Neutral Citation Number: [2016] EWHC 844 (Admin)

Case No: CO/2725/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Judgment handed down at
Leeds Combined Court Centre
The Courthouse, 1 Oxford Row,
Leeds, West Yorkshire LS1 3BG

Date: 18/04/2016

Before:

MR JUSTICE KERR

- -

Between :

R (on the application of HUDSON CONTRACT SERVICES LTD)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS	**Defendant**
- and –	
THE CONSTRUCTION INDUSTRY TRAINING BOARD	**Interested Party**

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Jonathan Peacock QC and Michael Fordham QC (instructed by **Norton Rose Fulbright**) for the **Claimant**

Sam Grodzinski QC and Brendan McGurk (instructed by the **Govrnment Legal Department**) for the **Defendant** and (instructed by **Fieldfisher LLP**) for the **Interested Party**

Hearing dates: 1-2 March 2016
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APPROVED JUDGMENT

Mr Justice Kerr:

1. The claimant ("Hudson") contends that certain delegated legislation requiring it to pay a statutory levy is unlawful and should be quashed. The defendant ("the Secretary of State") and the interested party ("the Board" or "the CITB") beg to differ. At first permission was refused on the papers, by Holroyde J on 5 August 2015. He regarded all four grounds as unarguable. Then Kenneth Parker J, after an oral hearing, granted permission to move, on grounds 1-3 but not ground 4. That was on 8 October 2015.

2. Hudson is a provider of services to employers in the construction and engineering construction industries. Those services relate to the self-employed part of the workforce. Hudson receives a fixed fee from its employer clients in return for contracting with, and providing payroll services for, self-employed construction workers. Hudson takes the risk of them being considered employees, with attendant rights. It does not supply labour to its clients, as a conventional agency would, and does not retain a pool of workers.

3. The Secretary of State made the Industrial Training Levy (Construction Industry Training Board) Order 2015 ("the 2015 Order") on 10 March 2015. It entered into force the next day. It is the latest in a long series of levy orders going back to the 1960s, providing for levy payments to be made to the Board, which is the statutory body responsible for training the workforce in the construction industry. Under the 2015 Order, Hudson has to pay, or may have to pay, levy. It did not have to under previous levy orders. Hudson complains that the 2015 Order is *ultra vires*, unfair and unlawful because it violates classic public law principles.

4. Specifically, Hudson seeks to quash, or have declared invalid, article 7(2) which (read with article 7(3) and (4)), sets the formula for calculating the amount of levy due in the third of three "levy periods"; that period being 1 January to 31 March 2017. Hudson estimates that if the levy in respect of that period ("the levy", as I shall refer to it) stands, and if Hudson has to pay it, its gross profit will be reduced from about £8.8 million to zero in the relevant financial year; and it says it will be unable, for commercial reasons, to pass on the cost by charging its clients more.

5. In the first three grounds of challenge, Hudson contends that the levy is unlawful because it is *ultra vires* the enabling statute in three particular ways, applying familiar public law principles of fairness, consistency of treatment, the *Padfield* requirement to make decisions (including by delegated legislation) within the purposes set by the four corners of the enabling legislation, and rationality. The fourth ground, for which permission was refused, was a freestanding irrationality challenge founded on alleged disproportionate impact of the levy on Hudson.

6. The legislative history is turgid but unavoidable; I will omit as much of the detail as I can. It starts with the Industrial Training Act 1964 ("the 1964 Act"), which conferred power to create industrial training boards by order. The power was to be exercised "for the purpose of making better provision for the training of persons over compulsory school age … for employment in any activities of industry or commerce" (section 1(1)).

7. A board was to provide training courses for those employed in the industries concerned (section 2(1)), including courses for industries other than its own (section 2(3)). There was no mention of training the self-employed. A board was required to impose levies on employers in the industry "for the purpose of raising money towards meeting its expenses" (section 4(1)), in accordance with orders made by the Minister, whose power was exercisable by statutory instrument (sections 4 and 7). No particular formula was prescribed; the formula was left to the boards and the Minister. Exemptions were permitted (section 4(1)).

8. The first levy order I am concerned with was made in 1965: the Industrial Training Levy (Construction Board) Order 1965, approving proposals submitted by the CITB ("the 1965 Order"). It did not include reference to a self-employed part of the workforce. There was a small employer exemption. The levy was fixed by reference to each construction industry "establishment" (as defined) at 0.5 per cent of the "emoluments of the persons employed in that establishment" (article 4(2)). Emoluments were "emoluments assessable to income tax under Schedule E .... ."

9. In 1967, the levy was extended to cover self-employed arrangements: see the Industrial Training Levy (Construction Board) Order 1967 ("the 1967 Order"). The levy was one per cent of "emoluments" (defined as before) for employed workers and one per cent of "sums paid or deemed … to have been paid by the employer … to any person (not being an employer in the construction industry) under an agreement for the performance of labour …" (article 4(2)(a) and (b) respectively).

10. So, in the case of the self-employed, a payment by an employer only attracted a levy (of one per cent) if the recipient was a self-employed worker and not another employer. If an employer paid another employer for a job done by the second employer's self-employed workers paid by the second employer, the first employer did not pay levy but the second employer did.

11. An agreement for the performance of labour was defined, not very succinctly, as:

> … any arrangement, not being a contract of service or of apprenticeship, made between an employer and any other person or persons whereby the services (including any incidental use of tools) of such person or persons, or of any person or persons in his or their employment, are rendered to the first mentioned employer in his trade or business.

12. A further order in 1970, the Industrial Training Levy (Construction Board) Order 1970 ("the 1970 Order"), changed the system to one of per capita payments. Employed workers were placed in categories and levy was raised at a fixed rate for each category of worker at a particular establishment. The range was from £8 to £41 for employed workers, and £25 for a person "employed under an agreement for the performance of labour", the definition of which remained (materially) the same.

13. The small employer exemption was defined by reference to "emoluments", defined as before (article 4(2)), in the case of employees, and by reference to sums paid under an agreement for the performance of labour in the case of the self-employed. Again, no levy was payable if the recipient of a payment was an employer and not an employee or self-employed worker (article 3).

14. The Employment and Training Act 1973 ("the 1973 Act"), made amendments to the 1964 Act. The definitions of "employee" and "employment" were changed so as to embrace the self-employed as well as the employed workforce. The former were included within the term "employee", which was defined in section 1(2) so as to include a person "engaged under a contract for services"; and "employment" included "employment under … a contract for services or otherwise than under a contract".

15. The power to impose a levy was now to be exercised for "the purpose of encouraging adequate training in the industry" (section 6(1) and (2) of the 1973 Act, read with Schedule 2, modifying section 4(1) of the 1964 Act). The "industry" was "the activities in relation to which it [the relevant industrial training board] exercises functions".

16. For the first time, a qualified cap on the total amount of levy to be raised was included (section 4(2A)(d) of the 1964 Act, as modified). The cap could not be exceeded unless the Minister considered that was appropriate in the circumstances. The cap was set at (disregarding exemptions) one per cent of the estimated "aggregate of the emoluments and payments intended to be disbursed as emoluments which are paid and payable, by that employer to or in respect of persons employed in the industry" during the relevant levy period.

17. In 1974 another levy order (the Industrial Training Levy (Construction Board) Order 1974 ("the 1974 Order")) was made, under the amended 1964 Act. The per capita system was continued, but this time levy was charged on an "averaged per capita" basis, by reference to the average number of workers of each type at a particular construction establishment. Levy was payable in respect of a payment to a self-employed person - but again, not in respect of a payment to an employer of such a person - employed under a "labour-only agreement".

18. That was defined in terms similar to the definition of an "agreement for the performance of labour" in the 1967 Order. The definition in the 1974 Order (paragraph 1(h) of the Schedule) was:

> … any arrangement, not being a contract of service or of apprenticeship, made between an employer and any other person or persons whereby the services (including any incidental use of tools) of such person or persons, or of any other person or persons were rendered to the employer in his trade or business.

19. There was a small employer exemption for employers whose aggregate annual "emoluments" paid to its employed workforce fell below a certain threshold. Emoluments were again defined by reference to payments assessable to income tax under Schedule E.

20. The following year saw another levy order enacted (the Industrial Training Levy (Construction Board) Order 1975 ("the 1975 Order")). It retained the same definition of a "labour-only agreement". This time, an absolute cap was set (by paragraph 4 of the Schedule) in respect of each establishment: one per cent of the aggregate of "emoluments and payments intended to be disbursed as emoluments which have been paid or are payable by the employer to or in respect of persons employed in the industry" at or from that establishment, during the relevant levy period.

21. Subject to that limit, the levy was calculated (paragraph 3 of the Schedule) by means of a formula that could be described by an equation in the form (A + B) less (C + D); where:

- A was again an "averaged per capita" but this time applied to employed workers only;
- B was one per cent of the payments made under labour-only agreements to self-employed workers during the relevant levy period;
- C was a corresponding one per cent of payments *received* by an employer from another employer under a labour-only agreement in respect of work done under a labour-only agreement at or from an establishment; and
- D was a fixed sum of £20.

22. The small employer exemption in article 5 was again defined by reference to "emoluments", defined in the same way as in the 1974 Order. For some reason, the drafter omitted to apply the same definition of "emoluments" for the purpose of calculating the limit set by paragraph 4 of the Schedule. I suspect this was an oversight. Neither party regarded it as material, and nor do I.

23. Moving forward seven years, the Employment and Training Act 1981 ("the 1981 Act") wrought further amendments to the 1964 Act. Section 2 of the 1981 Act changed section 4(1) of the 1964 Act by redefining the purpose for which industrial training boards were to raise levy payments. Instead of the purpose being "encouraging adequate training in the industry", it was henceforth more mundanely (as it had previously been) "raising money towards meeting its [the board's] expenses".

24. There was a new provision (section 4A(1A) of the 1964 Act) inserted into it governing potential exemptions. No exemption proposals were required if potentially exempt employers would not have to pay more than 0.2 per cent of "emoluments and payments intended to be disbursed as emoluments which are paid and payable by him to or in respect of persons employed in the industry" in respect of the relevant levy period.

25. There was also a qualified cap, inserted as a new section 7(1BBB) of the 1964 Act: exempt employers would not have to pay a non-exempt levy of more than 0.2 per cent of "relevant emoluments", unless that was considered necessary to encourage adequate training in the industry. The phrase "relevant emoluments", though appearing in the legislation for the first time, was defined using already familiar language in a new section 4(2B) of the 1964 Act, using exactly the same language as in the new section 4(1A) quoted above.

26. Section 4(1) of the 1981 Act created a new blanket exemption from levy in respect of any establishment situated wholly or mainly in an area designated (under other legislation) as an enterprise zone. A separate exemption was created by section 4(2) from any levy imposed by reference to emoluments paid or payable to an employee whose employment is carried on at or from such an establishment.

27. I was shown (without objection) an extract from Hansard which appeared to show that the purpose of the second exemption, which at first sight appears unnecessary, was to ensure that levy was not charged retrospectively in respect of employees who had moved out of the enterprise zone by the time levy was charged but had been working inside it during the period to which the levy related.

28. The following year, Parliament decided to consolidate the law relating to industrial training boards, and did so in the Industrial Training Act 1982, which repealed the 1964 Act and, as amended by the Employment Act 1989 and the Further Education and Training Act 2007, remains in force. I shall refer to the Industrial Training Act 1982, as amended by those two subsequent statutes, as "the 1982 Act".

29. The basic building blocks of the 1982 Act were very like those in the 1964 Act. The definitions of "employee" and "employment" were not materially different, and continued to include the self-employed. The definition of "the industry" in relation to a particular industrial training board was also

unchanged. The functions of the boards were updated in section 5 but not fundamentally altered. A new power to provide overseas training was added by section 10.

30. The levy mechanism in section 11 was a modernised but not fundamentally altered version of that found in the 1964 Act. By section 11(2) the levy is raised by means of a levy order, which "shall give effect to levy proposals under subsection (1) above and shall provide for the levy to be imposed on employers in the industry, except in so far as they are exempted from it". A small employer exemption was mandatory: see section 11(3). It is unnecessary to recite section 11 in full detail. Two further points are sufficient.

31. First, various provisions in section 11 make reference to "relevant emoluments" as a reference point for setting the parameters of the levy, in particular in respect of the "base period" (section 11(2E)); the setting of exemptions (section 11(5) and (6G)); and the qualified cap (section 11(7)). "[T]he relevant emoluments" are defined in section 11(8), in (materially) the same manner as previously.

32. Secondly, subject to immaterial exceptions, the Secretary of State may not make a levy order unless satisfied that the board proposing it has taken "reasonable steps to ascertain the views of persons who the Secretary of State considers are likely to be liable to make payments by way of levy …" (section 11(6)(a)(i)); and that "a class of persons" comprising (in the Secretary of State's view) a majority of those likely levy payers who are likely to pay more than half the total amount levied "considers that the proposals are necessary to encourage adequate training in the industry" (section 11(6)(a)(ii), read with section 11(6A)).

33. Regulations may define what constitutes "reasonable steps" to ascertain views for this purpose: section 11(6B)-(6D). I was not taken to the applicable regulations, since neither party took any point arising under them. It is common ground that what amounts to the statutory consultation exercise was properly carried out in this case, and that no *vires* point arises from any defect in that exercise nor any insufficiency of industry support for what became the 2015 Order now under challenge.

34. I was referred to two subsections within section 12: subsection (1B), which requires levy proposals to include proposals for securing that no liability to pay levy more than once in respect of the same levy period is imposed. This is clearly aimed at preventing overlapping levy base periods, which could lead to levy being imposed more than once for the same work, under two different levy orders. Secondly, I was referred to section 12(6), which deals with parliamentary approval of a levy order. In the present case, the affirmative resolution procedure applies to the 2015 Order.

35. Section 13 deals with proposals for exemptions. Again, the scope of the potential small employer exemption is delineated by the "relevant emoluments" (as defined in section 11(8)) paid out by that employer in the

relevant period. Section 16 re-enacts, in similar terms to section 4(1) of the 1981 Act, the exemption for employers' establishments located in enterprise zones, and for emoluments paid or payable to an employee whose employment is carried on at or from an establishment in an enterprise zone.

36. Next, I must refer to the Industrial Training Levy (Construction Board) Order 1982 ("the 1982 Order"). It retained the definition of a labour-only agreement. Subject to exemptions, the amount of levy payable in respect of a particular construction establishment was (under paragraph 3 of the Schedule) the aggregate of the amount by which 2 per cent of labour-only payments exceeded 2 per cent of labour only receipts. Labour-only payments were payments made under labour-only agreements during the relevant 12 month period. Labour-only receipts were receipts received under labour-only agreements during the same 12 month period.

37. To that figure, there had to be added the "occupational levy": an averaged per capita amount calculated by multiplying the average number of employees of a particular category employed at the establishment during the 12 month period by the per capita amount fixed for that type of employee, less the amount (if any) by which 2 per cent of labour-only receipts exceeded 2 per cent of labour-only payments, but subject to a cap set at one per cent of "the aggregate of the emoluments and payments intended to be disbursed as emoluments which have been paid or are payable by the employer to or in respect of persons employed in the industry" during the relevant 12 month period.

38. Moving forward nine more years, the Industrial Training Levy (Construction Board) Order 1991 ("the 1991 Order") changed the formula. No longer was levy set by reference to an averaged per capita formula. This time, the levy was an amount per construction establishment, subject to exemptions, set by paragraph 3 of the Schedule as "the aggregate of the amount (if any) by which 2 per cent of the labour-only payments exceeds 2 per cent of labour-only receipts and an amount equal to 0.25 per cent of the aggregate of the emoluments".

39. Labour-only payments and receipts were defined by reference to a "labour-only agreement", which was defined in terms similar to the previous definitions. Emoluments were defined in paragraph 1 as "all emoluments assessable to income tax under Schedule E … (other than pensions), being emoluments from which tax under that Schedule is deductible, whether or not tax in fact falls to be deducted from any particular payment thereof".

40. Ten years on, the Industrial Training Levy (Construction Board) Order 2001 ("the 2001 Order") imposed levy in a different way again. Subject to exemptions, article 4 of the 2001 Order set the levy per establishment as an amount (if any) determined by the equation A + B – C, where:

- A was 0.5 per cent of the aggregate of the "emoluments and payments intended to be disbursed as emoluments which have been

paid or are payable to or in respect of persons employed by the employer in respect of the base period";

- B was 1.5 per cent of payments, other than payments not made in respect of the provision of services, made to any persons during the base period under labour-only agreements in respect of work carried out at or from the establishment; and

- C was 1.5 per cent of payments received by an employer during the base period, other than payments not received in respect of the provision of services, from any other employer under labour-only agreements in respect of work carried out at or from the establishment.

41. Thus, so far as the self-employed workforce was concerned, an employer was able to offset against levy on sums paid out by that employer to its self-employed workforce under labour-only agreements (the definition of which remained materially the same), the notional levy on sums received from a second employer under such an agreement, where those sums were received in respect of the services of the first employer's self-employed labour at the establishment concerned.

42. Moving on another eight years, the Industrial Training Levy (Construction Industry Training Board) Order 2009 ("the 2009 Order"), set the levy using the same equation A + B – C, and the percentages were the same as in the 2001 Order. The small employer exemption was defined by article 10 by reference to payments not exceeding a certain threshold (£80,000 during the relevant base period).

43. The payments were defined as the "emoluments" paid during the relevant base period in the case of the employed workforce and, in the case of the self-employed, "sums (if any) paid in the relevant base period by the employer to any person under labour-only agreements in respect of work carried out at or from those [construction] establishments". Emoluments were defined in article 2 as salaries, wages and fees, and any gratuity or other profit or incidental benefit of any kind, in money or money's worth, other than pension contributions, and anything else that constitutes, or is intended to constitute, earnings of the relevant employment.

44. Another three years later, the Industrial Training Levy (Construction Industry Training Board) Order 2012 ("the 2012 Order") changed the basis of the small employer exemption (by introducing a new 50 per cent reduction for employers in certain cases) again by reference to "emoluments" and in the case of the self-employed, sums paid under labour-only agreements.

45. Emoluments were defined in the same way as in the 2009 Order, but the definition of a "labour-only agreement" was updated to include an exclusion where "substantial use of plant or specialist equipment or both" was required. The new definition was:

> … any agreement or arrangement (other than a contract of service, a contract of apprenticeship or a contract which requires substantial use of plant or specialist equipment or both) between an employer and any other person, the purpose of which is wholly or mainly the provision of services (not including professional services) of such a person or any other person to the employer.

46. The next levy order was made in 2015, and is the subject of the present claim. A "levy working party" established by the Board was already in existence. It considered various options for how best to raise the levy. Consultations within the industry took place in 2013 and 2014, in the run up to the 2015 Order. It is not disputed that the consultation exercise took place in accordance with the requirements of the Industrial Training Levy (Reasonable Steps) Regulations 2008. There was an "impact assessment" from the Board, dated 12 January 2015 and signed off on 19 January 2015.

47. There was a vast amount of written evidence before me relating to the consultation process and the rationale underpinning the enactment of the 2015 Order, in the witness statements of Mr Ian Anfield, Hudson's managing director, and of Mr Colin Chapman, the Board's Levy Development Manager, and the voluminous exhibits to those witness statements. Mr Anfield in his witness statement engaged in a detailed critique of the levy as embodied in the 2015 Order, and its impact on the industry and on Hudson in particular. Mr Chapman defended the rationale and effect of the 2015 Order, also in detail.

48. Mr Chapman's evidence was that the historic "offset" mechanism, which prevented levy being raised twice on the same work, no longer commanded majority support within the construction industry because it was difficult to separate out the labour element of payments to subcontractors from other elements comprised within those payments; and because the majority view was that "those who both received and made payments under labour-only agreements unfairly escaped making an important contribution to levy and the wider industry".

49. Mr Peacock QC, for Hudson, characterised that evidence as "weasel words", but Hudson does not challenge the legality of the consultation exercise nor the level of industry support for the 2015 Order. Much of the evidence I have just mentioned would have been relevant to a freestanding irrationality challenge, permission for which was refused. It is unnecessary to set out the detail because there is no surviving irrationality challenge and no attack on the legality of the consultation exercise.

50. Hudson does not dispute that the consultation requirements in the 1982 Act were met, and that the levy embodied in the 2015 Order had the requisite degree of industry support. I accept that, broadly, the 2015 Order was enacted for the purpose of giving effect to the wish to simplify levy collection while raising adequate funds to train the workforce and secure an adequate supply of skilled labour. There was no specific agenda to increase

the amount of levy collected, only to change the way in which it was collected which, inevitably, must create winners and losers.

51. The essence of the radical change embodied in the 2015 Order was described thus in the Board's January 2015 impact assessment document (at paragraph 1.6):

> The preferred solution, referred to as Net CIS, [is] that Levy is no longer generated on payments employers make to labour-only sub-contractors … , but instead on the labour element of payments made to sub-contractors taxed (Net paid) by way of … HMRC Construction Industry Scheme (CIS).

52. The main question in this challenge is whether that selected method of raising the levy complied with the requirement to stay faithful to the purpose of the empowering statute, the 1982 Act, and the obligation to exercise lawfully the legislative power it conferred on the Secretary of State. That brings us, finally, to the 2015 Order itself. It was made by the Secretary of State under sections 11(2), 12(3) and 12(4) of the 1982 Act. Its preamble comprised unusually long recitals.

53. These recitals state that the 2015 Order is made to give effect to levy proposals submitted by the Board; that the Secretary of State is satisfied that the proposals are necessary to encourage adequate training in the industry; that the Secretary of State estimates that the amount of levy exceeds one per cent of employers' relevant emoluments; that he considers that the amount of levy is appropriate; that he has consulted the Scottish Ministers; and that a draft of the Order has been approved by both Houses.

54. The 2015 Order retained the terminology of "emoluments" and a "labour-only agreement". The definitions of these terms were unchanged. Levy remained payable on a per establishment basis. The establishment had to be a "construction establishment", defined in article 2(1) and 5(2) as "any particular establishment of the employer engaged wholly or mainly in the construction industry during the necessary period".

55. The "construction industry" was defined in article 2(1) (so far as material) as "the activities of the construction industry as defined by Schedule 1 to the Industrial Training (Construction Board) Order 1964 … ." I shall return to this definition later. For present purposes what matters is that levy was payable in respect of payments made to the workforce at a particular establishment only if its main activity during the relevant base period was "construction industry" activity.

56. The 2015 Order covers three different "levy periods" (article 3). Employers are liable to pay an amount by way of levy in respect of each period if they are employers in the construction industry (as defined) during that period. Liability crystallises when an assessment notice is served. The first period ran from 11-31 March 2015. The second ran from 1 January 2016 to 31 March 2016. The third levy period (the only one that is controversial in this

case) will run from 1 January 2017 to 31 March 2017. It is in relation to that three month period that Hudson may have to pay levy for the first time.

57. The levy payable in respect of those three periods is assessed by reference to workforce payments made during the "base period" corresponding to each of the three levy periods. The base period for the first levy period ran from 6 April 2013 to 5 April 2014. For the second levy period, the base period was 6 April 2014 to 5 April 2015. For the third, controversial, levy period, the base period started on 6 April 2015 and ended recently, on 5 April 2016.

58. For the first and second levy periods, the amount of levy payable (article 7) was and is calculated by reference to the same "A + B – C" formula as used in previous levy orders, and as already explained earlier in this judgment. For the third levy period, the 2015 Order marked a radical departure in the method of assessing and calculating the amount of levy due and the category of persons or bodies from whom, or from which, it was due.

59. Article 7(2), (3) and (4) of the 2015 Order, provide as follows:

> (2) In respect of the third levy period, the amount of the levy to be assessed in respect of each construction establishment is—
>
> A + B
>
> where
>
> A is an amount equal to 0.5% of all emoluments which have been paid or are payable by the employer to or in respect of persons employed by the employer at or from the establishment in the relevant base period; and
>
> B is an amount equal to 1.25% of the relevant part of all contract payments made by the employer at or from the establishment in the relevant base period.
>
> (3) "Contract payment" has the meaning given to it by section 60 of the Finance Act 2004.
>
> (4) The relevant part of a contract payment is the part of the contract payment in respect of which the relevant percentage is applied for the purpose of section 61 of the Finance Act 2004.

60. Sections 60 and 61 of the Finance Act 2004 ("the 2004 Act") form part of the raft of provisions in Chapter 3, establishing the Construction Industry Scheme ("CIS"). The CIS is a scheme designed to promote and ensure compliance with obligations to pay income tax within the construction industry which, it is perceived, has had a poor tax compliance record in the past.

61. Under the CIS, where a subcontractor is "net paid", employers deduct 20 per cent of the payment to the subcontractor and hold it on account of the subcontractor's tax liability. Subcontractors are not subject to such deductions if they are "gross paid", i.e. registered as such with HMRC under provisions in the CIS (which are found in the 2004 Act, sections 63-67, and

Schedule 11). Deductions under the CIS do not include payments in respect of the direct cost of materials or plant and equipment hire.

62. A contractor seeking gross paid status must satisfy various tests, including relating to turnover and tax compliance history. Thus, small sole traders and partnerships tend to be net paid. These are likely to include labour-only subcontractors. There is a disagreement between the parties in this case about whether small subcontractors often provide more than just their labour, i.e. whether they also frequently hire out plant and equipment as part of their services. The Secretary of State and the Board say that is not common. Hudson says it is.

63. By section 60(1) of the 2004 Act, a "contract payment" is a payment made under a construction contract (as defined) to a subcontractor or a nominee of a subcontractor. Unless the contractor is registered for gross payment (see section 60(4)), it must deduct from a contract payment the "relevant percentage" (see section 61(1) of the 2004 Act) and hold it on account of the subcontractor's tax liability to HMRC. The relevant percentage is such as the Treasury may determine by order (section 61(2)), currently 20 per cent for those who register for gross payment, and 30 per cent for those who do not apply or are not accepted.

64. In response to the 2015 Order, Hudson became registered for gross payments in May 2015. It did so reluctantly, not content with the method of raising levy during the third levy period (January to March 2017, corresponding to a base period of 6 April 2015 to 5 April 2016), but no longer wishing to be "net paid", which would require "contract payments" made to it by persons making payments to it to be made subject to deductions under the CIS.

65. Hudson objects that the 2015 Order uses a new, unlawful method of charging; first, because it allows levy to be raised from two different employers in respect of the same work; secondly, because it allows levy to be raised by reference to costs other than the cost of labour; and thirdly, because it allows levy to be charged for work on which a different levy is also chargeable to a different employer by a different levy board, the Engineering Construction Industry Training Board ("the ECITB").

66. On behalf of Hudson, I was referred to a large number of authorities (to which it is unnecessary to refer in detail) supporting the now unremarkable proposition that a legislator, when making delegated legislation, must do so within the framework of the statute conferring the legislative power, must not do so for an ulterior purpose contrary to or subversive of that framework, must observe minimum standards of fairness, both substantive and procedural, and must not abuse the power being exercised.

67. A power to legislate oppressively is unlikely, though not impossible. As Lord Steyn observed in the very different context of tariffs for prisoners serving life sentences:

> Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. …. It is true that the principle of legality only has prima facie force (*R. v. Secretary of State for the Home Department ex p. Pierson* [1998] AC 539, 591E-F).

The House held that the Secretary of State did not have the power to increase a prisoner's tariff after it had lawfully been fixed.

68. There was a disagreement between the parties on whether the 2015 Order was a measure that imposed what might be called "double taxation". In its strongest sense, this denotes taxing the same person twice in respect of the same subject matter. It is more accurate here to speak of "double recovery", which denotes taxing different persons in respect of the same subject matter. I was referred to the speeches of Lords Hoffmann and Millett, who with Lord Scott formed the majority, in *R (Edison First Power Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 4 All ER 209.

69. Lord Hoffmann said, at paragraphs 25-28:

> 25. My Lords, the presumption against double taxation is one facet of a wider common sense principle of the construction of statutes by which courts will often imply qualifications into the literal meaning of wide and general words in order to prevent them from having some unreasonable consequence which it is considered that Parliament could not have intended: see *Stradling v Morgan* (1560) 1 Pl 199 and, for a more recent example, *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299 . The strength of the presumption depends upon the degree to which the consequences are unreasonable, the general scheme of the legislation and the background against which it was enacted.
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> 26. The specific presumption against double taxation was considered by the House of Lords in *Regina v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* [1990] 1 WLR 1400 . That case also concerned a power in general terms to make regulations; in that case, for the taxation of building society interest. The Society complained that the effect of the regulations was to make it subject to tax in respect of payments of interest which had already been taxed in a previous year and that the statute should not be construed as permitting such double taxation. But the House of Lords held that the background to the enactment of the statute made it clear that this was exactly what Parliament had in mind. Lord Oliver of Aylmerton said (at pp. 1412–13):
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> > "The suggested inhibition against such cumulative taxation lies not in the words which Parliament has chosen to use but in certain well-established presumptions or principles — a presumption against double taxation, a presumption that income tax, being an annual tax, is payable only on income of a particular year and so on. But these are only presumptions. They are clearly rebuttable if sufficiently clear express words are used. But they can also be rebutted, as it seems to me, by circumstances surrounding the enactment of the particular legislation which lead to an inevitable inference that Parliament intended, in using the words that it did, that these presumptions or principles should not apply."

> 27. In the present case, there was a division of opinion in the Court of Appeal about whether it really was an example of double taxation....
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> 28. I do not think that it advances the argument to debate whether this is really a case of double taxation or not. The question is whether the Act authorised what actually happened, whatever you choose to call it. ….

70. Lord Hoffmann went on to examine the statutory scheme and concluded that the relevant order made under it was not *ultra vires*. Lord Millett, in similar vein, said at paragraphs 114-116:

> 114. My Lords, I have no doubt, and the Secretary concedes, that Dyson LJ's analysis of the effect of the legislation is correct, and that the question has to be addressed as a matter of substance and not as a matter of form. I also have no doubt that it is generally regarded as oppressive for the same person to be taxed twice over in respect of the same matter: *IRC v Clifforia Investments Ltd* [1963] 1 WLR 396; *IRC v FS Securities Ltd* [1964] 1 WLR 742 at p 751. The present, however, is not such a case.
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> 115. There is not, in my opinion, necessarily the same objection to double recovery where two different persons are taxed in respect of the same matter. In *Furniss v Dawson* [1984] AC 474 at p 525 Lord Brightman observed that there was an element of double taxation whenever a shareholder sells at a profit his shares in a company that has itself realised a capital asset at a profit, but that he did not see any undesirable element of double taxation in such cases.
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> 116. This shows that the presumption against double taxation is not a strong presumption which gives effect to a high constitutional norm, like the presumptions against the abrogation of the privilege against self-incrimination or legal professional privilege. It is rather a species of a wider genus, viz. the presumption that Parliament intends to act reasonably: see *IRC v Hinchy* [1961] AC 748 at p 767 per Lord Reid. The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.
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> 117. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it: see (in a contractual context) *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 at p 251 per Lord Reid. I do not, therefore, find it profitable to discuss whether the effect of the ESI Order amounts to "double taxation" or "double assessment" (whether straightforward or not) or the rather less objectionable "double recovery". I would prefer to go straight to the real question: whether the scheme established by the ESI Order is so oppressive, objectionable or unfair that it could only be authorised by Parliament by express words or necessary implication.

71. So I ask myself whether, in the words of Lord Millett, the method of raising levy during the third levy period is "so oppressive, objectionable or unfair that it could only be authorised by Parliament by express words or necessary

implication", and if so whether such express words or necessary implication can be found in the statutory provisions. Hudson says that the parts of the 2015 Order under challenge fail these tests in three specific respects corresponding to the three grounds of challenge.

72. As a prelude, Hudson submitted that the specific legislative history in this case shows the following consistent pattern:

(1) that the fundamental purpose of the levy is, and has always been, to raise the funds necessary to ensure adequate training of workers in the construction industry, and not any wider purpose;

(2) that the levy has always been recognised in the various orders, and in the documents preceding the 2015 Order, as a levy on the cost of labour (employed or self-employed) only, i.e. on "emoluments";

(3) that levy is raised, to avoid "double counting", only on the "last link in the chain"; thus an employer can offset receipts against payments, so that only the employer who actually pays for the labour is charged;

(4) that levy is akin to a payroll tax raised once only, and not more than once, in respect of a particular piece of work done, whether by an employee or self-employed; this again avoids double counting.

73. The Secretary of State and the Board contend that there is nothing unlawful about the novel charging methods in the 2015 Order; that the discretion to set the basis of the levy is wide and cannot be narrowed as Hudson contends; that the enactment of the 2015 Order was approved by both Houses following a lawful statutory consultation exercise; that the new methods of raising levy command widespread industry support; and that the 2015 Order and its purposes fall squarely within the four corners of the 1982 Act and are in no way an abuse of the powers it confers.

74. The Secretary of State and the Board submitted that the court would have to be satisfied that something had gone "radically wrong" before intervening in a challenge to a "polycentric" decision concerning the allocation of resources and burdens as between participants in a particular activity, in an area in which the court possesses no particular expertise (cf the observations of Laws LJ in *R (London Criminal Courts Solicitors Association) v. Lord Chancellor* [2015] EWHC 295 (Admin), DC, at paragraphs 30-32), especially where the measure under challenge has been preceded by lawful consultation and approved by both Houses (*Bank Mellat v. HM Treasury* [2014] AC 700, per Lord Sumption at paragraphs 43-45).

75. More specifically, the Secretary of State and the Board submitted, through Mr Grodzinski QC, that *R (Buildstone Ltd) v. Secretary of State for Education and Employment* (transcript, 30 November 2000, Sir Richard Tucker) is authority for the broad approach he advocates. The judge rejected the submission that the 1982 Act did not allow the Secretary of

State to impose a levy setting a differential between direct and self-employed trasdesmen carrying out the same work.

76. At paragraph 22, the judge cited from Lord Scarman's speech in *Nottinghamshire CC v. Secretary of State for the Environment* [1986] AC 240, at 247, where he emphasised the reluctance of courts to strike down guidance on public expenditure limits and the incidence of the tax burden, unless it were clearly established that the Secretary of State had abused his power. Indeed, Lord Scarman refused to examine the detail of the guidance at issue, on the ground that it was not shown that the Secretary of State had acted in bad faith or for an ulterior purpose, or that "his guidance were so absurd that he must have taken leave of his senses".

77. At paragraphs 24 and 25 in *Buildstone*, Sir Richard Tucker accepted the submission that the statutory scheme in the 1982 Act confers a very broad discretion on the Secretary of State to consider what criteria to adopt when enacting a levy order, provided that the criteria adopted were not irrational. He said at paragraph 25: "I agree with Mr Pannick's submission that there is nothing in the [1982] Act to limit the wide discretion which is in my view given to the Secretary of State by the provisions of section 11".

78. At paragraph 29, he said that he took into account the intense consultation undertaken before each levy order; and at paragraph 30, he made the point that the levy order before him had been approved by both Houses and, referring to what Lord Scarman had said in the *Nottinghamshire* case: "it is a basic principle of public law that, where Parliament has conferred a broad discretion subject to Parliamentary approval, the courts are most reluctant to intervene where such approval has been given".

79. As to the legislative history here, the Secretary of State and the Board made the following main points:

(1) the purpose of the levy was expressly changed by the 1981 Act from "encouraging adequate training in the industry" to "raising money towards meeting its [a board's] expenses" (as set out earlier in this judgment);

(2) it is not correct that levy was always raised by reference to the direct cost of labour, as in the case of a payroll tax; from 1970 until 1990, the levy was raised, in varying ways, by reference to a per capita charge per worker;

(3) the legislative history discloses no required or consistently used formula for raising the levy; the history shows that different methods were favoured over different periods during that history, with no uniform pattern and no requirement for there to be one;

(4) the raising of levy by reference to "emoluments" did not mean that levy could only be raised on emoluments; at various times, it could

also be raised on "sums intended to be disbursed as emoluments", which could include sums paid to third parties in respect of labour;

(5) while previous levy orders incorporated a set-off provision which meant that only the last employer in the "chain" of payments was required to pay levy, that was not a consequence of any mandatory provision in the primary legislation; there was none.

80. In the light of that history, Mr Grodzinski submitted that one must look to the statute itself to discern such limits as there are to the powers of the Secretary of State when making levy orders; it is not for the court to read in other, more extensive limitations on the exercise of the power; and that identifying common features found in previous levy orders does not demonstrate that they were compulsory and that the Secretary of State is bound by them and powerless to change his approach in the 2015 Order and depart from previous practice.

81. On the latter point, a difference between the parties emerged at the hearing before me, on whether the so-called "principle of settled construction" had anything of significance to contribute to the competing arguments in this case.

82. Hudson sought to rely in its skeleton argument on the judgment of Lord Phillips PSC (paragraphs 58-61) in *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] 1 WLR 1546 and that of Carnwath LJ in *Isle of Anglesey County Council v Welsh Ministers* [2010] QB 163 (at paragraph 43) for the proposition that the 2015 Order "amounts to a fundamental new departure and offends the settled interpretation of the enabling legislation and all previous Orders".

83. The Secretary of State and the Board submitted that the subsequent discussion in the judgment of Lord Carnwath JSC (as he had by then become) in *R (N) v. Lewisham LBC* [2015] AC 1259, SC, demonstrated that the principle of settled construction, if it exists at all, does not assist Hudson here. Mr Grodzinski pointed to the difficulties with the proposition that legislation can acquire a particular meaning by custom and practice even where (as is not the case here), the provisions in question have been the subject of past authoritative interpretation.

84. Lord Carnwath JSC discussed (at paragraphs 81-86) his reason for rejecting Bennion's concept of "tacit legislation" and discussed the extent to which past practice and interpretation can be used as an aid to statutory construction; see paragraphs 89-98 of his judgment. At paragraph 95 he concluded:

> … settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts. This

> should not necessarily depend on the degree or frequency of Parliamentary interventions in the field. As in the *Anglesey* case, the infrequency of Parliamentary intervention in an esoteric area of the law may itself be an added reason for respecting the settled practice. On the other hand it may be relevant to consider whether the accepted interpretation is consistent with the grain of the legislation as it has evolved, and subsequent legislative action or inaction may be relevant to that assessment.

85. Lord Hodge JSC concurred (see paragraph 53), while Lord Neuberger PSC and Lady Hale DPSC dissented on the substantive issue in the appeals (concerning the interpretation of certain housing legislation), and expressed doubts (at paragraphs 148 and 168 respectively) about any "customary meaning" rule, on constitutional propriety grounds.

86. Against the background of those wide-ranging submissions on the correct approach, I now turn to the specific grounds of challenge. The first is that Hudson says it was unlawful to raise levy, in the third levy period, from more than one employer in respect of the same work. According to Hudson, this breaches the well-known public principles summarised above and leads to the conclusion that the provisions in the 2015 Order at article 7(2) which (read with article 7(3) and (4)) are *ultra vires* and should be quashed.

87. Mr Peacock submitted that it was improper and unlawful to make use of the CIS in this way. It meant that if during the third base period, a wall is built by a single bricklayer, the building of that wall can attract liability for two, three, five or more separate levy payments from different employers, each of which is liable separately for the whole of, and not merely a proportionate share of, the amount due. According to Mr Anfield's estimates, and the statistics provided in the Board's impact assessment, this would happen in some 10 per cent of cases where levy is due, and would affect about 55,000 contractors who between them would be liable for levy payments of about £70 million in a single year.

88. Conversely, Mr Peacock pointed out, a bricklayer building the same wall may generate no levy payment at all if all those in the chain of payments happen to be gross paid employers, from whose payments no tax is deducted before the payment is made. Hudson's estimate, through the evidence of Mr Anfield, is that this would lead to about £136 million of levy in a single year not becoming due, that would become due if levy were straightforwardly raised once for each job from the employer who pays for that job, as in the past.

89. In another example, Mr Peacock illustrated his submission with what he said was a further anomaly: if two bricklayers each build an identical wall, for different employers, the building of the first wall could generate two, three or more separate levy payments, while the building of the second wall could generate no levy payment at all. Mr Peacock said that too helps to show the method of levying is wrong, unfair and unlawful.

90. The vice at the heart of the challenged levy provisions, according to Hudson, is that while the levy is supposed to be collected for the purpose of

funding training in the industry, it is being raised by reference to a random factor – whether a particular employer happens to be gross paid or net paid – which has nothing to do with the nature of the levy nor the training which it is supposed to fund. The result is that it produces a random outcome determined by the tax status of the employer in question, which is irrelevant to its particular training needs or the extent to which it ought to contribute to industry training generally.

91. Hudson invites me to reject the Secretary of State's argument that the purpose of the levy is explicitly stated as the funding of the Board's expenses, and therefore need not be directly tied to specific construction industry jobs. Mr Peacock submits that this overlooks the obvious point that the raison d'être of the Board is to provide and fund adequate training courses for the construction industry workforce, and that this is why past levy orders have always enacted that levy should be raised from one employer for each job done.

92. Hudson also points out that the CIS operates as a fair and equitable tax collection policy because it includes "trueing up" at the end of each financial year; that is, the process of reconciling the amount of tax paid with that payable, by reference to year end accounts. By contrast, no such reconciliation forms part of the levying exercise based on the relevant percentage deducted from "contract payments" in the case of net paid contractors.

93. The amount of levy payable therefore makes no allowance, unlike the tax regime, for the incidence of deductible expenses at the financial year end. The levy simply lies where it falls irrespective of the profit earned or loss incurred by the contractor as determined in its year end accounts. It follows that, unlike the CIS from whose provisions the levy is fashioned, it does not prevent arbitrary disparate impact as between contractors, as well as failing to prevent double counting. This is especially unfair, says Hudson, given that section 12(1B) of the 1982 Act prevents "double counting" from arising through the use of overlapping levy periods.

94. The Secretary of State and the Board, through Mr Grodzinski, submit that nothing in the statutory scheme or the 2015 Order prevents the imposition of more than one levy on more than one employer in respect of the same work. They point out that the levy does not, during the third levy period, require payment of levy more than once by the same employer in respect of the same work. Where more than one employer is liable in respect of the same work, each employer is among the beneficiaries of better training of the industry workforce which the levy helps to achieve.

95. Thus, section 11(2) of the 1982 Act states that the levy is to be "imposed on employers in the industry, except in so far as they are exempted from it". The constraints on the exercise of the power to do that, for which Hudson contends, are simply not there, according to the Secretary of State and the Board. The express prohibition in section 12(1B) against the use of overlapping levy periods is aimed at preventing *the same* employer from

being levied twice for the same work. It does not justify reading into the Act an extended prohibition against levying more than one *different* employer for the same work.

96. Mr Grodzinski submitted that the justification for levying more than one contractor in a chain of payments is sufficiently established, at a general level, by the simple proposition that the levy is being raised for the purpose of funding the Board's expenses. How the Secretary of State chooses to raise the levy is a matter for him and the method cannot be impugned unless, which is not the case, a specific ground of invalidity can be made out.

97. Use of the CIS as the vehicle for raising levy, Mr Grodzinski said, is a permissible solution to the practical difficulties encountered by levy paying contractors in calculating levy, under the old system, by reference to labour-only agreements with an offsetting mechanism where there is a chain of payments. These were discussed extensively during the consultations leading up to the 2015 Order and there is clear evidence of industry support for the new system and the view that the old system unfairly favoured those in the middle of the chain of payments.

98. That made it impossible to argue that the new method of raising levy was so unreasonable or absurd that it could not be taken to have been authorised by the enabling statute; cf. the view of the majority of the House of Lords in the *First Edison* case. The case was, in a sense, one of double taxation – or, as Lord Millett pointed out, more accurately double recovery - because rates were payable twice by two different parties in respect of the same hereditament; but that did not mean the order so providing was invalid.

99. It was therefore, said Mr Grodzinski, not fatal to the levy that the system for collecting it allowed for more than one levy payment for the same work, and did not allow for "trueing up", as the CIS does when used for tax collecting. The CIS was merely the vehicle for collection. The recovery of more than one levy for the same work and the absence of trueing up at the financial year end were a fair price to pay for the virtue of simplicity which the new system delivers, with the backing of the industry.

100. In answer to a subsidiary argument of Hudson that levy would be charged arbitrarily on either 20 or 30 per cent of deductions from contract payments, according to whether a contractor had registered (or applied to be registered) for gross payment, Mr Grodzinski pointed to evidence that the Board intended to adjust its computer system so as to charge on the basis of the 20 per cent rate only, in all cases. Hudson pointed out that this would be more generous to those who deducted at 30 per cent than the 2015 Order provides. I do not think this subsidiary issue assists either side's case.

101. I come to my reasoning and conclusions on the first ground. The starting point must be the general scheme of the legislation and the background against which it was enacted. It seems to me, first, that I cannot ignore the expressed statutory purpose which is simply to fund the Board's expenses,

not specifically the funding of training courses. It is true that the Board exists principally to provide training courses, but it also has administrative expenses and is empowered to provide courses overseas and to workers in other industries. There is no reason for ignoring the cost of these.

102. Next, I think it is too rigid to characterise the levy as necessarily akin to a payroll tax that must be linked to emoluments. It is common to enact legislation providing for a tax or levy on income or other specifically identified money or money's worth, such as a capital gain or the value of a property. Why did not Parliament do so in the 1964 Act and subsequently the 1982 Act, if that is what it meant to do? The answer must be that it was left to the Board to propose and the Minister to adopt proposals which were not limited to raising a levy necessarily tied to payments and receipts for labour provided.

103. Indeed, the levy was for long periods raised by reference to a per capita sum per worker (or average number of workers) at each relevant establishment, regardless of how much the worker was paid in the relevant levy period. It is true, as Mr Peacock pointed out, that the amount of the per capita based levy was highest for categories of work requiring the highest levels of skill and therefore requiring the most training, and lowest for the least skilled jobs. But that was, I infer, the product of consultation, negotiation and the legislative choice of the Minister. It was not a result compelled by express provisions in the 1964 and 1982 Acts.

104. I therefore reject the suggestion that there is any customary meaning or uniform pattern which has (in Mr Grodzinski's vivid phrase) "baked into" the legislation the unstated requirements advocated by Hudson: that the levy must be charged by reference to emoluments and must operate in the same way as, or in a similar way to, a conventional payroll tax. That disposes of Hudson's reliance on the principle of settled construction derived from Lord Carnwath's analysis in *R (N) v. Lewisham LBC*, discussed above. There is no express restriction to the effect contended for, and I see no obvious reason to imply one.

105. It is also relevant to the assessment of the legislation that the novel system governing the third levy period represents a "polycentric" decision in an area in which the court has no special expertise, which has the support of the industry and has been approved by both Houses of Parliament. These factors would not save it if it were plainly *ultra vires*, but they do make the court more cautious than it would otherwise be about reaching that conclusion.

106. Next, does this reading of the empowering legislation produce a result which is oppressive and unfair, to levy payers generally or to Hudson in particular? I find myself unpersuaded that it does. It is not suggested by Hudson that the new system for raising levy during the third levy period under the 2015 Order is intended to increase the amount of levy raised overall. Rather, it is intended to raise approximately the same amount of levy as in previous levy years, but by a different method. The novel method

must produce losers as well as winners, but being one of the losers does not establish unfairness or oppression; just as it was not unfair on other contractors that they previously had to pay levy while Hudson did not.

107. I do not see why the industry should not be entitled to have a system it supports, which changes the incidence of levy without increasing significantly the burden the industry must collectively bear. I accept that there is an element of rough justice in the use of the CIS deduction system without allowing the equitable adjustments that would flow if "trueing up" were allowed, and without gross paid contractors being levied. But I must set against that the evidence of properly undertaken consultation, widespread industry support, parliamentary approval and the lightening of the industry's administrative burdens through simplification of the calculation and payment system.

108. I also accept that, as a general proposition, Hudson benefits from having a stable and well trained workforce. It does not itself retain the services or employ a constant pool of labour but its business is assisted by the availability of a competent available workforce selected by others, without which it could not trade as effectively as it does. It has in the past received that benefit without paying any levy for the privilege of receiving it. There is nothing intrinsically unfair about Hudson now being asked to give something back to the industry in return for continuing to receive the benefit.

109. Hudson complains that it if it is liable to pay levy, it cannot pass on to its customers the cost of that liability, because the contracts made in respect of work done in the third base period (which has only just ended) were based on the old system and the terms cannot now be reopened. This does not of itself make the levy unfair to Hudson, or anyone else.

110. Hudson also complains that its commercial market will not bear future recoupment of its new levy liability through increased charges. The court is not able to judge whether that is too pessimistic a prognosis. It is commonplace for businesses to adjust their commercial practices to take account of new liabilities such as, for example, an increase in corporation tax or business rates. The evidence of increased commercial burden does not by itself come near establishing the unfairness and oppression contended for.

111. I consider next the arguments about double taxation or, more accurately here, double recovery. There is no double taxation in the extreme sense, i.e. where a person is taxed twice in respect of the same subject matter. There is an element of double or multiple recovery in that levy payments must be made in a significant number of cases by more than one person in respect of the same subject matter. But no one has to pay the levy twice over for the same work.

112. Overlaps between tax liabilities are not unknown in other fields, as Lord Brightman pointed out in *Furniss v Dawson* [1984] AC 474 at p 525. He

gave the example of a shareholder who sells at a profit his shares in a company that has itself realised a capital asset at a profit. Similarly, a purchaser of goods or services which are subject to VAT commonly has to pay for the goods or services, including the VAT element, out of net income that has already been taxed. You could argue that this is a form of double taxation. Yet it is not commonly suggested that it is oppressive or unfair. It is the orthodox position across the EU.

113. In this case, a consideration of the way in which levy is raised, in the context of the statutory scheme as a whole and the consequences of the measure for individual levy payers such as Hudson, does not lead me to a different conclusion from that reached by the majority in the *First Edison* case. Any presumption against the double recovery element of the novel regime is weak and easily rebutted by the factors I have already mentioned: statutory consultation, fulfilment of the statutory industry support requirements, parliamentary approval and alleviated administrative burdens.

114. The consequences of the new form of levy are not so unreasonable as to persuade the court that Parliament must have intended to exclude it from the range of legislative choices open to the Secretary of State. I therefore find against Hudson on the first ground.

115. The second ground is that the levy is *ultra vires* the 1982 Act because it is calculated by reference to CIS returns and therefore can, and often does, include amounts paid not for labour but for plant and materials which fall outside the definition of "the relevant emoluments" in the section 11(8) of the 1982 Act. That definition is: "in relation to any person …. the aggregate of the emoluments and payments intended to be disbursed as emoluments which are paid and payable by him to or in respect of persons employed in the industry ... ."

116. Hudson argues that section 11 implicitly restricts what levy payments can be based on, and requires them to be based on emoluments, as defined. That means, according to Hudson, that levy cannot be raised on amounts paid out by contractors that are not within the definition of "relevant emoluments". Hudson submits that this can be seen from the structure of the provisions and in particular section 11(7)(a), which, Hudson says, is not just there to cap the overall levy for a particular base period at one per cent of relevant emoluments paid out in that year, but also to state what the source of the levy must be.

117. Hudson's argument is founded on the premise that, as put in its skeleton argument, the levy "is for work done, and it is clearly intended to be based on payments made for work done". In oral submissions, the example was given of a job involving the erection of scaffolding. A scaffolding contractor is engaged to do the job. It charges £100 for the labour of erecting the scaffolding, £500 for the hire of the scaffolding over a certain period and a further £100 for the labour of dismantling the scaffolding at the end of the hire period.

118. Hudson submitted that, with reference to that example, it is unlawful to raise levy on the hire element of £500; it is only lawful to raise levy on the labour element of £200. The £500 hire charges are not "relevant emoluments", for they are neither emoluments nor sums intended to be disbursed as emoluments. They are hire charges, and as such attract a tax liability under the CIS which the contractor charging for the hire must pay; but they are not "relevant emoluments".

119. The same reasoning would apply if, say, a contractor charged fees for the use of crushing machinery in a demolition job, or special drilling equipment. The fees for use of that equipment represent a return on a capital investment, not payment for labour. The hiring out of equipment has no link to the training needs of the industry, and cannot, submitted Hudson, provide a basis for the levy.

120. Hudson pointed to the absence of any historic references in the legislation to the use of plant and machinery, with the solitary exception of the phrase "services (including any incidental use of tools) of such a person", in the definition in the 1967 and 1974 Orders of an agreement for the performance of labour, designed to deal with the bricklayer who brings his trowel to the job without charging anything for the use of it.

121. Reliance was also placed on section 16 of the 1982 Act, which (re-enacting a provision in the 1981 Act in similar terms) created an exemption for employers' establishments located in enterprise zones, and for emoluments paid or payable to an employee whose employment is carried on at or from an establishment in an enterprise zone. The submission was, again, that the reference to emoluments demonstrated the legislative intention that levy should be raised by reference to payments for labour and for nothing else.

122. There was considerable discussion about the purpose and meaning of the broader expression "sums intended to be disbursed as emoluments". Hudson's case was that it denoted payments made not directly to the person who carries out labour but to a third party, such as an employment agency or a gangmaster, for onward transmission to the person who actually does the labour. The phrase was therefore in keeping with the statutory scheme restricting levy to payments for work done and nothing else.

123. Even if that was wrong, Hudson submitted that sums paid for scaffolding hire or the use of drilling equipment were plainly not sums "intended to be disbursed as emoluments". The evidence showed, according to Hudson's witness Mr Anfield, that it pays approximately £1 billion in a normal year, of which about 29 per cent is paid to contractors working in sectors where large items of specialist equipment are owned and hired out by net paid contractors in addition to supplying the labour of those who operate them or provide other forms of labour.

124. Finally, Hudson emphasised that it did not regard the concept of emoluments as confined to payments made to employees, as distinct from self-employed workers. There was no reason to conclude that the definition

of emoluments was confined to the former and not the latter. The definition in section 11(8) of the 1982 Act was wide enough to encompass payments made to either species of worker, or intended to be disbursed as such.

125. The Secretary of State and the Board countered these arguments with the proposition that there is no mandatory link between how the levy is raised and how it is spent, and no warrant for the proposition that it must be raised on sums paid for labour and nothing else. In the example (mentioned above) of the contractor who charges for scaffolding hire as well as the labour of erecting and dismantling it, the levy referable to the hire charge is as much capable of meeting the Board's expenses (the statutory purpose of the levy) as that referable to the labour charge.

126. Mr Grodzinski said that section 11 of the 1982 Act was a detailed code and there was nothing in that code which required levy to be calculated only by reference to "emoluments" (or sums intended to be disbursed as such). Section 11(7) operated to impose a qualified cap on the amount of the levy and had nothing to say about the way in which it must be raised. The equivalent of what became section 11(7) and (8) had not featured in the earlier legislation until the 1964 Act was amended in 1973.

127. This told against Hudson's reliance on some sort of overarching principle that levy could only be raised from emoluments. Section 16 of the 1982 Act, Mr Grodzinski submitted, did not assist Hudson either; it was a specific provision dealing with incentives intended to promote industrial activity in enterprise zones and, again, did not support Hudson's prescriptive approach which was absent from any express provision in the legislation.

128. In addition, he said, it is common ground that "emoluments" (or sums intended to be disbursed as such) are broad enough to encompass payments made in respect of self-employed as well as employed labour. The meaning of "relevant emoluments" must therefore be wide enough to cover more than just direct payments for labour, even in the context of direct employment. It followed that no assistance could be derived from the necessarily narrower concept of emoluments as used in income tax legislation; in that different regime, emoluments are not used as the basis for taxing the self-employed.

129. Hudson's arguments, said Mr Grodzinski, were also inconsistent with use of a per capita (or averaged per capita) headcount of different categories of worker as the basis for raising levy during the two decades from 1970 to 1990. The levy would have been *ultra vires* during that period if Hudson were correct, since it was not calculated by reference to the amount actually paid to each such worker.

130. Having carefully considered these rival contentions, I find myself unable to read into the statutory scheme the unstated restriction on how levy may be raised, for which Hudson contends. The general discussion about the nature and purpose of the levy (under ground 1, above) is material to the more specific arguments advanced under ground 2. As I have already accepted,

the statutory scheme does not prescribe any particular method of raising levy. I do not find persuasive the arguments supporting the proposition that levy may only be raised by reference to payments made directly for labour.

131. Both parties accept that the concept of "relevant emoluments" in the statutory scheme is one that must be wide enough to cover payments made, in some cases, in respect of the provision of services under self-employment arrangements, and not just direct payments to employees. I therefore do not find the legislation and case law in the different context of income tax to be of any assistance. In that different statutory scheme, emoluments are not the basis on which the self-employed are taxed; the provider of services (whether labour, equipment or a combination of the two) is taxed on the profits of the business, after deducting expenses.

132. To import the term "emoluments" into this statutory scheme, borrowing it from the tax legislation but giving it what must be a wider and different meaning in this levy legislation, is a rather clumsy drafting technique. The clarity of the provisions is not improved by the inclusion within the definition of "relevant emoluments" not just actual emoluments but sums "intended to be disbursed" as such. I doubt whether that phrase means anything more specific than payments made which will in the end (perhaps after passing through several hands) be used to reward the provision of employed service or self-employed services.

133. Once it is accepted that emoluments can refer to payments made, directly or indirectly, in respect of services provided under self-employed arrangements, it seems artificial to restrict the "emoluments" paid in respect of such self-employed services to the labour element thereof, and to exclude from the concept any element of equipment hire. Payments made to self-employed contractors often include elements of plant and equipment hire, as both parties accept.

134. It is artificial also to adopt the narrow employee-based concept of emoluments, found in the tax legislation, for the purpose of inferring, as Hudson invites me to do, how the levy must be raised. I decline to read into the statutory scheme the restriction on the Secretary of State's powers for which Hudson contends, to the effect that levy cannot be raised except by reference to the direct cost of labour.

135. I ask myself why it is not there in the legislation, if it exists. The provisions on which Hudson relies (section 11(7) and section 16) both place express restrictions on the circumstances in which levy can be charged and the amount that can be charged. But they say nothing about how levy may be raised, outside the parameters which they set.

136. For those reasons, which are similar to those advanced by the Secretary of State and the Board, I find that the second ground of challenge does not succeed.

137. The third and final ground of challenge is that, according to Hudson, the levy in respect of the third levy period is unlawful because it allows levy to be charged for work on which a different levy is also chargeable to a different employer by the ECITB.

138. Hudson's grounds of challenge include the contention that it is *ultra vires* and unlawful for the CITB to collect levy payments "based, in part, on payments made to people undertaking engineering construction activities". Hudson invites the court to condemn the alleged vice that different boards can collect levy from different employers for the same work; and raises the objection in its grounds that the CITB "has no function in relation to the activities of the engineering construction industry", which is the province of the ECITB so far as the provision of training is concerned.

139. In their detailed grounds of resistance, the riposte of the Secretary of State and the Board is that Hudson's proposition is "correct but irrelevant". They accept that levy can be collected by the two boards separately in respect of the same work, but deny that this renders the CITB levy unlawful. They point out that, once again, the case is one of "double recovery", i.e. recovery by two separate boards from two separate contractors; not "double taxation" in the true sense, since no one contractor is charged twice in respect of the same work done.

140. The mechanics of the matter are complex but not in dispute. Briefly, they are as follows. The CIS, as enacted by chapter 3 of the 2004 Act, applies to "construction operations": see section 57(2) and section 74. A "contractor" who is subject to the CIS system includes, materially for present purposes, a "person carrying on a business which includes construction operations" (section 59(1)(a) of the 2004 Act). The definition of construction operations in section 74 embraces the activities of (as defined in the levy legislation) both the construction industry, and the engineering construction industry.

141. Section 11(2) of the 1982 Act requires that levy proposals by the Board (i.e. the CITB) "shall provide for the levy to be imposed on employers in the industry… ." The "industry" is defined in section 1(2), in relation to an industrial training board, as "the activities in relation to which it exercises functions". Those activities are to be specified by the Secretary of State by means of an order: see section 1(1).

142. Before the advent of the 1982 Act, the Industrial Training (Construction Board) Order 1964 ("the 1964 Construction Board Order") established the CITB "to exercise in relation to the activities specified in Schedule 1 … as the activities of the construction industry the functions conferred … by the [1964] Act" (article 2). Schedule 1 then defined in detail, by means of included and excluded activities, "the activities of the construction industry" in so far as carried out in Great Britain.

143. In 1992, after the 1982 Act had replaced the 1964 Act, the 1964 Construction Board Order was amended by the Industrial Training (Construction Board) Order 1964 (Amendment) Order 1992. It substituted a

new Schedule 1 for the old one. In the new Schedule 1, "the activities of the construction industry" became subject to an exclusion in the case of:

> the activities of any establishment engaged … wholly or mainly in activities not being construction activities or activities described in the Appendix to this Schedule; or … to a less extent [sic] in construction activities than in activities described in that Appendix in relation to any one industry (paragraph 2(a)(i) and (ii)).

144. The Appendix then referred to activities specified as "those of the engineering construction industry in Schedule 1 to the Industrial Training (Engineering Board) Order 1964 …." That latter order (as amended in 1991) defines in detail the activities of the engineering construction industry, which has its own industrial training board, the ECITB.

145. The new levy system under the 2015 Order uses deductions from CIS contract payments as the basis for payments to the self-employed workforce, as already explained. So far as deduction of tax payments on account is concerned (at either 20 per cent, or 30 per cent, for net paid contractors), tax is only deducted once, irrespective of whether the industry concerned is defined, for training board purposes, as the construction industry, or the engineering construction industry.

146. Thus, the CIS system does not differentiate between the two industries. The levy system does, and must do, since the activities of the two industries are defined in the levy legislation in terms that are mutually exclusive: a particular activity cannot be both an activity of the construction industry and, at the same time, an activity of the engineering construction industry. It must be one or the other.

147. However, by article 5(1) of the 2015 Order, levy is assessed and is payable in respect of each "construction establishment". A "construction establishment" is one where the employer in question is "engaged wholly or mainly in the construction industry during the necessary period" (article 5(2)).

148. The equivalent provisions in the engineering construction industry are not before the court, but it is common ground that each "establishment" is levied by either the CITB or the ECITB according to whether the activities carried out at that establishment are predominantly those of the construction industry, or of the engineering construction industry (*Bobcat Plant Hire (UK) Ltd v. CITB*, CO/2110/2003, unreported). You cannot have an establishment that is levied by both the CITB and the ECITB.

149. Now, the ECITB has not changed the basis on which it raises levy, while the CITB has, in the third levy period. So, Hudson argues, levy may be raised by the CITB from a contractor in respect of a construction industry establishment and, for the same work, or work done by the same worker, by the ECITB from a different contractor in respect of a different engineering construction industry establishment.

150. Hudson says that is unlawful and *ultra vires*, for it is "double levying"; and that there is no rational connection between the CITB's functions and the wholly distinct engineering construction industry. The Secretary of State and the Board, by contrast, say there is nothing unlawful about the legislative arrangements, because no contractor pays both levies; a contractor pays one or the other depending on the type of predominant activity at the establishment concerned.

151. To illustrate its argument, Hudson propounded an example. Modifying the example only slightly, one can envisage a versatile self-employed (and CIS net paid) worker, able to turn his hand to both construction industry work (e.g. building a wall at a construction site) and engineering construction industry work (e.g. delivery of central heating system components to the same site). He is paid subject to CIS deduction by employer A for building the wall, and by employer B for delivering the central heating system components.

152. In the example, it is to be assumed that the establishments operated by employer A and employer B are ones where the activities predominantly carried out are, respectively, construction activities in the case of employer A and engineering construction activities in the case of employer B. It therefore follows that in principle employer A is liable to pay levy to the CITB and employer B is liable to pay levy to the ECITB.

153. I am then invited to suppose that both payments are channelled through Hudson; that is, that employer A and employer B each pay Hudson the cost of the self-employed worker's services, and Hudson pays those sums on to that worker (and separately invoices employer A and employer B for its fees). Hudson must pay (assuming it is liable as an employer in the construction industry) the levy imposed by the CITB in respect of the building of the wall for employer A.

154. Hudson would not have to pay the levy imposed by the ECITB in respect of the delivery of central heating system components for employer B, because Hudson does not maintain more than one separate establishment. Its complaint in its skeleton argument is that "part of the sum used to calculate Hudson's liability to the CITB levy … has already been used as the basis for charging ECITB levy"; albeit charging it to a different person, namely employer B.

155. The Secretary of State and the Board submit, as they did in opposition to ground 1, that nothing in the 1982 Act prohibits the same work generating two levies, whether both levies are on different employers within the same industry (as was the case in relation to ground 1) or different employers in different industries (as is the case here, in relation to ground 3). The same reasoning should defeat both grounds, according to the Secretary of State and the Board.

156. Furthermore, they add that section 5(3)(a) of the 1982 Act allows training courses to be provided by the CITB to operatives working in other industries, not just the construction industry; so it cannot be said that there is necessarily an absence of any link between provision of training in one industry and provision of training in another.

157. Although the agreed legal framework and the rival submissions of the parties are quite lengthy, the principles are simple enough. The battleground in this third ground of challenge does not, in my judgment, differ in principle from that considered in ground 1, and I can deal with ground 3, therefore, much more briefly. It does not seem to me to make a difference in principle that in ground 3, levy is charged by different boards for "mixed" work straddling the divide between the two industries.

158. The heart of the matter is, once again, whether the enabling legislation empowers the Secretary of State to enact legislation providing for the levying of two different sums for the same work, but not charged to the same employer.

159. By a similar process of reasoning to that set out above when rejecting ground 1, it seems to me that ground 3 must also fail. The legislation does not preclude, either expressly or by necessary implication, the raising of levy by reference to CIS deductions in respect of work which, or part of which, is also subject to a levy charged to an engineering construction industry employer by the ECITB. I therefore reject the third ground of challenge.

160. It follows that Hudson has not made good its challenge to those parts of the 2015 Order which are the subject of this challenge, and that its claim must be dismissed.

161. By way of postscript, I wish to refer to one unhappy feature of this case. The documents were in a so-called "core" bundle running to four thick lever arch files containing an extraordinary amount of unnecessary materials, which were not referred to and were copied in single-sided A4 sheets making portability impracticable. This has delayed my written judgment.

162. The case cried out for a core bundle in the true sense of the term, which I had to assemble myself to make sense of the case and produce the draft judgment during a period of frequent travel. I hope in future that bundles will be copied double-sided (unless the court otherwise directs) and will be restricted to necessary documents. My own preference (though not, I recognise, that of all judges) is for A5 double-sided copies which greatly increase portability.

163. The parties are invited to agree a form of draft order, in the usual way, and submit it to my clerk for my approval. I conclude by expressing my thanks to counsel for their erudite and cogent submissions, both written and oral.