[2019] UKFTT 195 (TC)

TC07045

Appeal number: TC/2017/01720

INCOME TAX AND NATIONAL INSURANCE - intermediaries legislation - IR35 - sections 48-61 ITEPA 2003 - personal service company - contract for services or contract of service – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALBATEL LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JENNIFER DEAN
MR IAN MENZIES-CONACHER FCA

Sitting in public at Taylor House on 12 – 14 November 2018

Mr Keith Gordon, Counsel for the Appellant

Miss Elisabeth Roxburgh, Advocate instructed by the Office of the Advocate General, for the Respondents

DECISION

Introduction

1. By Notice of Appeal dated 17 February 2017 the Appellant appealed against a regulation 80 determination assessed in the sum of £899,912.95 and notice of decision in respect of Class 1 NICs assessed in the sum of £312,615.54 arising from the application of the intermediaries legislation (commonly referred to as "the IR35 legislation").

2. The purpose of the IR35 legislation was set out by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51]:

> "…the aim of both the tax and the NIC provisions (an aim which they may be expected to achieve) is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

3. The effect of the legislation, where it applies, is to treat the fees paid to a service company not as company revenue upon which corporation tax is payable but rather as deemed salary to the worker which is subject to income tax and NIC. The legislation applies to those workers who would be treated for NIC and income tax purposes as being employed under a contract of service by the client were it not for the involvement of the personal service company or agency.

4. In this case HMRC concluded that had there been a direct contract between Lorraine Kelly and ITV Breakfast Ltd during the period of engagement it would have been a contract of service, giving rise to a need to account for income tax and NICs in the relevant period. HMRC also contend that agency fees paid to Lorraine Kelly's agent Roar Global Ltd and paid by the Appellant are not deductible expenses.

Facts

5. The Appellant was incorporated on 4 September 1992. The directors and shareholders are Mr Stephen Smith and Mrs Lorraine Smith (professionally known as Lorraine Kelly). The Appellant is the personal service company of both Mr and Mrs Smith, however this appeal is only concerned with Mrs Smith. In this Decision we will refer to Mrs Smith as Ms Kelly as that is name used on the contractual documentation and by the witnesses. During the tax years 2012/13 to 2015/16 inclusive, the Appellant contracted to provide Ms Kelly's services as a presenter.

6. By a contract dated 9 July 2012 the Appellant contracted to provide the services of Ms Kelly to ITV Breakfast Ltd in connection with the television programmes "Daybreak" and "Lorraine". The services were to be provided from 3 September 2012 for a minimum of 2 years and six months ("the Agreement").

7. By an amendment agreement dated 17 February 2014 ("the Amended Agreement") the Appellant contracted to amend the Agreement so that it was contracted to provide Ms Kelly's services to ITV Breakfast Ltd:

(i) as a lead presenter on television programmes "Daybreak" and "Lorraine" for the period from 3 September 2012 to 10 April 2014 and;

(ii) as a lead presenter on television programme "Lorraine" for the period from 11 April 2014 to 15 July 2017.

8. A meeting took place at ITV Studios, London on 9 July 2015 between employees of HMRC and representatives from ITV. Following that meeting, by letter dated 28 September 2015, Mr Derek Richards, described as the Group Tax Compliance Manager at ITV, returned signed notes of the interview together with additional information, more about which we will say in due course.

9. By letter dated 22 July 2016 HMRC issued to the Appellant:

(i) Notices of Tax in respect of income tax deductible via PAYE ("the Determinations"); and

(ii) A Notice of Decisions in respect of Class 1 NICs("the Notice").

10. By letter dated 23 January 2017 the Determinations and Notice were varied. The determinations and notice of decisions were made on the basis that the IR35 legislation applies to the arrangements entered into between Albatel and ITV for the provision of the services of Ms Kelly.

11. The Grounds of Appeal relied upon by the Appellant can be summarised as follows: the nature and range of Ms Kelly's work mean that she should be treated as a self-employed star. Consequently, the IR35 legislation cannot be invoked so as to deem there to be any employment relationship. Furthermore, the Tribunal is invited to find that a deduction would have been permissible for agent's fees paid if the IR35 legislation is deemed to apply to the facts of this case.

Issues to be determined

12. The parties have agreed a net figure for the additional sum payable if the IR35 legislation is found to apply and agent's fees are not held to be deductible. The parties have not yet reached agreement on a figure if the fees are held to be deductible.

13. The issues therefore remaining between the parties can be summarised as follows:

(i) Whether the Appellant is to be treated as an intermediary employer and whether during the relevant period the provision contained in s49(1)(c) ITEPA 2003 is satisfied; namely, whether the hypothetical notional contract between Ms Kelly and ITV would have been a

contract of service, as HMRC contends, or a contract for services as the Appellant contends.

(ii) Whether agency fees paid by the Appellant to Roar Global Ltd for negotiating the agreement between the Appellant and ITV are deductible as an expense of the employment.

14. Although (ii) only arises if the Appellant is found to be liable to taxation as an intermediary employer, we were invited to set out our findings on the issue irrespective of our decision on (i).

Legal framework and authorities

15. The legislation for income tax purposes is found in section 49 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). The equivalent provision for national insurance purposes is contained in Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 ("the 2000 Regulations").

16. Section 49 provides as follows:

> (1) This Chapter applies where –
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that-
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided."

17. The wording in respect of NICs is broadly similar and the parties agreed that the effects of the provisions as applicable to this appeal are materially similar and produce the same result.

18. In this case there was no dispute that:

(a) Ms Kelly personally performed or was under an obligation personally to perform services for ITV; and

(b) Ms Kelly did not have a contractual relationship with ITV instead providing her services under arrangements involving the Appellant.

19. In those circumstances the provisions in section 49(1)(a) and (b) of ITEPA 2003 are satisfied. The issue for us to determine are whether the requirements of section 49(1)(c) are satisfied; i.e. whether the notional contract between Ms Kelly and ITV would have been a contract of service or a contract for services.

20. As a starting point many of the cases consider the conditions set out by MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 All ER 433 [at 439-440] ("*Ready Mixed Concrete*") for the existence of a contract of service:

> "A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master (iii) The other provisions of the contract are consistent with its being a contract of service."

21. The first condition is commonly known as "mutuality of obligation", the second relates to the degree of control and the third is a negative condition, i.e. where it is shown that there is:

> "requisite mutuality of work-placed obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms that places it in a different category"

(see *Weightwatchers (UK) Ltd v HMRC* [2012] STC 265 per Briggs J at [42]).

22. In *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173 Cooke J stated [at 184-185]:

> "… the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of

> his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

23. Nolan LJ in the Court of Appeal in *Hall v Lorimer* [1994]1 W.L.R. 209 [at 216] specifically approved of the comments made by Mummery J in the same case in the High Court [1992] 1 W.L.R. 939 at [944]:

> "In order to decide whether a person carries on business on his own account, it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation another. The process involves painting a picture in each individual case."

24. In *Usetech v Young* (2004) 76 TC 811 Park J explained (at [9] and [36]) that the court is required to construct a hypothetical contract between the worker and the company and then enquire what the consequences would have been if it had existed. The court may take into account all relevant circumstances, including any existing contracts. However, statements within the contracts between worker, intermediary and client as to whether the parties intended their relationship to be one of employment will be given minimal weight, if any, in construing the hypothetical contract between worker and client. In *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) Henderson J stated:

> "53. … statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see *Ready Mixed Concrete* ([1968] 2 QB 497 at 513) and *Massey v Crown Life Insurance Co* [1978] 2 All ER 576, [1978] 1 WLR 676.In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.
>
> 55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be

minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

25. In *Cotswold Developments Construction Ltd v. Williams* [2005] UKEAT 0457 05 2112 (21 December 2005) it was stated at [55]:

> "We are concerned that Tribunals generally, and this Tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is *some* obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in *Nethermere* put it as "… an irreducible minimum of obligation …". He did so in the context of a case in which home workers were held to be employees. Mrs Taverna refused work when she could not cope with any more. She worked in her own time. It is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some."

26. The right of a company to control a worker in respect of what, how, when and where work is undertaken can be an important indicator of an employment relationship, however control will not be the decisive test as per Lord Parker CJ in *Morren v Swinton and Pendlebury BC* [1965] 2 All ER 349 at [351]:

> "…control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

27. The key question is not whether in practice the company exercises control but whether it has a contractual right of control, as per *White v Troutbeck* [2013] IRLR 286 at [290]:

> "…the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work….In my judgment what was required was to analyse the terms of the agreement between the parties to see whether, expressly or by implication, Troutbeck…retained a right of control to a sufficient degree….Moreover, for the reasons I have given, it is not inconsistent with the concept of employment for an absentee owner to want someone to be responsible for maintaining and managing their property. The question is not by whom day-to-day control was exercised but with whom and to what extent the ultimate right to control resided."

28. In *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 the Court said at [19]:

> "MacKenna J made plain that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as to the existence of a contract of service can be answered. As to (ii) he had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment. MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which I take the first few lines only:
>
> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."'

29. In *Autoclenz Ltd v Belcher* [2011] ICR 1157 Lord Clarke stated at [1163] that if a right of control exists within the contract, the fact that the company does not exercise it does not detract from that fact:

> "Three further propositions are not I think contentious: (i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, 699 g, per Peter Gibson LJ. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg the *Tanton* case, at p 697 g."

30. In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC at [36] Lord Philips explained:

> "Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it."

31. *Dragonfly Consulting Ltd v HMRC* [2008] EWHC 2113 (Ch) at [41] and [52] explained that the degree of control needs only be sufficient as opposed to tantamount to that over an employee:

> "Everybody agrees that control is in some sense an essential ingredient of a contract of employment. It is the second of the three conditions to which MacKenna J referred to in *Ready Mixed Concrete*. By way of amplification, he said at 515F:
>
> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted…To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."
>
> …
>
> On the strength of the oral evidence, the Special Commissioner was in my view fully entitled to conclude that Mr Bessell's performance of his duties was subject to a degree of supervision and quality control which went beyond merely directing him when and where to work. In the case of a skilled worker, you do not expect to find control over how the work is done. Conversely, in the case of a self-employed worker in business on his own account you would not normally expect to find regular appraisal and monitoring of the kind attested to by Mr Palmer and Miss Tooze. The weight and significance to be attached to this evidence was a matter for the Special Commissioner, and in my view it was open to him to conclude that the nature and degree of the control by the AA under the hypothetical contract was on balance a pointer towards employment."

32. *Market Investigations v Minister of Social Security* [1969] 2QB 173 in which Cooke J suggested that the test to be applied was whether the worker was an employee *"as a matter of economic reality"* set out the following factors as potentially relevant in making that assessment:

- provision of own equipment;
- whether he hires his own helpers;
- what degree of financial risk he takes;
- what degree of responsibility for investment and management he has; and
- whether and how far he has an opportunity of profiting from sound management in the performance of his task.

33. In *Novasoft Ltd v Revenue & Customs* [2010] UKFTT 150 (TC) the FTT summarised the position as follows at [22]:

> "Mr Hall in his skeleton argument proposed the following list of factors for consideration, and we agree these are the relevant factors:
>
> (1) Extent and degree of control exercised by the client over the worker.
>
> (2) The worker's right to engage helpers or substitutes.
>
> (3) Mutuality of obligations between the worker and the client.
>
> (4) Financial risk of the worker.
>
> (5) Provision of equipment.
>
> (6) Basis of payment of the worker.
>
> (7) Personal factors
>
> (8) The existence of employee rights.
>
> (9) Termination of the contract.
>
> (10) Whether the worker was part and parcel of the client's organisation.
>
> (11) Exclusive services.
>
> (12) Mutual intention.
>
> We bear in mind the admonishment of Mummery J not to treat this as a checklist to run through mechanically. Instead they are the factors that go towards painting the picture whose overall effect must be evaluated."

34. More recently, in *Christa Ackroyd Media Ltd v Revenue and Customs* [2018] UKFTT 69 (TC) the FTT concluded at [171]:

> **"**We do not consider that the fact the fees were payable on a monthly basis akin to the way an employee might be paid is significant. Nor is the absence of any provision for holiday, sick pay or pension entitlement. The Contract was between CAM Ltd and the BBC and both parties accept that the Contract was not an employment contract. It would not be expected to contain such provisions. Mr Tolley suggested that as a "worker" Ms Ackroyd would have a statutory entitlement to such rights, but he accepted that did not assist the Respondents in establishing whether Ms Ackroyd was an employee. Mr Summers relied on the fact that if Ms Ackroyd had been an employee then she would have been entitled to employment rights on the eventual termination of the Contract. Again, this is not a relevant factor because the BBC and CAM Ltd were governed by the Contract, and not the hypothetical contract."

Deductible expenses

35. The Appellant contends that any liability it incurs in terms of Chapter 8 of Part 2 of ITEPA 2003 should be calculated following the deduction of agency fees. The relevant provisions are found in section 352 ITEPA which provides as follows:

(1) A deduction is allowed from earnings from an employment as an entertainer for agency fees (and any value added tax on them) if the fees are calculated as a percentage of the whole or part of the earnings from the employment.

This is subject to the limit in subsction (2).

(2) Amounts may be deducted under this section in calculating the net taxable earnings from an employment in a tax year only to the extent that, in aggregate, they do not exceed 17.5% of the taxable earnings from the employment in the tax year.

(3) Subsections (4) and (5) apply for the purposes of this section.

(4) "Entertainer" means an actor, dancer, musician, singer or theatrical artist.

(5) "Agency fees", in relation to an employment, means—

(a) fees paid under a contract between the employee and another person, to whom the fees are paid, who—

(i) agrees under the contract to act as an agent of the employee in connection with the employment, and

(ii) at the time the fees are paid is carrying on an employment agency with a view to profit, and

(b) fees paid under an arrangement under which a co-operative society or the members of such a society agree to act as the employee's agent in connection with the employment.

(6) For the purposes of subsection (5)—

"co-operative society" does not include a society which carries on or intends to carry on business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with or lent to the society or any other person, and

"employment agency" has the meaning given by section 13(2) of the Employment Agencies Act 1973 (c 35).

36. In relation to the guidance issued by HMRC as to what is meant by "theatrical artist", *Leeds City Council v HM Revenue and Customs* [2015] EWCA Civ 1293 confirms that such guidance does not have the force of law, the Court of Appeal noting at [4]:

> "The administration and collection of VAT in this country is under the management of HMRC (formerly the Commissioners for Customs & Excise). There are many problems of interpretation arising out of the VAT code and HMRC provide the public with their own interpretation of points of difficulty; and information about the practice they adopt in various areas. These are variously contained in Notices, Business Briefs and the VAT Manual. They are not law: they are no more than HMRC's interpretation of the law. HMRC are not of course infallible, and so Parliament has legislated for a system of tribunals to decide contested points. As and when cases are decided against HMRC they will often revise their opinion and inform the public accordingly. Sometimes, of course, HMRC disagree with a tribunal decision, in which event they may choose to appeal."

37. In *Madeley & Finnigan v Revenue & Customs* [2006] UKSPC SPC00547 (08 June 2006) the Special Commissioners stated (at [59] & [74]):

> "The following is the whole text of the HMRC commentary on s.201A from which I did not understand counsel for HMRC to resile in any way.
>
> "SE 62800 TAX TREATMENT OF THE ENTERTAINMENT INDUSTRY; THEATRICAL PERFORMERS - FEES PAID TO AGENTS
>
> Section 201A ICTA 1988
>
> From 1990/91 onwards a deduction is permitted by Section 201A ICTA 1988 for fees paid to agents by theatrical performers out of earnings taxed under Schedule E.
>
> For this purpose a theatrical performer is an actor, singer, musician, dancer or theatrical artist. This means that a deduction can be given **to any person with a particular theatrical talent in respect of an employment under which they perform in public**. A deduction cannot be given to non-performers, such as a stage manager. It can be given to individuals whose talents are not primarily theatrical but who are employed to perform in a theatrical setting, for example a sports personality appearing in a pantomime.
>
> To qualify for a deduction **the theatrical performance need not take place in a theatre. Any setting for a performance is sufficient, for example** a **television programme, a film or a concert hall."** *(my emphasis)*
>
> This published statement from HMRC seems to me to be correct in every way. The remark about the deduction being unavailable to "non performers" may be slightly inconsistent with a statement by Peter Lilley that I will refer to shortly, but the critical passages that I have high-lighted seem to me to be supportive of Richard and Judy's case, and manifestly to be fair commentary….

> The common thread then to Bruce Forsyth, Ant and Dec and Anne Robinson is that they are all putting on one or another form of act. Everything is a performance. And to my mind Richard and Judy share that attribute. Their act was and is to perform the role of the informal chatting husband and wife team, constantly trying to entertain, and making their personality and performance the core of the programme that they presented. And that makes them "theatrical artists".”

Evidence

38. We were provided with witness statements and heard oral evidence on behalf of the Appellant from Ms Lorraine Kelly, Ms Susan Walton, Mr Hugh Grant and Professor Jonathan Shalit.

39. We were also provided with a statement of agreed facts, the pertinent points of which are summarised at paragraphs [5] to [11] above.

40. HMRC did not rely on any witnesses but highlighted the following contractual arrangements:

41. The Agreement was dated 9 July 2012 and the Amended Agreement dated 14 February 2014. The services under the Agreement were to be provided from 3 September 2012 for a minimum of 2 years and six months. The Amended Agreement contracted the Appellant to provide Ms Kelly’s services to ITV Breakfast Ltd as

(i) as a lead presenter on television programmes “Daybreak” and “Lorraine” for the period from 3 September 2012 to 10 April 2014 and;

(ii) as a lead presenter on television programme “Lorraine” for the period from 11 April 2014 to 15 July 2017.

42. The Agreement identified the “Individual” as Ms Kelly and identified in Clause 1.1 that Albatel would procure that Ms Kelly rendered the services to ITV.

43. Clause 3.1 of the Agreement provided that, subject to due performance by Albatel and Ms Kelly, Albatel would be paid the following amounts by ITV for the services of Ms Kelly:

i. £1,000,000 (one million pounds) (plus VAT if applicable) for the period from 3 September 2012 to 2 September 2013 (“Year One”);

ii. £1,050,000 (one million and fifty thousand pounds) (plus VAT if applicable) for the period from 3 September 2013 to 2 September 2014 (“Year Two”); and

iii. £1,102,500 (one million one hundred and two thousand five hundred pounds) (plus VAT if applicable) for the period from 3 September 2014 to 2 September 2015 (“Year Three”).

44. Payment was to be made "in monthly instalments in arrears within 14 (fourteen) days of the end of the month of the Term or pro rata for any incomplete week or month of the Term". Clause 3.1 also stated that, subject to due performance by the Appellant and Ms Kelly, ITV guaranteed the engagement of Ms Kelly for a minimum of 2 years and 6 months. HMRC highlight that this meant a fee of £2,601,250 was guaranteed.

45. Under Clause 3.6 of the Agreement the Appellant was to receive ITV's invoices for the fees rather than producing its own.

46. Clause 12.2 of the Agreement provided as follows:

> "Either party shall be entitled to terminate the engagement at any time after 2 September 2014 on 6 (six) months' written notice without specifying any reason therefor. In the event of termination under this provision [ITV] will pay to [the Appellant] a portion of the Fee commensurate to the amount of Services provided up to the date of termination and this shall constitute the full extent of our liability to you and [Ms Kelly] as a result of such termination. Notwithstanding the foregoing in the event that termination occurs pursuant to this Clause 12.2 prior to 3 March 2015 then the balance of the Minimum Fee not already paid prior to termination shall be payable."

47. Clause 1.1 of the Agreement provided that the services would be provided to ITV by Ms Kelly on "an exclusive and first call basis for the period commencing on 3 September 2012 and continuing thereafter unless otherwise terminated."

48. Clause 1.2 of the Agreement provided that the services would be provided for 42 weeks each year excluding bank holidays. It also provided that Ms Kelly was entitled to be absent for the remaining 10 weeks in each calendar year at times "to be agreed in good faith at least one month in advance."

49. Clause 1.3 provided that for each episode where Ms Kelly's attendance was required she was "required to provide on-screen services between 7.00am and 9.30am as lead presenter for an hour and a half and sole presenter for an hour." In the first week Ms Kelly was to contribute to five episodes from Monday to Friday and thereafter unless requested to appear in five episodes, Ms Kelly was to contribute to four episodes of the programme per week.

50. The Services were set out at Clause 2 as:

> "the services…as a first class presenter in full and willing co-operation with reasonable requests made to [Ms Kelly] from time to time by the executive producer of the Programme". Such services included:
>
> - 2.1 appearing in and/or out of vision as a presenter for the Programme;
> - 2.2 Attending in a timely manner, filming sessions, production meetings and rehearsals for the Programme;

- 2.3 where required, providing creative input into the production of the Programme;
- 2.4 Participating in occasional short voice-overs and video tape recordings;
- 2.5 providing formal and informal interviews and/or contributions, behind the scenes material, participation in online chats and webcasts for on-line use on the Programme and/or the broadcaster website as requested by the executive producer (or our nominee);
- 2.6 undertaking promotional and public relations work from time to time as further set out in Clause 8;
- 2.7 rendering such other services as/or activities as are usually rendered by a first class presenter…"

51. Clauses 6.1 and 6.2 provided that all relevant copyright and moral rights were assigned to ITV and at 6.4 ITV had an unlimited right to edit, copy, alter, add to and take from the product of Ms Kelly's work.

52. Clause 4 provided that:

> "[Ms Kelly] shall not provide either directly or indirectly [her] services as a presenter or contributor of any television or audio-visual programme for production, broadcast and/or transmission in the UK that is available to viewers between the hours of 6am and 6pm during the term without [ITV's] prior approval (approval with regards to programmes on Saturday on Sunday *(sic)* shall not be unreasonably withheld)."

53. Clause 7.2 provided that neither the Appellant nor Ms Kelly will engage in conduct which may bring ITV, the programme or the broadcaster into disrepute. Clause 7.7 provided that Ms Kelly would comply with the rules and regulations of the place of work and television guidelines laid down by OFCOM. The clause also stated that clothing and accessories worn by Ms Kelly would not have visible branded logos and Ms Kelly could be asked to remove or change and items as directed by ITV.

54. Under Clause 12.1.7 ITV was able to terminate the Agreement with immediate effect if Ms Kelly in providing the services gave "public expression to any matter of public, political, social or other controversy."

55. The Agreement also stated (Clause 7) that the Appellant would procure that Ms Kelly would do certain things related to personal health including undergoing a full medical examination and not engaging in any hazardous pursuits without permission.

56. The Amended Agreement drew a distinction between two periods; 3 September 2012 to 10 April 2014 related to Ms Kelly's services provided in relation to "Daybreak" and "Lorraine", and the second period from 11 April 2014 to 15 July 2017 related to Ms Kelly's services in respect of "Lorraine". The Amended Agreement replaced Clauses 7.21 and 7.22 of the Agreement with the following at 7.21:

"you and [Ms Kelly] have not participated in or otherwise contributed to, and shall not participate in or otherwise contribute to, any press, radio or television or other media advertisement, commercial or other endorsement, which might be broadcast any time during the Term ("Commercial Activity") without our prior written consent in each case in accordance with the procedure set out in Schedule 3 hereto such consent not to be unreasonably withheld. For the avoidance of doubt, we shall be entitled to withhold our approval if in our reasonable opinion acting in good faith any of your new Commercial Activities would bear unfavourably upon us, the Programme, our editorial independence or reputation or conflict with activities of the Programme. The activities described in Schedule 2 hereto have been approved by us but are still subject to the other Terms of this Agreement."

Witness evidence

57. Ms Kelly provided a career overview in her witness statement. She has been freelance since 1992 and worked for a number of broadcasters including BBC, Channel 4, Channel 5, STV, Sky and ITV. Ms Kelly has also presented entertainment radio shows and writes two weekly columns for The Sun on a Saturday and The Sunday Post.

58. Ms Kelly explained that she is one of only a handful of entertainers who have their name in the title of their show, which she considers both an honour and a responsibility. As "Lorraine" is an entertainment show it is taken off air if a news story breaks overnight or early in the morning. As Ms Kelly is classed as an entertainer she is able to promote and endorse commercial products and has launched a clothing range for JD Williams. Ms Kelly is a brand ambassador for Avon and appears in an advert for online furniture company Wayfair. As an entertainer, commercial activity is permitted under OFCOM rules.

59. In relation to "Lorraine", Ms Kelly is involved in every aspect of the show from guests to forward planning to staging. Ms Kelly explained that she starts the day by checking the latest entertainment news and goes through the plan for the show with the day producer. Ms Kelly explained that she may make changes to the script or running order and approve any late additions. At approximately 8.10am Ms Kelly ad libs a "trail" on Good Morning Britain which is a chat about what is coming up on the show.

60. "Lorraine" airs from 8.30am to 9.30am. The running order can change depending on circumstances such as guests arriving late or failing to turn up. Ms Kelly stated that if she feels an interview is particularly interesting she will allow it to overrun and drop an item that was due to appear later on the show. Equally Ms Kelly will decide if an item should finish early. Ms Kelly will communicate with the director and producer during ad breaks and is given timings through an earpiece by the PA in order to ensure that the show does not overrun.

61. The debrief after the show is chaired by Ms Kelly and the producer and is followed by a meeting about the next morning's show. Ms Kelly will discuss and decide on guests, content and running order and there have been many occasions over

the years where she has dressed up and re-enacted movie scenes in skits and sketches, the aim of which is to set up the guests in an entertaining way and keep people watching. Ms Kelly explained that she decides her own hours; she can leave after the show has aired but instead she chooses to attend meetings to make decisions about the next show.

62. Ms Kelly explained that she will often go to movie screenings, previews of plays or read books in order to prepare for guests on the show; this is entirely Ms Kelly's choice and where other presenters often rely on members of their team to prepare a brief and questions, Ms Kelly carries out her own research and prepares the interview. Ms Kelly supplies her own phone and iPad and ITV contacts her via a personal email address or mobile phone number.

63. Ms Kelly gave a number of examples of turning down an interview, for instance with Sir Elton John which required a live link from Australia at 4am. As Ms Kelly was filming for the BBC later in the day she chose not to do the interview for her convenience. Similarly Ms Kelly was asked to be involved in the Woman of the Year Awards but she turned down the offer as she had a commitment with the BBC at the same time.

64. Ms Kelly told us about an expedition to Antarctica she had made in February 2017 which was not for ITV but for a magazine and newspaper article and for which Ms Kelly was absent from the show for 4 weeks in addition to the 10 weeks holiday specified in the contract. Ms Kelly explained that there is give and take in her relationship with ITV and she had told them that she intended to take part in the expedition. When Ms Kelly is absent she has suggested presenters to stand in who have worked very well.

65. In respect of "Daybreak" Ms Kelly explained that it was a magazine show with 'soft news' content and human interest stories. Ms Kelly's role and involvement was the same as for "Lorraine". Ms Kelly explained that her involvement in "Daybreak" came about as a result of the show's lack of success as a result of which ITV asked Ms Kelly in 2012 to present the show. The screen tests for a co-presenter took place in Dundee for Ms Kelly's convenience and it was Ms Kelly who chose the co-presenter Aled Jones. Ms Kelly's involvement was never intended as a long term commitment but to help ITV. Ms Kelly described "Daybreak" as mainly entertainment; the news was read between 6am and 7am by newsreaders in a separate newsroom and the content of the programme was much lighter after 7am. Ms Kelly explained that she was helping ITV on a short term basis as she continued with her own show at the same time which meant the hours could not be sustained on a long term basis. Ms Kelly confirmed that she could not carry out work for commercial products during her time at "Daybreak" due to OFFCOM but she was able to take acting roles.

66. Ms Kelly explained she was baffled by HMRC's reluctance to accept that she is an entertainer. We were provided with numerous clips of Ms Kelly's work which showed her dressing up for comedy sketches and features of shows such as the "bikini promise" with Ms Kelly drawing the distinction between her role in this type of

programme and that of Jeremy Paxman in Newsnight. Ms Kelly agreed that "Daybreak" was not classified as entertainment but stated that her role on the show was that of an entertainer with features of dressing up and doing sketches with Aled Jones. Ms Kelly stated that she viewed the term "theatrical artist" widely and that she acted everyday as a version of herself. Ms Kelly stated that she was not reliant on ITV for her work; she is in the public eye for more than the ITV programmes she has presented.

67. Ms Kelly explained that she has a freelance stylist but it is Ms Kelly who decides what to wear on the show. At the end of every season Ms Kelly decides which clothes to keep and which to give to charity. Ms Kelly also wears her own clothes and shoes. Ms Kelly agreed that transport was provided for her but explained that this is standard practice in the industry and furthermore there was no public transport running at the time she left for work.

68. Ms Kelly has a personal twitter account. She has no involvement in the ITV account "Lorraine on ITV". Ms Kelly does not contribute to the ITV website which is run by ITV and she disagreed that ITV could require her to contribute.

69. We were provided with an extensive list of Ms Kelly's film and TV work which includes Have I Got News for You, Never Mind the Buzzcocks, Would I Lie to You, Presenter of the Scottish BAFTAS, presenter of the Chelsea Flower Show, The Bill, Graham Norton and Sunday Brunch. In addition to the weekly columns for The Sun and Sunday Post, and travel pieces for the Mail on Sunday, Ms Kelly has also presented or been a guest on Radio 1, Radio Scotland, Radio Clyde and Steve Wright in the Afternoon among others. Ms Kelly has a bi-annual magazine "At home with Lorraine Kelly", has been an agony aunt for weekly magazine "Best" and "Marie Claire" and written for a number of magazines including Hello! and OK!

70. Ms Kelly confirmed that she did not receive the perks of an employee at ITV such as a pension nor do the obligations on ITV employees apply to her, such as training, health and safety, think tanks and away days. Ms Kelly stated that there was no job security; she was not entitled to sick pay or the benefits enjoyed by employees and when a contract expired there was no guarantee that it would be renewed even if the programme had been successful. Ms Kelly agreed that ITV could alter or edit anything in the programme and that there existed a spirit of cooperation with those she provided services to. Ms Kelly agreed that she was obliged to meet OFCOM regulations however Ms Kelly disagreed that there was any obligation on her to comply with all reasonable requests of ITV as she controlled the show explaining that it was no more than a reasonable working relationship and whilst she would listen to the producer ultimately she made the decisions, as it was her name on the door.

71. Ms Kelly agreed that the Appellant had signed the agreement with ITV but did not agree that all of the clauses applied to her situation, for instance Ms Kelly highlighted the variety of radio and television work she had undertaken while the contract with ITV was in place and stated that she did not need or obtain ITV's consent but rather she would tell them out of courtesy any other work or activities she intended to carry out.

72. Ms Kelly explained that she can work for any other broadcaster and recently filmed a documentary on penguins in South Africa for Channel 5. ITV are under no obligation to pay Ms Kelly if she is unable to present the show. Ms Kelly is not provided with office space and explained that she carries out her preparation at home. In the hour that Ms Kelly is contracted to work she stated she had total control; any additional work related to the show is a choice of Ms Kelly. Any requests to appear as a guest on another ITV show would go via Ms Kelly's agent and be subject to separately negotiated contracts. Ms Kelly highlighted that she is taken off air when a new story breaks, such as the terror attacks in London and the Grenfell Fire.

73. Ms Kelly explained her frustration at the manner in which HMRC had conducted the enquiry. She stated that there had been significant delay on HMRC's part and the whole process has been extremely stressful. The tax determinations initially issued were grossly inaccurate which caused significant anxiety.

74. Ms Walton is an experienced TV senior exec who has worked in the role of executive producer and editor on a range of shows including GMTV, This Morning, Loose Women and Lorraine. Until August 2017 Ms Walton was the editor and executive producer of the Lorraine show.

75. Ms Walton explained that Ms Kelly is a unique broadcaster who has had a show bearing her name for approximately 20 years. The DNA of the show and Ms Kelly are intertwined; she and her personality are the brand and for that reason her influence on and input into the programme content is vital.

76. Ms Walton explained that many guests agree to be interviewed as a direct result of their knowledge of Ms Kelly and her reputation. Ms Walton stated that Ms Kelly has a clear idea about the pitch, tone and values of the show. Ms Walton stated that Ms Kelly has her own personal twitter feed and ITV runs a twitter feed dedicated to the Lorraine show.

77. Ms Walton described a typical working day in which Ms Kelly arrives at 6-6.15am having already carried out preparation such as reading the papers and social networks and she finalises the script. Ms Kelly informs Ms Walton the approach she will take to an interview and before the show items such as fashion will be rehearsed for the benefit of the camera and gallery crew. Ms Walton explained that Ms Kelly prepares her own interviews and does not use a script or an autocue. Ms Kelly undertakes preparation for interviews by, for instance, viewing films and reading books. The show is transmitted live and Ms Kelly will have indicated the intended duration of interviews which is used on the running order. Ms Kelly decides if an interview is cut short or runs over and tells the editor where the extra time will be recouped or added. Ms Kelly is advised about timings through an earpiece. After the show there is a de-brief with the team at which Ms Kelly expresses her opinion on how it has gone, that is followed by a planning meeting for the following day's show. Ms Walton describes Ms Kelly's role as an "active" and "leading part." Ms Kelly will regularly attend a screening of a film after the show and she will interview high profile stars at different locations, thereafter contacting the team to say how it went, how long the interview ran and where it can be placed in the running order. Ms Kelly

has discussions later in the day with the senior producer to cover any changes. If a big story breaks Ms Kelly is contacted immediately to discuss such things as the approach and the position in the running order.

78. Ms Walton explained that "Daybreak" would have been classified as a news and current affairs show under OFCOM. "Lorraine" is a live daytime magazine show. Ratings fall when Ms Kelly does not present the show.

79. Ms Walton described a meeting with HMRC which took place on 9 July 2015 and signed by the three ITV representatives on 28 September 2015. Present at the meeting were four HMRC officers, ITV's Head of Business Affairs, ITV's Group Tax Compliance Manager and Ms Walton as Editor of "Lorraine".

80. The relevant points contained in the meeting notes can be summarised as follows:

- Ms Kelly drives and controls her services and the programme; it is up to her how she presents and the subject matter;
- Ideally ITV would seek to protect itself against a presenter being involved in competing activities;
- Presenters need to be aware of OFCOM. Ms Kelly is not bound by ITV's Code of Conduct which is for employees;
- Ms Kelly is a brand and prominent personality and has a bigger profile. She is primarily associated with Breakfast time but does other things;
- Ms Kelly will not represent herself as ITV;
- There are no appraisals;
- Planning of shows would be discussed with Ms Kelly; they couldn't do anything Ms Kelly didn't believe in;
- The decision as to who to interview is a shared thing, the broadcaster has the right of veto. Ms Kelly could not be forced to interview someone she did not want to;
- Ms Walton as editor is responsible for the programme flow and has ultimate broadcasting compliance responsibility. She has the right to drop, change or add a story. Ms Kelly influences the running order;
- Ms Kelly has final say on length of an interview;
- A first class presenter is someone who is professional and technically very experienced;

- Ms Kelly drives the ratings. Ms Kelly is only answerable to the ratings. Ms Walton runs the team. Ms Kelly operates in an Oprah type way. Ms Walton could not run the show if Ms Kelly was not on the same page. If there was no Ms Kelly there would be no show.

81. Ms Walton understood the meeting was to clarify discussions at an earlier meeting on 9 July 2015 at which the key areas of questioning related to the role of Ms Kelly, timings, ear-piece, transport, ITV pass, training and wardrobe. Ms Walton explained that she answered in the same vein as she had at the earlier meeting, describing "robust discussions" with Ms Kelly and that "the key was tuning into Lorraine…as her DNA is in the show…" Ms Walton gave examples of Ms Kelly bringing guests to the show and Ms Kelly's role in deciding the duration of interviews. ITV pay for transport which is typical across the broadcasting industry as is the issue of a pass to allow Ms Kelly access to the buildings and certain floors. Ms Kelly does not receive training in the same way as Ms Walton and ITV employees and a freelance stylist paid for by ITV sources clothes from which Ms Kelly decides what to wear and which are later donated to charity.

82. Ms Walton could not recall making any amendments to the meeting notes nor could she recall a follow up meeting with those present from ITV. Ms Walton stated that the right of veto was not a quote from her and although she agreed she had signed the document which is broadly true, she explained that it did not give the whole story. Ms Walton explained that she would never force Ms Kelly to do something she did not want to do and it is Ms Kelly who is in control when the show is on air. If the show was taken off the air it would be a decision of the Network, not Ms Walton.

83. Ms Walton gave an example of ITV wanting to move the programme outside of London; Ms Kelly refused and the programme remained in London entirely as a result of Ms Kelly's decision. Ms Walton explained that a large part of her role generally is to understand the rules which apply to broadcasting such as OFCOM. However, in the case of Ms Kelly she is someone with complete knowledge of such regulations and therefore Ms Walton's role was far less involved. Ms Walton's role is also to ensure that a one-hour show of quality is delivered to ITV. Ms Walton explained that she has worked on several shows which differed to her experience on the "Lorraine" show as it is Ms Kelly's name on the show and therefore by its very nature substantial input comes from Ms Kelly. Ms Walton said she may converse with Ms Kelly during a show but only about something unexpected such as a fire or an incident about which Ms Kelly would be unaware. The director would guide the cameras and once the show starts it is in Ms Kelly's hands. All programmes have researchers and in the after show meetings ideas are discussed and Ms Kelly would tell the team the angle she intended to take with an item or feature. Ms Walton gave the example of the "bikini promise" feature which she described as "a typical Lorraine idea, with her name all over it". She stated that Ms Kelly wanted to do the item which was a big success in large part due to Ms Kelly's willingness to wear a bikini on television and bring so much of herself to the campaign. Ms Walton described her own role as "very supportive" of the feature. Ms Walton described the unusual situation of the "Lorraine" show in that where agents will usually be approached for their celebrity

client to be interviewed, in this case agents would approach the show asking to be interviewed by Ms Kelly.

84. Ms Walton confirmed that if sensitive items could not be discussed on air she and Ms Kelly would discuss this or lawyers would be called if the matter was urgent and the show was on air in order to obtain advice as to the legal complexities. Ms Walton always had confidence in Ms Kelly to conduct the show properly and comply with any legal matters.

85. Ms Walton concluded by saying that ratings are revenue, the show is akin to "Oprah", it has Ms Kelly's DNA, she is the show, it could not happen without her and could not exist without her ideas and input. Ms Kelly does her own research and decides running order, items to keep and features to drop; it is her name on the door. OFCOM is a professional regulator which is the ultimate responsibility of the Network. However if Ms Kelly was adamant she would do something, whether that be asking a question Ms Walton disagreed with or even something extreme, ultimately the decision rested with Ms Kelly who has the final say.

86. Mr Grant of Findlay & Company confirmed that the firm has acted on behalf of the Appellant for approximately 20 years. He clarified that he acted in the role of advisor, for instance the Appellant was set up on the company's advice, but that he was giving evidence as a witness of fact rather than an expert witness.

87. Mr Grant confirmed that the Appellant's percentage of income from ITV ranged from 33% to 69%, the higher figure reflecting the 18 month period when Ms Kelly was involved in "Daybreak". In cross examination Mr Grant accepted that the underlying documents to support the figures had not been provided, but clarified that HMRC had never disputed them nor had he been asked for the source materials. Mr Grant was unable to confirm the effect of the split of income between the Appellant's tax years on the percentage figures given without checking the contracts and underlying documents however he confirmed that the Appellant's income doubled during the time that Ms Kelly was involved in "Daybreak".

88. In a second witness statement Mr Grant exhibited correspondence issued by Mr Mark Frampton who he understood to be HMRC's senior policy advisor on IR35. The correspondence was issued to the representative of a body of industry agents and which advises that the definition of a theatrical performer is very broad and includes most in-front of camera talent. The definition excludes newsreaders and presenters of current affairs programmes. Mr Grant takes the view that HMRC's stance in this case is inconsistent with the guidance issued by Mr Frampton. The guidance set out in an email from Mr Frampton dated 23 October 2017 stated:

> "I am saying that the non-news presenters on entertainment type shows, including magazine shows (but not news) are entertainers and qualify for relief under s352…The Richard and Judy case dealt with the grey area of magazine shows with a news content and found it in scope and set out that news was outside. Who is an entertainer is very broad and covers almost all of your in front of camera talent."

89. Mr Grant exhibited a letter from Mr Frampton dated 12 March 2018 in which HMRC's policy appeared to change significantly. The revised guidance now aligns with HMRC's stance in this case however Mr Grant understands that Ms Kelly would still fall within the definition of an entertainer for the purposes of agents fees being an allowable deduction. The letter referred to the definition of a theatrical artist in *Madeley and Finnigan* stating:

> "HMRC's policy view is that this definition does not apply to TV or radio shows presenters in general. Whilst a presenter may have a unique style, and offer analysis and personal opinion, they cannot in general be described as entertainers or theatrical artists whilst performing that specific role…Where an individual performs both types of role, for example as well as reading the news they might additionally appear in an entertainment situation, it may still be possible to claim tax reliefs on the deductions relating to the entertainment fee, subject to the facts of the engagement and the rules in tax law."

90. Mr Grant accepted that Mr Frampton's views are not determinative nor binding on the Tribunal and clarified that it was no more than his opinion that HMRC's policy appeared to have changed to align with the facts of this case.

91. Professor Shalit OBE is the Chairman of the ROAR Group Talent Management Agency which specialises in representing entertainers. Mr Shalit takes the view that the "Lorraine" show is clearly entertainment covering items such as Hollywood, cooking and fashion. He noted that when an important news story breaks "Lorraine" is taken off air. Professor Shalit explained that he has worked with employees of broadcasters who present news and current affairs programmes. Presenters of news and current affairs have much more restrictive contracts than Ms Kelly as governed by OFCOM, for example they cannot market or be associated with products and services in the way that Ms Kelly has been able to have her own clothing range with JD Williams. As Ms Kelly is regarded as an entertainment presenter she is not governed by these restrictions. Professor Shalit explained that unlike most employees in the UK presenters such as Ms Kelly rarely have long term job security.

92. Professor Shalit explained in oral evidence that for most presenters at ITV contracts are usually standard contracts because it is significantly onerous to write different contracts. Professor Shalit explained that the contract is fairly irrelevant in reality as both parties know what is expected of the relationship. He stated that the phraseology in the contract is standard but does not really apply to Ms Kelly as she will undertake dangerous pursuits such as parachute jumps and zip wires irrespective of the clause in the contract restricting such activities. Professor Shalit confirmed that the extent of Ms Kelly's control was significant; she could say what she wanted on air and has vetoed potential guests in the past; this is the reason Ms Kelly is hired and liked and the reason it is the "Lorraine" show and not the "ITV show".

93. Professor Shalit explained that the parties to the contract with Roar Global are Professor Shalit and Ms Kelly which therefore also encompass her companies. Their agreement is based on a relationship of trust and therefore a lengthy contract is not required. Ms Kelly's accountant instructs Roar Global how to invoice. Professor Shalit explained that in his view the Appellant and Ms Kelly are the same person.

94. Professor Shalit explained that in his view the contract which required the services of a "first class presenter" meant that Ms Kelly was given a task of presenting in general terms and, if available, was expected to do it to a high standard. Professor Shalit clarified that the clauses relating to transport, clothing, expenses and exclusivity were all standard terms in the industry which he did not challenge as the reality was that if Ms Kelly wanted to do other work she would, even if it conflicted with the timing of the programmes, and ITV would be informed out of politeness but not to seek consent. Professor Shalit confirmed that ITV were so eager to hire Ms Kelly for "Daybreak" that they had travelled to Dundee to persuade her and that she had chosen her co-presenter.

95. Having recited the evidence we will now set out the parties' submissions as to how that evidence should be applied to the factors to be considered in deciding whether the hypothetical contract would have been a contract for services or a contract of services.

HMRC's submissions

96. On behalf of HMRC Miss Roxburgh made the following submissions.

97. In determining the terms of the hypothetical contract, the Tribunal must have particular regard to the terms of the actual arrangements in place. The Agreement provides that Albatel will procure that Ms Kelly act in defined ways. In consequence there must necessarily have been a contractual relationship between the Appellant and Ms Kelly entitling the Appellant to control the services of Ms Kelly; that was necessary in order for the Appellant to be able to comply with the terms of the Agreement. HMRC invite the Tribunal to conclude that a contract of employment was necessarily to be implied between the Appellant and Ms Kelly.

98. Ms Roxburgh did not submit that the witnesses were not trying to assist the Tribunal but she submitted that Ms Kelly and, to a lesser extent Ms Walton gave the impression of trying to avoid giving evidence detrimental to the Appellant's case. By way of example Ms Roxburgh highlighted the notes of meeting which Ms Walton had signed but the content of which she sought to dilute in evidence. Ms Roxburgh noted that Ms Walton was reluctant to agree that she had ultimate control over Ms Kelly although she appeared to concede in cross-examination that she could have said no to Ms Kelly. Ms Roxburgh submitted that Professor Shalit had agreed that ITV retained control over Ms Kelly in relation to obligations under OFCOM. He also agreed that although Ms Kelly may have chosen Aled Jones as a co-presenter, ultimately ITV "paid the cheque" and therefore retained control.

99. HMRC submit that mutuality of obligation existed in this case. The Agreement provides for services for up to 42 weeks allowing for holidays as employees would be entitled to. It is therefore not inconsistent with a contract of employment. Furthermore Ms Kelly is obliged to perform if called on by ITV to do so and regardless of whether they do so, they are obliged to pay the Appellant. Although ITV has broad powers to terminate the contract for reasons outside Ms Kelly's control, ITV is still required to

make payment of the minimum sum under the contract if it does so. Each of these factors demonstrates mutuality of obligation.

100. HMRC submit that Ms Kelly falls into the category of persons who can have both an employment and separate self-employed income. HMRC do not question Ms Kelly's talents as a presenter but highlight that it is perfectly feasible for a skilled person (such as a surgeon or professional footballer) to be an employee. HMRC drew a parallel with the facts of this case and the recent Decision of *Christa Ackroyd* in which the Tribunal accepted the Appellant's factual case, for instance that Ms Ackroyd was expected to drive ratings, was involved in the look, feel and approach of the programme, was a very successful television journalist and presenter, was more than just a newsreader and had a high degree of autonomy. Nevertheless the Tribunal found that the BBC retained the contractual right of control, consistent with employment at [168]:

> Mr Summers rightly submitted that the contract had no express term dealing with control. Control of Ms Ackroyd's work pursuant to the hypothetical contract must lie somewhere, either with Ms Ackroyd or with the BBC. We are not satisfied that it lay with Ms Ackroyd. We consider that the BBC did have ultimate control in how, where and when Ms Ackroyd carried out her work. We accept a submission by Mr Tolley that this was an implied term of the hypothetical contract in order to give that contract business efficacy. In the context of Ms Ackroyd's role it was necessary for the BBC to at least have the power to direct Ms Ackroyd's work, otherwise Look North as a programme ran the risk of not complying with the Editorial Guidelines. For example, if Ms Ackroyd consistently failed to comply with the Editorial Guidelines, it is inconceivable that the parties intended that the BBC should be obliged to continue to pay Ms Ackroyd for her work even if as a result she was not called on to present Look North.

101. HMRC do not dispute that when presenting, Ms Kelly has to use her individual judgement, for example as to what to say when conducting live interviews. Given the practical realities of a live broadcast environment there is no sensible means by which ITV could determine the words that Ms Kelly would say before she said them. However, as the examples of the surgeon and footballer demonstrate, a practical inability to control the decisions of a person at the moment of delivery of the skilled work is not inconsistent with employment; the limits of ITV's practical control in respect of Ms Kelly at the point of delivery are the same as they would be in relation to an employed presenter.

102. HMRC submit that what matters is where the right of control lies, which would undoubtedly be with ITV under the hypothetical contract. The agreement contains express clauses requiring a first class presenter for the two programmes, granting editorial control to ITV and requiring the Appellant to procure that Ms Kelly would cooperate with instructions from ITV which includes matters ancillary to the shows. Such clauses are consistent with ITV's need to control its output in order to comply with OFCOM's guidelines.

103. HMRC contend that Ms Kelly is incorrect as a matter of contract when she stated "for the hour that I am contracted to do I am in total control" and "I have control over the content of my show and who I interview." HMRC accept that where programmes are aired live the control over words spoken by the presenter is limited but submit that this is the case whether a presenter is employed or self-employed. Ms Roxburgh highlighted the fact that it is irrelevant whether control was in fact exercised, the point is that the right existed.

104. HMRC contend that although ITV may listen to Ms Kelly's suggestions and there exists a spirit of collaboration avoiding conflict where possible, it is the editor Ms Walton who has overall authority for putting the Lorraine programme together. Ms Walton has ultimate authority to drop, change or add stories and ITV has the right to veto a guest suggested by Ms Kelly. ITV s ultimately responsible for the output, it has the right to reject any editorial suggestions made by Ms Kelly for example as to which stories to run or people to interview. The fact that a situation has not arisen where ITV has exercised that right does not mean that the right does not exist.

105. HMRC contend that the hypothetical contract would have included all those provisions in the actual contracts that gave ITV ultimate control over the work that Ms Kelly did, where and when she worked and how she did it. Ms Roxburgh submitted that there was no evidence from the Appellant that the Agreement did not reflect the true contract between the parties. Ms Kelly conceded that timings were controlled by ITV. She noted that the Agreement included both rights and restrictions on Ms Kelly which is relevant to the "what" element of control. Furthermore the "how" element is reflected in the system of control by which the Agreement provides for ITV's right to edit the programme and for the producer to make reasonable requests of Ms Kelly.

106. HMRC highlight that the work of Ms Kelly was in the context of a team environment in which the presenter is only one part, albeit an important and public part. The services were the provision of delivering the show to the public.

107. Although the Appellant provides Ms Kelly's services to a range of different clients it can only do so with the consent of ITV. HMRC accept that Ms Kelly is to be treated as self-employed in these other engagements however the work was always subject to the requirement that Ms Kelly obtain ITV's permission to enter into new Commercial Activities. HMRC submit that there was no means by which the Appellant could increase its profits from the arrangement, nor was there any realistic possibility of making a loss, no requirement to invest in equipment or staff and no significant variability in the amount of work to be provided and paid for.

108. Ms Roxburgh submitted that in looking at the overall picture Ms Kelly worked on "Lorraine" for over 4 years. She was required to attend to present the show plus ancillary work; this was not a case in which there were a number of short successive contracts of different durations with different companies, Ms Kelly has worked on ITV for over 30 years and is part and parcel of the "ITV family". HMRC accept that in other work Ms Kelly is self-employed but submit the focus should be the

programmes which make up the main work. Viewed as a whole Ms Kelly's situation is one of substantial part time employment.

109. HMRC contend that the hypothetical contract between Ms Kelly and ITV would have included, inter alia, the following terms:

(i) Ms Kelly would be contractually obliged to provide the services of a first class presenter to ITV and ITV would be obliged to pay her for them. This would involve presenting the minimum number of agreed shows as well as carrying out the ancillary work required by ITV (for instance programme promotion and preparation);

(ii) ITV would not be obliged to provide Ms Kelly with work. However whether or not work was provided, ITV would still require to make payment to Ms Kelly;

(iii) Ms Kelly would have no contractual right to provide a substitute to perform her duties. The Appellant's obligation was to make available the services of a particular person and its obligation would not have been satisfied by the Appellant making available the services of another individual. The final choice for a substitute was that of ITV;

(iv) ITV would have to pay Ms Kelly the agreed monthly fee specified in the contract subject only to Ms Kelly failing to perform the work required;

(v) ITV could require Ms Kelly to attend at production meetings, interviews, press launches, public relations and other events. Ms Kelly would have no contractual right to any greater remuneration if she carried out the ancillary services contemplated in the contract. There may have been an element of give and take in the relationship but the right remained with ITV;

(vi) ITV would have guaranteed the engagement of Ms Kelly for a minimum of 2 years and 6 months. It could terminate the contract in giving 6 months' written notice. However, if this occurred prior to the expiry of 2 years and 6 months, ITV would still require to pay Ms Kelly for that minimum period;

(vii) ITV would be obliged to arrange and pay for flights taken by Ms Kelly at their request for the purposes of providing the services. This would include flights from her home in Dundee to London. ITV would also be obliged to provide Ms Kelly with an executive VIP car in London to take her to the locations of the recording of the programmes and to pay or reimburse Ms Kelly for all expenses reasonably incurred in providing the Services;

(viii) ITV would have overall control of where, when, what and how the work was done;

(ix) The place of work would normally be the ITV studios or the site of an outside broadcast as determined by ITV;

(x) ITV would have final editorial control over the Programme;

(xi) Ms Kelly would have no contractual right (over and above those rights granted by statute) to be paid for absence caused by sickness, holiday or maternity;

(xii) Ms Kelly would be obliged to comply with the television programme guidelines laid down by OFCOM;

(xiii) Ms Kelly would be restricted in the work and some non-work activities that she did, or might do, outside TV. In particular she would not be able to appear as a presenter or contributor on any television or audio-visual programme broadcast in the UK that is available to viewers between the hours of 6am and 6pm without the consent of ITV.

110. HMRC submit that the terms of the hypothetical contract as set out above clearly meets the requirements of mutual obligation and personal service. Furthermore ITV would have sufficient contractual right of control over what Ms Kelly did when performing her duties under the contract, when and where she did them. To the extent possible in a live broadcast ITV had the right to control how Ms Kelly performed her duties; the fact that the right would or could not be enforced in practice is irrelevant.

111. Ms Roxburgh submits that the criteria of *Ready Mix Concrete* are clearly satisfied and stepping back from the detail of the contract, the picture that emerges of the hypothetical contract is one of regular, predictable and substantial part-time employment.

Deductible expenses

112. In relation to deductible expenses, HMRC submits that the definition of "agency fees" in section 352(5)(a)(i) ITEPA 2003 requires there to be an agreement between the employee and the agent in connection with the employment. The only written agreement lodged by the Appellant is an agreement between Roar Global Ltd and Ms Kelly dated 29 September 2010 which has a duration of 1 year. The Appellant has not disclosed the agreements that relate to the years under review.

113. HMRC contend that the agency agreement during the relevant period was between the Appellant and Roar Global Ltd. This is supported by the fact that sums due under the Agreement and Amended Agreement are payable to the Appellant, invoices issued by the Appellant are paid to Roar Global Ltd, the agency fees have been addressed to the Appellant and those fees were paid by the Appellant. Ms Roxburgh submitted that the correct interpretation of the legislation is that agency

fees are only deductible if an employee would have been able to deduct it; the vehicle is via an employee not the company and therefore there must be a contract between Roar Global and Ms Kelly with the obligation on Ms Kelly to pay the fees to ROAR under the terms of an agreement. However, the evidence of Mr Grant was that the liability was that of Albatel, not Ms Kelly.

114. The second point highlighted by HMRC is that the category of "entertainer" is restricted to those employed as "an actor, dancer, musician, singer or theatrical artist". Ms Kelly's written evidence refers to her as an "entertainer" with no further explanation save that the programmes she presents are not categorised as "news" by OFCOM. The Appellant's skeleton argument refers to Ms Kelly as a "theatrical artist". HMRC accept that its guidance on the term "theatrical artist" does not have the force of law.

115. HMRC submit that it is not enough for an individual to be a performer or entertainer; it must be shown that the individual is performing "with a theatrical bent" or "in a manner of acting or theatre".

116. HMRC submit that Ms Kelly is not an actor, dancer, musician, singer or theatrical artist. She is employed as a lead presenter on a morning television programme; she is not playing a part or acting out a role.

117. HMRC contend that there has been no suggestion that "Daybreak" was an entertainment programme. Moreover, the question is not whether episodes of "Lorraine" are comparable to "This Morning", the key findings in "This Morning" related to the act put on by the presenters; they were putting on a performance and that performance was the core of the programme that they presented.

118. In *Madeley & Finnigan* at [21] – [26] the Special Commissioner noted the following:

> 21. Pre-recorded skits were apparently shown about 2 to 3 times a week, with 5 programmes being broadcast on week-days. The slots were not particularly long but ran for approximately 2 to 3 minutes. Although 2 to 3 minutes in roughly every other programme sounds to constitute only a very minor proportion of the running time of the programmes, two things are worth emphasising.
>
> 22. Firstly, the skits were very much in the style of the rest of the programme. When watching a programme it was not as if the presenters were giving a straight performance, which was suddenly and occasionally interrupted by a pre-recorded skit. The atmosphere of the programme was always light-hearted, and often jokey. For instance Richard and Judy would often intervene in a humorous way in the cookery slot. Each would put forward their own, plainly personal and sometimes provocative, opinions. Continuity slots would often contain light-hearted banter so that the pre-recorded skits seemed to be a seamless part of the whole presentation rather than an interlude out of character with the rest of the programme.
>
> 23. Secondly, the skits were very professional. It is unusual in a decision in a tax appeal to be having to comment on and criticise people's performances but

having been shown one video which contained several highlight skits, I should describe them shortly. One showed Richard and Judy swapping roles and of course clothes. One showed Richard playing or at least 'air-playing' a guitar and seemingly singing (quite well!) in a rock band. Another showed Judy having a discussing with Ali-G in fact played by Richard. The fourth that I was shown was particularly good. Apparently shown in the early days of Chris Tarrant's 'Who wants to be a millionaire?' programme, it shows Richard and Judy at breakfast, with Richard irritating Judy by pretending to be Chris Tarrant as she gradually assembles what she wants to eat for breakfast. Riddled with lines such as whether 'Marmalade' is her final answer, and with the proposition that he will give her one piece of toast but would really prefer to give her two, the skit is again very funny, and entirely in line with the character that the two performers portray generally in the programme. As a skit, it is not dissimilar to the Two Ronnies' sketch on Mastermind, where each answer is the answer to the next question. In other words it is highly professional.

24. Richard and Judy's typical day was described to me and this is worth repeating because it has some bearing on the appeal. Before it was moved to London, the 'This Morning' programme was filmed in an old warehouse/studio in the Liverpool dock area. Accordingly Richard and Judy left their home in Manchester very early in the morning and drove to Liverpool. There would then be a couple of hours covered by rehearsing for the programme which started at 10.10 am or 10.30, and by make-up and hair-styling etc. The programme itself had a skeleton script but this was designed to enable Richard and Judy to ad-lib at all times. The programme was always broadcast live, and therefore when ad-libbing, and filling in gaps if interviewees were un-forthcoming etc, and chipping in on the cooking, fashion and other slots, the amount of confidence and skill required to deliver the programme professionally was obviously considerable. Indeed if the question in this appeal was whether Richard and Judy demonstrated more skill and confidence in their performance than an actor who acts well and remembers his lines or a comedian who tells scripted jokes, some of which are funny and others of which are not, the decision would be easier than it actually is.

25. Following the end of the programme there was a working lunch to go through the format for the following day's show. Richard and Judy asserted, and it was not disputed, that they provided significant editorial and creative input into the style, structure and content of the show. This was almost inevitably so since they would always be ad-libbing on the show so that the content would have to accord with their own style. There were also doubtless professional producers, but I certainly accepted that they performed this role as well. After lunch there would be rehearsals for the following day's show.

26. In the course of cross-examination Richard was asked whether he had ever described himself as a journalist when being interviewed either for a programme or magazine article. He accepted that he had initially been a journalist and he accepted that he still operated to an extent like a journalist in the respect that when ad-libbing on a topical programme he needed to be well-informed about current affairs and generally well-informed. He accordingly accepted that he regularly read newspapers to keep fully up-to-date so as to be well-informed but nevertheless did not consider that this coloured his

performance and moved it from the entertainment sphere to the sphere of news and current affairs.

27. One final point that I should mention that was made by Richard but indeed by other witnesses as well was that whenever Richard and Judy were unable to present the programme by virtue of being on holiday or otherwise unavailable, the audience ratings generally dropped. I think it fair to add that it was self-evident that the very great popularity of the programme was largely attributable to their personal contributions. It was certainly not the case that they were just providing passive links and continuity between each separate item on the shows, with the audience being attracted principally by those various items. Their personalities and style put a personal stamp on the programme, which goes to explain why the Channel 4 programme that was broadcast after the dates material to this appeal was called 'Richard and Judy'.

119. In contrast there is no evidence of regular sketches on either "Lorraine" or "Daybreak" and Ms Kelly is under no obligation to attend rehearsals as she is not acting out a part, she is being herself which sets the tenor of the programmes.

The Appellant's submissions

120. On behalf of the Appellant Mr Gordon submitted that Ms Kelly's earnings are derived from various performances, appearances, writing and endorsement activities; the decisions under appeal focus on merely one strand of the company's income, that being Ms Kelly's performances on daytime television. It is the Appellant's contention that the nature and range of Ms Kelly's work (both for ITV and more broadly) mean that she should be treated as self-employed and consequently the IR35 legislation cannot be invoked so as to deem there to be an employment relationship.

121. Mr Gordon noted that Ms Kelly has provided her services through the Appellant company since 1992. No challenge was made by HMRC until 14 years later, despite having opened an enquiry into the Appellant's 2009 return which was closed with no amendments.

122. The present investigation focused on "Lorraine" and the decisions extended to "Daybreak" which Ms Kelly co-presented for a temporary period as a stopgap arrangement. During the relevant period the Appellant provided additional services in the form of Ms Kelly as a broadcaster, actress, model and writer to a range of clients. HMRC acknowledge that these additional activities are not caught by the IR35 legislation. However HMRC have failed to take the additional services into account when considering the overall picture.

123. Mr Gordon noted that OFCOM categorises "Lorraine" as entertainment as opposed to a news programme. Moreover, when new stories break "Lorraine" is taken off air. This categorisation puts the Appellant's arguments in context and allows Ms Kelly to perform a wider range of services through the Appellant than would be permissible were Ms Kelly classed as a presenter of a news programme. He submitted that the classification of by OFCOM of "Daybreak" as "news and current affairs" is a

red-herring and not indicative of what Ms Kelly did on the programme. Ms Kelly and Professor Shalit both confirmed in unchallenged evidence that "Daybreak" had a news content between 6am and 7am thereafter the content became far lighter. The only difference with "Lorraine" was that Ms Kelly had a co-host and there were half hourly news bulletins which were read by news presenters.

124. In applying the tests set out in *Ready Mixed Concrete* to the present case, Mr Gordon submitted that the first limb requires the deemed hypothetical contract:

> (a) To provide for a sufficient mutuality of obligations (although this is rarely a determinative issue in most cases per Park J in *Usetech*); and
>
> (b) To require the provision of Ms Kelly's services and not those of any substitute (howsoever qualified).

125. In this regard, Mr Gordon noted that the programme is aired throughout the year whereas Ms Kelly's services are provided for up to 42 weeks, Ms Kelly is instrumental in identifying substitute presenters and rating fall in the weeks when Ms Kelly is absent.

126. Mr Gordon also note that there is no obligation for Ms Kelly to provide any services to ITV; ITV merely has the right to call on Ms Kelly "on an exclusive and first call basis". In addition ITV has broad powers to terminate the contract (and without obligation to make payment to the Appellant) for reasons outside Ms Kelly or the Appellant's control.

127. Mr Gordon conceded in relation to personal service that the Appellant was unable to send anyone to replace Ms Kelly. However he did not concede that the mutuality of obligation test is satisfied, although this is not the main thrust of the Appellant's case.

128. On the issue of control, Mr Gordon submitted that contrary to HMRC's approach, it is not sufficient to point to matters where ITV might be said to "control" how Ms Kelly carries out her performance. The overall elements of control must be considered as a whole and in context – it is only when stepping back and looking at the whole picture of the working relationship can one decide whether or not the worker has conceded "control in a sufficient degree" to the putative employer.

129. Mr Gordon submitted that HMRC have misunderstood the approach to take in relation to control; the starting point is the contract from where control emanates. However, that does not provide the full answer as the Tribunal must decide the terms of the hypothetical contract and it is trite law that a contractual relationship can evolve. Furthermore, it is clear that the written terms of the Agreement do not reflect the true agreement between the parties. Professor Shalit explained that clauses were industry standard and it was clear that neither party felt bound by every clause, for instance despite the written terms Ms Kelly undertook activities such as an expedition to Antarctica, abseiling and zip wires. Ms Walton was consistent with the evidence that Ms Kelly was not bound by the written terms to the extent she was able to offer evidence.

130. Mr Gordon explained that the focus of the Appellant's case is the "what" element of control. He gave the analogy of a gardener who can be told where to plant or when to prune but if asked to serve dinner, an employee would be unable to refuse but a self-employed worker could. Similarly, a passenger can control the route a taxi takes to a destination but there is no obligation on the taxi driver to take the fare.

131. The final limb obliges the Tribunal to take a holistic view of arrangements in deciding whether the individual is self-employed or an employee.

132. Mr Gordon noted that although control on its own does not mean employment, a lack of sufficient control is fatal to the existence of an employment relationship. Furthermore, control is not simply telling the worker where and how to carry out the work but also what should be done. Mr Gordon contends that HMRC's approach in relying on ITV's editorial control is flawed. By way of example Mr Gordon highlighted an actor appearing in a 12 month run of a West End show; it is inconceivable that the actor would be considered anything other than self-employed except where the terms of the engagement clearly point towards employment

133. The actor is required to follow a script, wear the clothes chosen for the production and move around the stage as directed. In contrast Ms Kelly has considerably more control over her performance.

134. Mr Gordon referred us to *Davies v Braithwaite* (1931) 18 TC 198 in which the Court said:

> "One might possibly draw a line and say what amount of duration makes the employment incidental to the exercise of the profession, but I do not think that that matters.
>
> It seems to me quite clear that one can have both an employment and a profession at the same time. Quite clearly one can have it in different categories. A man might have the steadiest employment in the world by day, and he might do something else entirely different in the evening and make some more money by way of a professional vocation. I cannot doubt that that would be so, but even if it were in the same line, I do not see why he should not have both. I do not see why a man who is a musician, for instance, and holds an office could not do that and hold an employment in respect of some permanent engagement which he has and at the same time pursue his profession at large. I do not think there is any difficulty about doing both things at once."

135. Mr Gordon submitted that ITV has no right to tell Ms Kelly or Albatel what to do which distinguishes the present case from *Christa Ackroyd* in which the BBC could direct Ms Ackroyd to present any programme of their choice whereas the Appellant's contract is no more than a contract for specific services, akin to that provided by any self-employed individual. Mr Gordon highlighted the distinction with the case of *Christa Ackroyd* in which the BBC had a general right to call on Ms Ackroyd's services and could call on her to present Look North, read the weather, to work in Leeds or wherever the task she was required for was.

136. Mr Gordon relied on the examples provided by Ms Kelly in evidence as to how she chooses whether to take on additional work, such as "Daybreak" which helped ITV on a temporary basis. The requirements and/or restrictions imposed on Ms Kelly such as those in relation to assisting with marketing, are no more than would be expected from a person providing services as a performer.

137. Mr Gordon submitted that the control element must be effective; the star may use their own skill for instance in an interview, but there must be an entitlement by ITV to choose the subject matter, the running time or the person interviewed. Mr Gordon submitted that the role of OFCOM as a regulator is irrelevant to control in the context of this case as it applies as a professional body to everyone in the industry.

138. HMRC confuse ITV's responsibility as a broadcaster with the test of control. ITV undoubtedly had duties to OFCOM. Similarly they paid for the services of Ms Kelly, as one would pay for the services of any freelancer or self-employed individual. However, ultimately control was in the hands of Ms Kelly as sole presenter who decided how long an interview would last.

139. Mr Gordon noted HMRC's notes of meeting with ITV which stated:

> "LK [i.e. Mrs Smith] has final say on length of interview…LK can decide if the interview is going well or badly…LK can say that an item can be extended."

140. This was emphasised by the former editor Ms Walton who confirmed that Ms Kelly chooses to dispense with others' scripts and even the guests reflect Ms Kelly's choice.

141. Mr Gordon submitted that the provision by ITV of studio equipment and some clothing is a red herring; the Appellant was providing the services of Ms Kelly, it did not purport to be the producer of the "Lorraine" show. Furthermore part of the Appellant's remuneration package was the contribution towards Ms Kelly's wardrobe. That ITV paid for part of it does not mean that ITV controlled what was worn.

142. "Lorraine" is essentially Ms Kelly's show, a reflection of her personal brand. HMRC's notes of meeting in 2015 confirm the control Ms Kelly has:

> "LK essentially drives and controls her services and essentially she drives the programme. It is up to her how she presents and the subject matter…LK is not bound by ITV's Code of Conduct which is for employees…They [ITV] couldn't do anything LK didn't believe in…LK drives the ratings. LK is operating in an Oprah type way. If there was no LK there would be no show."

143. Ms Kelly chooses when to take time off and chose to pre-record the Friday show to allow her to spend more time at home in Scotland. On paper and in reality it is Ms Kelly who is in control, not ITV.

144. In taking a holistic view as required by the third limb of the *Ready Mixed Concrete* test, Mr Gordon submitted that the overall arrangement is not consistent

with that of employment. Mr Gordon relies on the following in support of the submission:

> (a) The Appellant provides Ms Kelly's services to a range of different clients with ITV work comprising just 33% and 37% of the company's total turnover, increasing to 65% and 69% in the short period in which "Daybreak" was also presented;
>
> (b) Ms Kelly is not tied to ITV in the same way that an employee might be. She has worked and continues to work for other broadcasters;
>
> (c) Ms Kelly is not an intrinsic part of the ITV organisation and can provide services to rival broadcasters and other media outlets;
>
> (d) Other services provided by Ms Kelly include film and radio work. Ms Kelly also writes regularly for newspapers and magazines.

145. There is financial risk borne by the Appellant and Ms Kelly. If the ratings fall, the programme is unsuccessful or there is simply a change of mind, ITV can terminate the contract. There is no ongoing obligation to pay for Ms Kelly's services. Ms Kelly is not subject to fixed hours as would typify any employment contract.

146. Mr Gordon submitted that the final limb of *Ready Mixed Concrete* is a "reality check"; a checklist cannot be followed and the reality of the situation must be looked at. There is a clear lack of indicators to support a contract of services.

147. Mr Gordon submitted that a narrow approach should not be taken; although this appeal relates to two successive contracts in respect of "Lorraine" and "Daybreak", the Tribunal must look at the full picture which involves pre-2012 and post 2016. "Lorraine" and "Daybreak" were just two engagements in a series of engagements over Ms Kelly's professional career; longevity does not automatically point towards employment and this appeal only reflects 3 ½ years of an ever-evolving career. He submitted that the evidence was clear; Ms Kelly was in total control (there being no suggestion of any real difference between the programmes). Ms Walton's evidence was crucial in confirming this; she held a role that would ordinarily have meant control rested with her but Ms Walton was clear that this was not the case in ITV and her own relationship with Ms Kelly. This evidence was also supported by Professor Shalit.

Deductible expenses

148. The application of the definition of "entertainer" is the only issue in dispute between the parties. Mr Gordon noted that the predecessor legislation was considered by Special Commissioner Howard Nolan in *Madeley & Finnigan* in which the Decision related to work undertaken in a very similar programme to that presented by Ms Kelly. The Special Commissioner was satisfied that the couple's work on "This Morning" amounted to a theatrical performance. The expression "theatrical artist" was interpreted as:

> "a performer or entertainer, performing with a theatrical bent, or in the manner of acting or theatre, but not necessarily in the theatre."

149. That conclusion has been fully endorsed by HMRC in its guidance. The only distinction in the present case is that Ms Kelly is a sole presenter. However, her performance is undoubtedly theatrical and Ms Kelly's sketches are all clear examples of being an entertainer over and above the more regular "informal chatting…constantly trying to entertain, and making [her] personality and performance the core of the programme."

Discussion and Decision

The appeal

150. The issues we must determine are whether the hypothetical contract between would have been a contract of services or a contract for services and whether agency fees paid to Roar Global by the Appellant are deductible expenses.

151. In *Primary Path Ltd* Judge Sadler helpfully provided a helpful summary of the test to apply at [61] – [64]:

> "It is clear from the cases that although there is a range of factors or indicia which might usefully be taken into account in ascertaining whether a contract is one of employment or one for the provision of services by an independent contractor, there is no simple formula or process which can be applied to determine, in any particular case, which factors are relevant or the weight or significance which is to be attributed to any factors which are considered to be relevant…
>
> The essential factors – the "irreducible minimum" – which must be present if an employment contract is to exist were set out in the *Ready Mixed Concrete* case by MacKenna J in terms which have since been recognised as the helpful starting point for the analysis of the true nature of contracts in this difficult area…
>
> The first of these conditions has evolved into two distinct factors: first, that there should be what has commonly been called "mutuality of obligation"; and second, that a defining feature of an employment contract is that the employee, and he alone, is the person whose services are to be provided.
>
> The question of "mutuality of obligation" has led to discussion as to whether all that is required on the part of the employing party is that it should simply pay the remuneration contracted for, or whether a defining characteristic of an employment contract is that the employer is required to provide a flow of work and to continue to pay the contracted remuneration even if at times there is no work. The Special Commissioner in the *Dragonfly Consultancy* case provides a helpful review of the cases which deal with the employer's obligation (see paragraphs 50 to 59), and reaches this conclusion: for a contract to exist there must, of course, be mutual obligations, but that obvious requirement is met if the "employee" is obliged to provide his labour and the "employer" is obliged to make payment for it; and that "an obligation on the employer to provide work or in the absence of available work, to pay, is not a precondition for the contract being one of employment, but its presence in some form…is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship."

152. In reaching our conclusion we have had regard to the nature of the hypothetical contract and the principles to be applied from the authorities cited. We have considered the cumulative features and considered all of the relevant circumstances as per Park J in *Usetech Ltd v Young (Inspector of Taxes)* [2004] All ER (D) 106 (Oct) at [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."

153. We bear in mind that the test is not a "mechanical exercise of running through items on a checklist" but rather the full picture "from the accumulation of detail" must be considered followed by standing back to make an "informed, considered, qualitative appreciation of the whole" (per Nolan LJ in *Hall v Lorimer*). We have therefore approached this case by making a value judgment on the circumstances as a whole rather than focussing on isolated features.

154. Both parties agreed that the burden of proof rests with the Appellant. The standard of proof is the balance of probabilities.

155. Our view was that all of the witnesses gave honest and cogent evidence. We did not accept the criticisms of Ms Kelly and (to a lesser degree) Ms Walton's evidence as seeking to avoid giving answers detrimental to the Appellant's case. Ms Kelly is clearly an intelligent lady who understood the nature of the case and we found it understandable that she sought to understand the questions being asked of her. However, we did not find that this detracted from the reliability of the evidence she gave. In relation to the evidence given by Ms Walton we accepted her evidence that the purpose of her meeting with HMRC in 2015 was not clearly explained to her and that although she had signed the notes of the meeting, she had not been responsible for the amendments made. We also accepted Ms Walton's evidence that the meeting notes were broadly true but did not reflect the entire picture and we were satisfied that Ms Walton's oral evidence was accurate to the best of her recollection.

156. We should note that there was some criticism levelled against the Appellant in relation to DVD clips produced and, in particular the limited evidence relating to "Daybreak". We did not accept that there was any merit in this criticism; it was clear significant efforts had been made to compile examples of Ms Kelly's work and we accepted the evidence that clips of "Daybreak" in particular were not readily available. On the material before us it appeared that during the course of the enquiry and ADR HMRC had not paid any significant attention to the clips which is regrettable. We found the clips we viewed extremely helpful in demonstrating the nature and tenor of Ms Kelly's work and they served to reinforce the evidence that we heard.

157. We have set out many of the authorities to which we were referred in some detail at [20] – [34] above. From those authorities we have derived the following principles as relevant to our considerations:

(i) Mutuality of obligation to perform personally work offered and to pay remuneration is the "irreducible minimum ... necessary to create a contract of service" (see *Carmichael v National Power Plc* [1999] 1 WLR 2042);

(ii) Whether the worker is subject to "a sufficient degree" of control in terms of what is to be done, and where, when and how it is to be done as a contractual right (see *White v Troutbeck [2013] IRLR 286*);

(iii) The existence of a right to substitute, irrespective of whether or not that right was exercised in practice (see *Autoclenz Ltd v Belcher* [2011] ICR 1157);

(iv) Whether the worker was in business on his own account, including consideration of factors such as whether the worker had to provide at his own expense the necessary equipment, hires his own helpers, whether the worker bears a financial risk, whether the worker has the opportunity to profit and whether the worker engaged himself to perform services in the course of an already established business of his own; and

(v) The duration of the contract, degree of continuity and whether the worker was "part and parcel" of the organisation (see *Hall v Lorimer*).

158. As per Park J in the *Usetech Ltd* we considered the terms of the hypothetical contract by reference to the wider circumstances including the conduct of the parties, and not solely the actual contractual terms. In applying the principles set out in the authorities, we find that the terms of the hypothetical contract between Ms Kelly and ITV would be as follows:

(1) The contract was for a term of 2 years and 6 months. Ms Kelly was contractually obliged to perform the services of a first class presenter to ITV and ITV was contractually obliged to pay the fees set out in clause 3. If Ms Kelly did not perform the services for the minimum of 42 weeks then the fees would reduce proportionately. It could terminate the contract in giving 6 months' written notice. However, if this occurred prior to the expiry of 2 years and 6 months, ITV would still require to pay Ms Kelly for that minimum period;

(2) ITV was not contractually bound to call on the services of Ms Kelly**;**

(3) ITV had the right to call on the services of Ms Kelly but if she was not available for any reason Ms Kelly may propose a substitute. ITV could determine whether to accept the substitute;

(4) Ms Kelly was expected to attend to present the live show subject to being available. Beyond that there were no set working hours or days or location;

(5) Ms Kelly must, in providing her services, co-operate with ITV and take account of its directions but Ms Kelly can at her discretion decide the manner, means and methods by which she performs the services;

(6) Ms Kelly was entitled to undertake other paid or unpaid work outside ITV provided there is no conflict with the live programmes;

(7) Ms Kelly was not subject to training days, formal appraisals nor did she have a team leader or line manager;

(8) There was no express provision for holiday pay, sick pay, maternity leave or pension entitlement;

(9) Ms Kelly was not required to attend at production meetings, interviews and other services ancillary to the programme;

(10) ITV arranged and provided transport for the purposes of the services provided by Ms Kelly;

(11) ITV would have final editorial control over the Programme.

159. In applying the terms of the hypothetical contract, we make the following findings in relation to the issue of whether the contract was a contract of services or a contract for services.

Mutuality of obligation

160. In *Usetech* at [60] the Court said:

> "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."

161. Mr Gordon conceded, and we agree, that Ms Kelly was obliged to personally perform the services; the Appellant had no other employees it could send in her place and the Agreement specifically named Ms Kelly as the person engaged to perform the services.

162. Although not main thrust of the Appellant's case, Mr Gordon did not concede the issue of mutuality of obligation, noting that X paying Y for a specific task is insufficient; an employer calls on the services of an employee however in this case ITV is entitled to call on Ms Kelly but it is not obliged to do so nor is there an obligation to continue to call on the services of Ms Kelly.

163. As recognised in *Dragonfly Consultancy* an obligation to provide work or pay in the absence of it is not a precondition for a contract of services although it may point towards it. In this case ITV was obliged to pay Ms Kelly for the services performed and there was an expectation that there would be up to 42 weeks of work per year. However, ITV was not obliged to call on Ms Kelly and the show could have been dropped, for instance as we were told by the witnesses if ratings fell.

164. In our view there was mutuality of obligation, but such that what there was amounted only to the "irreducible minimum" and we did not find it determinative of the issue.

Control

165. The Appellant's case relied, in the main, on the absence of control as a significant indicator pointing away from a contract of services. As MacKenna J explained:

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

166. The authorities recognise that absence of control in the case of a skilled worker is not an automatic indicator away from employment (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576).

167. The issue is whether a contractual right of control existed to a sufficient degree, irrespective of whether that right was exercised (*Autoclenz v Belcher* [2011] UKSC 41 at [19]).

168. In this case Ms Kelly was engaged for her specific skill. We accepted the evidence of Ms Walton and Professor Shalit that in relation to "Lorraine" and, to a lesser extent, "Daybreak", it was Ms Kelly's "brand" that was specifically engaged. We accepted the parallel drawn with "Oprah" and it was clear from the evidence that Ms Kelly had minimal or no supervision.

169. We accepted Ms Kelly's evidence that she decided on the running order of the programme, the items to feature and the angle to take in interviews. In looking at the overall picture we were wholly satisfied from the evidence that contrary to being part of a jigsaw, Ms Kelly was the jigsaw. The fact that the programmes were aired from a studio in our view is no more than a practical requirement and it was clear to us that if Ms Kelly had decided to present the show from a different location then this would happen. We accepted the evidence of Ms Kelly and Ms Walton that when ITV wanted to move the programme to Scotland or Manchester this was vetoed by Ms Kelly. We accepted that it was the decision of Ms Kelly to stay on site after the show and lead meetings about the following day's show; in our view this was a reflection of the control Ms Kelly had in determining what would or would not feature.

170. We were satisfied that Ms Kelly's preparation or attendance at interviews were not matters in respect of which ITV had control but rather examples demonstrating why Ms Kelly was engaged; rather than relying on researchers Ms Kelly chooses to carry out her own preparation which is why the programme has, as described by Ms Walton, Ms Kelly's "DNA".

171. On the basis of the evidence we heard from Ms Kelly, Professor Shalit and Ms Walton we had no doubt that Ms Kelly was not hired to be part of a team but rather to lead a team. Specifically in relation to "Lorraine" we can put it no better than the witnesses when they told us "it was her name on the door". In relation to "Daybreak" we accepted the evidence of Ms Kelly and Professor Shalit that ITV approached Ms

Kelly to seek her services in making the show a success and increasing ratings; on this basis we were satisfied that it further demonstrated Ms Kelly being engaged to use her skills as she saw fit and with a free rein. We found the fact that ITV travelled to Dundee to cast for a co-presenter indicated the substantial level of control exercised by Ms Kelly; this went beyond Ms Kelly simply making suggestions which ITV took into consideration and in our view reflected the fact that Ms Kelly was in control of the format of the programme. We accepted that the choice of co-presenter was dictated by Ms Kelly as otherwise ITV would have had no need to travel to Dundee.

172. We considered the notes of the meeting in 2015. We have set out a summary of the pertinent points at [84] above. We accepted Ms Walton's evidence that the contents of the notes were broadly accurate but did not reflect the full picture. The picture we painted from our reading of the notes was that rather than Ms Kelly being subject to ITV's control specifically via Ms Walton (as HMRC argued), the two roles were entirely separate and distinct; Ms Walton was there to a lead a team and provide ITV with a live programme to air. In our view Ms Walton's obligations were to ITV and the only responsibility specific to Ms Kelly was to ensure she was there, presented the show to a high quality, did not overrun (due to it being live) and complied with industry regulations such as OFCOM. Ms Kelly's role was to provide a programme in any manner she chose. Our reading of the meeting notes reinforced our view that the relationship between Ms Kelly and ITV was that of a contract for services.

173. We were satisfied that Ms Kelly was free to carry out other work and activities without any real restriction and that whilst the Agreement purported to give ITV control the reality was that Ms Kelly was able to carry out other activities such as the expedition to Antarctica for four weeks which interfered with her availability to perform the duties for ITV.

174. We found the references to OFCOM did not assist; the duty to comply with the requirements of an industry governing body is found in many professions irrespective of whether an individual is employed or self-employed and we did not accept that this was a matter in respect of which ITV had specific control of Ms Kelly; ultimately it was a matter for Ms Kelly if she acted in a manner which breached OFCOM, the consequences of which would no doubt have an impact on Ms Kelly's career together with ITV and the Network.

175. We are satisfied that control of Ms Kelly's work pursuant to the hypothetical contract lay with Ms Kelly. In our view the level of control falls far substantially below the sufficient degree required to demonstrate a contract of service and we are satisfied that the factors strongly indicate that the contract was one for services.

Whether other provisions of the contract indicate the contrary

176. Ms Kelly was not entitled to sick pay, holiday pay or other benefits to which employees generally have an entitlement. She was not provided with training nor subject to processes such as appraisals which ITV employees were. We were satisfied that there was no obligation to attend other than to present the show and no obligation

to provide other services to ITV unrelated or ancillary to the show. Whilst there is no requirement for a contract of employment to include such features, in our view the absence of them indicates that Ms Kelly was not considered to be or treated as an employee.

177. Henderson J in *Dragonfly* made it clear that statements by the parties may assist in a borderline case, although little weight would normally be attached to such a statement. To the extent that the parties' intentions are a relevant consideration (as set out in Clause 9 of the Agreement) we are satisfied that neither party intended to create a contract of services. However, as we do not consider this to be a borderline case we do not consider this factor assists in determining the issue.

178. In relation to financial risk there was no scope for Ms Kelly to increase profits. We noted that Ms Kelly was exposed to the type of risk which would be found in self-employment, such as the programme being dropped or long-term sickness rendering her unable to provide her services.

179. Save for an earpiece and clothes, no equipment was provided to Ms Kelly. Ms Kelly did not contribute to social media related to the programme. We took the view that these were neutral factors which do not point towards or away from a contract of service.

180. In applying the test as to whether the Appellant was providing services in business on its own account we noted that while engaged with ITV Ms Kelly carried out a variety of work from writing to designing and advertising a fashion line. Ms Kelly also appeared on other television shows. The picture that emerges from the considerable and varied activities of Ms Kelly is that she cannot be considered to be part and parcel of ITV Breakfast. In our view ITV was not employing a "servant" but rather purchasing a product, namely the brand and individual personality of Lorraine Kelly. We concluded that all this supports the conclusion that the Appellant was in business on its own account.

181. In looking at the overall picture and making a considered and qualitative assessment of the evidence as a whole we have reached the view that the relationship between Ms Kelly and ITV was a contract for services and not that of employer and employee.

Agency fees

182. Having concluded that the IR35 legislation does not apply to the particular facts of this case the ancillary issue relating to the deductibility of agency fees has no bearing on the outcome of this appeal. However the parties requested that we address the issue irrespective of our conclusion on the main issue and we therefore make the following comments.

183. HMRC's first argument is that the expenses are only deductible if a contract exists between Ms Kelly and ROAR Global. The Appellant submits that the commercial reality is that the contract was between Ms Kelly and ROAR Global as,

purposively construed, the liability although paid by the Appellant rests with Ms Kelly.

184. We were provided with an invoice from ROAR Global to the Appellant dated 30 September 2015 and the terms of ROAR Global's Services as exclusive manager of Lorraine Kelly dated 29 September 2010. We were told by the witnesses, and we have no reason to reach a different view, that the contract remains in place and indeed the terms of the document provide that the contract is in force for 1 year and then continues until either party gives 90 days written notice. The evidence of Ms Kelly and Professor Shalit was clear; neither party had given notice and we therefore rejected HMRC's suggestion that there is no evidence of an agreement covering the years under review.

185. The question is whether the contract relates to Ms Kelly or the Appellant or both. The evidence, which we accept, of Professor Shalit was that all parties considered that Ms Kelly and the Appellant are one and the same. We have no doubt that such was the intention between the parties as Ms Kelly's work was all provided, as far as we understand, through the Appellant therefore, if the contract was construed on a narrow basis excluding the Appellant, the invoice and services rendered by ROAR Global to would be redundant. We do not accept this to be the case; we take the view that a contract existed between ROAR Global and Ms Kelly as both an individual and the Appellant and the fact that the invoices were paid through the Appellant does not alter this. We did not find that the evidence of Mr Grant assisted on this issue; the manner in which items are paid and financial advice given in that regard does not determine the parties to the contract.

186. The *Madeley & Finnigan* case is not binding upon us but the agreed position between the parties is that we must apply the test set out therein.

187. The remaining issue between the parties is the classification of Ms Kelly's work. In *Madeley & Finnigan* at [70] – [75] the Special Commissioner gave the following guidance:

> "70. It is not necessary or appropriate in this decision to try to indicate whether various other presenters, game show hosts, and people such as newsreaders would in my opinion rank as 'theatrical artists'. In the course of the hearing however, a number of remarks and arguments were made and advanced in relation to such other categories. In the interests thus of testing the conclusion that I have reached, and of applying a type of 'sanity check', I think that it will be worth referring to my broad assumption as to the status of certain other performers. Naturally no-one in the hearing gave much attention to the status of the particular people who were referred to and I have given relatively little thought to the full circumstances of the people who I will now mention. In the unlikely event that any of them are also posed with the difficult question of whether they can claim deductions for agents' fees under s 201A, their circumstances would have to be considered in more detail. I am only referring to them now in order to try to illustrate a certain consistency in my approach.

71. I would certainly accept that newsreaders and the weathermen on television are not 'theatrical artists'. Few will forget Angela Rippon's 'high kick', and I accept that the weathermen usually perform an amusing Christmas carol shortly before Christmas. I also accept that with the cult of the celebrity, more attention is given to the appearance and personality of newsreaders than in the past, but I still consider that their role is passive. People switch on the 'news' to find out what has happened, and the presenter will ideally be pleasant but unobtrusive. I would not describe newsreaders as performers or entertainers, and certainly not as theatrical artists.

72. I reach the same conclusion about presenters of current affairs programmes. Some have their unique style and some or most can be very impressive, but they are again neither entertainers nor theatrical artists.

73. Game show hosts can probably cross the line and be described as 'theatrical performers'. I would unquestionably apply that description to Bruce Forsyth and to Ant and Dec. My observation as regards Bruce Forsyth is not so much because I assume that he has a background in dance and stage or music-hall. It is simply that his ability to break into dance, and his whole presentation is 'theatrical', and he is clearly an artist.

74. Quiz show hosts are more difficult. Whilst the following observations have nothing to do with their appeal, and one's admiration for them, I suspect that many would agree that Jeremy Paxman was not a theatrical artist, when presenting 'University Challenge'. He might well be classed as an entertainer, and a performer but I very much doubt as a theatrical artist. Exactly the same would apply to John Humphrys, the presenter of Mastermind. Christ Tarrant on 'Who wants to be a Millionaire?' is border-line. But Anne Robinson on 'Weakest Link' is indeed probably theatrical.

75. The common thread then to Bruce Forsyth, Ant and Dec and Anne Robinson is that they are all putting on one or another form of act. Everything is a performance. And to my mind Richard and Judy share that attribute. Their act was and is to perform the role of the informal chatting husband and wife team, constantly trying to entertain, and making their personality and performance the core of the programme that they presented. And that makes them 'theatrical artists'."

188. The first area of dispute between the parties was as to the nature of the programmes. We did not find OFCOM's classification of "Daybreak" as current affairs determinative of the issue. We accepted the oral evidence of the witnesses, in particular Ms Kelly, as to the similar nature of "Daybreak" and "Lorraine". We accept that "Daybreak" contained more news items than "Lorraine" hence its classification by OFCOM. However the legislation specifically refers to "employment as an entertainer". In our view this means we must look at the nature of Ms Kelly's role as opposed to determining the issue on the programme as a whole. Furthermore it was clear from the evidence that items such as the news were a separate part of the programme presented by newsreaders in a separate studio. Ms Kelly's role was to provide light entertainment of a similar nature to "Lorraine" and therefore our findings relate to both programmes equally.

189. We had the benefit of viewing numerous clips of Ms Kelly's work which taken together with the oral evidence gave us a clear impression of the tenor of the programmes. It was clear to us that neither the programmes nor Ms Kelly's role in them could be viewed as current affairs or programmes of a similar nature.

190. In our view, whether or not Ms Kelly presented with a co-host (as she did in "Daybreak") or without ("Lorraine") makes no difference; a performance is not made so simply by the number of people involved.

191. HMRC highlighted the Special Commissioners' reference to pre-recorded skits and the number of them contained in This Morning. Again, we do not think this is a determinative factor. The point the Special Commissioner was making, as we read the Decision, is the style of the programme as a whole:

> "Firstly, the skits were very much in the style of the rest of the programme. When watching a programme it was not as if the presenters were giving a straight performance, which was suddenly and occasionally interrupted by a pre-recorded skit. The atmosphere of the programme was always light-hearted, and often jokey. For instance Richard and Judy would often intervene in a humorous way in the cookery slot. Each would put forward their own, plainly personal and sometimes provocative, opinions. Continuity slots would often contain light-hearted banter so that the pre-recorded skits seemed to be a seamless part of the whole presentation rather than an interlude out of character with the rest of the programme."

192. In our view there are significant similarities between This Morning and the programmes which are the subject of this appeal. We have no hesitation in finding that the programmes were light-hearted in nature with Ms Kelly regularly dressing up in skits, ad-libbing live on air and filling in gaps if, for example, a guest failed to attend. In this regard we agree with the comment in *Madeley and Finnigan* at [24]:

> "The programme was always broadcast live, and therefore when ad-libbing, and filling in gaps if interviewees were un-forthcoming etc, and chipping in on the cooking, fashion and other slots, the amount of confidence and skill required to deliver the programme professionally was obviously considerable. Indeed if the question in this appeal was whether Richard and Judy demonstrated more skill and confidence in their performance than an actor who acts well and remembers his lines or a comedian who tells scripted jokes, some of which are funny and others of which are not, the decision would be easier than it actually is."

193. We did not accept that Ms Kelly simply appeared as herself; we were satisfied that Ms Kelly presents a persona of herself; she presents herself as a brand, and that is the brand ITV sought when engaging her. All parts of the show are a performance, the act being to perform the role of a friendly, chatty and fun personality. Quite simply put, the programmes are entertaining, Ms Kelly is entertaining and the "DNA" referred to is the personality, performance, the "Lorraine Kelly" brand that is brought

to the programmes. We should make clear we do not doubt that Ms Kelly is an entertaining lady, but the point is that for the time Ms Kelly is contracted to perform live on air she is public "Lorraine Kelly"; she may not like the guest she interviews, she may not like the food she eats, she may not like the film she viewed but that is where the performance lies, as no doubt with other entertainers such as Ant and Dec or Richard and Judy. For that reason, we have no hesitation in concluding that Ms Kelly is a "theatrical artist" and the legislation is satisfied such as to make the expenses deductible.

Conclusion

194. The appeal is therefore allowed.

195. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 16 MARCH 2019