[2004]EWHC2248(Ch) Case No: CH/2004/APP/0271

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08 October 2004

Before :

THE HONOURABLE MR JUSTICE PARK

Between :

Usetech Limited	**Appellant**
- and -	
Graeme Young (HM Inspector of Taxes)	**Respondent**

Simon Devonshire (instructed by **Nelsons**) for the Appellant
Akash Nawbatt (instructed by **the Solicitor of Inland Revenue**) for the Respondent

Hearing dates : 26 & 27.07.2004

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
Mr Justice Park

Mr Justice Park :

Abbreviations, dramatis personae, etc

1. These are as follows.

ABB	ABB Vetco Gray (UK) Limited, the 'end user' of the services of Mr Hood; a company which provided a range of equipment to the oil and gas industry.
Mr Devonshire	Simon Devonshire, counsel for Usetech.
EAT	Employment Appeal Tribunal.
Hood, Mr	William Hood, specialist in a software system used by ABB, called Pro-Engineer; shareholder in and director of Usetech.
IR35	The reference number of an Inland Revenue Press Release of 2000, which led to the enactment of the legislative provisions which are in point in this case.
Nawbatt, Mr	Akash Nawbatt, counsel for the Inspector of Taxes, the respondent to this appeal.
NES	NES International Limited, a company described as an agency company which provided technical recruitment services.
NICs	National Insurance Contributions
Usetech	Usetech Limited, the appellant on this appeal; 'one man company' owned by Mr Hood, which provided his services to end users.

Overview

2. This is a tax and NICs appeal by the taxpayer, Usetech, against a decision of a Special Commissioner, Mr Colin Bishopp, dated 12 March 2004. The decision determined a question of principle concerning the liability to tax and NICs of Usetech and its principal shareholder and director, Mr Hood. Usetech was a 'one man company'

whose business consisted of making the services of Mr Hood available to third party users. By transactions entered into in May 2000 Mr Hood's services were made available to ABB, and he worked in the business of ABB for about 17 months from 1 June 2000. The transactions involved not only Mr Hood, Usetech and ABB, but also, in a manner which I will describe later, another company, NES. Mr Hood had no beneficial interest in NES. The question of principle is whether the transactions attracted the operation of provisions introduced, both for tax and for NICs, in 2000 and commonly referred to as the IR35 legislation. IR35 was the reference number of an Inland Revenue Press Release which had foreshadowed the legislation.

3. If the IR35 legislation applied its effect would be to treat payments received by Usetech for the provision by it of Mr Hood's services (the payments being received, not from ABB directly, but from NES) as if they had been personal income of Mr Hood from an employment with ABB. For income tax they would be treated as emoluments taxable under Schedule E, rather than as receipts of Usetech's trade which would be taken into account in computing its profits liable to corporation tax. For NICs they would be treated in a similar way as employment income of Mr Hood. The liabilities both to income tax and to NICs would fall to be met by Usetech, not by Mr Hood. Thus it is Usetech which is the appellant taxpayer.

4. The Inland Revenue issued formal decisions that the IR35 provisions applied, and Usetech appealed to the Special Commissioners. In form there were two decisions and two appeals, one for tax and one for NICs, but they turned on two sets of almost identical legislation and stood or fell together. The appeals were heard by Mr Bishopp on 22 January 2004, and by a reserved decision dated 12 March 2004 he dismissed the appeals, thus affirming the decisions which the Inland Revenue had issued. Usetech now appeals to me. It is clear that an appeal can only succeed if the decision was wrong in law. There is no appeal on a question of fact: see s.56A(1) and (4) of the Taxes Management Act 1970.

5. Mr Devonshire, who appears for Usetech, has helpfully limited his submissions to two specific respects in which he says that the Special Commissioner erred in law. I will describe them fully later in this judgment. The first respect involves an argument that the IR35 legislation cannot apply because of a contractual provision between Usetech and NES (not between Usetech and ABB or between NES and ABB), which Mr Devonshire submits must be taken into account, entitling Usetech to provide the services of a substitute in place of Mr Hood. I will refer to this as the right of substitution argument. The second respect in which Mr Devonshire says that the Special Commissioner erred involves an argument that ABB was not obliged to provide work for Mr Hood to do (although in fact it did do so). Therefore, it is argued that, even after applying the hypotheses required by the IR35 provisions, there was insufficient mutuality of obligation for an employer/employee relationship to exist, with the result that the provisions did not apply. I will refer to this as the want of mutuality argument.

6. I have considered Mr Devonshire's arguments carefully, but my conclusion is that I cannot accept either of them. The issues are too complex for me to encapsulate the

essence of my reasoning in this overview at the beginning of my judgment. I shall explain it as the judgment progresses. The result is that I respectfully agree with the decision of the Special Commissioner. Therefore I shall dismiss the appeal.

The IR35 legislation

7. For income tax and corporation tax (income tax so far as concerns Mr Hood and corporation tax so far as concerns Usetech) the legislation is contained in section 60 of and Schedule 12 to the Finance Act 2000. The critical provisions are those which identify the cases to which Schedule 12 applies. If the Schedule applies there is not, if I understand correctly, any dispute as the consequences. The dispute is whether it applies at all. The case revolves around provisions in paragraph 1 of the Schedule. I will now set out the relevant parts of the paragraph, interpolating in italicised square brackets the actual identities in this case of the parties referred to in general terms in the paragraph.

> 1 (1) This Schedule applies where –
>
> (a) an individual ('the worker') *[Mr Hood]* personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person ('the client') *[ABB]*,
>
> (b) the services are provided not under a contract directly between the client *[ABB]* and the worker *[Mr Hood]* but under arrangements involving a third party ('the intermediary') *[Usetech]*, and
>
> (c) the circumstances are such that, if the services were provided under a contract directly between the client *[ABB]* and the worker *[Mr Hood]*, the worker would be regarded for income tax purposes as an employee of the client *[ABB]*.
>
> (2), (3) ...
>
> (4) The circumstances referred to in sub-paragraph (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.

8. In the quotation of sub-paragraph (1)(b) above I have identified 'the intermediary' in this case as being Usetech. As I will explain later, on the facts NES might also be regarded as an intermediary in the general sense of the word, but it is clear from paragraph 3 of Schedule 12, which I need not set out verbatim, that only Usetech counts as an intermediary for the purposes of paragraph 1. However, the 'arrangements involving ... the intermediary' (referred to in sub-paragraph (1)(b)) may involve other persons as well as the intermediary. If they do the respects in which the other persons are also involved may affect the application or non-application of paragraph 1. In the present case this could be relevant to the participation of NES in the entire transaction: NES was neither 'the worker' nor 'the client' nor 'the intermediary', but it was involved in the arrangements in which 'the

intermediary' (Usetech) was involved, so its part in those arrangements falls to be taken into account as well as Usetech's part in them.

9. A more general point of construction is worth spelling out at this stage. The conditions of sub-paragraphs (a) and (b) involve an analysis of the actual facts and legal relationships, but when that analysis shows that those two sub-paragraphs are satisfied sub-paragraph (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain, and in the present case there is. The dispute arises in connection with the right of substitution argument which is advanced by Mr Devonshire on behalf of Usetech. I will explain how precisely the issue arises at a later stage in this judgment.

10. The comparable provisions for NICs are contained in regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000. They are not quite identical to the provisions in the Finance Act 2000, but they are similar in all relevant respects. For completeness I will set out the specific wording.

> 6 (1) These Regulations apply where –
>
> (a) an individual (the worker) *[Mr Hood]* personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person (the client) *[ABB]*,
>
> (b) the performance of those services by the worker *[Mr Hood]* is carried out, not under a contract directly between the worker *[Mr Hood]* and the client *[ABB]*, but under arrangements involving an intermediary *[Usetech]*, and
>
> (c) the circumstances are such that, had the arrangements taken the form of a contract between the worker *[Mr Hood]* and the client *[ABB]* the worker *[Mr Hood]* would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client *[ABB]*.

As in the Finance Act 2000 there is a provision (regulation 5) under which 'the intermediary' is, so far as this case is concerned, Usetech (and not NES). However, the same point applies in that, to the extent that NES was involved in the arrangements, its participation may have to be taken into account in determining whether regulation 6 applies notwithstanding that it was none of the parties ('the worker', 'the client', or 'the intermediary') specifically identified in the regulation. Curiously regulation 6 does not contain a provision like paragraph 1(4) of Schedule 12 to the Finance Act 2000, expanding on what is covered by 'the circumstances' referred to in sub-paragraph (c) of regulation 6(1). However, no-one has suggested to me, nor do I consider, that that or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided one way for NICs and another way for income tax and corporation tax.

The facts

11. Mr Hood has now retired but at the time when this case arose he worked in connection with the production of design drawings of oil wells, rigs and similar equipment. He was a specialist in the use of a software product called Pro-Engineer, which produced 3-D models of such equipment. He started to operate through his one man company, Usetech, in May 1996. There was no evidence before the Special Commissioner about his arrangements before then, so the Commissioner inevitably decided the case on the basis of the Usetech arrangements alone, uninfluenced by what Mr Hood's tax and national insurance status may have been in earlier years.

12. Usetech had several engagements for the provision of Mr Hood's services to 'end users' over its trading life from 1996 to May 2003 (when Mr Hood was obliged to retire by reason of ill health). Some of the engagements were pursuant to direct contracts between Usetech and the end users, but engagements with ABB were not, since, as I explain in more detail in the next paragraph, NES was interposed between Usetech and ABB (the end user). There were three different periods when Mr Hood was working in the business of ABB at its premises in Aberdeen. The present case is specifically about the period of 17 months beginning in June 2000. (In fact the Special Commissioner was only strictly concerned with the period from 1 June 2000 to 31 March 2001, but I assume that that was for some procedural reason to do with tax years or companies' accounting periods or something of that nature. The Commissioner's decision would undoubtedly govern the whole period of the engagement for Mr Hood to work in the business of ABB.)

13. ABB is a United Kingdom subsidiary of a world-wide group which provides a range of equipment to the oil and gas industry. It has a core staff of 750 to 850 permanent employees, but it supplements them when demand requires by taking on what its Human Resources Manager described as 'sub-contract employees'. This was done by means of companies described as 'agencies', of which NES was one. There was no evidence from NES, but on its letter heading it describes itself as 'Europe's largest technical recruitment agency'. As will appear, NES sometimes acted contractually as a principal rather than as an agent in the strict legal sense.

14. The way in which Mr Hood was engaged to work in the business of ABB, which I assume was typical of how ABB and NES operated, was as follows. Management within ABB identified that ABB had a need for another specialist in Pro-Engineer, but did not wish to have another permanent employee recruited. The Human Resources manager contacted agencies, including NES. NES knew about Mr Hood, and contacted him, or more strictly contacted his personal company, Usetech. Mr Hood was obviously willing to go and work in Aberdeen in ABB's business, because the matter proceeded. If ABB had not already known Mr Hood it would have required to interview him first, and had in fact done so for the earlier occasion when he had been provided to it through NES. However, since it already knew him it did not require an interview on this occasion. Two contracts were entered into, one between Usetech and NES and one between NES and ABB. Each contract appears to have been made on 22 May 2000, to commence on 1 June 2000, although the documents which were

before the Special Commissioner are a little confusing about this. The system of having two contracts is quite common (or so I understand), and contracts of these kinds are sometimes referred to as 'the lower level contract' and 'the upper level contract'. However, I will refer to them in this judgment as 'the Usetech/NES contract' (the lower level) and 'the NES/ABB contract' (the upper level). There must also have been a contractual relationship (at the lowest level) between Mr Hood and Usetech, but it appears that there was no written contract of service. At least no such written contract was produced in evidence.

15. As regards the Usetech/NES contract (the lower level contract) there appear to have been two contractual documents: a one page letter of offer by NES signed by way of acceptance by Mr Hood on behalf of Usetech, and a longer set of 'Terms and Conditions' in standard form. A complication here is that the documents before the Special Commissioner appear to have included three versions of the first document and three of the second. This may have had something to do with variations in the anticipated duration of the engagement, but there are aspects of the duplication or triplication of documents which puzzle me. However, I do not think that they are fundamental to the issues in the case.

16. The first of the three offer letters is dated 22 May 2000. It is from NES and is addressed to Usetech at Mr Hood's home address. It includes the following: *'We are pleased to offer you a contract to supply contract staff in a position as Pro-Engineer Designer in accordance with the following: NAME(S) OF CONTRACT STAFF: WILLIAM HOOD. CLIENT: ABB VECTO GRAY.'* Certain brief other details follow, covering such matters as the hourly rate of payment, the commencement date, and the notice period. Mr Hood signed to indicate acceptance. For completeness I mention that the other two offer letters have slightly different periods of service, do not mention Mr Hood personally and are not signed by him by way of acceptance. I do not follow what their relevance to the appeal is or what their function was, and I have concentrated on the letter dated 22 May 2000.

17. I turn to the longer form document, the standard form headed '*Terms and Conditions for the supply of services to NES International Ltd (performed by a limited company sub-contractor'*. There are three versions of this document in the documents which were before the Special Commissioner and which are now before me. None of them mentions Usetech (or any other specific sub-contractor for that matter), and none of them is signed by or on behalf of either NES or Usetech (or any other person). The evidential status of the three documents in the bundle is not clear to me, but I will assume that at least one of them was supplied by NES to Usetech (in common, I assume, with all other subcontractor companies which had similar relationships with NES), and that it did in general regulate the contractual relationship between the two companies. The Special Commissioner said, and I agree, that although the three versions of the Terms and Conditions are not quite identical, the differences between them do not appear to be material to this case.

18. The Terms and Conditions are quite long documents. They are in no sense tailor-made for the particular relationship being entered into between Mr Hood, Usetech,

NES and ABB. They are standard form documents plainly intended to be used by NES across the spread of arrangements which it makes with companies like Usetech to enable the services of employees of such companies to be provided to outside clients like ABB. It would be disproportionate for me to set out one of the documents in this judgment or to attempt a full summary of it. In the broadest of terms it provides for 'the sub-contractor' (in this case Usetech) to agree with NES that it will provide 'the Services' to the reasonable satisfaction of 'the client', that is the end user, being ABB in this case. The agreement which the sub-contractor has, however, is between it and NES, not between it and the end user. 'The Services' (which Usetech agreed with NES to provide to the reasonable satisfaction of ABB) are defined as *'the work or project identified in the contract letter and/or notified to the sub-contractor by the Client'*. I assume that the contract letter referred to is the letter of 22 May 2000 (or possibly all three letters) by which NES offered the engagement to Usetech and Usetech accepted it. On that basis it appears that (in so far as the matter is affected by the 22 May 2000 letter, which was the only document which appears to have signed on behalf of Usetech by way of acceptance) 'the Services' were the services of Mr Hood as Pro-Engineer Designer.

19. The Terms and Conditions cover a range of matters which I need not describe in this judgment. They include matters such as payments of fees (to be made to Usetech by NES, not by ABB), use of motor vehicles, trade secrets, and non-competition by the sub-contractor with the end user (NES's 'client'). There is, however, one provision which I should set out in full, since it provides the basis for Mr Devonshire's right of substitution argument. The final clause is headed 'General', and contains a number of different provisions. One of them reads as follows:

> The Sub-Contractor shall be entitled to substitute the named Personnel for an alternative, with the prior written consent of the Company – such consent not to be withheld if the proposed replacement has the appropriate skills, qualifications and abilities in the reasonable opinion of the Client.

I specifically point out that 'the Company', which can give prior written consent to a substitution, is NES, and is not 'the Client': in this case it is not ABB. Further, the only parties to this agreement are the sub-contractor (Usetech in this case) and NES. The client (e.g. ABB) is not a party. I will examine the argument which Mr Devonshire bases on this provision at a later stage in this judgment.

20. So much for the contractual relationship between Usetech and NES. There was also a contractual relationship between NES and ABB. I should state at the outset that Usetech and Mr Hood did not know the detailed content of that relationship. If they thought about the matter they must obviously and correctly have assumed that there would be a contract of some sort between NES and ABB, that it would provide for NES in some way to cause Usetech to provide the services of Mr Hood to ABB, and that ABB would make payments to NES for the services. But I doubt that Usetech and Mr Hood would have known or assumed anything more detailed about the NES/ABB contractual relationship.

21. There was indeed an NES/ABB contract (an upper level contract), and it was placed before the Special Commissioner. I understand that the copy of it was obtained from ABB. It takes the form of a letter agreement, signed on behalf of both parties, dated 22 May 2000, which was also the date of the offer letter made by NES to Usetech and signed by way of acceptance by Mr Hood. The letter which constitutes the NES/ABB contract is from NES to ABB. It is headed: *'Sub-Contractor – Usetech Ltd. Contract Staff – Mr William Hood.'* It begins: *'We confirm that the above Contract Staff supplied by the above sub-contractor will be available to commence work on 30th May 2000 to perform the services of Pro-Engineer Designer.'* A number of other detailed matters were covered, including the hourly rate payable by ABB to NES for the services (a little higher, as one would expect, than the hourly rate payable onward by NES to Usetech), a seven days notice period, and a minimum number of weekly hours (37.5 hours). Two pages of detailed Terms and Conditions are attached, but they do not appear to me to add anything relevant (except for condition 3.2, to which I refer in paragraph 63 below).

22. There is nothing in the NES/ABB contract about the provision of a substitute for Mr Hood, and in my view that contract is solely one for the provision of his services, not one for the provision of the services of him or a substitute who is reasonably acceptable to ABB.

23. Moving on from the contracts as such, there are some other factual points which might have a bearing on the right of substitution argument and which I ought therefore to mention. The question of a substitute for Mr Hood never arose. For the 17 months of the engagement which began on 30 May (or 1 June) 2000 the services were provided entirely by Mr Hood himself. Mr Hood did, however, say in his witness statement that there were other Pro-Engineer specialists whom he knew and whom he could have sent. I should also quote the following findings from paragraph 25 of the Special Commissioner's decision.

> [T]he reality … is that ABB required Mr Hood's services. It was not contracting, indirectly, with [Usetech] for the supply of a person competent in Pro-Engineer; it required Mr Hood. It would not have accepted a substitute, if Mr Hood had sent one, without interview and certainly not on the basis that Mr Hood or the substitute might attend as [Usetech] elected from day to day. Mr Hunter's evidence, which I accept, can lead to no other conclusion than that the arrangement was personal to Mr Hood. I do not go so far as to say that the right to substitute was a sham – Mr Hunter agreed that, if Mr Hood had become unavailable and suggested someone to continue in his place, that suggestion would be given some weight – but Mr Hood and [Usetech] could not dictate, at will, who would perform the work: it had to be Mr Hood. In my view, the 'right' of substitution was largely illusory.

24. So far as the right of substitution argument is concerned I do not think that there are any other specific aspects of the facts which I need to describe. However Mr Devonshire also advances the want of mutuality argument, and there are some other factual points which I ought to mention, since they could be of some relevance to that argument. The Special Commissioner, having heard evidence from Mr Hood and from two witnesses from ABB, found that any temporary member of staff (like Mr

Hood) was treated, on a day to day basis, in a manner barely distinguishable from an employee. One of the ABB witnesses said that as a general rule temporary staff were expected to work 50 hours a week, and Mr Hood did so. Mr Hood's own evidence was that he typically worked for 58 hours per week. He also said that, if there was no work for him to do, he could be sent home. He could recall at least three or four occasions when the computer crashed and he was sent home without payment. The Special Commissioner recorded this aspect of Mr Hood's evidence, but did not make a specific finding of his own on it. I confess that I have some reservations about it, and I will return to this later when I discuss the want of mutuality argument.

The Special Commissioner's decision

25. In a careful and comprehensive reserved decision the Special Commissioner, Mr Bishopp, set out the statutory provisions and reviewed the facts. He noted that the IR35 provisions (both for tax and for NICs) require a notional contract between Mr Hood and ABB to be assumed, and that the critical question was whether that contract would have been a contract of employment. He considered a number of factors which might bear on the question, and in the course of doing so he quoted a well-known passage from the judgment of McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

> 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 to a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

The Special Commissioner considered condition (iii) first, and concluded that there was nothing in the notional contract which was 'incompatible with the relationship between them [ABB and Mr Hood] of employer and employee' (paragraph 24 of the decision). It was at this point that he considered the issue of substitution, doing so in the terms which I quoted in paragraph 23 above and concluding that in his view 'the right of substitution was largely illusory'. (As will appear later I would put the matter rather differently, but I would not change the 'bottom line' conclusion that the provision for substitution in the Usetech/NES contract does not lead to a decision in favour of Usetech.)

26. Moving on, the Special Commissioner compared Mr Hood with normal employees of ABB who had similar skills to his own, and saw little outward difference. I quote a few extracts from paragraph 27 of the decision:

> Mr Hood was expected to undertake the work allocated to him by ABB and to do so in accordance with its directions and at times of its choosing. … In that, too, he was in materially the same position as an employee. … [O]verall it seems to me that there is no difference between the measure of control exercised over his work by ABB and that it would have exercised over an employee of his status.

27. The Special Commissioner considered that, in so far as there was a requirement for mutuality of obligation to exist for a relationship to be a contract of employment, the requirement was in any event satisfied by the obligation on the one hand to work and on the other to remunerate. (In my view there may be rather more to be said on this point, but as I will explain I do not disagree with the Commissioner's conclusion.)

28. The Commissioner also considered whether Mr Hood or Usetech could realistically be seen to have been in business on their own account, and was of the opinion that they could not. For that and the other reasons which I have summarised and which he examined more fully he decided: *'The conclusion must be that the notional contract between ABB and Mr Hood was one of service. I can find no factor in the case which is inconsistent with that conclusion.'*

The appeal to this court

29. In the overview at the beginning of this judgment I observed that Mr Devonshire has limited the grounds of appeal to two issues, which I am calling the right of substitution argument and the want of mutuality argument. Points about the right of substitution and points about the alleged want of mutuality were made on behalf of Usetech before the Special Commissioner, but, as it seems to me, they were made not so much as self-contained arguments either of which would be sufficient entirely by itself to conclude the appeal in favour of Usetech, but rather as items in a comprehensive view of the interconnecting relationships between Mr Hood, Usetech, NES and ABB. I think that the Special Commissioner perceived the main case advanced on behalf of Usetech as being one which looked at all aspects of the case together and in the round. Those aspects included the provision in the Usetech/NES contract about substitution and also what was contended to be a want of mutuality between Usetech and ABB. But they also included points made about the degree of control exercised by ABB over the work done by Mr Hood, about alleged differences in practice between Mr Hood's position in the operations of ABB and the positions of full time employees, about other activities altogether carried on by Mr Hood through Usetech, and so on.

30. In the thorough skeleton argument which Usetech's advocate placed before the Special Commissioner he wrote: *'On the evidence it is submitted that the hypothetical contract in this case would show a genuine substitution right, a lack of control over Mr Hood, project based work on an hourly basis, a clear lack of mutuality of obligations, flexibility of hours, no significant integration of Mr Hood into the ABB organisation and several practical differences between Mr Hood and regular ABB employees'.* That was in the nature of a global synopsis. It should be apparent from the previous section of this judgment that the Special Commissioner did not accept several of the elements in the synopsis. In the result he was not persuaded that, looking at everything in a global way, the overall picture which emerged was that, if Mr Hood had been engaged by a direct contract between himself and ABB, he would have been an independent contractor and not an employee.

31. It may be worth adding that there appears to have been no significant argument advanced to the Commissioner that, before Mr Hood established Usetech and provided his services to end users through Usetech (with or without the interposition of an agency company like NES), he carried on some sort of self-employed profession which involved him having a series of engagements with a succession of clients. (Compare, for example, the observations of Rowlatt J about theatrical actors and actresses in *Davies v Braithwaite* [1931] 2 KB 628 at 635 to 636.) Certainly there was no argument before me that the present case could be affected by an established tax treatment or NICs treatment which had been applied to Mr Hood in the earlier years of his working career. I can, however, imagine other cases in which arguments of that sort could be material.

32. Mr Devonshire, realistically in my opinion, has not invited me to approach the appeal on the basis that I should take all the circumstances into account and conclude that Mr Hood would indeed have been an independent contractor, not an employee. An argument of that sort was entirely appropriate for the first instance hearing before the Special Commissioner, but in the High Court the decision of the Commissioner can only be effectively challenged on grounds that it was wrong in law. In *Synaptek Ltd v Young* [2003] STC 543, [2003] EWHC 645 (Ch), at page 553 Hart J said (in a case which arose under the same IR35 statutory provisions as the present one): *'Deciding, in a borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult. ... In general the question is regarded as one of fact, or as it is sometimes put, a question of mixed fact and law, the evaluation and determination of which is a matter for the fact-finding tribunal.'* The judge had been invited to reverse a decision of General Commissioners that, if there had been a direct contract between the individual involved in that case and the end user of his services, it would have been a contract of employment. He declined to do so, essentially on the ground that the Commissioners' decision had been one of fact which it was not open to him (the judge) to alter on an appeal limited to questions of law.

33. It is against that background that Mr Devonshire has restricted his challenge to the Special Commissioner's decision in this case to the right of substitution argument and the want of mutuality argument. Each argument is to the effect that, because of the item focused on (the alleged right of substitution in the first case and the alleged want of mutuality in the second), the postulated relationship between Mr Hood and ABB was legally incapable of being the relationship of employee and employer. Therefore in this judgment I consider only those two arguments. In a sense the starting point for me is that, but for the alleged right of substitution and the alleged want of mutuality, it is common ground in this court that, if Mr Hood had been engaged directly by ABB, he would have been an employee. That is not to say that the Special Commissioner could not possibly have taken a different view. I have not been asked to consider whether he could have done that, and I have not done so. I say a little more about this at the end of this judgment.

The right of substitution argument

34. In paragraph 25 above I said that I agreed with the Special Commissioner's conclusion that the inclusion of a substitution provision in the Usetech/NES contract did not mean that the appeal should be allowed, but I also said that I would myself put the matter rather differently from how he put it. He said in paragraph 25 of his decision that 'the "right" of substitution was largely illusory'. I follow what led him to say that, but in my view there is a logically prior question which ought to be considered. Would there have been any right of substitution at all in the notional contract between Mr Hood and ABB which the IR35 provisions require to be assumed? In my view, for reasons which I will explain, there would not, and that is in itself sufficient to exclude Mr Devonshire's right of substitution argument.

35. As regards income tax and corporation tax FA 2000 Schedule 12 paragraph 1(1)(c) poses a hypothesis expressed as: *'had the arrangements taken the form of a contract between the worker [Mr Hood] and the client [ABB]'.* As regards NICs the hypothesis under the Social Security Contributions (Intermediaries) Regulations 2000 regulation 6(1)(c) is expressed as: *'if the services were provided under a contract directly between the client [ABB] and the worker [Mr Hood].'* The two wordings are not identical, but the meanings are. There was not in fact a direct contract between Mr Hood and ABB, but the provisions require it to be assumed that there was. What would it have contained? Mr Devonshire's argument assumes that it would have contained a provision permitting Mr Hood to substitute himself by an alternative Pro-Engineer specialist, subject only to ABB's consent which could not be withheld if the substitute had the appropriate skills. If that assumption is wrong the right of substitution argument falls away altogether.

36. The factor which complicates the issue in this case is that in the chain of contracts NES is interposed between Usetech and ABB. The structure primarily contemplated by the legislation seems to me to be one where there are two contracts: the first is a contract of service, written or oral, between the worker and his one-man service company (the equivalent of Usetech), and the second is a contract between the service company and the end user (the equivalent of ABB) for the service company to furnish the personal services of the worker to the end user. In a case which is as straightforward as that I think that the contents of the notional contract between the worker and the end user will be fairly obvious: they will be based on the contents of the second contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user.

37. In the actual case with which I am concerned there were three contracts, not two, which have to be subsumed into one notional contract:

a) First there was the actual contract between Mr Hood and Usetech. It appears that this did not take the form of a written service agreement: at least none was produced in evidence before the Special Commissioner. But there must have been a contractual relationship of some sort, however informal. It is not suggested, and could not realistically be suggested, that that relationship contained any term whereby, while Mr

Hood agreed generally to work as an employee of Usetech (or as a working director of Usetech), he was entitled to provide a substitute for himself.

b) Second, there was the actual contract between Usetech and NES. That contract did contain the substitution provision which I have quoted in paragraph 19 above. Even so the provision was a standard form provision which, I assume, was always (or at least usually) part of the agreements which NES entered into with all one-man companies with which it did business. The provision appeared in a clause headed 'General' at the end of the contract, and was obviously not specially negotiated for Mr Hood and Usetech. It was, no doubt, binding between Usetech and NES, but it would not be binding upon a third party, like ABB, to which NES agreed to provide the services of Usetech's employee and director, Mr Hood, unless it or an equivalent substitution provision was expressly included in the onward contract between NES and the third party.

c) Third, there was the actual contract between NES and ABB. As I described in paragraphs 21 above it took the form of a letter agreement for NES to provide the services of Mr Hood to ABB, with some standard terms and conditions attached. There was no provision for substitution included in the NES/ABB contract. In my definite opinion the NES/ABB contract was simply one for the services of Mr Hood, not for the services of Mr Hood or of a suitably skilled substitute.

38. In those circumstances, should the hypothetical direct contract between Mr Hood and ABB include the substitution provision or not? The Special Commissioner did not specifically decide that question, but I think that I should decide it myself. I believe that I can do that: it is not a question of fact such that I ought to remit it to the Commissioner to decide. Alternatively, if it is to any extent a question of fact, it is one of what inference should be drawn from the primary materials before the Commissioner. In my judgment there is only one tenable inference which can be drawn, and I see no point in remitting the case to the Commissioner for him to draw it.

39. In my judgment the hypothetical contract between Mr Hood and ABB would not have contained a substitution provision. That is, as it seems to me, the common sense of the matter; it is in accordance with the Special Commissioner's findings of fact; and it is also supported by the absence of evidence which one might have expected if there was a substantial case that the hypothetical contract would have contained a substitution provision. Suppose that there had been no interposition of NES, but that Usetech had itself contracted with ABB to provide the services of Mr Hood. I do not believe that a Usetech/ABB contract would have included a substitution provision, and there was no evidence from Mr Hood (the director of Usetech) that it would. The actual terms on which Mr Hood's services were provided to ABB (by NES under the NES/ABB contract) did not contain a substitution provision, and there would be no justification for assuming that, if he had contracted directly with ABB, he would have

provided his services on any different basis. If, given the actual contracts between Usetech and NES and (separately) between NES and ABB, someone had turned up at ABB one day and said that he was being provided by NES as a well-qualified substitute for Mr Hood (already a far-fetched and unrealistic assumption), and ABB had sent the man away, Usetech might have had a contractual complaint against NES, but it would certainly have had no contractual complaint against ABB. Let me take the hypothetical assumptions a stage further. Suppose again that Usetech contracted directly with ABB but that (improbably) Usetech tried to have inserted in the contract a provision that it could from time to time provide a substitute for Mr Hood. Would ABB have agreed? There was no specific evidence on the point, but I believe that the strong probability, which Usetech needed to adduce strong evidence to refute, is that ABB would not have agreed. I assert that the only realistic form which the hypothetical direct contract between Mr Hood and ABB could have taken would have been one without a substitution provision.

40. My assertion is in accordance with the Special Commissioner's findings, and a contrary assertion would be inconsistent with them. He found that 'the reality ... is that ABB required Mr Hood's services.' He went on to observe that *'ABB was not contracting indirectly with [Usetech] for the supply of a person competent in Pro-Engineer: it required Mr Hood'*. I have taken those particular findings from paragraph 25 of the decision. I have quoted much of that paragraph in full in paragraph 23 above, and the whole of it is consistent only with a conclusion that a hypothetical contract between ABB and Mr Hood would have been one for the specific services of Mr Hood and no-one else. There are also points to be made about evidence which is absent from the case. Mr Hood's witness statement does touch on the substitution provision in the Usetech/NES contract, but he does not suggest that it was of practical importance to him. There was no evidence that, in years before he started to operate through Usetech and may have had one or more direct contracts with end users of his services, he insisted on having substitution provisions in his contracts. It is inherently improbable that he would have done that, and, if he had, I can, I think, realistically assume that he would have said so.

41. At the risk of labouring the point I repeat that the substitution provision in the Usetech/NES contract was a standard form provision at the end of NES's standard form contract. I cannot imagine that it was a provision which Usetech asked to be included, and I doubt that any particular notice was taken of it when the contract was entered into. At any rate there was no evidence that particular notice was taken of it. In contrast, the main clause of the contract, on which Mr Hood might realistically have focused his attention, was clause 3, headed 'Provision of the Services'. By clause 3.1 Usetech agreed with NES that it would carry out 'the Services', and by clause 3.3 it agreed (still with NES) that it would 'provide the Services to the reasonable satisfaction of the client [ABB]'. As I have pointed out earlier (see paragraph 18 above) 'Services' was a defined term. It meant 'the work or project identified in the contract offer letter'. In the contract offer letter from NES to Usetech dated 22 May 2000 the work identified was the supply of Mr Hood as Pro-Engineer Designer to ABB; it was not the supply of Mr Hood or of a qualified substitute.

42. In all the circumstances I consider that, if there had been a real direct contract between Mr Hood personally and ABB for him to provide his skilled services to ABB, the contract would not have included a substitution provision. If, contrary to what I believe likely, Mr Hood had raised in negotiation the possibility of such a provision, ABB would in my view not have agreed to it, and I do not believe that Mr Hood would have pressed the point. Rather he would have proceeded to agree to provide his services without any provision for him to be entitled to provide a substitute. Of course if, in the events that happened, he became unable to provide his services under the assumed direct contract between himself and ABB (for example because of illness), he might have drawn on his contacts to suggest to ABB a possible replacement for himself. Mr Hunter of ABB said that the company would have given some weight to Mr Hood's suggestion. That, however, is a far cry from the direct contract between Mr Hood and ABB containing an express provision which conferred on him an entitlement to substitute someone else for himself, subject only to the substitute having the required skills.

43. There is one other point which I should consider before I move on. Mr Devonshire makes the point that, although Mr Hood and Usetech knew the detailed provisions of the Usetech/NES contract, or at least had full access to those detailed provisions if they wanted, they did not know the terms of the NES/ABB contract. So, while they knew, or could have known, that there was a substitution clause in the first of those contracts, they did not know and had no means of knowing that there was no corresponding substitution clause in the second of those contracts. From this it is said to follow that the hypothetical contract must have been one which did contain a substitution clause, because that was a feature of the contract of which Mr Hood and Usetech had personal knowledge. It is further argued that the conclusion is reinforced by the self-assessment nature of the tax system. How, Mr Devonshire asks, could Usetech be expected to make a self-assessment of its liability to corporation tax under the IR35 provisions of FA 2000 on the footing that there was no substitution clause in the NES/ABB contract, when it did not know the contents of that contract?

44. I do not accept that argument, which to me has an air of unreality and formalism about it. I take it for granted that Usetech did not submit a self-assessment return which showed itself as liable to corporation tax under the IR35 provisions, but I do not suppose for a moment that, if it had known the detailed contents of the NES/ABB contract, it would have assessed its own liability on the basis that those provisions applied. In any case the self-assessment provisions are a matter of tax machinery and were not intended to affect substantive principles of tax liability. If, as the Special Commissioner held and as I believe, Usetech would have been liable to corporation tax under the IR35 provisions had there been no self-assessment system in operation, then it was still liable to corporation tax under those provisions notwithstanding that there was a self-assessment system in operation.

45. Usetech did not know the detailed content of the NES/ABB contract, but it did know that there must have been an NES/ABB contract, and it had itself entered into the Usetech/NES contract in order to enable NES to conclude its contract with ABB. Usetech had no reason to suppose that the NES/ABB contract would contain a substitution clause. If it had speculated about it the likely speculation would have

been that there would have been no such clause. Usetech took no steps to request or require NES to include such a clause in the onward contract between itself and ABB. I do not think that Usetech and Mr Hood can successfully argue that, because they did not have specific knowledge that the NES/ABB contract did not contain a highly improbable provision, therefore they escape the operation of the IR35 provisions.

46. I also draw attention to certain observations of Burton J in *R (on the application of the Professional Contractors Group Ltd and others) v IRC* [2001] EWHC Admin 236, [2001] STC 629 at page 651. The case involved an unsuccessful challenge under human rights law and Community law to the whole concept of the IR35 provisions. In the course of the judge's discussion of certain guidance material which had been prepared by the Revenue he touched on arrangements which, like the one in this case, involved a lower level contract and an upper level contract: the lower level contract being between the worker's personal service company (like Usetech) and an agency (like NES), and the upper level contract being between the agency and an end user (like ABB). He said this:

> Equally, in so far as the inspector has access to something not available to the service contractor [the worker, the equivalent of Mr Hood], such as the contract between the agency [the equivalent of NES], which recruited him, and the client [the equivalent of ABB], which is or may be relevant, then it should clearly be supplied by the agency or the client or by the inspector. ... It appears to me clear that the Revenue must bear in mind that under IR35 they are *not* considering an actual contract between the service company [the equivalent of Usetech] and the client [ABB], but imagining or constructing a notional contract which does not in fact exist. In those circumstances, of course the terms of any contract between the agency and the client as a result of which the service contractor will be present at the site are important, as would be the terms of any contract between the service contractor and the agency. But, particularly given the fact that, at any rate at present, a contract on standard terms may or may not be imposed by an agency, or may be applicable not by reference to a particular assignment, but on an ongoing basis, and may actually bear no relationship to the (non-contractual) interface between the client and the service contractor, such documents can only form a part, albeit an important part, of the picture.

47. It seems plain that Burton J was of the opinion that all relevant circumstances would fall to be taken into account in determining the contents of the hypothetical contract between the worker and the end user, including the provisions (or the absence of particular provisions) of a contract between an agency like NES and an end user like ABB. And he took that view whether or not the worker and his personal service company knew what the detailed provisions of the contract between the agency and the end user were. I would respectfully agree, and I would only add that it is by no means unknown for a person's liability to tax to be affected by a transaction which he knew was going to happen between other parties even if he did not know the details of it. For an example see *Emery v IRC* (1980) 54 TC 607.

48. For all of the foregoing reasons I do not accept the starting point of Mr Devonshire's right of substitution argument: I do not accept that the hypothetical direct contract between Mr Hood and ABB would have contained a substitution clause under which it would have been open to Mr Hood not to provide his services personally but instead

to provide a suitably skilled substitute. That being so, I do not strictly need to consider whether I agree with the next step in Mr Devonshire's argument, which is that, if the contract had contained such a provision, it would as a matter of law have been incapable of being a contract of employment. That matter was, however, fully argued, and I think that I ought to say something about it, although I hope that I will be forgiven if I do not go into the arguments as comprehensively as I would otherwise have done.

49. The right of substitution argument is based largely on the decision of the Court of Appeal in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367. The underlying issue was whether Mr Tanton was an employee entitled to the various protections provided by the Employment Rights Act 1996 and associated legislation. He was a driver who agreed to provide his services to the company. The contract included this provision:

> 3.3 In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services.

The Court of Appeal held that, because of that sub-clause, the relationship was incapable of being an employment. I accept that there are sentences in the judgment of Peter Gibson LJ which, taken by themselves, suggest that any contract for services which contained any right for the worker to provide a substitute can never be a contract of employment. However, the *Tanton* case needs to be evaluated together with other cases, including two later decisions of the EAT (the Employment Appeal Tribunal) which considered the ambit of it.

50. An earlier case which the court cited in *Tanton* is *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. I have already quoted one passage from the judgment of McKenna J in paragraph 25 above. Shortly after that passage His Lordship said this (with my italics identifying wording to which significance has been attached in the recent cases before the EAT):

> Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, *though a limited or occasional power of delegation may not be*: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

I move on to the two recent EAT cases. *MacFarlane v Glasgow City Council* [2001] IRLR 7 (in which the President of the Tribunal was Lindsay J) concerned gym instructors who worked for the Council. If for any reason they were unable to take a class they were to arrange replacements from a register of coaches maintained by the Council. The EAT reversed a decision of the tribunal below that that provision, read in the light of *Tanton*, meant that the instructors could not be employees of the Council. Lindsay J referred to *Tanton* and to the passage in the *Ready Mixed Concrete* case which I quoted above. In paragraph 13 of the judgment he went on to say:

> The relevant clause in *Tanton* was extreme. The individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute. He could choose the substitute and then in effect he would be the master. Properly regarded, *Tanton* does not oblige the tribunal to conclude that under a contract of service the individual has, always and in every event, however exceptional, personally to provide his services.

The actual decision in *MacFarlane* was that the case should be remitted to the first instance tribunal for it to decide by reference to all of the circumstances whether the gym instructors were employed or self-employed, but not to proceed on the basis that, because there was a substitution provision in the terms of service, that conclusively established that there could not have been an employment relationship.

51. The second EAT case to which I refer is *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96, in which both *Tanton* and *MacFarlane* were considered by a tribunal presided over by Mr Recorder Underhill QC. The applicants were building workers who were engaged under contracts which plainly set out not to be contracts of employment. The applicants nevertheless argued that on a proper understanding they were entitled to holiday pay under the Working Time Regulations 1998. The matter did not turn solely on whether in truth they were employees, but the observations of the EAT on that issue are instructive. The agreements included the following provision:

> 13. Where the subcontractor is unable to provide the services, the subcontractor may provide an alternative worker to undertake the services but only having first obtained the express approval of the contractor.

I quote some extracts from the Tribunal's judgment:

> In our view it is plain that the contracts do require the applicants personally to perform work or services for Byrne Brothers. As a matter of common sense and common experience, when an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. In our view that consideration is admissible as part of the factual matrix. … But even if that were not so … clause 13, which concerns the use of additional or substitute labour, only makes sense against the background of an understanding that, subject to its provisions, the services are to be provided by the subcontractor personally. It is of course true that the effect of the provisions of clause 13 is that in certain circumstances the services may be provided by someone other than the subcontractor himself. But the clause falls far short of giving the subcontractor a blanket licence to supply the contractual services through a substitute.

The Tribunal then reviewed the authorities which I have mentioned. One thing which it did was to cite the passage in Professor Atiyah's book on Vicarious Liability which was alluded to but not specifically cited by McKenna J in the *Ready Mixed Concrete* case (see the extract quoted in the previous paragraph of this judgment). The passage is to the effect that an employment requires the performance of 'at least part' of the work by the employee himself. That does not suggest that, if the person concerned can provide a substitute for any part of the work, the relationship is legally incapable

of being an employment. The EAT in *Byrne Brothers* concluded by agreeing with the tribunal below that the essential facts brought the case within the ratio of *MacFarlane* rather than *Tanton.* So despite the existence of the substitution clause the workers were employees.

52. I have one other case to mention. My attention has been drawn to it by Mr Nawbatt. *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1984] ICR 286, was an Australian appeal to the Judicial Committee of the Privy Council. It concerned lecturers for Weight Watchers classes. Their contracts included a clause for substitution of other lecturers approved by the company. The lecturers who were the parties to the contracts were held to be employees. It is true that, as Mr Devonshire pointed out, there was no discussion of whether the existence of that clause affected the status of the lecturers as employed or self-employed. However, the Privy Council was undoubtedly aware of the clause. Indeed Lord Brandon, delivering the advice of the Board, listed it among clauses which required particular consideration. The conclusion was: *'The effect of the contract as a whole is to create between Narich and the lecturer the relationship of employer and employee.'* The *Narich* case was not cited to the Court of Appeal in *Tanton*: it may be relevant to note that Mr Tanton had appeared in person on the appeal and that the judgment was, I believe, an unreserved one. If the case had been cited I do not suppose for a moment that the decision in *Tanton* would have been any different, but perhaps the court might have expressed itself somewhat differently when considering the effect of substitution clauses.

53. As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances. In the words of Hart J in *Synaptek Ltd v Young* [2003] STC 543 at 554-555, the context is one *'where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia'*. The presence of a substitution clause is an indicium which points towards self-employment, and if the clause is as far-reaching as the one in *Tanton* it may be determinative by itself. In this case, however, if, contrary to my view, the hypothetical direct contract between Mr Hood and ABB has to be assumed to have contained a substitution clause similar to that in the Usetech/NES contract, in my opinion (agreeing with the Special Commissioner) it would not be sufficient to override the effect of all the other considerations which led the Commissioner to decide that the relationship would have been that of employee and employer.

54. For all of the foregoing reasons I do not accept Mr Devonshire's right of substitution argument.

The want of mutuality argument

55. I am unable to accept the want of mutuality argument either. The argument is that a contract cannot be a contract of employment unless there is mutuality of obligation: an obligation of the employee to provide his service to the employer, and conversely an obligation or obligations of the employer – certainly an obligation to remunerate the employee for work done, and (a less clear cut matter) an obligation to provide work for the employee to do, or at least an obligation to pay the employee for times when he

is available for work but no work is provided. It is argued in this case that, if a direct contract had been in force between Mr Hood and ABB, it would not have obliged ABB to provide work for Mr Hood, and therefore it would have lacked the element of mutuality which would have been essential for it to be a contract of employment. Mr Devonshire relies in that connection on evidence from Mr Hood that he was at times sent home (or back to his lodgings) by ABB at short notice (e.g. when the computer crashed or when work was not available). Mr Hood recalled 'at least three or four occasions when the computer crashed and I was sent home without payment'. He also said that Usetech 'did not receive any payment whatever for the down time'. However, as I read his witness statement, that last sentence relates to occasions when he had been planning to work over weekends but it turned out that there was no weekend work available.

56. The Special Commissioner addressed the want of mutuality argument briefly in paragraph 28 of his decision. He did not accept it, principally because he considered that the requirement of mutuality might 'be satisfied by the obligation, on the one hand, to work and, on the other, to remunerate'.

57. For myself, while I agree with the result which the Special Commissioner reached on this issue, and certainly I consider that it was a result which it was open to him to reach, I would be inclined to put the matter in a more detailed way. If there is a relationship between a putative employer and employee, but it is one under which the 'employer' can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done, the cases appear to me to establish that there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment. See *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (Court of Appeal); *Carmichael v National Power PLC* [1999] 1 WLR 2042 (House of Lords); *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2001] IRLR 627 (Court of Appeal).

58. That leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment, and it was, I believe, that concept which the Special Commissioner had in mind as covering this case. That is consistent with his referring in the same paragraph of his decision to the decision in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, in which part time interviewers for a market research company were held to be engaged under a series of separate contracts of employment. The judgment of Cooke J in that case contains a valuable and much cited discussion of principles which are relevant to distinguishing between contracts of employment and contracts for services rendered in a self-employed capacity (see especially pages 184G to 185E). I confess that I have doubts about the factual conclusion which the learned judge reached when he applied the principles to the facts of the case. For myself, I see considerable force in the alternative analysis, namely that the interviewers provided their services on a free lance or casual basis and not as employees. See for an example of an analysis of that nature *O'Kelly v Trust House Forte Plc* [1984] QB 90.

59. However that may be for a case where the argument is that there has been a succession of separate contracts of employment, this case is not really of that nature. In contrast to a case like *Market Investigations* (or so it seems to me), the facts lend themselves readily to the conclusion that, if Mr Hood had been working for ABB under a direct contract, it would have been a contract of employment. The engagement lasted for 17 months. Viewed realistically there was nothing casual about it. On Mr Hood's own evidence he worked for an average of 58 hours a week. The Special Commissioner found that 'he was, as a rule, expected to work the "core" hours from 8am to 5pm'.

60. I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free lance services. However, in this case it was at the lowest open to the Special Commissioner to form the view that, if there had been a direct contract between Mr Hood and ABB for him to provide his services to ABB, it would have fallen to be regarded as a contract of employment, not as contract for free lance services. Mr Devonshire argues that that was not the case because ABB was not obliged to provide work for Mr Hood to do. The argument is unconvincing on the facts. At the cost of repeating myself I say again that ABB provided work for Mr Hood over a continuous period of 17 months, and provided enough work for him to be working for 58 hours in a typical week. As to the occasions mentioned in Mr Hood's witness statement when he says that he was sent home because there was nothing for him to do, the occasions must have been highly exceptional. The evidence of the engineering manager from ABB was that 'as a general rule, temporary staff were expected to work 50 hours a week, and Mr Hood did so' (decision paragraph 13). Neither witness from ABB recalled an occasion on which Mr Hood was sent home without pay, though they did accept that that could have been possible.

61. However, I have some reservations (as I said in paragraph 24 above) about the evidence from Mr Hood that he was sent home without payment. There are two points which make me cautious about the evidence in that respect, and I remain cautious notwithstanding that the ABB witnesses accepted that for Mr Hood to be sent home without pay was a possibility. The first point is: how could Mr Hood know whether, if he was sent home because there was no work, there would be no payment for his unused time? Whether ABB would pay for any time when Mr Hood was available for work but his services were not needed was a matter between ABB and NES. In connection with the right of substitution argument Mr Devonshire said that Mr Hood and Usetech did not know what the contents of the NES/ABB contract were. So how could Mr Hood say that, on the occasions when he was sent home, there was no payment made by ABB for his availability?

62. The second point is that, if Mr Hood's evidence is that ABB only paid for hours of actual work, that is inconsistent with a provision in the NES/ABB contract. As I have said in paragraph 21 above, the letter agreement of 22 May 2000 between NES and ABB specified an hourly rate of payment, and also specified 'Minimum Hours: 37.5

hours'. If ABB sent Mr Hood home in a week when he worked for fewer than 37.5 hours, ABB was liable to pay for unworked time up to a total number of 37.5 paid hours for the week. The minimum hours provision in the NES/ABB contract was underpinned by a provision that seven days notice had to be given by either party to terminate the contract. I cannot be sure, but I think it unlikely that these provisions were present to the minds of the ABB witnesses when they accepted that it would have been possible for Mr Hood to be sent home without payment.

63. The minimum hours provision in the contract is important in another respect, because it presents a fundamental objection to the whole of the want of mutuality argument. The starting point for that argument is that, under the hypothetical contract between ABB and Mr Hood, ABB would have had no obligation to provide work. But I believe that ABB would have had an obligation to provide work. The letter agreement of 22 May 2000 between NES and ABB (see paragraph 21 above) incorporated a set of printed Terms and Conditions. One of them was condition 3.2:

> The Client [ABB] shall provide the Minimum Hours of work to each member of the Contract Staff.

Mr Hood was the only member of the Contract Staff, so the effect of the letter and the Terms and Conditions in combination was that ABB agreed with NES that it would provide a minimum of 37.5 hours of work a week for Mr Hood. Even if it failed to do that, it would plainly have to pay NES for 37.5 hours.

64. The cases indicate, and (as I recall) Mr Devonshire accepted, that the mutuality requirement for a contract of employment to exist would be satisfied by a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment. See especially the *Clark* and *Stevedoring & Haulage* cases referred to in paragraph 57 above.

65. For the reasons which I explained in connection with the right of substitution argument I believe that the hypothetical contract between ABB and Mr Hood would contain provisions reflecting those in the actual NES/ABB contract. It would therefore provide that ABB was to provide a minimum of 37.5 hours of work a week, and to pay for the hours actually worked (with payment for a full 37.5 hours if the hours actually worked fell short of the required 37.5). There would have been both an obligation to provide work and an obligation to pay for a minimum of 37.5 hours a week. On that basis the mutuality requirement would in any event be satisfied. This particular point is not, I think, made by the Special Commissioner, but it is, as it seems to me, a further and decisive refutation of the want of mutuality argument.

Conclusion

66. For the foregoing reasons I conclude that this appeal falls to be dismissed. I would like to repeat the point, implicit if not explicit in earlier parts of this judgment (especially paragraphs 32 and 33), that my decision does not necessarily mean that the Special Commissioner was bound to reach the decision which he did. He looked at the entire circumstances in the round (as I believe that both the Inspector and the advocate for Usetech invited him to do), and he came to the conclusion that, if there had been no Usetech, a direct contract between Mr Hood and ABB would have been a contract of employment. Suppose that he had looked at the case in a similar way (perhaps also taking account of Mr Hood's earlier history of being a specialist in his particular field), and had reached the opposite conclusion: that a contract between Mr Hood and ABB would not have been a contract of employment but rather would have been an ingredient in a self-employed profession. My present decision should not be understood as meaning that such a decision by the Special Commissioner would have been wrong in law. It might or might not have been, and I have heard no argument on the question. However, given that decisions of Commissioners in tax appeals are generally final on questions of fact rather than law, the grounds on which I could now reach a decision in favour of Usetech are much narrower than those on which the Special Commissioner could have reached such a decision.

67. Mr Devonshire has appropriately limited his submissions to me to grounds on which it can be said that the Commissioner made a clear error of law, rather than that he came to one conclusion rather than another on a question of fact and degree which arguably might have gone either way. I have, I hope, examined carefully and comprehensively the two grounds which Mr Devonshire has advanced. I am unable to agree with either of them. The result therefore can only be that I dismiss the appeal.