2017 to 31 May 2019 (the "Second Contract") (together the "Contracts").

(3) The principal terms of the Contracts were set out at FTT[29]-[44].

(4) During the period under appeal, Mr Barnes' main engagements were with Sky, the Times and the Sunday Times. Mr Barnes also worked for non-Sky broadcasters in covering the 2015 and 2019 World Cups, and fitted in various commitments with other media organisations.

(5) The FTT made findings at FTT[61]-[65] as to the proportion of SLB's income which arose from Sky. During the relevant period, the income received by SLB from Sky as a percentage of its overall income in the year ranged from 57.3% to 61.5%, dropping in 2019-20 to 33.4% when Sky Sports significantly reduced its coverage of rugby union matches.

(6) The FTT set out Mr Barnes' oral evidence, and made findings of fact, as to the various roles which he fulfilled in relation to the services rendered to Sky; how he interwove Sky and non-Sky work; the rugby season work pattern; the Six Nations; the World Cup; the manner and degree of control which Sky exercised over him, and the Stuart Barnes brand.

THE FTT'S DECISION

16. After setting out the arguments of the parties, the FTT identified the issue for determination and that the burden of establishing that Mr Barnes would not be regarded as an employee of Sky pursuant to the hypothetical contract was on SLB.

17. In relation to the construction of the hypothetical contract, the FTT recorded that the parties agreed that there were no material differences between the First and Second Contracts, so that a single hypothetical contract could be constructed and taken as applicable to the entire relevant period: FTT[103].

18. In relation to the extent to which circumstantial factors outside the actual Contracts should be taken into account in constructing the hypothetical contract, the FTT referred to the guidance on this issue given by the Court of Appeal in *HMRC v Atholl House Productions*

Limited [2022] EWCA Civ 502 ("*Atholl House*"). The FTT drew two principles from that guidance. First, the terms of the hypothetical contract must be derived from all the circumstances in which the relevant services were provided, taking as a starting point the terms of the actual contracts: FTT[108]. Second, "what is admissible in the factual matrix in constructing the hypothetical contract is limited to Sky's awareness of Mr Barnes' engagements with the Times and the Sunday Times, and with other broadcasters for high-profile games not broadcast by Sky": FTT[110].

19. At FTT[111], the FTT set out its conclusions as to the material terms of the hypothetical contract. We have set out those terms in the appendix to this decision. With the exception of its findings in relation to Sky's right of first call over Mr Barnes, which are the subject matter of the first ground of appeal, the parties do not challenge those conclusions.

20. The FTT then applied the *RMC* test to the hypothetical contract, and decided that the parties "did not intend the Contracts to be the exclusive record of the terms of their agreement", but that "the terms of agreement between the parties are to be gathered partly from documents, and partly from their conduct": FTT[115] and [116].

21. The FTT noted that SLB had conceded that the mutuality and control tests in *RMC* were satisfied. However, the FTT considered it necessary to reach its own view on those issues, guided by advice as to the importance of doing so in *Atholl House*. The FTT concluded that mutuality was indeed satisfied. In relation to control, the FTT also found that there was a sufficient framework of control over Mr Barnes in the performance of his services.

22. At FTT[127]-[138], the FTT considered the Third RMC Stage, under the heading "Other Provisions and Factors". The FTT referred to the principles derived from *Atholl House* at FTT[130], as follows:

> In *Atholl House*, the Court of Appeal reviewed the relevant case law applying the RMC test, and the legal principles emanating from the review in *Atholl House* on the third stage of the RMC test are summarised as follows.
>
> (1) The court or tribunal is required to weigh any terms, which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment; it is a multi- factorial process addressing all the relevant factors: at [76].
>
> (2) The court or tribunal is not restricted in its analysis to the terms of the contract; this is clear from *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 ('*Market Investigations'*) and many subsequent cases, including *Hall v Lorimer* [1994] ICR 216: at [113].
>
> (3) It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests. Both are 'multifactorial' approaches which recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment: at [122].
>
> (4) A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract as in some authorities. In many other authorities, however, a wider range of factors was taken into consideration, such as *Matthews v HMRC* [2012] UKUT 229 (TCC) ('*Matthews*'): at [122].
>
> (5) The question for the 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 by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties: at [123].

23. The FTT referred to the focus at the third stage remaining anchored on the contract in issue, but taking into account the context and circumstances. The FTT then listed various factors which it considered to be relevant at the third stage, which we will need to deal with in detail below. The FTT concluded that the Contracts would not have been contracts of employment: FTT[135].

GROUNDS OF APPEAL

24. The FTT refused HMRC's application for permission to appeal, but the Upper Tribunal (Judge Jones) granted permission, on the following two grounds:

> (1) **Ground 1**: The FTT erred in its construction of the hypothetical contract concerning Sky's right of first call over Mr Barnes and purported variations to the contract.
>
> (2) **Ground 2**: The FTT erred in its interpretation and/or application of the third stage of the RMC test, including by taking into account irrelevant factors and failing to take into account relevant factors.

GROUND 1: RIGHT OF FIRST CALL

Contractual provisions

25. Clause 2.7 of the First Contract stated as follows:

> 2.7 Notwithstanding any other provision of this Agreement, Sky shall have first call on the Company's Personnel [Mr Barnes[2]] for the provision of the services. … Neither the Company nor any Personnel shall endorse or promote or otherwise grant any rights of association or provide marketing or promotional services to any competitor of Sky, its products, brands or services.

26. The Key Terms included the following (FTT[31(1)]:

> The Assignment will be from 1st June 2013 to 31st May 2017 on an ad hoc and when required basis for up to 228 days. For the purposes of this Agreement, "Year" means each consecutive 12 month period commencing 1st June each year.

27. In the Second Contract, the definition of "services" included the following:

> The Company shall provide the services of the Personnel as a commentator, interviewer and/or other participant in the making of any editorial, programme and/or video whether in vision or audio and/or whether in studio or on location, live or recorded on an ad hoc as and when required basis by Sky for up to two hundred and twenty eight (228) days per year during the Term.
>
> The above shall include, by way of example only, appearances on Sky Sports News (including reacting to breaking news stories), appearances on other Sky

[2] Se FTT[31].

> Sports programming and the provision, on request by Sky, of additional bespoke content (including but not limited to columns, blogs and interviews) for use on Sky Sports' digital services.

28. While the "services" to be so provided are defined slightly differently in the First and Second Contract, for both contracts, clause 1.1 of the "Key Terms" provides as follows:

> The Services will be provided on the terms set out in this Agreement subject to any variations agreed by the Parties in writing and to any Associated Company as may be agreed between the parties from time to time.

29. The term "Associated Company" is defined as, broadly, a holding company or subsidiary of BSkyB or a company controlled by BSkyB[3].

Basis of appeal

30. HMRC's appeal under Ground 1 relates to the following finding by the FTT as to the terms of the hypothetical contract, at FTT[111(5), (6) and (7)]:

> (5) Sky 'shall have first call' on Mr Barnes' Services up to 228 days per annum, which would be inclusive of days being on air of around 90 to 120 days per annum.
>
> (6) The exercise of the 'first call' right by Sky would be subject to Mr Barnes' availability in conjunction with his standing commitments to the newspaper columns, and in co-ordination with Mr Barnes' coverage of high-profile matches of which Sky had no broadcasting rights, (such as the coverage of the Six-Nations, British & Irish Lions, and World Cup matches would take priority over Sky's fixtures).
>
> (7) Such variations to the provision on 'first call' were expressly provided by clause 1.1 under the Key Terms in the First Contract:
>
> > 'The Services will be provided on the terms set out in this Agreement subject to any variations agreed by the Parties in writing and to any Associated Company as may be agreed between the parties from time to time.'

31. HMRC recognised that their challenge under Ground 1 is a challenge to a finding of fact on the basis of the principles in *Edwards v Bairstow* [1956] AC 14. In *HMRC v Anna Cook* [2021] UKUT 0015 (TCC), the Upper Tribunal stated as follows, in relation to such a challenge, at [18]-[19]:

> 18. An appeal to this tribunal lies only on a point of law: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14. In that case, Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[4].

[3] Clause 15.2 of each Contract.
[4] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

> 19. Grounds 1 and 3 of HMRC's appeal are *Edwards v Bairstow* challenges. In considering those grounds, we have borne in mind the caveats helpfully summarised in *Ingenious Games LLP & Others v HMRC* [2019] UKUT 226 (TCC), at [54]-[69]. The bar to establishing an error of law based on challenges to findings of fact is deliberately set high, and that is particularly so where the FTT is called on to make a multi-factorial assessment. As stated by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463, at 476:
>
> > … for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong. A failure to appreciate what is the correct approach accounts for much of the time and expense that was occasioned by this appeal to the High Court.

Significance of issue

32. As we have described, before the FTT the parties agreed that the control requirement was satisfied, and the FTT agreed. Therefore, Ground 1 is relevant in this appeal only insofar as the FTT's finding at FTT[111(6)] influenced its decision regarding the Third RMC Stage and/or its overall decision that IR35 did not apply.

33. We are satisfied that the finding at FTT[111(6)] was taken into account by the FTT in its decision regarding the Third RMC Stage, since it was specifically identified as a relevant factor at the Third RMC Stage by the FTT at FTT[134(6)]. As we will discuss below in relation to Ground 2, the extent of control in the hypothetical contract is itself a relevant factor, in any event, at the Third RMC Stage.

Arguments of the parties

34. HMRC's oral submissions on Ground 1 were ably provided by Mr Randle. Following the four stages in an *Edwards v Bairstow* challenge identified by the Court of Appeal in *Georgiou*, he argued as follows:

(1) Stage 1: The finding challenged was the variation of Sky's right of first call in FTT[111(6)].

(2) Stage 2: The significance of the finding was as we have described above at [32] and [33] of this decision.

(3) Stage 3: In relation to the evidence relevant to the challenged finding, it is not easy to discern from the Decision what evidence the FTT relied on. The FTT apparently considered it relevant that Mr Barnes would work on his standing commitments in respect of his newspaper columns and that he would provide coverage of high-profile matches over which Sky had no broadcasting rights, and that clause 1.1 of the Key Terms provided for contractual variations. There was no other evidence relevant to whether there had been a variation of the right of first call.

(4) Stage 4: The finding was not one which the FTT was reasonably entitled to make. Pursuant to clause 1.1 of the Key Terms, any variation to the contractual terms had to be agreed in writing. Further, none of the matters relied on by the FTT were actually in conflict with the contractual right of first call. The lack of any conflict in practice or the sort of "flashpoint" situation identified in *Atholl House* meant that Sky was not required in practice to insist on its full contractual rights.

35. Mr Randle also pointed out that the FTT may have thought that the actual Contracts were varied as described, which would not have been permissible given that any variations had to be agreed in writing.

36. For SLB, Mr Collins argued that the FTT was entitled and correct to find that the contractual first call was varied so as to be subject to Mr Barnes' newspaper commitments and coverage of high-profile matches over which Sky had no broadcasting rights. He referred to FTT[134(6)]:

> …There was the long-standing understanding between the parties that Mr Barnes would be unavailable to Sky during the Six Nations season, and the World Cup tournament, although he could be requested for interviews by Sky Sports News. What Sky lost in terms of Mr Barnes' availability was gained in return through the publicity of having one of its regular commentators as a columnist of these high-profile games, which in turn reflected well on Sky as the broadcaster with the exclusive right to Mr Barnes' services.

37. He also referred to FTT[69(4)]:

> When Sky did not have the broadcasting rights for major game events in rugby union, such as the Six Nations tournament for the northern hemisphere, Mr Barnes would be focussing on his newspaper columns to cover the Six Nations tournament, and not be appearing in any Sky Sports game fixtures.

38. Mr Collins said that the disputed finding was also based on ample evidence before the FTT from Mr Barnes, including paragraph 14 of his witness statement:

> Every Six Nations, I focus 100% on newspaper commitments. This has long been the case and Sky have long understood the imperative of attending these games…I am more likely to be seen chairing a Times/Sunday Times Readers Plus night in either London or Dublin than to be on television around the time of the leading tournaments.

39. Mr Collins also said that HMRC's argument relating to the need for a variation of the Contracts to be in writing missed the point, because the terms of the hypothetical contract can include terms based on the circumstances and the conduct of the parties.

Discussion

40. The Upper Tribunal decision in *HMRC v Atholl House Productions Ltd* [2021] UKUT 37 (TCC) ("*Atholl House UT*") provided guidance, which we gratefully adopt, regarding the approach which should be taken to the construction of the hypothetical contract. That guidance was very helpfully summarised by the FTT in *Atholl House Productions Ltd v HMRC* [2024] UKFTT 00037 (TCC) ("*Atholl House Remitted*") at [21], as follows:

> …At paragraphs [8], [9], [43] and [54] to [56] in *Atholl House UT*, the Upper Tribunal held as follows:

(1) in determining the terms of the hypothetical contract, Sections 49(1)(c) and 49(4) of the ITEPA 2003 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;

…

(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 Upper Tribunal, 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 Upper Tribunal 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…

41. We deal first with the FTT's reference in making the disputed finding to clause 1.1 of the Key Terms. This refers to "any variations agreed by the Parties in writing and to any Associated Company as may be agreed between the parties from time to time". Unfortunately, this drafting is both confused and ambiguous. It can be read either as encompassing only variations agreed in writing between the parties (including any associated company of Sky), or as encompassing both variations in writing and non-written variations agreed from time to time. It appears from FTT[111(7)] that the FTT probably interpreted it as having the latter meaning, and that is made clear by the FTT's reference at FTT[125(2)] to "clause 1.1 under the Key Terms which provided for the provision of services 'subject to any variations agreed by the Parties in writing' and 'from time to time'". HMRC's position is that the clause has the former meaning, so that only variations agreed in writing are effective, leaving the words "as may be agreed between the parties from time to time" to refer only to the inclusion as a party of an Associated Company.

42. We consider that it is unclear which meaning should be attributed to clause 1.1, but that in the circumstances that issue is of limited relevance. That is because it is relevant to the construction of the Contracts themselves, whereas the disputed finding related to the terms of the hypothetical contract. The real question for the FTT was whether all the circumstances, including the conduct of the parties, justified a decision that in the hypothetical contract a particular written term in the Contracts would have been omitted, varied, modified or supplemented. Put another way, the inclusion in an actual contract of a provision providing unequivocally that no variations would be permitted unless in writing would, of course, be relevant to the construction of that contract, but it could not operate to prevent a conclusion that the terms of that contract would be modified in some way when construing the hypothetical contract, even though the modification had not been agreed in writing. That is clear from the guidance set out above from *Atholl House UT*.

43. In our view, the material question in relation to Ground 1 is the *Edwards v Bairstow* question of whether the FTT's decision at FTT[111(6)] was one which was reasonably available to it on the evidence, or rather was (as HMRC say) irrational.

44. We agree with Mr Collins that there was sufficient evidence available to the FTT for it rationally to reach the decision which it did, including that to which he referred and which we set out above. The FTT's findings of fact, including its acceptance of Mr Barnes' evidence as to matters of fact, formed a rational basis on which to conclude that in the hypothetical contract the right of first call would be modified as set out at FTT[111(6)]. A judgment as to whether the parties' mutual understanding and working practices went so far as to justify that modification in the hypothetical contract was one for the FTT to make on the basis of all the available evidence. We agree with the FTT's statement, at FTT[104], that "the construction of a hypothetical contract remains an indispensable task for the tribunal as part and parcel of its fact-finding remit".

45. HMRC suggested that the decision which it reached was not open to the FTT on the evidence because the FTT considered no instances of "flashpoints" or clashes between Sky and Mr Barnes which would have served to evidence the likelihood of a modification in the hypothetical contract. We do not agree. The reference in *Atholl House UT* to the helpfulness of "flashpoints" in this context (summarised at [40(7)] above) does not mean that a finding cannot reasonably be made in the absence of flashpoints. They are helpful but no more than that. In any event, as we pointed out in the hearing, FTT[81] and [82] refer to evidence of what might

fairly be described as flashpoints, which formed part of the evidence available to the FTT on this issue.

46. In conclusion, we dismiss HMRC's appeal under Ground 1. The determination of Ground 2 will, therefore, be made on the basis that the FTT's finding at FTT[111(6)] stands.

GROUND 2: THE THIRD RMC STAGE

47. The FTT agreed with the parties that the mutuality and control tests were satisfied. Its decision therefore turned on its evaluation of the Third RMC Stage. We set out below the direction which the FTT gave itself in carrying out that evaluation.

48. At FTT[134], the FTT set out twelve factors which it stated were relevant to the RMC Third Stage. We discuss each of these in detail below.

49. The FTT then set out its conclusion as follows, at FTT[135]:

> Having regard to the cumulative totality of the provisions in the hypothetical contract in the context of the parties' conduct and intention, I conclude that the relevant Contracts would not have been contracts of employment for the duration of the relevant period. In reaching my conclusion I have not given any weight to the express provision in the Contracts in relation to the parties' intention that Mr Barnes as the Personnel shall not be an employee of Sky.

HMRC's appeal

50. HMRC appeal under Ground 2 on the bases that in reaching it conclusion on the Third RMC Test, the FTT:

(1) took into account irrelevant factors,

(2) treated factors as inconsistent with employment when they were either consistent with employment or neutral, and

(3) failed to take into account material factors.

Arguments of the parties

51. Essentially, HMRC's objection is that the FTT erred in the application of the Third RMC Stage because the twelve factors which it identified were not, individually or cumulatively, indicators against employment status, and because it failed to weigh in the balance other terms of the hypothetical contract which were strong indictors of employment status.

52. Mr Collins pointed out that in *Northern Light Solutions Ltd v HMRC* [2021] UKUT 0134 (TCC), the Upper Tribunal cautioned as follows, at [85]:

> …in applying the *Ready Mixed Concrete* tests the FTT is called upon to reach a broad evaluative conclusion based on all the evidence before it. As the authorities have repeatedly indicated, this Tribunal should be reluctant to interfere with the evaluative judgment of the FTT unless it is clear that the FTT has misdirected itself as to the law, misapplied the law to the facts or has reached a conclusion which is not open to it on the facts found (in accordance with the principles set out in *Edwards v Bairstow*).

53. Mr Collins argued that an assertion by HMRC that a factor taken into account by the FTT was "neutral" was a complaint about weight, which was entirely a matter for the FTT, and not a point of law which gives a right of appeal. He said that the FTT's twelve factors did indicate that Mr Barnes would not have been employed under the hypothetical contract, and the factors which HMRC claimed the FTT had failed to take into account were taken into account. The FTT's self-direction as to the law showed that the FTT was fully aware of the factors to take into account at the Third RMC Stage. Even if the FTT did err, said Mr Collins, none of the errors was material to its decision.

Nature of HMRC's challenge

54. The parties disagreed as to the nature of HMRC's challenge under Ground 2. Mr Collins characterised it as a challenge to the FTT's evaluative conclusion and an impermissible attack on the weight given by the FTT to different factors. Mr Stone accepted that the FTT's overall conclusion was evaluative, but denied that HMRC were challenging weight, or any of the FTT's primary findings or its overall conclusion. Rather, said Mr Stone, HMRC's position was that errors of law arose because the FTT took into account irrelevant factors and failed to take into account material factors as required at the Third RMC Stage. This was not, he said, an *Edwards v Bairstow* attack.

55. Mr Stone referred to the decision in *WM Morrison Supermarkets PLC v HMRC* [2023] UKUT 00020 (TCC) ("*Morrisons*"). In that case, the parties disagreed as to what constituted an error of law in a multi-factorial assessment where the FTT failed to take into account a material factor. The Upper Tribunal discussed the well-established principle that an appellate tribunal should be slow to interfere with an evaluative multi-factorial assessment, but then said this, at [34] (emphasis in original):

> …we note the focus on appellate caution is directed towards to analysis of weight or matters of degree and, in the context of a multi-factorial evaluation the first-instance court or tribunal's overall evaluation…None of that is controversial. However, the appellant points out there is nothing in these principles which suggests an appellate tribunal should defer where the fact-finding tribunal has taken account of an irrelevant factor, or as they say happened in the instant case, disregarded a relevant factor.

56. In *Morrisons*, HMRC argued that an error of law arose only where the relevant matter was one which no tribunal properly instructed would have left out of account, so the decision was "perverse". The Upper Tribunal disagreed, stating (at [39]) "while a requirement to show the decision is perverse applies in relation to matters of weight/evaluation, failing to take account of a relevant factor or taking an irrelevant factor into account will constitute an error of law (albeit there will be subsequent issue of whether any such error is material to the decision in question)". At [43], the Upper Tribunal stated that while a perversity hurdle must be surmounted where the challenge concerns the factual issue of whether a factor was probative on the facts of the case, a challenge as to whether a factor was relevant, as a matter of principle, does not face such a hurdle, and is a question of law.

57. We agree with the distinction drawn in *Morrisons*, described above, and have approached Ground 2 on the basis that HMRC's challenge is not that the FTT afforded to much or too little weight to a factor, or that its overall conclusion was perverse or irrational, but rather that the FTT took into account at the Third RMC Stage factors which were **as a matter of principle** irrelevant, or failed to take into account at the Third RMC Stage factors which were **as a matter of principle** relevant. In the context of this appeal, relevance is determined by reference to

whether a factor is indicative of employment status. It is important to state at the outset that even if we find that the FTT made such an error, we must still determine whether that error was material to its decision; we discuss this below.

FTT's self-direction

58. The first question is whether the FTT correctly directed itself in law in addressing the Third RMC Stage. We have set out above, at [8]-[10], the overall approach which should be adopted in determining whether IR35 applies, and the context in which the Third RMC Stage falls to be considered. In relation to the Third RMC Stage, the Court of Appeal in *Kickabout* said (at [104]) that "the court's task at that stage is to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists."

59. The FTT directed itself as to the approach which it should take at FTT[130] and [133], as follows:

> 130. In *Atholl House*, the Court of Appeal reviewed the relevant case law applying the RMC test, and the legal principles emanating from the review in *Atholl House* on the third stage of the RMC test are summarised as follows.
>
> (1) The court or tribunal is required to weigh any terms, which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment; it is a multi-factorial process addressing all the relevant factors: at [76].
>
> (2) The court or tribunal is not restricted in its analysis to the terms of the contract; this is clear from *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 ('*Market Investigations'*) and many subsequent cases, including *Hall v Lorimer* [1994] ICR 216: at [113].
>
> (3) It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests. Both are 'multifactorial' approaches which recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment: at [122].
>
> (4) A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract as in some authorities. In many other authorities, however, a wider range of factors was taken into consideration, such as *Matthews v HMRC* [2012] UKUT 229 (TCC) ('*Matthews*'): at [122].
>
> (5) The question for the 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 by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties: at [123].
>
> …
>
> 133. The case law principles are all reminders of the centrality of the contractual relationship in issue, even at the third stage of the *RMC* test. The focus at the third stage remains anchored on the contract in issue, but the angle of the focus widens out to take in the context and circumstances in which the contractual relationship is created; the direction of the perspective is to zoom out from the contract in issue. The flaw in the

> tribunals' approach in *Atholl House*, as I understand it, is to approach the third stage from the peripherals, focusing on Ms Adams' career outside the relevant contract, and zoom in from the circumstantial factors to construe the relevant contract in the light of Ms Adams having been in business on her own account. The flaw of the UT's approach in *Atholl House* is analysed by the Court of Appeal at [125] to [139].

60. We consider this to be a very helpful and accurate summary by the FTT of the approach which should be taken at the Third RMC Stage.

61. Therefore, we are mindful in approaching Ground 2 of the guidance given by the Court of Appeal in *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672:

> [58]…where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision.

62. We must nevertheless decide whether, looking at the decision in its entirety, the FTT in fact failed to follow its self-direction in some material respect[5].

Discussion: the factors identified as relevant by the FTT

63. Having directed itself as to the applicable principles, the FTT then stated at FTT[134] "**With these precepts in mind, the factors in the present case relevant to my consideration at the third stage of the RMC test are as follows**". The FTT then set out twelve factors. Although it is not made explicit in the decision, it is apparent from the discussion of those factors and also from its subsequent conclusion (that IR35 did not apply notwithstanding that mutuality and control were present) that the FTT considered that each of these twelve factors suggested or supported a conclusion that the hypothetical contract would not have been one of employment.

64. We now consider whether each of the twelve factors was, as matter of principle, indicative or supportive of a conclusion that the hypothetical contract would not have been one of employment.

Factors (1) and (2)

65. These were set out at FTT[134(1) and (2)]:

> (1) There is a distinction between a presenter and a commentator in the broadcast of a live match. Mr Barnes started as a presenter with Sky, but moved to become a commentator. During the relevant period, the principal services provided by Mr Barnes to Sky as a co-commentator in live matches were punditry in nature, which I find to be qualitatively different from those provided by Miles Harrison as a presenter.

[5] In the IR35 context, the Upper Tribunal recently held that the FTT had correctly directed itself, but failed to follow that self-direction: *HMRC v RALC Consulting Limited* [2024] UKUT 00099 (TCC).

> (2) Mr Harrison was the 'first voice' and provided the running commentary of a match, while Mr Barnes was the 'second voice' giving the analytical insights on the good and bad moments of a game, from team strategy to the execution of moves by individual players. Mr Harrison would be on air most of the time, while Mr Barnes' commentary would come in at the appropriate moments and would often be accompanied by co-ordinated replays.

66. The FTT is here pointing out the distinction that Mr Barnes' role was as a pundit providing occasional expert comments, by contrast to Mr Harrison, who was the lead commentator for a match. We note that although the FTT described Mr Harrison as a "presenter", Sky described him as a commentator: at FTT[46], Sky's response to being asked to comment on the respective work arrangements of Mr Harrison and Mr Barnes was recorded as follows:

> [A]: The working arrangements are similar but Miles and Stuart carry out different roles. Miles is a "lead commentator" who describes the action onscreen; the "who" and the "what". Stuart's role is to analyse the "how" and the "why" and provide the context of the action.'

67. The FTT did not indicate, explicitly or implicitly, why it considered that this point was relevant to the question of whether the hypothetical contract would have been one of employment.

68. The distinction would have meant that Mr Barnes would speak for less time than Mr Harrison during a match, and the different role he was performing might arguably have required a type of expertise or experience not possessed by Mr Harrison. Mr Collins suggested that the first two factors were relevant to the FTT's finding elsewhere that Mr Barnes was carrying on an enterprise of being "Stuart Barnes, the voice of rugby": FTT[134(9)].

69. HMRC said that (1) a requirement to deploy individual skill and personality is frequently present in a contract of employment: see, for example, *Market Investigations* at 188B, (2) Mr Barnes was engaged under the hypothetical contract to provide various services, not just punditry, and (3) in *PD & MJ Limited v HMRC* [2024] UKFTT 00038 (TC) ("*PD*") the FTT rejected the submission that the fact that a sports pundit gives his own opinions in television commentary is inconsistent with employment status.

70. In our opinion, the first two factors were, as a matter of principle, not factors pointing away from employment. We do not know from the Decision what point the FTT had in mind here, but we consider that there was no rational basis on which the difference in the roles performed by Mr Barnes and Mr Harrison during a match commentary suggested that the hypothetical contract was less likely to be one of employment. As the Court of Appeal put it in *Atholl House*, at [128], "It is not the activities that matter but the capacity in which, and the conditions under which, they are performed."

Factor (3)

71. This was set out at FTT[134(3)]:

> (3) Without Mr Barnes' analytical input, the live commentary of a match with only the first voice would be all the duller, and unlikely to attract as many viewers as a live match with punditry input. In fixing the annual fee payable to Mr Barnes, Sky did not stipulate the minimum days of services, only the maximum. In real terms, the number of days Mr Barnes would appear on air for Sky varied from 90 to 120 days. Taking 120 days as the benchmark, it

> means Mr Barnes could be working 25% less than the benchmark maximum without any issue being raised by Sky. I do not consider the annual fee resemble a 'salary' in nature as submitted for the respondents. I find the annual fee to be a block fee, for the exclusive right to have first call of Mr Barnes' services for a period of time. To ensure that Mr Barnes' services would not be made available to another UK broadcaster, Sky was content to pay a premium for the assurance of exclusive right, in full knowledge that Mr Barnes' availability on air could vary up to 25%, as reduced by the duration of 6-8 weeks the World Cup tournament.

72. The FTT appears to have considered that the fee payable by Sky did not resemble a "salary" in nature because the contract did not stipulate the minimum days of service; that it was relevant that Sky were prepared to pay a premium for the exclusive right to Mr Barnes' services, and that it was relevant that Sky were aware that Mr Barnes could appear on air for less than the maximum period under the contract.

73. Mr Stone said in his skeleton argument that "payment of a fixed fee in equal monthly instalments, paid irrespective of days worked…was consistent with employment status, and certainly not inconsistent with it". We agree. The fact that the payments received under the hypothetical contract effectively had some characteristics of a retainer was not, as matter of principle, indicative that the relationship was not one of employment. Nor was Sky's awareness that in practice Mr Barnes might not be called on to appear on air to the full extent of Sky's entitlement under the hypothetical contract. Those factors were in our view equally consistent with a contract for service and a contract for services.

Factors (4), (5) and (9)

74. At FTT[134(4), (5) and (9)], the FTT stated as follows:

> (4) The provisions for intellectual property rights under clause 10 would place no embargo on Mr Barnes' right to reproduce his opinions elsewhere that had been given during a live broadcast for Sky. The work pattern for the match on Saturday 10 November 2018…illustrates the intensity of preparation in the run-up to cover for a live match, and immediately after the match, Mr Barnes would be putting pen to paper to produce his Sunday Times column. In his journalistic output, Mr Barnes would most likely be reproducing aspects of his commentary given in the Sky broadcast on the same match. The phrasing and the emphasis might differ for the column, but it would be the same match from which Mr Barnes had gleaned insights as a live commentator while broadcasting for Sky, and he was not debarred by Sky in reusing any material so gleaned in other domains or avenues. One such avenue would be when Mr Barnes participated as an expert representative to select the 'Player of the Season' for the European Cup. The material that Mr Barnes had used to provide his services for Sky remained his intellectual property, essentially because he is the master and the creator of his opinions as a pundit.
>
> (5) Sky would not consider it to be a conflict of interest when Mr Barnes reproduced in newspapers material which had been gleaned in the course of providing his services to Sky. On the contrary, Sky would be attuned to the publicity benefits conferred on its broadcast when Mr Barnes' column on the match broadcast by Sky would cover the back page of the Sunday Times the next day. Mr Barnes' Times/Sunday Times columns would take some of Sky's games to the newspaper readers, and Sky in turn benefitted from the reputation of Mr Barnes as a renowned columnist on its roster of commentators.

> (9) To maintain his profile as a pundit, Mr Barnes' experience as a professional ex-player has stood him in good stead. It is in part his experience as a former player that he can profit from dedicating hours and days to watching replays of matches dimming out the sound, in order to find that unique angle for his commentary, to gain fresh insights so that his opinions do not become stale. There was no demarcation in the research, the thinking, the scripting he did for Sky broadcast and the newspaper columns, or indeed in any other ancillary engagements he undertook, (such as being an expert witness to the court on Farrell; or as representative to select the 'Player of the Season' for the European Cup). It was the one and the same enterprise of being 'Stuart Barnes, the voice of rugby'.

75. The FTT considered it relevant that Mr Barnes was free, and even encouraged by Sky, to exploit his work product for other businesses. The FTT also considered it relevant that there was no demarcation between the preparation and work which Mr Barnes did for Sky and that which he did for other businesses; it was all part of the same enterprise.

76. The terms in which the FTT expressed these factors, particularly Factor (9), suggest that the FTT may have fallen into the sort of error found by the Court of Appeal in *Atholl House* to have been committed by the Upper Tribunal in *Atholl House UT*, namely of approaching the Third RMC Stage by carrying out a comparison of the business carried on by the taxpayer outside the relevant hypothetical contract and that carried on under that contract. However, any such error would be a different error from that asserted by HMRC under this element of Ground 2, because HMRC's argument under Ground 2 is that the twelve factors identified were irrelevant, since as matter of principle they were not indicators pointing away from an employment relationship under the hypothetical contract.

77. We consider that Factors (4), (5) and (9) were, as a matter of principle, capable of being indicators that the relationship under the hypothetical contract was not one of employment. In principle, an ability on the part of the individual to create and immediately exploit intellectual property generated in providing the services under a hypothetical contract in business activities outside the hypothetical contract points towards a contract for services rather than a contract for service.

Factor (6)

78. FTT[134(6)] stated as follows:

> (6) Mr Barnes had much latitude in stating his availability to cover live matches for Sky. The conduct between the parties in drawing up booking schedules of Mr Barnes' time would appear to be by gentlemanly consensus, with Sky being reasonable in its requests, and Mr Barnes exercising his leeway of refusal pursuant to the express term under Key Terms (c1.1) on 'variations' agreed between the parties from time to time. There was the long-standing understanding between the parties that Mr Barnes would be unavailable to Sky during the Six Nations season, and the World Cup tournament, although he could be requested for interviews by Sky Sports News. What Sky lost in terms of Mr Barnes' availability was gained in return through the publicity of having one of its regular commentators as a columnist of these high-profile games, which in turn reflected well on Sky as the broadcaster with the exclusive right to Mr Barnes' services.

79. As explained above, it is in our view unclear whether non-written variations to the Contracts were permitted by the terms of clause 1.1 of the Key Terms, but we do not consider

that question is material to the findings of fact underpinning Factor (6). Since we have dismissed HMRC's appeal under Ground 1, it follows that the FTT's findings of fact in relation to Factor (6) stand.

80. Mr Stone argued that a co-operative relationship is not inconsistent with an employment relationship, and such a relationship has been found to exist in a number of IR35 decisions which have found that the relationship would have been one of employment.

81. We agree with Mr Stone that the mere existence of a co-operative working relationship does not of itself point away from employment. However, Factor (6) goes further than referring to co-operation, because it describes the working agreement with Sky as to Mr Barnes' availability to perform services under the hypothetical contract. In our view, this is a factor which is, as matter of principle, a pointer away from employment, in particular as it goes to the extent of control, which is a relevant circumstance at the Third RMC Stage.

Factor (7)

82. FTT[134(7)] stated as follows:

> (7) Depending on his availability, Mr Barnes would agree to be interviewed for Sky Sports News during pre-match on request, especially for matches not broadcast by Sky such as the Six Nations and the World Cup. The news interviewer of Mr Barnes might have been an employee for Sky, but it would be most unusual for an employer to interview its employee regularly on request (if Mr Barnes were Sky's employee). The context in which Mr Barnes became a regular candidate to be interviewed by Sky Sports News was his reputation as a rugby union expert, well-known and well-regarded outside Sky TV. It was Mr Barnes' personal reputation in this respect that Sky contracted with SLB to ensure it could have regular access and first call. The fact that Sky Sports News sought to interview Mr Barnes is a strong indicator that the contractual relationship in real terms was not that of a master-servant relationship in a contract of employment.

83. Mr Stone argued that the FTT's central premise, that it would be most unusual for an employer regularly to interview an employee, was perverse, and based on no specific or general evidence; it is no more or less likely that a person who is interviewed by a broadcaster which engages them for their expertise is engaged on an employed or self-employed basis.

84. We agree with Mr Stone. We are puzzled as to why the FTT considered that this was a "strong indicator" that the relationship was not one of employment. We do not consider that, as matter of principle, it pointed one way or the other.

Factor (8)

85. This factor was set out at FTT[134(8)]:

> (8) Outside his Sky commitments, Mr Barnes was in business on his own account. The 31 articles published during the 2015 World Cup illustrate the competitiveness of the field to maintain parity as a sought-after sport pundit. Other expert voices were called on to give coverage of the tournament, each jostling for a unique angle to sum up a match, for insightful comments on a player or a team that would prove to be prophetic.

86. Mr Stone challenged the basis for the FTT's finding that Mr Barnes was in business on his own account outside his contract with Sky, because, he said, the 31 articles were an insufficient evidential basis for that finding.

87. Properly understood, HMRC's challenge to Factor (8) is not that as matter of principle being in business on own account cannot be a factor pointing away from employment, but rather it is a disguised *Edwards v Bairstow* challenge to the rationality of the finding. It was a finding clearly made by the FTT, and repeated at FTT[136]. It was, in any event, not a finding based solely on the 31 articles (which the FTT described as illustrative of the competitiveness of the world of punditry) but on all the evidence and arguments referred to throughout the Decision.

88. This was clearly a relevant factor at the Third RMC Stage.

Factor (10)

89. This was set out at FTT[134(10)]:

> (10) The profit Mr Barnes can make from the sound management of his business is through the efficient use of his time, and he did so with his engagements with Sky – writing the Sky online column on a Monday, doing the Rugby Club mid-week, fitting his broadcasting engagements round his newspaper commitments.

90. Mr Stone argued as follows:

(1) Opportunity to profit in this context is relevant only insofar as it is an aspect of financial risk. The FTT made no finding of any financial risk.

(2) In *PD*, the FTT correctly found in relation to a pundit for Sky that the "potential to increase his income through the efficient use of time is neutral…As it is possible to be employed by one principal and self-employed for engagements with other principals, the ability to increase the amount of self-employed work does not cause the employed engagement to change its nature": [68(9)].

(3) Mr Barnes was paid a fixed amount per month by Sky under the hypothetical contract. He had no ability to increase his profit from an engagement with Sky by performing it more quickly, and he had no financial risk since his fee was fixed.

91. We agree with Mr Stone that Factor (10) was not, as matter of principle, a pointer away from employment under the hypothetical contract. The opportunity for Mr Barnes to profit from efficient use of time in his overall business sheds no light on the question at the Third RMC Stage, which is whether in all the circumstances the hypothetical contract would have been one of employment.

Factor (11)

92. At FTT[134(11)], the FTT said this:

> (11) In *Basic Broadcasting Ltd v HMRC* [2022] UKFTT 00048 (TC) ('*BBL*') in relation to the services provided by Adrian Chiles to ITV and the BBC, it is found that '[e]very time [Mr Chiles] presented a programme his reputation was at risk'. In common with this finding in BBL, there was a reputational risk for Mr Barnes every time he appeared on air for Sky, whether it was for

> a live commentary or for an interview by Sky Sports News. As stated in the questionnaire response, which I accept, 'any editorial issues that emanate from [Mr Barnes'] mouth are his own responsibility' (§47 (6)). The reputational risk is real, and requires vigilance to mitigate, and is part and parcel for being in business on his own account which is staked largely on Mr Barnes' profile as a world expert on rugby.

93. The decision in *BBL* has now been remitted to the FTT following an appeal to the Upper Tribunal (*HMRC v Basic Broadcasting Limited* [2024] UKUT 00165 (TCC)), but, in any event, the FTT in *BBL* went on to say, in the passage referred to at Factor (11), that "[H]owever, this is the sort of risk that applies to every presenter, whether they are employed on a fixed-term contract or as a self-employed contractor": [350].

94. In agreement with the FTT in *BBL*, we do not consider that the reputational risk faced by Mr Barnes which the FTT found to exist was an indicator, as a matter of principle, that he would not have been employed under the hypothetical contract.

Factor (12)

95. The final factor referred to by the FTT was at FTT[134(12)]:

> (12) Mr Barnes was not financially dependent on Sky during the relevant period, notwithstanding the fact that the income from Sky accounted for some 60% of his overall turnover. In absolute terms, his income from the Times/Sunday Times was by no means modest. His refusal to enter into a new contract with Sky after 2019 to cover 3 second division matches was another indicator that Mr Barnes was not financially dependent on Sky. There was no lack of contacts asking for Mr Barnes' services and he had no need for an agent. If Sky had not procured exclusive right for Mr Barnes' services as a broadcaster during the relevant period, through sound management of his time, Mr Barnes would most probably have found another outlet for his talent, owing to his personal reputation as a world-renowned expert on rugby. The reputation is personal to Mr Barnes, which was not, and is not, dependent on Sky.

96. Mr Stone described this as perverse finding, given that the Sky income was 60% of SLB's turnover. He also argued that, on the basis of *Atholl House*, this was not a permissible factor to be taken into account, because the precise percentage could not have had not been shown to be known to Sky at the time when the hypothetical contract began. Finally, he said that the reference to what happened in 2019 was again inadmissible as it related to a period after the hypothetical contract.

97. We do not agree that the FTT's finding was perverse, particularly given that in absolute terms the income from non-Sky sources exceeded £150,000 in each year in the relevant period: FTT[65]. It was within the range of reasonably available decisions, particularly since "financial dependency" is a somewhat elastic concept.

98. We accept that, following *Atholl House*, a fact must have been known or reasonably available to both parties in order to form part of the admissible factual matrix at the Third RMC Stage. However, in this case Sky will have been aware of Mr Barnes' most significant work commitments outside his Sky contracts, namely his regular columns for the Times and Sunday Times. It is clear that, as matter of principle, financial dependency is a relevant factor. In *Hall v Lorimer*, Nolan LJ stated that "the extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his talents may well be

significant": [1994] 1 WLR 209, at 218C. We consider that the FTT was entitled to take this into account as a relevant factor.

The twelve factors: conclusion

99. In conclusion, we consider that the FTT made no error of law in taking into account Factors (4), (5), (6), (8), (9) and (12), but that it did err in law, for the reasons set out above, in taking into account at the Third RMC Stage Factors (1), (2), (3), (7), (10) and (11).

100. In determining whether this means that we must set aside the FTT's decision on this issue, it is necessary to decide whether the errors of law were material. In this context, we agree with the Upper Tribunal in *Morrisons* (at [75)] that the relevant principles as to materiality are those set out in *Degorce v HMRC* [2017] EWCA Civ 1427 ("*Degorce*"). In that case, Henderson LJ said " I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision."[6] Applying that approach, we have concluded that it might have made a difference to the FTT's decision to allow the appeal if it had not taken into account Factors (1), (2), (3), (7), (10) and (11). Other than the statement in relation to Factor (7) that it was a "strong indicator" of non-employment status, we cannot determine the weight given by the FTT to the twelve factors, so we must conclude that the errors of law in relation to six of those factors might have made a difference to the FTT's decision.

101. We therefore set aside the FTT's decision. We discuss below the disposition of the appeal after we have discussed the second limb of Ground 2.

Failure to take factors into account?

102. HMRC also assert under Ground 2 that in reaching its decision on the Third RMC Stage, the FTT erred in law by failing to take into account a number of important factors which were consistent with employment under the hypothetical contract. In particular, say HMRC, the FTT failed properly to take into account the following factors which point towards employment:

(1) Sky's right of first call and right of exclusivity.

(2) The duration of the Contracts.

(3) The duration of Mr Barnes' total engagement with Sky.

(4) The degree of control.

(5) Financial risk.

103. Mr Collins argued that the FTT did not fail to take into account any of these matters. He points to the statement at FTT[135] (emphasis added to original):

> **Having regard to the cumulative totality of the provisions in the hypothetical contract in the context of the parties' conduct and intention**, I conclude that the relevant Contracts would not have been contracts of employment for the duration of the relevant period.

[6] *Degorce* at [95].

104. Mr Collins also relied on the FTT's self-direction at FTT[130] referring to the need to weigh all the terms and address all relevant factors. He argued that the fact that the FTT italicised certain provisions of the Contracts showed that it understood the importance of those provisions. He emphasised that the FTT need not deal with every argument or spell out its reasoning in great detail.

Approach to the Third RMC Stage

105. Mr Stone characterised this aspect of Ground 2 in the same manner as Ground 1, namely as being a challenge that the FTT had erred in law by failing to take into account relevant factors, and the error was material to its decision.

106. In a broader sense the challenge raises the wider issue of how the FTT could and should approach the Third RMC Stage. In the many decisions reached on IR35, a wide variety of approaches have been adopted by the FTT and Upper Tribunal. In some cases, the approach has been to identify and discuss those factors pointing towards employment, those factors pointing away from employment and those factors which might be described as neutral, and then to either carry out a balancing exercise, or, in some instances, simply to state a conclusion. In other cases, the approach has been more impressionistic, identifying the "bigger picture" leading to a conclusion as to employment status. In several cases, the discussion of the Third RMC Stage has focussed on whether the individual was in business on their own account, and the relationship between services provided inside and outside the hypothetical contract.

107. Without wishing to lay down a prescriptive template, it may be helpful, given the divergent approaches which have been taken, to offer some general guidance as to how the Third RMC Stage should be approached.

108. We consider that the following principles can be discerned from the authorities in approaching the assessment of the Third RMC Stage in an IR35 case:

(1) The question posed by section 49 ITEPA 2003 is whether "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". We are told that "the 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". The Third RMC Stage is therefore to be assessed by reference to the hypothetical contract and all the circumstances (save insofar as a circumstance is not part of the admissible factual matrix for any of the reasons set out in *Atholl House*) and not the contract between the service company and the client.

(2) The Third RMC Stage requires a consideration of which provisions of the hypothetical contract are consistent with it being a contract of service and which are consistent with it being a contract of services. The starting point for the Third RMC Stage analysis should be the material provisions of the hypothetical contract as found by the FTT.

(3) In terms of the structure of the analysis, while there is no template, an approach which involves identifying and dividing material provisions of the hypothetical contract and other circumstances between those which point towards (or are, in the *RMC* terminology, consistent with) employment, those which are not, and those which are neutral, may minimise any risk that the analysis proceeds from the wrong starting point or strays too far from the statutory question. The FTT should explain why, in light of all

the factors which it has so identified, it reaches the conclusion which it does on whether the relationship under the hypothetical contract would be one of employment.

(4) Where the Third RMC Stage analysis requires consideration of whether the individual is in business on their own account, it is helpful to keep in mind the principles which were recently summarised in *HMRC v Basic Broadcasting Limited* [2024] UKUT 00165 (TC), at [48]:

> …we consider that the following principles can be drawn from the case law:
>
> (1) Whether or not an individual is in business on their own account can be used in two contexts; in determining the status of the contract in question and in describing the individual's working practices outside that contract.
>
> (2) The relevance of the issue differs depending on which of these contexts applies.
>
> (3) As applied in determining the status of the contract in question, the formulation is one way of approaching the Third RMC Stage. It is not a different test to the Third RMC Stage, but simply one way of answering the question framed by MacKenna J.
>
> (4) In determining the status of the contract in question, asking whether or not the individual was acting in business on their own account under that contract may be a helpful way of answering the question, and may even be "very helpful indeed" (*Nethermere*). However, that approach "may be of little assistance in the case of one carrying on a profession or vocation" (Nolan LJ in the Court of Appeal in *Hall v Lorimer*). The extent to which the approach is a helpful way of answering the Third RMC Stage depends on all the facts.
>
> (5) The existence of a business on own account in the second context, namely the individual's working practices outside the contract in question, is a relevant factor in considering the employment status of the contract in question. It is "an important contextual circumstance", but is "no more than that": *Synaptek* at [20].
>
> (6) While it would be "myopic to ignore" the existence of a business on own account outside the contract in question, the weight to be attached to that factor is a matter for the FTT: *Atholl House CA* at [124].
>
> (7) The Third RMC Stage is not approached correctly by asking whether the activities under the contract in question are different in some relevant respect from activities performed by the individual outside the contract: *Atholl House CA.*

(5) While the presence of mutuality and control should have been discussed and decided by the point in the decision where the FTT considers the Third RMC Stage, that does not mean that they do not require any consideration at the Third RMC Stage. In *Atholl House*, rejecting HMRC's submission to the contrary, Sir David Richards said this, at [76]:

> Even on HMRC's argument, the court or tribunal is required to weigh any terms of the contract which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment. What is said is that no account should be taken of the strength or weakness of the finding of control. I am unable to accept this. In some cases, the control may be so pervasive as to make it very difficult, if not impossible, to conclude that it is not a contract of employment. In others, the decision on whether the right of control is sufficient may be

> borderline. I can think of no good reason why account should not be taken of these differences in what all agree is a multi-factorial process addressing all the relevant factors…

(6) In considering the Third RMC Stage, no single factor is decisive. It is not a mechanical exercise of running through items on a checklist, but rather is about painting a picture from an accumulation of detail and then standing back to make an informed qualitative assessment. No exhaustive list can be compiled of the factors which should be taken into account and it is not possible to lay down 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 relevant factors need to be taken into account: see *Market Investigations* at 184 and *Hall v Lorimer* at 216. A helpful summary of factors relevant to the Third RMC Stage which have been addressed in case law is set out by the FTT in *Atholl House Remitted* at [135(4)].

Discussion

109. In its decision refusing permission to appeal, the FTT did not address HMRC's argument that it had failed to take into account relevant factors consistent with employment.

110. There are a number of points which weigh against HMRC's case under the second limb of Ground 2. First, the FTT correctly directed itself as to the proper approach, including the need to take all relevant factors into account, so we should be slow to conclude that it has not followed that self-direction. Second, Mr Collins meticulously took us through the FTT's findings which preceded its discussion of the Third RMC Stage, and these included findings in relation to almost all of the issues identified by HMRC. Third, the FTT stated at FTT[135] that, in reaching its conclusion, it had had regard to " the cumulative totality of the provisions in the hypothetical contract in the context of the parties' conduct and intention".

111. However, we have, with regret, concluded that in this case the FTT did not properly follow its self-direction to "weigh any terms which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment" (FTT[130(1)]) and to keep in mind "the centrality of the contractual relationship in issue" with the focus remaining "anchored on the contract" (FTT[133]). As a result, it erred in law.

112. We have reached this conclusion for two reasons. First, the twelve factors which the FTT identified as "relevant" at FTT[134] mostly focus not on the terms of the hypothetical contract, but on the circumstances in which that contract operated in practice. That indicates a failure to keep the hypothetical contract at the centre of the enquiry. Second, more importantly, there is no indication or reasoning given by the FTT in its consideration of the Third RMC Stage to explain (1) what it considered to be the terms of the hypothetical contract which favoured a conclusion of employment or (2) why those terms were in its view outweighed by terms or circumstances to the contrary. In those circumstances, we do not consider that the FTT's reference to the cumulative totality of the provisions in the hypothetical contract in the context of the parties' conduct and intention was adequate to address this deficiency.

113. We cannot say with any confidence that the FTT's decision might not have been different but for this error, so it was in our opinion material. We therefore set aside the FTT's decision under this limb, as well as the first limb, of Ground 2.

DISPOSITION

114. Since we have set aside the FTT's decision, we must decide whether to remake it or remit it.

115. There is no challenge by HMRC to the FTT's findings of primary fact, and their only challenge relevant to the FTT's findings as to the terms of the hypothetical contract was pursuant to Ground 1, which we have dismissed. Therefore, we consider that we can and should remake the FTT's decision. We do so on the assumptions that the FTT's findings of fact, its findings as to the terms of the hypothetical contract and its conclusions regarding the mutuality and control tests, are undisturbed. It follows from our finding in relation to the first limb of Ground 2 that we also assume that of the twelve factors identified by the FTT at FTT[134], Factors (4), (5), (6), (8), (9) and (12), and only those factors, are in principle capable of pointing away from a relationship of employment under the hypothetical contract.

116. So, since mutuality and a sufficient framework of control are both present, the decision turns on the evaluation of the Third RMC Stage. We take into account the principles we have set out above regarding how that evaluation should be approached. We begin with the material terms of the hypothetical contract, as found by the FTT at FTT[111] and set out in the appendix to this decision.

117. We consider that the following terms of the hypothetical contract are the most significant terms which are more consistent with a relationship of employment:

(1) The FTT found that the hypothetical contract would be for a fixed term of 4 years, extendable by another 2 years, and subject to further renewal by mutual agreement. The duration of an engagement is clearly a relevant factor at the Third RMC Stage: see *Hall v Lorimer* at 218D. In *Kickabout*, addressing an argument that a two-year contract did not provide security, Sir David Richards said (at [94]) "in modern employment conditions, many employees would regard a two-year engagement, terminable during the term on not less than four months' notice, as providing significant security". The hypothetical contract was terminable by Sky with immediate effect at any time, but only if in Sky's "reasonable opinion" any of certain specific conditions in the contract applied.

(2) Mr Barnes was contractually obliged to perform the Services personally, and had no right to provide a substitute.

(3) Sky had a right of first call on Mr Barnes' Services for up to 228 days per annum, varied by the arrangements regarding availability: FTT[111(6)], discussed above under Ground 1. That was a significant proportion of each year.

(4) Sky had the exclusive right to Mr Barnes' services as a broadcaster within the UK. 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. Additionally, Mr Barnes would have to seek permission from Sky before engaging in any "new" commercial activities.

(5) The annual fee payable to Mr Barnes (between £235,000 and £265,000) was payable in monthly instalments. It was fixed in advance and not calibrated to the actual number of days Mr Barnes would be on air for Sky. When Mr Barnes was providing his services on a live sky event, Sky provided all necessary studio equipment and related

travel and accommodation bookings. Mr Barnes was therefore subject to very limited financial risk in the performance of the Services under the hypothetical contract.

118. We consider that the following terms of the hypothetical contract are the most significant terms which are more consistent with a relationship other than employment:

(1) The provisions in the hypothetical contract relating to intellectual property did not restrict Mr Barnes from exploiting and reusing his work product for Sky. In fact, he did this regularly, with Sky's knowledge and acquiescence, in his newspaper columns. The material which Mr Barnes had used to provide his services for Sky remained his intellectual property. There was no real demarcation between his Sky work and his newspaper columns. We consider this position to be more indicative of a contract for services than employment.

(2) The variation found by the FTT to arise in the hypothetical contract in respect of Sky's right of first call under the Contracts was that Mr Barnes had "much latitude" in stating his availability to cover live matches for Sky, and there was an understanding between the parties that Mr Barnes would be unavailable for match commentaries during various tournaments. This feature was in our opinion more consistent with a contract for services.

119. We consider that the other provisions of the hypothetical contract are broadly neutral, or not material, in terms of the status of the relationship under that contract.

120. HMRC argued that the extent of Sky's control over Mr Barnes under the hypothetical contract was a material indicator of employment status. The FTT found that a sufficient framework of control existed, which is the correct test for the control limb of *RMC*, but on balance we are not persuaded that the extent of the control was a material indicator of employment. The type and nature of control over Mr Barnes was indeed broad, but in our opinion Sky's rights in this respect were rights which it would have sought to impose on someone in the position of, and with the role of, Mr Barnes whether he was an employee or a contractor.

121. In terms of the circumstances relevant to the hypothetical contracts, we consider that the following were of relevance:

(1) Mr Barnes was found by the FTT to be in business on his own account outside his Sky commitments. He was his own brand, "the voice of rugby". While the precise parameters of that business, in particular the tax status of his non-Sky engagements, were not the subject of detailed findings, that was a relevant background factor at the Third RMC Stage.

(2) Mr Barnes worked for Sky for over 20 years up to the periods under appeal. In *Kickabout*, the Court of Appeal said (at [94]) that the length of the relationship before the relevant contracts began was a factor which the tribunal was entitled to take into account. Such a long relationship is more consistent with a relationship of employment.

(3) In terms of financial dependency on Sky, the Sky income averaged about 60% over the relevant period. As well as constituting around 40% of total income, the non-Sky income was substantial in its own right. The FTT found that Mr Barnes was not "financially dependent" on Sky, but as we have said that status is to a degree in the eye of the beholder. Each party claimed to find support in these figures for their respective

positions. In our opinion, this factor, while clearly relevant, was not a strong indicator of employment status one way or another.

122. Drawing together these issues, and standing back to look at the picture created, we have concluded that the relationship under the hypothetical contract would have been one of employment.

123. The long duration of the contract, the absence of a right of substitution, the right of first call for 228 days a year (as varied), the rights of exclusivity, the absence of financial risk and the overall length of the relationship with Sky are factors which in our opinion collectively outweigh the right of Mr Barnes to exploit his work product, his agreement regarding availability and the fact that he was in business on his own account outside his relationship with Sky. The evaluation of all relevant admissible factors required at the Third RMC Stage leads us to conclude that the relationship would have been one of employment.

124. Finally, we asked the parties at the hearing for further written submissions, which were duly provided, on the question of whether, were we to set aside and remake the decision, we should take into account the fact that there was an express provision in the Contracts stating that (broadly) the intention of the parties was that Mr Barnes would not be an employee of Sky. The FTT did not in fact make any express finding as to whether a similar provision would have been included in the hypothetical contract, although it stated at FTT[135] that it had given no weight at the Third RMC Stage to the inclusion of such a provision in the Contracts. It is well established that such a provision is only likely to be relevant (and even then given limited weight) in a borderline case: *Dragonfly Consultancy Ltd v HMRC* [2008] EWHC 2113 at [54]-[55]. We have not found this to be a borderline case, so we have reached our decision without reference to such a clause, were it to have been present in the hypothetical contract.

125. HMRC's appeal under Ground 2 is allowed, and we set aside the FTT's decision and remake it to dismiss SLB's appeal.

JUDGE THOMAS SCOTT
JUDGE MARK BALDWIN

Release date:

APPENDIX: TERMS OF THE HYPOTHETICAL CONTRACT

(1) The contract would be for a fixed term of 4 years, extendable by another 2 years to coincide with the expiry of Sky's rights to broadcast the European International Championship, and subject to further renewal by mutual agreement.

(2) Mr Barnes would be contractually obliged to personally perform the 'Services' as the named Personnel under the Key Terms.

(3) Mr Barnes had no right to provide a substitute when he was unable to provide the required services personally. Sky would choose and arrange for any substitute and would pay the substitute directly.

(4) The Services to be provided by Mr Barnes would comprise:

> (a) Principally, 'punditry service' as a co-commentator and expert analyst in rugby union sport events being broadcast by Sky Sports; as the 'second voice' along with the lead commentator;
>
> (b) For live sport events, Mr Barnes' attendance pre-match for rehearsal, and during the match would be mandatory, (but not post-match);
>
> (c) For all preparatory work, Mr Barnes would carry out the research and script drafting in his own time to ensure that he would provide an engaging commentary on the day on certain themes as agreed with the executive producer prior to a match;
>
> (d) In addition to punditry service, Mr Barnes would provide such other services as approved by the Head of Rugby Union, such as the weekly Monday Column for Sky Magazine online, and the mid-week programme 'The Rugby Club';
>
> (e) Interview requests from Sky Sports News (and to a lesser extent Sky News) on high-profile games, including but not restricted to those broadcast by Sky (such as the European International Championship), and games not broadcast by Sky (such as the World Cup and the Six Nations) for which Mr Barnes would be present from the press box throughout the games, and for any short-notice responses to news-worthy items in the world of rugby which Sky Sports News decided to cover.
>
> (f) Ad hoc requests for special programmes as planned by Sky Sports, or Sky Sports News, such as the 'Sky Sports News HQ review of the year'.
>
> (g) Ad hoc requests for any promotional or publicity events (such as the pre-Guinness Pro 12 PR event with press and radio).

(5) Sky 'shall have first call' on Mr Barnes' Services up to 228 days per annum, which would be inclusive of days being on air of around 90 to 120 days per annum.

(6) The exercise of the 'first call' right by Sky would be subject to Mr Barnes' availability in conjunction with his standing commitments to the newspaper columns, and in co-ordination with Mr Barnes' coverage of high-profile matches of which Sky had no broadcasting rights, (such as the coverage of the Six-Nations, British & Irish Lions, and World Cup matches would take priority over Sky's fixtures).

(7) Such variations to the provision on 'first call' were expressly provided by clause 1.1 under the Key Terms in the First Contract: 'The Services will be provided on the terms set out in this Agreement subject to any variations agreed by the Parties in writing and to any Associated Company as may be agreed between the parties from time to time.'

(8) Sky would have exclusive right of Mr Barnes' services as a broadcaster within the UK. Mr Barnes would not be permitted to render his services to another broadcaster, or radio, and/or all media organisations without the prior written consent of the Head of Sky Sports. Such consent would not be unreasonably withheld, such as consent for Mr Barnes to broadcast during the World Cup season for a broadcaster outside the UK. In the event of any breach of Sky's exclusive right to Mr Barnes' services in this respect, Sky would be entitled to injunctive relief.

(9) Sky would have the right to allocate Mr Barnes from the roster of commentators to cover a specific game to be broadcast by Sky Sports. To that extent, Sky had control over the location, the date, and which match Mr Barnes would cover, subject to any reasonable alternatives being suggested by Mr Barnes, whether it be location (such as not covering matches in Scotland in two consecutive weekends) or the interest of the match (such as switching to cover La Rochelle v Harlequins on Mr Barnes' suggestion).

(10) The contract would be terminable pursuant to clause 5, which would give Sky the right to terminate the contract 'with immediate effect at any time' if in Sky's 'reasonable opinion' any of the stipulated conditions had obtained.

(11) Sky would pay Mr Barnes the annual fee of £235,000 in 2013-14 with an increment of £10,000 per annum to £265,000 in 2016-17 as stated in the Key Terms, and thereafter the annual fee would remain at £265,000 for the two years to 31 May 2019. The fee would be payable in equal monthly instalments in arrears upon the rendering of an invoice by Mr Barnes.

(12) The annual fee payable by Sky would be fixed in advance, and would not be calibrated to the actual number of days Mr Barnes would be on air for Sky.

(13) In relation to programme content, Sky would expect Mr Barnes to adhere to the running order of the live match, and to work to the direction and instructions of the executive producer, whether it be for Sky Sports, Sky News, or for Sky Sports News. The content of the pre-match broadcast, and of the live commentary would be Mr Barnes' sole responsibility, subject to prior clearance with the executive producer in relation to the themes to be covered.

(14) As with the commentary for live matches, the content of any interviews given to Sky News, and Sky Sports News, or in relation to the Monday Column, and the Rugby Club, would be content solely created by Mr Barnes.

(15) Mr Barnes would be subject to restrictions in relation to the handling of confidential information (clause 6) and non-solicitation (clause 7) and restrictions as to the provision of his Services outwith Sky as set out under the 'non-compete' undertakings at paragraph 4.2 of the NDA Schedule.

(16) Mr Barnes would carry out his research, write his own script, and adhere to the Ofcom Guidelines in relation to the Services he would perform in presenting a Sky programme. In other aspects of the delivery of his Services, Mr Barnes was expected to work under the direction of Sky's production manager in charge of the programme. Sky would have full editorial control over any programme and Mr Barnes would have to follow the reasonable requests of the executive producer, such as who to interview.

(17) Sky would provide all necessary studio equipment during the live streaming of a sport event in which Mr Barnes provided his Services, including microphone and earpieces, and the necessary travel and accommodation bookings to enable location performance of the Services to take place. Sky would reimburse any reasonable expenses claimed by Mr Barnes, upon submission of receipts and if approved by Sky.

(18) Mr Barnes would agree to assign to Sky all rights (intellectual property, copyright, etc) to enable Sky to have the exclusive rights in the commercial exploitation of his output emanating from presenting for Sky Sports.

(19) Mr Barnes would have to seek permission from Sky before engaging in any new commercial activities. He would agree not to exploit his image rights in any manner, or to undertake any assignments from other broadcasters, or media outlets, that would cause a breach of the 'non-compete' restrictions pursuant to the Non-Disclosure Agreement.

(20) Pursuant to clause 3.4, the Fixed Fee per annum would be agreed on the basis as to include a sum to satisfy Mr Barnes' 'paid holiday entitlement' under the Working time Regulations 1998. Mr Barnes would have no contractual rights (over and above those rights granted by statute), to be paid for absences caused by sickness.