Neutral Citation: [2022] UKFTT 194 (TC)

Case Number: TC08519

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/06187;TC/2021/00258

INCOME TAX, PAYE and NICs – Appellant engaged to provide services to BSkyB through the agency of Mr Alan Parry – whether intermediaries legislation applies – construction of hypothetical contracts between Mr Parry and BSkyB and the application of the tests in Ready Mixed Concrete to those hypothetical contracts and the surrounding circumstances – held that the mutuality of obligation and control tests were satisfied and that the terms of the hypothetical contracts and the surrounding circumstances were consistent with a relationship of employment – appeal dismissed

Heard on: 27, 30 and 31 May, 2022
Judgment date: 16 June 2022

Before

TRIBUNAL JUDGE BEARE

Between

ALAN PARRY PRODUCTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Chris Leslie of Tax Networks Limited

For the Respondents: Mr Bayo Randle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to appeals by the Appellant against:

   (1) determinations in respect of income tax payable by way of Pay As You Earn ("PAYE") under Regulation 80 of the Income Tax (PAYE) Regulations 2003 (2003/2682) (the "PAYE Regulations") (the "Determinations"); and

   (2) decision notices in respect of Class 1 National Insurance Contributions ("NI") payable under Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 (the "SSCTFA") (the "Notices").

2. Each of the Determinations and each of the Notices was made on the basis that the "intermediaries legislation" in Sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 (the "ITEPA 2003"), and the related provisions of the Social Security Contributions (Intermediaries) Regulations 2000 (the "2000 Regulations"), commonly known as the "IR35 legislation", applied to the arrangements entered into between the Appellant and the company which, over the period that is relevant to the appeals, was named either British Sky Broadcasting Limited or Sky UK Limited (and to which I will refer throughout this decision as "BSkyB") in relation to the provision by the Appellant to BSkyB of the services of Mr Alan Parry over a period corresponding to the tax years of assessment 2013/14 to 2018/19.

3. The amounts of PAYE which are in issue between the parties are as follows:

Tax year of assessment	PAYE
2013/14	£40,310.60
2014/15	£40,884.20
2015/16	£42,619.60
2016/17	£24,553.80
2017/18	£35,380.20
2018/19	£38,726.00

and the amounts of NI which are in issue between the parties are as follows:

Tax year of assessment	NI
2013/14	£35,010.50
2014/15	£28,519.40
2015/16	£29,399.29
2016/17 and 2017/18	£28,818.76
2018/19	£12,198.02

4. There is no dispute between the parties in relation to the amounts set out in the above table, assuming that IR35 did apply to the Appellant in relation to the tax years of assessment in question. Similarly, there is no dispute between the parties as to the validity of the Determinations and the Notice assuming that the IR35 legislation did apply to the Appellant in relation to the tax years of assessment in question. The only issue between the parties is whether the conclusion on which the Determinations and the Notice are based – namely, that the IR35 legislation applied to the Appellant in relation to the tax years of assessment in question - is correct. In that regard, the burden of proof is on the Appellant to show that the conclusion is incorrect.

BACKGROUND

5. The Appellant is the personal services company of Mr Alan Parry, who is the sole director and majority shareholder in the Appellant. Mr Parry is a well-known football commentator who has commentated for BSkyB for many years. In common with many other people who were engaged in the provision of media services, Mr Parry carried out his services as a commentator for BSkyB through the Appellant as his intermediary. In other words, rather than Mr Parry's entering into a contract of employment in relation to his services as a commentator directly with BSkyB, the Appellant entered into a contract with BSkyB to provide those services and then the Appellant provided the services through the agency of Mr Parry and paid a salary and dividends to Mr Parry.

6. The IR35 legislation relates to circumstances in which Parliament has considered that, notwithstanding the legal form of the transactions on which services have been provided, those transactions are to be treated for tax purposes as if the relevant individual had provided those services directly as an employee. In other words, the legislation has the effect for tax purposes of converting the contract for services between two companies – to which I will refer in this decision as, respectively, the "client" and the "intermediary" - into a contract of service between the client and the individual who actually provided the services to the client through the intermediary – to whom I will refer in this decision as the "worker".

7. It is to the IR35 legislation which I will now turn.

THE RELEVANT LEGISLATION

8. Chapter 8 of Part 8 to the ITEPA 2003 deals with the provision of services through an intermediary.

9. Sections 49 of the ITEPA 2003 provides as follows:

"49 Engagements to which this Chapter applies:

(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…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…

(2). . . . . .

(3) The reference in subsection (1)(b) to a "third party" includes a partnership or unincorporated body of which the worker is a member.

(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…

(5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1)."

10. In this case, it is common ground that:

(1) Mr Parry personally performed services for BSkyB (so that Section 49(1)(a) of the ITEPA 2003 was satisfied);

(2) those services were provided not under a contract directly between BSkyB and Mr Parry but instead under arrangements involving the Appellant (so that Section 49(1)(b) of the ITEPA 2003 was satisfied); and

(3) if Mr Parry had an engagement to which the Chapter applied, then, under Section 51 of the ITEPA 2003, the Appellant was required to be treated as making to Mr Parry, and Mr Parry was required to be treated as receiving from the Appellant, a payment which was to be treated as earnings from employment.

11. It therefore follows that the only question which is in issue between the parties in relation to the application of Chapter 8 of Part 8 to the ITEPA 2003 is whether Section 49(1)(c) of the ITEPA 2003 was satisfied in relation to the tax years of assessment in question – namely, whether, if the services supplied by Mr Parry to BSkyB had been supplied under a contract directly between Mr Parry and BSkyB, which for the purposes of this decision I will term a "hypothetical contract", Mr Parry would have been regarded for income tax purposes as an employee of BSkyB.

12. Both parties agree that, in this context, despite some differences in the wording, the relevant NI legislation gives rise to precisely the same test as the legislation set out above.

13. That legislation is as follows.

14. Section 8(1)(m) of the SSCTFA provides that "it shall be for an officer of the Board … to decide such issues relating to contributions… as may be prescribed by regulations made by the Board."

15. Regulation 6 of the 2000 Regulations provides as follows:

"Provision of services through intermediary

6.—(1) This Part applies where–

(a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client") who is not a public authority,…

(b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

(c) the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.

(2) Paragraph (1)(b) has effect irrespective of whether or not–

(a) there exists a contract between the client and the worker, or

(b) the worker is the holder of an office with the client.

(3) Where this Part applies–

(a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with regulation 7 ("the worker's attributable earnings"), as employed in employed earner's employment by the intermediary, and

(b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker's attributable earnings,

and Parts I to V of that Act have effect accordingly.

(4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (decision by officer of the Board)."

16. It is common ground that the Appellant is an "intermediary" for the purposes of paragraph 6 of the 2000 Regulations and therefore the issue which needs to be determined pursuant to that paragraph is whether, if the services supplied by Mr Parry to BSkyB had been supplied under a hypothetical contract directly between Mr Parry and BSkyB, Mr Parry would have been regarded for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 as employed in employed earner's employment by BSkyB.

THE RELEVANT CASE LAW

17. The starting point in any examination of the relevant case law must be to the statement made by Robert Walker LJ in *R (Professional Contractors Group & Others) v Inland Revenue Commissioners* [2001] EWCA Civ 1945 to the effect that the purpose of the IR35 legislation is "to ensure that individuals who ought to pay tax and NICs as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation". It follows that, if, once one ignores the corporate structure (ie the tripartite nature of the arrangement) which actually existed in this case (as Section 49(1)(c) of the ITEPA 2003 and Regulation 6(1)(c) of the 2000 Regulations require), the relevant worker should be regarded as an employee of the client, then the IR35 legislation is in point.

18. It was common ground between the parties that this requires the following three stage process to be adopted:

(1) *Stage 1* - find the terms of the actual contractual arrangements which existed at the relevant time (between, on the one hand, the intermediary and the client and, on the other hand, the worker and the intermediary) and the relevant circumstances within which the worker carried out his services;

(2) *Stage 2* - ascertain the terms of the hypothetical contract (between the client and the worker) postulated by Section 49(1)(c)(i) of the ITEPA 2003 and Regulation 6(1)(c) of the 2000 Regulations; and

(3) *Stage 3* - consider whether that hypothetical contract would have been a contract of employment.

19. This is the approach identified in the Upper Tribunal decision in *The Commissioners for Her Majesty's Revenue and Customs v. Kickabout Productions Limited* [2020] UKUT

216 (TCC) ("*Kickabout*") at paragraph [6] and approved by the Court of Appeal in *The Commissioners for Her Majesty's Revenue and Customs v. Atholl House Productions Limited* [2022] EWCA Civ 501 ("*Atholl House*") at paragraph [7].

Stage 1

20. In *Kickabout*, the Upper Tribunal said as follows in relation to Stage 1 of the process:

"The question whether interpretation of a contract is a question of law or of fact was considered by Lord Hoffmann in *Carmichael v National Power plc* [1999] 4 All ER 897 at 903, [1999] ICR 1226 at 1233:

(1) If parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents, the meaning of those documents, and so the interpretation of the contract, is a pure question of law.

(2) The question whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is a question of fact.

(3) If, however, the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct, then the terms of the contract are a question of fact" (see *Kickabout* at paragraph [25]).

21. In terms of identifying the terms of the actual contractual arrangements at Stage 1 of the process, the decision of the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41 ("*Autoclenz*") has for some years been considered as the leading authority for the proposition that the well-established principles of contractual interpretation might not always be applicable in the employment context. In that case, the issue was whether valeters engaged by the appellant to provide car cleaning services to the appellant's clients were "sub-contractors" (as the contracts described them) or "workers" within the meaning of two particular sets of regulations. The Supreme Court held that those terms of the contracts which served to support the description of the valeters as sub-contractors did not represent the true agreement of the parties and that the remaining terms of the contracts showed that they were employees and, hence, "workers" for the purposes of the relevant regulations.

22. Lord Clarke, giving the only judgment, with which the other Justices agreed, held that the well-established principles of contractual interpretation continued to apply to ordinary contracts but that there was a "a body of case law in the context of employment contracts in which a different approach has been taken". That approach involved disregarding the terms of a written contract where they did not reflect what Elias J in *Consistent Group Ltd v. Kalwak* [2007] IRLR 560 ("*Kalwak*") had referred to as "the reality of the situation".

23. However, the relevance in the context of cases relating to the IR35 legislation of the approach which was adopted in *Autoclenz* was addressed at some length by the Court of Appeal in *Atholl House* at paragraphs [140] et seq.. In that part of his judgment, Sir David Richards LJ noted that:

> (1) in *Uber BV v Aslam* [2021] UKSC 5 ("*Uber*"), Lord Leggatt in the Supreme Court had pointed out that *Autoclenz* was ultimately not about contractual interpretation at all but was rather concerned with determining whether particular individuals fell within the definition of "worker" in the relevant regulations so as to qualify for the rights accorded to "workers" under those provisions;
>
> (2) thus, *Autoclenz* was actually about statutory interpretation and not contractual interpretation (see *Uber* at paragraph [69]);

(3) it was in that context that the Supreme Court in *Autoclenz* had addressed the question of whether the express terms of a written contract between parties in the employment context could be disregarded in determining the terms of the actual agreement between the parties;

(4) the question at issue in relation to the IR35 legislation was whether the particular individual should be regarded for income tax purposes as an employee under Section 49 of the ITEPA 2003, as determined by the application of the common law tests of employment and where the statutory context gave no special meaning to the term "employee"; and

(5) it followed that, in the context of the IR35 legislation, there was no need to look beyond the terms of the written agreement to find the parties' "true agreement" and therefore it was not appropriate to follow the approach which had been adopted by the Supreme Court in *Autoclenz* in that context.

24. It follows from this that, in the context of a dispute in relation to the application of the IR35 legislation, the decision in *Autoclenz* is no longer authoritative in determining the terms of the actual contractual arrangements at Stage 1 of the process. In the words of Sir David Richards in *Atholl House* at paragraph [156], "it is not legitimate to apply the *Autoclenz* approach." Instead, in a case involving the IR35 legislation, the actual terms of the contractual arrangements need to be determined by reference to well-established rules on the interpretation of contracts in general and without regard to the fact that the contractual arrangements relate to the context of employment.

25. Some guidance on those well-established rules may be found in the Supreme Court decision in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 ("*Wood*"). Lord Hodge, with whom the other Justices agreed, noted, at paragraphs [10] and [11], that:

(1) "[the] court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement";

(2) this is not a literalist exercise focused solely on a parsing of the wording of the particular clause. Instead, the court needs to consider the contract as a whole and, depending on the nature, formality and quality of the drafting in the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning;

(3) where there are rival meanings, the court can give weight to the implications of the alternative constructions "by reaching a view as to which as to which construction is more consistent with business common sense";

(4) in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of the drafting of the clause; and

(5) the court must be alive to the possibility that:

(a) one party may have agreed to something which, with hindsight, does not serve his interest;

(b) a provision may be a negotiated compromise; and

(c) the parties may have been unable to agree more precise terms in the course of the negotiations.

Stage 2

26. The Court of Appeal in *Atholl House* had very little to say about Stage 2 of the process – that is to say, identifying the terms of the hypothetical contract between the client and the worker. That is because, in the Court of Appeal:

(1) the grounds of appeal by the Respondents related solely to the manner in which the Upper Tribunal in that case had approached certain aspects of Stage 3 of the process; and

(2) the "Respondent's notice" served by the taxpayer related solely to:

(a) the application of the decision in *Autoclenz* at Stage 1 of the process; and

(b) if the taxpayer succeeded on that ground, the manner in which the Upper Tribunal in that case had approached certain aspects of Stage 3 of the process.

27. Thus, the way in which Stage 2 of the process was to be approached – and, in particular, the interaction between Stage 2 of the process and Stage 1 of the process - were very much left at large by the Court of Appeal decision. However, those matters were addressed in some detail by the Upper Tribunal in that case in *The Commissioners for Her Majesty's Revenue and Customs v. Atholl House Productions Limited* [2021] ("*Atholl House UT*") and the Upper Tribunal's judgment on those matters is binding on me.

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

(1) in determining the terms of the hypothetical contract, Sections 49(1)(c) and 49(4) of the ITEPA 2003 refer to the "circumstances" in which the services are provided and stipulate that those "circumstances" "include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided";

(2) it follows that the terms of the actual contracts forming part of the arrangements will generally be highly material in determining the terms of the hypothetical contract but will not be determinative of them;

(3) whereas the terms of the actual contracts should be determined by reference to the ordinary canons of contractual interpretation, those ordinary canons will not, of themselves, determine the contents of the hypothetical contract;

(4) in addition, it is not necessary to defer all analysis of the hypothetical contract at Stage 2 of the process until all of the terms of the actual contractual arrangements have been comprehensively determined at Stage 1 of the process. It might often be appropriate, in the iterative way identified by Lord Hodge JSC in *Arnold v Britten* [2015] UKSC at paragraph [77], to construe the terms of the actual contractual arrangements whilst considering at the same time how the contractual arrangements would work in determining the content of the hypothetical contract;

(5) when determining the terms of an actual contract, the parties' subjective beliefs as to the meaning of the contract or ignorance of the contract's terms will typically be irrelevant. Similarly, unless giving rise to a variation or some form of waiver or estoppel, the manner in which the actual contract is performed is typically irrelevant to its construction. However, those matters should not be regarded as being necessarily irrelevant in determining the terms of the hypothetical contract and are, in the view of the Upper Tribunal, matters that can appropriately be taken into account. This is because they are part of the "circumstances" which are required to be taken into

account in determining the terms of the hypothetical contract. The Upper Tribunal observed that:

"The process of synthesising the hypothetical contract out of the actual contracts in fact agreed involves additional considerations, and not merely the usual processes of interpretation."

As such, the parties' subjective beliefs and conduct are relevant circumstances which need to be considered in determining the terms of the hypothetical contract at Stage 2 of the process, even if they do not affect the identification of the terms of the actual contracts at Stage 1 of the process;

(6) it is not correct to construct the hypothetical contract simply by reference to the understanding by one of the parties of the terms of the actual contractual arrangements. That would be to place too much weight on matters not necessarily relevant to the construction of the hypothetical contract. Instead, the appropriate way to approach the task of constructing the terms of the hypothetical contract is to conduct a "counterfactual" exercise - in other words, to consider what the terms of the contract would have been if the client had contracted directly with the worker. In doing so, where the intermediary is under the control of the worker, the terms of the written contract between the intermediary and the client is a safe starting point because that is what the client agreed with the intermediary and what the intermediary (which is controlled by the worker) agreed with the client;

(7) in many cases, the worker and the client will have enjoyed a harmonious working relationship in which the precise terms of the actual contractual arrangements do not feature prominently as there will be no need for either party to insist on enforcing the strict contractual terms between the parties. It is therefore helpful in constructing the terms of the hypothetical contract to consider what might have happened in the event of certain hypothetical potential "flashpoints" – which is to say, postulating circumstances where one of the parties might have wished to stand on its rights as set out in the written contracts against the wishes of the other party and then to consider what might then have occurred; and

(8) these principles are as applicable in the case of the relevant NI legislation as they are in the case of the PAYE legislation notwithstanding the fact that Regulation 6 in the 2000 Regulations does not contain an equivalent to Section 49(4) of the ITEPA 2003 – which expressly directs attention to the terms of the actual contracts – because the provisions deal with similar and overlapping subject matter.

Stage 3

29. Once the terms of the hypothetical contract have been identified following the application of Stages 1 and 2 of the process, it is necessary to determine, at Stage 3 of the process, whether that contract amounts to a contract of employment.

30. In that regard, the leading authority is the three-stage test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*"). Given the importance that MacKenna J's articulation has assumed, it worth setting out here the substance of MacKenna J's test at 515-517:

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

I need say little about (i) and (ii).

As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

As to (ii). 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.

"What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." – Zuijs v. Wirth Brothers Proprietary, Ltd.

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.

The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: Amalgamated Engineering Union v. Minister of Pensions and National Insurance.

I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is

to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."

31. The three stages described in the extract set out above has been described in subsequent cases as the "RMC test". In *Atholl House*, Sir David Richards provided a comprehensive summary of some of the applicable case law in relation to the RMC test and there have also been other cases which have shed light on how the test is to be applied.

32. Taking all of those into account, the following principles emerge:

(1) mutuality of obligation and a right of control – which are the first two stages of the RMC test - are a necessary but not sufficient condition of a contract of service – see *Fall v Hitchin* [1973] 1 WLR 286 ("*Fall*"). They are, in the words of Buckley J and Longmore LJ in *Montgomery v Johnson Underwood Limited* [2001] ICR 819 ("*Montgomery*") at paragraphs [23] and [46], the "irreducible minimum" which need to be satisfied before considering the other relevant factors at the third stage of the test (see also *Atholl House* at paragraphs [98] and [100]). Accordingly, those two stages in the test must always be addressed first;

(2) turning to the first stage of the RMC test – the need for mutuality of obligation - there are two aspects to this stage. The first relates to the nature of the client's obligations – the client limb of the mutuality of obligation stage - and the second relates to the nature of the worker's obligations – the worker limb of the mutuality of obligation stage;

(3) as regards the client limb of the mutuality of obligation stage, prior case law establishes that, in order for this limb to be satisfied, the client must either be obliged under the hypothetical contract to provide work to the worker or obliged under the hypothetical contract to pay a retainer to the worker – see *Clark v Oxfordshire Health Authority* [1998] IRLR 125 ("*Clark*") at paragraph [41], *Usetech Limited v Young* [2004] TC 811 ("*Usetech*") at paragraph [64] and *Atholl House* at paragraph [73]. In this regard, it is important to note the distinction between:

(a) a contract under which the client agrees to pay a retainer to the worker in return for which the worker agrees to do the work which the client may provide; (but the client is not obliged to provide work for the worker); and

(b) a contract under which the client agrees to make a payment to the worker if work is provided in return for which the worker agrees to do the work which the client may provide (but the client is not obliged to provide work for the worker) – for example, a piecework contract.

In the former case, the obligation on the part of the client to pay the retainer is sufficient to satisfy the client limb of the mutuality of obligation stage - see *Turner v Sawdon & Co* [1901] 2 KB 653 (CA) - whereas, in the latter case, the absence of the obligation to provide work prevents that from being the case – see *Devonauld v Rosser & Sons* [1906] 2 KB 729 and *Professional Game Match Officials Limited v The Commissioners for Her Majesty's Revenue and Customs* [2021] STC 1956 ("*PGMOL*"). Sir David Richards highlighted this distinction in *Atholl House* at paragraphs [73] and [74];

(4) as regards the worker limb of the mutuality of obligation stage, MacKenna J in *RMC* said that, in order to satisfy this limb, the worker "must be obliged to provide his own work and skill. Freedom to do a job by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may be".

However, subsequent case law has more fully explored the question of when the worker's right to substitute the services of another person for the worker's own services can be seen as preventing this limb of the mutuality of obligation stage from being satisfied.

In *Pimlico Plumbers Limited v Smith* [2018] ICR 1511 ("*Pimlico Plumbers*"), the Supreme Court addressed the question of whether, assuming that the worker (a plumber) had a contractual right as against the client to arrange for a particular job to be done by another plumber who also did work for the client, that contractual right was incompatible with an obligation of personal performance on the part of the worker and hence negated the existence of a contract of service between the client and the worker. The Supreme Court concluded that the appropriate way to approach this issue was to consider whether the "dominant feature" of the contract in question remained one of personal performance on the part of the worker. In *Pimlico Plumbers* itself, the Supreme Court focused on two particular aspects of the facts in that case, namely:

> (a) the language used in the terms of the contract, and particularly the use of the vocative, which revealed that the right of substitution was an insignificant part of the contract; and
>
> (b) the fact that the substitute needed to come from the ranks of plumbers who were acceptable to the client – in other words, those who could be assumed to be under similar obligations as regards carrying out the services as the worker in question,

and concluded that the "dominant feature" of the contract in that case was one of personal performance. The contract was to be contrasted with "a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done" (see *Pimlico Plumbers* at paragraph [34]).

The "dominant feature" test set out in *Pimlico Plumbers* was applied by the Upper Tribunal in *Northern Light Solutions Limited v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKUT 134 (TCC) ("*Northern Light*"), a case relating to the IR35 legislation. In that case, it had been held at first instance that the hypothetical contract included a right on the part of the worker to offer a substitute which the client could refuse as long as it acted reasonably in so doing. The Upper Tribunal held that, assuming that the First-tier Tribunal had been right to conclude that the hypothetical contract included a term to that effect, it was unlikely, in practice, that the worker would be able to offer a substitute who met the requirements for the right experience and qualifications whom the client, acting reasonably, would accept. That was because it was clear from the facts in that case that the client particularly valued the worker for his specialist expertise and familiarity with the way in which the client operated. That was sufficient to show that the "dominant feature" of the hypothetical contract was personal performance by the worker.

The "dominant feature" test set out in *Pimlico Plumbers* was also considered by the Court of Appeal in *Stuart Delivery Limited v Warren Augustine* [2021] EWCA Civ 1514 ("*Stuart*"). In that case, the worker (a courier) did not have a right of substitution as such. The courier could give up slots that he or she had previously accepted provided that another courier who worked for the same client was able and willing to take the slot. In the Court of Appeal in *Pimlico Plumbers*, Sir Terence Etherton MR had set out what he saw as five basic principles which could be derived from the prior case law as to when a right of substitution would or would not negate the obligation of

personal performance and the lower courts in *Stuart* had considered whether the facts in *Stuart* fell within the fifth of those principles.

However, the Court of Appeal in *Stuart* rejected that approach. It held that it was unhelpful to try to impose rigid rules based on the facts of prior cases as to when a right of substitution would or would not negate the existence of an obligation of personal performance. Instead, each case needed to be considered on the basis of its own facts and in the light of the injunction by the Supreme Court in *Pimlico Plumbers* to consider whether the "dominant feature" of the contract in question was one of personal performance (see *Stuart* at paragraphs [47] to [58]). In so doing, it was necessary to consider "whether the nature and degree of any fetter on the right or ability to appoint a substitute …was inconsistent with any obligation of personal performance" (see *Stuart* at paragraph [55]). It concluded that, on the facts in that case, the limited right or ability of the courier to give up a slot was not sufficient to remove from the courier the personal obligation to perform his work personally for the client and the facts were analogous to those in *Pimlico Plumbers*;

(5) turning then to the second stage of the RMC test – the need for the client to have the power of deciding the thing to be done, the way in which it should be done, the means to be employed in doing it and the time when, and the place where, it should be done, or, as it has often been put, the "what, how, when and where" – the case law reveals the following:

(a) the extent and degree of control exercised by the client over the worker is not, by itself, decisive – see *RMC* itself, *Market Investigations Limited v Minister for Social Security* [1969] 2 QB 173 ("*Market Investigations*") at 183 and *Atholl House* at paragraph [82];

(b) it has long been acknowledged that the test for control over the "how" - which is to say the way in which the work will be carried out and the means to be employed when doing it - is less important than control over the "what, when and where" and that the "how" test should be focused more on ultimate authority than on close direction by actual supervision. That is because there are many examples, of which this is one, where the degree of skill which the work requires is such that direct control is necessarily absent – see *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56 at paragraph [36].

In this regard:

(i) in *Montgomery*, at paragraph [19], Buckley J gave the examples of a master of a vessel, a surgeon or a science or technology expert and said that control over the "how" existed as long as there was "some sufficient framework of control" even though the level of knowledge and skill required to carry out the work meant that control exercised by actual supervision was impossible;

(ii) in *Christa Ackroyd Media Limited v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 326 (TCC) ("*Ackroyd*") at paragraphs [51] to [54], the Upper Tribunal considered the meaning of the above phrase and held that "what mattered in determining control was not the practical exercise of day-to-day control and whether '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'." In *Ackroyd*, the Upper Tribunal gave as an example the facts in

White v Troutbeck [2013] IRLR 286 ("*Troutbeck*"), where the owner of an estate who left a servant in charge of the day-to-day running of the estate but "retained the right to step in and give instructions concerning what was, after all, their property" was held to have retained control over the servant - see the decision of the Employment Appeal Tribunal in *Troutbeck* at paragraphs [40] to [42]; and

(iii) in *PGMOL*, at paragraphs [115], [130] and [132], the Court of Appeal approved the statement which had been made by the Upper Tribunal at paragraph [138] of its decision in that case to the effect that "[a] right to give directions cannot be ignored just because 'there is no ability to step in and give directions during the performance of the obligations (where the nature of the obligations precludes it)";

(6) the third stage of the RMC test is a "negative condition", which falls to be addressed only if the first two stages of the test have been satisfied – see *RMC* itself and *Atholl House* at paragraph [75]. In some cases, such as in the High Court in *Hall v Lorimer* [1992] 1 WLR 939 ("*Hall*"), the question posed at this stage of the test has been whether the worker was in business on his or her own account and, in other cases, such as in *RMC* itself, the question posed at this stage of the test has been whether the worker was an independent contractor. However, nothing turns on this distinction. There is no dichotomy between those two expressions of the relevant test – see *Atholl House* at paragraphs [56] to [61], [122] and [168]. Indeed, as Nolan LJ noted in the Court of Appeal in *Hall* – in *Hall v Lorimer* [1994] 1 WLR 209 ("*Hall CA*") – the question of whether an individual is in business on his own account, though often helpful "may be of little assistance in the case of one carrying on a profession or vocation" because the indicia applicable to a commercial business might well be inapplicable to one carrying on a profession or vocation – see *Hall CA* at 218B and *Atholl House* at paragraph [96];

(7) regardless of the way that the test is phrased, the key point is that the relevant court or tribunal is entitled to take into account not only the express or implied terms of the hypothetical contract between the client and the worker, but also a broader range of factors – see *Market Investigations*, *Hall*, *McGregor v Edinburgh Leisure* [2007] UKEAT 0027/07/2908 (29 August 2007) and *Matthews v The Commissioners for Her Majesty's Revenue and Customs* [2014] STC 297. All aspects of the relationship between the client and the worker need to be considered and no single factor is decisive – see *O'Kelly v Trusthouse Forte plc* [1984] 1 QB 90 ("*O'Kelly*") at 104G and 124E and *Atholl House* at paragraphs [86] and [122];

(8) the fact that the first two stages of the test have been satisfied by the time that the third stage is addressed does not mean that that gives rise to a prima facie conclusion of employment which then has to be displaced by other terms of the contract which are clearly inconsistent with a conclusion of employment in order for the hypothetical contract to be a contract for services. In *Atholl House*, Sir David Richards expressly rejected the proposition to that effect - which had been adopted by Briggs J in the earlier case of *Weight Watchers (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] STC 265 and on which the Respondents sought to rely in *Atholl House*. Instead, no such presumption arises and the position should be considered from a neutral perspective. Putting it another way, it is sterile to debate whether the third condition is one of consistency or inconsistency with a conclusion of employment. Instead, as Sir David Richards LJ said in *Atholl House*:

"[The] court or tribunal will in any event have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment. Given that mutuality of obligation and control are necessary elements of employment, there will inevitably have to be factors pointing in the opposite direction, but it is, in my view, no more than that"

- see *Atholl House* at paragraphs [75] and [113] and *Augustine v Econnect Cars Limited* [2019] UKEAT 0231/18 ("*Augustine*") at paragraph [61];

(9) allied to this point, it is not the case that, having satisfied itself that the hypothetical contract meets the "irreducible minimum" of mutuality of obligation and control, the court or tribunal should not take those factors into account at the third stage of the RMC test. The court or tribunal needs to weigh any terms of the contract which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment. In so doing, the strength or weakness of the finding of control is a factor which needs to be taken into account at the third stage. This is because, as Sir David Richards LJ noted in *Atholl House*:

"In some cases, the control may be so pervasive as to make it very difficult, if not impossible, to conclude that it is not a contract of employment. In others, the decision on whether the right of control is sufficient may be borderline. I can think of no good reason why account should not be taken of these differences in what all agree is a multi-factorial process addressing all the relevant factors"

- see *Atholl House* at paragraphs [76] and [169] and also *Augustine* at paragraph [66];

(10) no exhaustive list can be compiled of the factors which should be taken into account at the third stage of the RMC test and it is not possible to lay down strict rules as to the relative weight which such factors should carry in particular cases. This is because each case turns on its own particular facts and all of the relevant factors need to be taken into account. The most that can be said is that:

(a) consideration is not necessarily confined to the express or implied terms of the hypothetical contract although those terms are central to the enquiry and should clearly be the starting point – see the Court of Appeal decision in *Troutbeck* – in *Todd and another v Troutbeck SA* [2013] EWCA Civ 1171 ("*Troutbeck CA*") at paragraphs [38] and [41] – and *Atholl House* at paragraphs [122] and [130]. What is needed is a consideration of "the relationship between the parties recorded in the Agreement in the setting of the surrounding circumstances" – see *Troutbeck CA* at paragraph [41]; and

(b) control is not the sole determining factor and "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" – see *Market Investigations* at 186. In *Hall* at 944 and 945, Mummery J referred to those factors and added:

"It may be relevant to consider the understanding or intentions of the parties; whether the person performing the services has set up a business-like organisation of his own; the degree of continuity in the relationship between the person performing the services and the person for whom he performs them; how many engagements he performs and whether they are performed mainly for one person or for a number of different people. It may also be relevant to ask whether the person performing the services is accessory to

the business of the person to whom the services are provided or is "part and parcel" of the latter's organisation."

The Upper Tribunal in *Kickabout* at paragraph [87] relied on the reference, in the passage set out above, to continuity in the relationship, in citing the long-standing nature of the relationship in that case as a factor pointing towards an employment relationship;

(11) the third stage of the RMC test 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. As Mummery J noted in the High Court in *Hall*:

"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 to another"

- see *Hall* at 944 and 945 and *Atholl House* at paragraphs [92] to [96];

(12) the factors to be taken into account are the same as those which inform the interpretation of the actual contractual arrangements and the hypothetical contract at Stage 1 and Stage 2 of the process in relation to the IR35 legislation. In *Atholl House*, Sir David Richards noted that:

"The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties" (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [21])" - see *Atholl House* at paragraph [123].

Arnold LJ in that case agreed, noting that the hypothetical contract "should not be construed in a vacuum, but in the light of the admissible factual matrix". In that regard, factual circumstances which were known or reasonably available to both parties at the time when the actual contracts were executed should be taken into account whereas factual circumstances not known or reasonably available to one of the parties at that time should not - see *Atholl House* at paragraph [170];

(13) the reference in paragraph 32(12) above to whether, judged objectively, the parties intended their agreement to create a relationship of employment means that the court or tribunal should consider whether, in the light of the factors which the decided cases have shown to be relevant, the terms of the hypothetical contract and the related circumstances indicate that the parties intended to create a relationship of employment. It does not mean that a statement in the actual contract between the client and the intermediary to the effect that no relationship of employment is intended should be determinative. Any such statement is no more than one relevant factor to be taken into account as part of the overall picture and the weight to be attached to such a statement will generally be minimal although there may be borderline cases where it could be of real assistance – see *Dragonfly v The Commissioners for Her Majesty's Revenue and Customs* [2008] STC 3030 at paragraphs [54] and [55]. In *Kickabout*, both the First-

tier Tribunal and the Upper Tribunal regarded the existence of such a statement in the hypothetical contract as being "broadly neutral" – see *Kickabout* at paragraph [86];

(14) in terms of the factual matrix, the fact that a person's working life generally involves entering into a series of engagements in the course of self-employment does not preclude that person from being regarded as an employee in relation to one of those engagements if the terms of that one engagement are more consistent with that person's being an employee – see *Fall* and *Sidey v Phillips* [1987] STC 87. Nevertheless, the fact that that person's working life generally involves entering into a series of engagements in the course of self-employment is "an important contextual circumstance" to be taken into account, along with all of the other relevant factors, in determining whether that person should be regarded as an employee in relation to the particular engagement in question – see *Synaptek Limited v Young* [2003] ICR 1149 ("*Young*") at paragraph [20]. In *Atholl House*, Sir David Richards LJ noted that:

"If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal"

- see *Atholl House* at paragraph [124];

(15) however, in each case, the focus should be on the contractual terms and circumstances of the engagement which is being considered and not the contractual terms and circumstances of the relevant worker's other engagements. The fact that the relevant worker performs similar services for others as an independent contractor is merely a "relevant fact, if known or reasonably available to the putative employer" but "it goes no further than that" – see *Atholl House* at paragraph [128]; and

(16) it follows from the fact that only those circumstances which are known or reasonably available to both parties at the time when the parties enter into the hypothetical contract can be taken into account in determining this question that, where the dispute over the worker's status as an employee or independent contractor relates to a particular tax year:

(a) the contractual terms and circumstances in existence over periods falling prior to that tax year, if known or reasonably available to both parties, are also relevant factors but no more than that; and

(b) the contractual terms and circumstances in existence over periods falling after the end of that tax year are wholly irrelevant.

Instead, the critical period in which the contractual terms and circumstances need to be considered is the tax year in question.

THE EVIDENCE

Introduction

33. The evidence in these appeals may usefully be divided into the following five categories:

(1) the terms of the contracts which existed between the Appellant and BSkyB over the tax years to which the appeals relate;

(2) exchanges of correspondence (including responses to questionnaires) between Mr Parry's representatives and the Respondents and notes of a meeting between Mr Parry's representative and officers of the Respondents;

(3) exchanges of correspondence between BSkyB and the Respondents and notes of a meeting between representatives of BSkyB and officers of the Respondents;

(4) the evidence of Mr Parry, in the form of two witness statements and oral evidence at the hearing; and

(5) information about the financial affairs of the Appellant.

The contracts

34. As I have noted above, the starting point in identifying the terms of the hypothetical contracts which existed between BSkyB and Mr Parry is the terms of the actual contractual arrangements which existed between BSkyB and the Appellant over the period to which the appeals relate. In that regard, I was provided with four written contracts between BSkyB and the Appellant pursuant to which the Appellant provided Mr Parry's services to BSkyB over the tax years to which the appeals relate.

35. The first of those contracts ("Contract 1") related to the period 1 August 2010 to 31 July 2013, the second of the contracts ("Contract 2") related to the period 1 August 2013 to 31 July 2016, the third of the contracts ("Contract 3") related to the period 1 August 2016 to 31 July 2018 and the fourth of the contracts ("Contract 4" and, together with each of Contract 1, Contract 2 and Contract 3, the "Contracts" and, each, a "Contract") related to the period 1 August 2018 to 31 July 2019.

36. The form of each of Contracts 2 to 4 was slightly different from the form of Contract 1 although all four Contracts were on broadly the same terms, with some minor differences to which I will refer in the paragraphs which follow.

37. Contract 1 comprised some boilerplate "clauses" followed by "Schedule 1", which set out the bespoke terms of the particular engagement and "Schedule 2", which contained a form of non-disclosure agreement. The main provisions in Contract 1 may be summarised as follows:

(1) in return for the "Fee", as defined in the Contract, BSkyB was from time to time entitled to require the Appellant to provide the "Services", as defined in the Contract, to BSkyB over the "Assignment" – clause 1;

(2) the "Services" were defined in Schedule 1 as "the services of Alan Parry as a commentator, presenter, interviewer, guest, or other participant (as requested by BSkyB from time to time) in the making of any editorial, programme or video whether in vision or audio and whether in a studio or on location, live or recorded as and when required by BSkyB during the Assignment"– Schedule 1;

(3) the "Assignment" was defined as being for the period 1 August 2010 to 31 July 2013 "on an ad hoc as and when required basis" – Schedule 1;

(4) the "Fee" was defined as a specified fixed amount for each year of the Contract and was expressed to be payable in arrear on a monthly basis against an invoice provided by the Appellant to BSkyB – Schedule 1;

(5) in addition to the Fee, BSkyB was required to reimburse the Appellant for its expenses reasonably incurred in the provision of the Services provided that those expenses were agreed in writing with BSkyB in advance – clause 4;

(6) the Appellant was required to "use its best endeavours to use Alan Parry to provide the Services." However, the Appellant had the right to provide the Services through another employee or through a sub-contractor provided that:

(a) the use of another employee or a sub-contractor was subject to BSkyB's confirming to the Appellant that the relevant other employee or relevant sub-contractor was suitable;

(b) the use of a sub-contractor was subject to BSkyB's prior written consent; and

(c) the use of a sub-contractor was conditional on the Appellant's procuring that the individual or individuals supplied by the sub-contractor signed a non-disclosure agreement

- clauses 2.1 to 2.4 and Schedule 2 – and the Contract provided that any person involved in the provision of the Services from time to time would be the "Personnel" for the purposes of the Contract – clause 2.2;

(7) all Personnel were required to execute a non-disclosure agreement prior to performing the Services – clause 2.5;

(8) BSkyB would have first call on the Personnel for the provision of the Services and the Appellant was required to procure that no Personnel were to "be involved directly or indirectly in the provision of any services to any other television and/or radio organisation and/or media organisations during the Assignment….where such services are the same as or similar to the Services, without the prior written consent of the Head of Sky Sports, such consent not to be unreasonably withheld" – clauses 3.1 and 3.7. Clause 3.1 went on to specify that the clause was "not intended to limit the Personnel from providing their services to any other entity that is not a provider or distributor of television and/or radio services, provided that such services do not interfere with the provision of the Services, as determined by BSkyB". Clause 3.2 stated that damages would not be an appropriate remedy for a breach of clause 3.1 and that BSkyB would be entitled to injunctive relief for any such breach;

(9) the parties agreed that there existed "no employment agreement or relationship" between the Personnel and BSkyB and that the individuals would, throughout the Assignment, be employees or sub-contractors of the Appellant. Consequently, the Appellant was to be responsible for the salaries, benefits and holiday pay of the Personnel and to indemnify BSkyB in respect of any liabilities arising in respect of those matters or any claim that any employment agreement or relationship between the Personnel and BSkyB existed – clauses 3.3, 4.4 and 10.1;

(10) the Appellant would correct defective work in its own time and at its own expense – clause 3.4 - and would indemnify BSkyB and its associated companies for any losses suffered by reason of its breach of the Contract – clause 2.6. In addition:

(a) the Appellant and the Personnel were precluded from incurring any liability or obligation on behalf of BSkyB without the prior written consent of BSkyB – clause 3.5; and

(b) BSkyB would not be liable for any personal injury, ailment or death of the Personnel arising out of the provision of the Services except to the extent that it arose as a result of BSkyB's negligence – clause 12;

(11) the Appellant was required to procure that the Personnel travelled to any destination required by BSkyB and at any time or date ("including bank holidays and weekends and anti-social hours") required by BSkyB in order to perform the Services – clause 3.6;

(12) the Appellant was required to procure that the Personnel attended at BSkyB's request for the purposes of recording trailers and/or promotional material to advertise BSkyB's programmes and services – clause 3.7;

(13) the Appellant warranted that, inter alia, the Personnel would comply with all directions and requests made by BSkyB and would not do anything which might bring BSkyB into disrepute – clauses 5.1 and 5.3;

(14) the Contract would terminate if:

(a) the Appellant was unable to provide the Services for a period exceeding 4 weeks for any reason or if the facial or physical appearance or voice of the Personnel became altered in such a way that, in BSkyB's reasonable opinion, it would affect his performance of the Services and the Appellant was unable to provide a substitute suitable to BSkyB;

(b) the Appellant suffered an insolvency-related event;

(c) the Appellant was in material breach of the Contract and failed to remedy or persisted in the breach within seven days of being required by BSkyB to remedy or desist from the breach;

(d) production or transmission of the programmes in respect of which the Services were to be provided were prevented, interrupted or delayed for a prolonged period for a cause outside BSkyB's control or BSkyB were to cease to hold the broadcasting rights for the matches; or

(e) the Personnel was guilty of serious or persistent misconduct or convicted of a criminal offence or brought himself, BSkyB or Sky Sports into disrepute

- clause 6.1;

(15) there were various provisions in relation to intellectual property rights, data and confidential information the effect of which was to give BSkyB the entitlement to all intellectual property rights arising as a result of the provision of the Services and to ensure that the Personnel maintained the confidentiality of the confidential or proprietary information which they obtained in the course of providing the Services – clauses 7, 8, 11 and 13;

(16) the form of the non-disclosure agreement" was set out in Schedule 2 to the Contract and was executed by Mr Parry as the Personnel. The non-disclosure agreement:

(a) involved the acceptance by the relevant individual of obligations mirroring the obligations of the Appellant in respect of intellectual property rights, data and confidential information arising in relation to the provision of the Services which are described in paragraph 37(15) above – paragraphs 1, 2, 5 and 6 of schedule 2;

(b) involved the acceptance by the relevant individual of obligations mirroring the obligations of the Appellant under the warranties in the Contract which are described in paragraph 37(13) above – paragraph 3 of schedule 2; and

(c) provided that the relevant individual acknowledged that:

(i) he had a reputation in the market place as an expert and commanded audience share; and

(ii) during the Assignment, he would have become associated with Sky Sports in the minds of the public and gained knowledge about the methodology and unique practice of BSkyB,

so that it would damage BSkyB's commercial interests if he were to cease to be involved in the provision of the Services during the Assignment. Accordingly, the relevant individual agreed that, if he ceased to provide the Services during the Assignment, then he would not, for the remainder of the Assignment, "be involved directly or indirectly in the provision of any services to any other television and/or radio organisation and/or media organisations ….where such services are the same as or similar to the Services, without the prior written consent of the Head of Sky Sports, such consent not to be unreasonably withheld" – paragraph 4.2 of schedule 2. Paragraph 4.2 went on to specify that it was "not intended to limit me from providing my services to any other entity that is not a provider or distributor of television and/or radio services, provided that such services do not interfere with the provision of the Services, as determined by BSkyB";

(17) there was an "entire agreement" clause which stated expressly that the written terms of the Contract constituted the entire agreement between the parties and superseded all prior agreements and understanding between the parties – clause 14.2;

(18) the Appellant was precluded from assigning, novating, sub-contracting or otherwise disposing of the Contract or any part thereof without the prior written consent of BSkyB – clause 14.4; and

(19) the Contract was expressed to be governed by English law and the parties submitted to the exclusive jurisdiction of the English courts – clause 14.5.

38. In contrast to Contract 1, the form of each of Contracts 2 to 4 comprised some initial "Key Terms", which set out the bespoke terms of the particular engagement, followed by some boilerplate "Terms and Conditions" and then the "Schedule", which contained a form of non-disclosure agreement. In each of Contracts 2 to 4:

(1) the definitions of the "Fee", the "Services" and the "Assignment" (in Contract 4 referred to as the "Term") were all set out in the Key Terms;

(2) the Key Terms provided that, to the extent of any inconsistency between the Key Terms, the Terms and Conditions and/or the Schedule, the "order of prevalence" [sic] (in Contracts 3 and 4 corrected to the "order of precedence") would be, first, the Key Terms, then the Terms and Conditions and finally the Schedule;

(3) the parties again agreed that there existed "no employment agreement or relationship" between the Personnel and BSkyB and that the individuals would throughout the Assignment be employees or sub-contractors of the Appellant;

(4) there was again an "entire agreement" clause which stated expressly that the written terms of the Contract constituted the entire agreement between the parties and superseded all prior agreements and understanding between the parties;

(5) the Appellant was precluded from assigning, novating, sub-contracting or otherwise disposing of the Contract or any part thereof without the prior written consent of BSkyB; and

(6) the Contract was expressed to be governed by English law and the parties submitted to the exclusive jurisdiction of the English courts.

39. Leaving aside some minor differences in language which are not material to the appeals, and of course the fact that each Contract related to a different period and contained different amounts in respect of the "Fee", the main areas in which the terms of Contracts 2 to 4 differed from the terms of Contract 1 are as follows:

(1) in each of Contracts 2 to 4:

(a) the Contract provided that the Fee would be reduced pro rata if the Services were not provided in accordance with the Contract – see clause 3.6 in each Contract;

(b) the "Personnel" was defined in the Key Terms as "Alan Parry". The Terms and Conditions provided that the Appellant was required to "use best endeavours to use the Personnel specified in the Key Terms to provide the Services". However, the Appellant had the right to provide the Services through another employee or through a sub-contractor subject to the same provisos as are set out in paragraph 37(6) above - see clauses 1.1 to 1.4 of the Terms and Conditions in, and the Schedule to, each of Contracts 2 to 4 - and the Terms and Conditions in each of Contracts 2 to 4 provided that any person involved in the provision of the Services from time to time would be the "Personnel" for the purposes of the Contract – see clause 1.2 of the Terms and Conditions in each of Contracts 2 to 4;

(c) the term requiring the prior written consent of BSkyB to other engagements by the Personnel with other television, radio and/or media organisations – see paragraph 37(8) above – was extended to include other engagements by the Personnel with print and betting organisations – see clause 2.1 of the Terms and Conditions in each of Contracts 2 and 3 and clause 2.2 of the Terms and Conditions in Contract 4 – and a corresponding change was made to the terms of the non-disclosure agreement which was required to be executed by all Personnel – see paragraph 4.2 in the Schedule to each of Contracts 2 to 4;

(d) there was a provision which required the Appellant to procure that the Personnel did not use any social media service to discuss BSkyB or its staff, agents or contractors and/or any sports rights holder and/or any related matter "other than in accordance with any direction and/or with the prior written consent of [BSkyB] from time to time" – see clause 2.9 of the Terms and Conditions in each of Contracts 2 and 3 and clause 2.11 of the Terms and Conditions in Contract 4. In each case, the relevant clause was expressly stated to be a "material term" of the Contract; and

(e) the Appellant was required to procure and maintain all necessary insurances required for the provision of the Services – see clause 12 of the Terms and Conditions in each of Contracts 2 to 4;

(2) in each of Contracts 3 and 4:

(a) the definition of the "Services" specified that the "Services" were on "an ad hoc as and when required basis" for up to twenty matches per year and the "Fee" was not simply defined as a specified fixed amount for each year of the Contract but included an additional specified fixed amount per match for each match in a particular year which was over and above the twenty matches for that year to which reference was made in the definition of the "Services"; and

(b) the warranty on the part of the Appellant to the effect that it would procure that, inter alia, the Personnel would comply with all directions and requests made by BSkyB and would not do anything which might bring BSkyB into disrepute

was expanded to include additional obligations to the effect that it would procure that:

(i) the Personnel would "comply with all of [BSkyB's] reasonable directions during the provision of the Services including only wearing clothing supplied or approved by [BSkyB] and not wearing anything capable of being perceived as an advertisement or of a commercial or advertising nature or anything that may be inconsistent with [BSkyB's] regulatory and/or legal obligations"; and

(ii) the Personnel would observe all rules and regulations in force at the locations or premises where the Services were to be performed

- see clauses 4.1(i) and 4.1(j) of the Terms and Conditions in each of Contracts 3 and 4 – and a corresponding change was made to the terms of the warranties set out in the non-disclosure agreement which was required to be executed by all Personnel – see paragraph 3 in the Schedule to each of Contracts 3 and 4;

(3) in Contract 2, the definition of the "Fee" in the Key Terms included an acknowledgement by the Appellant and BSkyB that the "Fee" was lower than the "Fee" which had been payable under Contract 1 "as a result of the reduced amount of time in which BSkyB shall require provision of the Services during the Assignment compared with [Contract 1]"; and

(4) in Contract 4, there was a provision which required the Appellant to procure that the Personnel did not work for, endorse or promote in any way the products or services of any entity involved in betting or gaming activities which could reasonably be considered to be a competitor in respect of the products or services of Sky Bet without the prior written consent of the Managing Director of Sky Sports – clause 2.3 of the Terms and Conditions in Contract 4 - and a corresponding change was made to the terms of the non-disclosure agreement which was required to be executed by all Personnel – see paragraph 4.2 in the Schedule to Contract 4.

The exchanges of correspondence and the notes of the meeting between the Appellant's representatives and the Respondents

40. I was provided with a various exchanges of questions and answers between Mr Parry's representatives and the Respondents.

41. The first of these was the responses given by Mr Parry on 4 November 2016 to questions raised with him by the Respondents on 15 September 2016. The key points emerging from those responses are as follows:

(1) although the Contracts refer in their definition of "Services" to Mr Parry's performing roles other than those of commentator at BSkyB's request, Mr Parry was a commentator and therefore "the actual services that are likely to be required will be limited to the field of his expertise";

(2) the process whereby the requirement for Mr Parry's services would be communicated to him was that BSkyB would contact him, usually by email, to inform him of the matches which BSkyB would like him to cover and then Mr Parry would let BSkyB know whether or not he was able to cover the requested matches;

(3) there was never any occasion on which Mr Parry simply refused to cover a match notwithstanding BSkyB's request. Instead, the process involved a discussion between the parties, in the course of which agreement would be reached as to those matches which Mr Parry would cover;

(4) the Appellant had never proposed the use of a substitute to BSkyB although, if the Appellant had proposed a substitute and had that substitute been accepted by BSkyB, then the Appellant would have been paid for the services provided by the substitute;

(5) BSkyB was responsible for putting each match on air and therefore a close interaction with the producer, director and editor was required from Mr Parry on each occasion that he commentated on a match;

(6) BSkyB was in control of the programme and its timing but Mr Parry's commentaries were live and so his work was unscripted and he had a reasonable amount of freedom to apply his own editorial judgment in the course of his commentary; and

(7) Mr Parry would tend to take his holiday during the off-season so that he could be available for matches as much as possible.

42. Mr Parry provided responses on 1 October 2018 to further questions raised with him by the Respondents on 30 May 2018. The key points emerging from those responses are as follows:

(1) Mr Parry first started providing his commentating services to BSkyB in 1996;

(2) he would not be paid unless he did the job himself;

(3) BSkyB provided a stats pack before each match and he would read through it and add any relevant material from it to his own material but he was not obliged to use any of the material provided by BSkyB;

(4) he would normally arrive at the ground at least three hours before kick off but that timing was his own decision and not dictated by BSkyB. Over the pre-match period, he would liaise with the BSkyB producer and director in relation to the programme and speak to the managers of the two teams. The discussion with the producer and director was a collaborative process and he was not bound to include in his commentary anything which they suggested;

(5) BSkyB would ensure that he had the pass necessary to gain access to the ground before the match and he provided his services from the commentary box;

(6) a running order for the programme would not be given to him although he might read a copy if one was "lying around". The running order for the programme was of little relevance to him because the timing of his contribution to the running order was circumscribed by the timing of the match. The producer was responsible for the running order and the director was responsible for the live television feeds and replays. The director would let him know when graphics for future programmes were about to be shown so that he could then mention them on the commentary;

(7) he could not be required by BSkyB to provide additional services in addition to his commentating services such as interviews or post-match punditry and BSkyB did not provide any clothing to him or issue him with any instructions as to his clothing;

(8) he had not been provided by BSkyB with any editorial guidelines, information as to BSkyB's ways of working or training in relation to presentation skills or BSkyB technology;

(9) BSkyB provided the equipment which he needed in order to carry out the services – namely, a microphone, headphones and a monitor;

(10) he had not been involved in any BSkyB promotional events or advertising and he had not provided services to BSkyB through social media platforms or received any guidance from BSkyB over the use of social media;

(11) over the entire period in which he had provided his services to BSkyB, he had missed one game which he had previously agreed to do and that was through illness. On that occasion, BSkyB had found a replacement commentator itself;

(12) he provided his commentary services to other organisations apart from BSkyB such as Talk Sport and IMG;

(13) he was not required to have public liability insurance in relation to the services; and

(14) any trains and hotels required for him to provide his services were booked through the BSkyB travel department, whilst any car travel costs were paid by him and claimed back from BSkyB.

43. Mr Parry provided responses on 7 December 2018 to further questions raised with him by the Respondents on 24 October 2018. The key points emerging from those responses are as follows:

(1) the pre-match briefings between Mr Parry and the producer were informal in nature and held in whatever location happened to be convenient at the time. In those conversations, Mr Parry might suggest a particular player to be profiled but the producer was not obliged to accept Mr Parry's suggestions;

(2) BSkyB, through its head of football, Mr Gary Hughes, would decide on how many commentators should cover a particular match and whether commentary would be from the BSkyB studio or from the ground;

(3) in general, Mr Parry would be required to provide his commentary from the ground although, when BSkyB had had the European Champions' League rights, Mr Parry would occasionally be required to provide his commentary from the studio;

(4) it was very rare for Mr Parry to be asked to appear live on camera. Generally, he was off-screen;

(5) Mr Parry took his cues for when to start and finish his commentaries from the producer and director. He would also receive other information from the producer and/or the director during the match, such as scores from other games and VIPs in the crowd;

(6) if Mr Parry were to be required to conduct interviews before or after a match, it would be the producer who would inform him of this; and

(7) Mr Parry did not always make BSkyB aware of any services he might be providing to other organisations, particularly when providing those services to Talk Sport or IMG.

44. On 22 August 2019, Mr Leslie, the Appellant's representative, attended a meeting with two officers of the Respondents, Mr Andy Donaldson and Mr Mark Bradford. The notes of that meeting record that Mr Leslie informed the two officers that:

(1) the Appellant had engaged Ms Corinne Goodall as its agent to negotiate Contracts 1 and 2;

(2) the Appellant did not work exclusively for BSkyB;

(3) Mr Parry was free to commentate on matches in his own style and without control by BSkyB;

(4) Mr Parry was paid for each match on which he commentated and, if he didn't commentate, he didn't get paid; and

(5) Mr Parry did not get sick pay or holiday pay.

45. On 13 November 2019, Mr Leslie wrote to Mr Bradford to comment on the notes of the meeting of 22 August 2019. In the course of that email, Mr Leslie said that:

(1) Mr Parry never received running orders before a match as those were for the production staff and the presenter and had no relevance to a commentator; and

(2) Mr Parry produced his own stats pack for matches and was not obliged to use any of the material in the stats pack which BSkyB provided to him for the match.

The exchanges of correspondence and the notes of the meeting between BSkyB and the Respondents

46. The Respondents raised various questions with BSkyB in relation to BSkyB's commentators and pundits in general on 20 October 2017 and received responses to those questions from BSkyB on 8 February 2018. The key points emerging from those responses are as follows:

(1) the production team were responsible for deciding how many commentators would be needed for each match, for identifying those commentators who were to do each match and for creating the match roster;

(2) the commentators would conduct their own pre-match research and BSkyB would not check this as it trusted the commentators to do that job properly in their own professional interests. BSkyB did produce its own stats pack for the production team on each engagement and this was shared with the relevant commentator but the commentator was not obliged to use the stats pack so provided in the course of his or her commentary;

(3) the production team was responsible for the relevant programme and the running order although:

(a) it was a collaborative process and the producer would discuss the forthcoming match with the relevant commentator prior to the match and take the commentator's views into account in determining the focus and content of the programme;

(b) as the commentator was commenting on a live event as it unfolded, the commentator had a great degree of latitude in the content of the commentary; and

(c) the commentator might well continue with a particular strand of content for longer than the original running order had anticipated but that was only if the producer considered that to be appropriate;

(4) BSkyB expected the commentators to arrive on time and to dress appropriately because that was in the commentators' own professional interests;

(5) BSkyB also expected the commentators to be aware of, and to adhere to, the OFCOM regulations which governed broadcasts but there was no formal training of commentators in relation to those regulations;

(6) BSkyB reserved the right to recover from a commentator the cost of any fine imposed by OFCOM as a result of the commentator's conduct and could also terminate the relevant commentator's contract in an appropriate case; and

(7) there was no formal review process for commentators although a producer might provide feedback informally after a match in the course of a discussion about how the programme had gone.

47. On 17 January 2019, a meeting was held at BSkyB's offices between three officers of the Respondents and four representatives of BSkyB, including Mr Hughes as head of football and Mr Steve Smith, as director of content, production and operations. The purpose of the meeting was to discuss the working arrangements in relation to a number of individuals who provided their services to BSkyB through personal services companies including Mr Parry. The notes of that meeting, which were signed by, inter alia, Mr Hughes and Mr Smith after the meeting, recorded the following:

(1) Mr Parry was a lead commentator as opposed to a co-commentator. Typically, co-commentators would perform multiple roles for the organisation instead of, or in addition to, acting as co-commentators, as required from time-to-time by BSkyB;

(2) the role of the lead commentator was to be the main voice describing the match and the action on the field, whilst the role of the co-commentator was to provide his expertise (as an ex professional footballer) to explain what had happened. Essentially, lead commentators were chosen for their journalistic skills whereas co-commentators were chosen for their analytical skills and prior experience as footballers;

(3) at paragraph 4 of the notes was a preface to the paragraphs which then followed, making it clear that references to a "commentator" in those paragraphs should be taken to mean both lead commentators and co-commentators except where indicated otherwise in a particular context. The same point was re-stated at paragraph 41 of the notes;

(4) Mr Hughes would decide which commentator would do which game. A colleague of Mr Hughes would send the desired roster to the commentators in order to confirm the commentators' availability;

(5) if a commentator who had previously agreed to do a match was unable to do so on short notice, then hypothetically the relevant commentator could suggest a substitute for himself as the Appellant's representative but:

(a) it was at BSkyB's discretion as to whether or not to accept any suggested substitute; and

(b) in practice, instead of continuing to engage the relevant personal services company but with the suggested substitute in place, BSkyB would source its own replacement from the pool of talent which it already had – ie other individuals who had already entered into contractual arrangements with BSkyB either directly or through a personal services company.

The rearrangement of the roster and any changes to the roles played by the talent which was required by the cancellation would be up to the relevant producer;

(6) BSkyB would decide on whether a commentary would be provided from the BSkyB studio or the ground and, for commentaries from the ground, would decide, in discussions with the Premiership or the Champions' League and the home club, the location of the commentators in the ground;

(7) it was up to the producer and the production team to decide on the content, structure and style of broadcast. The production team were responsible for all editorial decisions but it was a collaborative process. The length of each programme and the running order was decided by BSkyB and the producer could require a commentator to attend a pre-match meeting to discuss the running order;

(8) the director would decide whether a pre-match rehearsal was needed and the conduct of any rehearsal. For commentators, rehearsals would consist of running though the team news as the graphics appeared on screen;

(9) it was the responsibility of the producer to decide what roles the relevant personnel, including the lead commentators, would play in relation to a particular game. Lead commentators were vastly experienced and had the ability to perform other tasks such as conducting pre-match interviews, if asked;

(10) if a commentator were to be asked to conduct an interview, then that would be arranged by BSkyB with the club in question and BSkyB would decide on which players to interview although the relevant commentator could make suggestions in that regard which BSkyB would not be obliged to accept. BSkyB would also decide on the content and length of the interview and when the interview took place;

(11) usually, commentators did not appear in front of the camera but there had been occasions when a commentator had appeared live on camera to provide his views either before kick off or at half-time. It was up to the producer to make this decision and to tell the relevant commentator the topic which BSkyB wished him to cover and the length of time for which BSkyB wished him to speak;

(12) on the rare occasions that a commentator did appear live on camera, BSkyB would be entitled to request the removal of any inappropriate clothing which the commentator might be wearing and to provide alternative clothing;

(13) BSkyB would:

(a) inform the commentator of any breaking news story which might be relevant to the broadcast; and

(b) ask the commentator not to discuss a particular topic if it considered that topic to be particularly sensitive;

(14) BSkyB might also ask a commentator to apologise on air in certain circumstances such as where the background microphones at the ground picked up swearing;

(15) so far as graphics and replays were concerned, this decision would be up to the director. The commentator and/or the cameraman were able to make suggestions in that regard but the director did not have to accept them;

(16) BSkyB would provide all the equipment needed by a commentator although a commentator could instead bring along his own earpiece if he so wished;

(17) it was up to the producer to decide on how long after a match ended that the commentary would continue. Generally, it would be straight after the match ended but there were occasions when the commentator would be asked to continue – for example, because there was a good atmosphere in the stadium;

(18) on a rare occasion where a factual mistake had been made on a commentary which was to be re-broadcast, the commentator might be required to re-do the commentary in the studio the next day;

(19) the commentators were highly professional therefore rarely late in arriving before a match. However, if a commentator were to be persistently late, then the ultimate sanction would be for BSkyB to terminate the contract. Termination would also be the sanction if the relevant commentator were regularly to finish commentating earlier than expected without there being mitigating circumstances or regularly to disregard instructions from the production team but neither of these had ever happened and so the position was entirely hypothetical;

(20) BSkyB would keep the commentators updated in relation to any changes in the OFCOM regulations but such updates were informal and there was no formal training. However, at the time of the meeting, BSkyB was about to oversee some training for commentators in relation to the new video assistant referee system;

(21) the fee due to the personal services company under each contract was calculated by reference to the number of matches which BSkyB expected to cover over the period in question and was paid as specified in monthly instalments regardless of how many matches the relevant personal services company actually covered; and

(22) a commentator could not provide services to anyone else without BSkyB's approval and therefore BSkyB could restrict the commentator's other engagements at its discretion. The commentator would need to contact Mr Hughes before accepting any other engagement to obtain Mr Hughes's consent and, if this was not done, then Mr Hughes would contact the commentator to remind him of the relevant contractual obligation. The ultimate sanction for infringing this obligation would be termination of the contract or a refusal to renew the contract.

48. On 5 September 2019, the Respondents sent a copy of the above notes to Mr Leslie and, on 14 October 2019, the Respondents invited Mr Leslie to let them know if there was anything in the notes with which Mr Parry disagreed. Mr Leslie raised various objections to the facts contained in the above notes, both in his response to that invitation, on 13 November 2019, and in the course of his submissions at the hearing. Those objections were that:

(1) the format of the notes sent to him was not identical to the format of the notes provided for the purposes of the hearing;

(2) the Respondents had not provided, either to him or for the hearing, a list of the questions to which the representatives of BSkyB had been responding;

(3) Mr Parry had not been represented at the meeting;

(4) it was not known whether the representatives of BSkyB present at the meeting had been in post at the time when the contracts with the Appellant had been executed or, if so, whether those representatives had any familiarity with the relevant contracts;

(5) the representatives of BSkyB present at the meeting had not given evidence in the course of the proceedings and could therefore not be cross-examined;

(6) a number of the paragraphs in the notes referred only to a "commentator" and, as Mr Parry was a lead commentator and not simply a commentator, those paragraphs were not relevant to Mr Parry; and

(7) Mr Parry was able to decline matches which were offered to him when BSkyB sent around the roster and was not required to perform any role other than that of lead commentator although he had voluntarily agreed to act as an interviewer on one occasion when the relevant reporter had been prevented by weather conditions from arriving on time.

The evidence of Mr Parry

49. Mr Parry executed two witness statements before the hearing.

50. In his first witness statement ("WS1"), Mr Parry said as follows:

(1) he understood that, in order to determine his status under the IR35 legislation, the Respondents were supposed to look at what happened in practice but the Respondents in this case had not done that. In particular, the Respondents had not taken into account the existence of the BSkyB talent pool and the purpose of that pool;

(2) in his experience, the contract that the Appellant had with BSkyB was "far more flexible than the written clauses";

(3) BSkyB had wanted his personal services. The clauses in the Contracts which provided for the Appellant to nominate replacements for him implied that the Appellant had the right to do that when, in reality, the Appellant "did not have to provide any substitutes". BSkyB operated a talent pool and therefore he and BSkyB had agreed that he would provide the Services by agreement with the right of refusal;

(4) contrary to the provisions in the Contracts which stipulated that his services were to be provided on "an ad hoc basis as and when required", his engagements were all based on mutual agreement at the relevant time based on his availability and willingness to commentate on a match. He had a right of veto in relation to any match proposed by BSkyB. Moreover, he was not paid for merely making himself available. Instead, if he didn't agree to commentate on matches, the Appellant didn't receive payment;

(5) contrary to the provisions in the Contracts which required him to seek the permission of BSkyB before engaging in other work, it was up to him as to whether or not he took on other work and he was allowed to do this without obtaining the prior written consent of BSkyB. So far as he could recall, he had never asked BSkyB's permission to do other work and BSkyB were perfectly happy with that;

(6) contrary to the provisions in the Contracts which allowed BSkyB to tell him the locations at which he was to perform the Services, everything was in fact done by agreement;

(7) there was no need for the provisions in the Contracts giving BSkyB first call on his services. From his perspective, BSkyB paid well and enjoyed a significant share of the live football market and therefore it was in his own financial interests to prioritise BSkyB's requests to commentate on matches. From BSkyB's perspective, it operated a talent pool and therefore there was no need for it to have a first call on his services as it could just ask another commentator to do any match for which he was not available;

(8) contrary to the provisions in the Contracts which allowed BSkyB to tell him what to do in the course of providing his services, it was all done by mutual agreement and, apart from the fact that the dates, timings and places of the matches were determined by the events themselves, he enjoyed autonomy in the way that he prepared for, and carried out, his commentaries. For example, he did not receive running orders, he did his own research and was not required to use the BSkyB stats pack;

(9) similarly, contrary to the restrictions set out in Contracts 2 to 4, there was no restriction on him over his use of social media;

(10) the Appellant was exposed to financial risk in relation to any failure on its part to comply with the Contracts;

(11) as regards the statement in the Key Terms in Contract 2 to the effect that the fees payable under that Contract had been reduced because of "the reduced amount of time in which BSkyB shall require provision of the Services during the Assignment compared with [Contract 1]" (see paragraph 39(3) above), this reduction had been at his instigation because his life partner had a terminal illness and so he wanted to work less in order to care for her; and

(12) he had taken out loss of earnings insurance as it seemed sensible to do that in his position.

51. In his second witness statement ("WS2"), Mr Parry said as follows:

(1) in WS1, he did not mean to imply that the Contracts, as written, did not reflect the actual agreement between the parties. On the contrary, they did. His point had instead been that the way that the Contracts operated in practice was not in accordance with the written terms;

(2) it was important to emphasise that "there was always a clear and robust contractual right of substitution". Although any substitute was subject to BSkyB's confirming the suitability of the substitute, that was "more of a sense check than any robust limitation on the exercise of that contractual right";

(3) the nominated substitute did not need to come from within the talent pool;

(4) the right of the Appellant to sub-contract the services was also a term of the written Contracts and allowed the Appellant to retain control of the commercial arrangement by arranging for its sub-contractor to fulfil the assignment in question; and

(5) the Appellant had never exercised either the substitution clause or the sub-contractor clause but "this ought not be taken to undermine the actual and commercial reality of the contract" which was that the Appellant was a media company conducting its own business and acting in accordance with BSkyB's entrepreneurial culture.

52. At the hearing, Mr Parry gave oral evidence which supplemented his two witness statements as follows:

(1) he had chosen to pursue his career as a freelance commentator for the freedom which it gave him. However, BSkyB had a dominant position in the market for live matches and paid very well and so it was in his own commercial interests to enter into the Contracts with BSkyB;

(2) he believed that his Contracts were in a similar form to the contracts which BSkyB executed with other talent although, in practice, the arrangements were more flexible than the relevant contracts suggested. For example:

(a) despite the language in the Contracts which required the Appellant to provide the services on "an ad hoc basis as and when required", BSkyB would contact him in advance to discuss the matches on which they wished him to commentate and he would then indicate in the course of the ensuing discussions if he was able and willing to commentate on the matches in question. Thus, notwithstanding the language in the Contracts, it was a consensual process;

(b) he would tend to commentate for BSkyB on one or two live matches in each week during the football season although the number of matches on which he commentated fluctuated over the period covered by the appeals. For example, when BSkyB lost the rights to the European Champions League matches, the number of matches reduced and they also reduced at his request when his partner

became terminally ill and he wished to reduce his commitment to BSkyB in order to spend more time with her;

(c) despite the language in the Contracts which allowed BSkyB to require him to perform roles other than that of lead commentator, BSkyB was not entitled to do that and had never asked him to play any other role, although, as a professional member of the team, he had once stepped in voluntarily for a reporter to do an interview when the reporter had been delayed by bad weather. Thus, notwithstanding the answer recorded in paragraph 43(6) above, the services to be provided under each Contract were solely those of lead commentator and nothing else; and

(d) although he had never expressly discussed it with BSkyB, it was an "unwritten agreement", based on precedents set before he had started to work for BSkyB, that he was entitled to pursue other engagements without the prior written consent of BSkyB and that BSkyB was happy with this. During the terms of the Contracts, he had provided commentary services to IMG and Talk Sport as well as to BSkyB and had not sought BSkyB's consent for that;

(3) as regards substitution, he accepted that:

(a) the Appellant did not have an unqualified right to nominate a substitute for him in the provision of the services. The Appellant merely had the right to propose a substitute and then it was up to BSkyB to decide if the substitute was acceptable;

(b) where the proposed substitute was a sub-contractor, the use of the substitute was subject to BSkyB's prior written consent, which BSkyB was entitled to withhold at its absolute discretion; and

(c) any proposed substitute who was accepted by BSkyB would have to sign a non-disclosure agreement in the form of the non-disclosure agreement appended to the relevant Contract and the terms of that agreement would, inter alia, preclude the substitute from working for any television, radio or other media organisation without the prior written consent of BSkyB;

(4) also in relation to substitution, he explained that:

(a) in relation to the answer set out in paragraph 42(2) above, he had simply meant that he, Mr Parry, would not get paid if he didn't do the commentary himself and not that the Appellant would not get paid if, instead of providing the services through him, it were to use a substitute; and

(b) in practice, on the one occasion that, as a result of illness, he had been unable to commentate on a match which he had agreed to cover, BSkyB had simply approached another member of its talent pool to replace him and the substitution process had not been used;

(5) he accepted that ultimate responsibility for the broadcasts rested with the producer and director but he said that he had a great deal of autonomy in his role. He would arrive well before the match to discuss matters with his co-commentator and the producer but, once the match started, he was in charge of his own content and his interactions with the producer and director were minimal. Moreover, the process was collaborative in nature in which everyone worked as part of a team;

(6) there were a number of areas in which his own commercial interests and professionalism were aligned with the commercial interests of BSkyB and so it was

irrelevant that the Contracts purported to create obligations which appeared to restrict his activities. For example:

(a) as a football commentator, it made sense for him to take his holidays in the close season so that he was available for work as much as possible. Thus, the requirement that he be available for work throughout the season accorded with his own wishes;

(b) he would naturally wish to get his facts right and not to breach OFCOM regulations when doing his commentaries and to ensure that he didn't say anything on social media which might bring himself or BSkyB into disrepute;

(c) he would naturally liaise with the BSkyB team when it came to dealing with team graphics and replays during the course of the match when it came to promoting future BSkyB programmes;

(d) he would not need to be instructed to carry on commentating after the match in the event that there was a good atmosphere in the ground or there was an incident which occurred just before the end of the match. He would just know that that was the appropriate way to carry out his role; and

(e) if he made a mistake in his commentary, he would naturally wish to go through the process needed to correct it.

The alignment of interests described above meant that Mr Parry's response to questions from Mr Randle in relation to what would have happened in the case of various hypothetical scenarios was "I don't know – it never happened" or "you would have to ask BSkyB";

(7) in the earlier years of the Appellant's engagement with BSkyB, he had taken out public liability insurance but had not done so in the more recent years as he did not think that it was necessary;

(8) following the end of Contract 4, he had continued to work for BSkyB, initially under an oral contract and then, from April 2020, under an employment contract; and

(9) as head of football at BSkyB, Mr Hughes was someone who had an intimate knowledge of the Contracts and who was therefore well-placed to comment on the relationship between the Appellant and BSkyB under the Contracts.

Financial information

53. I was provided with financial information in relation to the Appellant for each of its financial years ending 31 March 2014 to 31 March 2019 (inclusive). This revealed that, in each financial year, the percentage of the Appellant's gross revenue in the relevant financial year which came from BSkyB was follows:

Financial year ending	Percentage of gross revenue from BSkyB (%)
31 March 2014	95.13
31 March 2015	96.66
31 March 2016	100.00
31 March 2017	97.67
31 March 2018	100.00

31 March 2019	100.00

54. I was provided with accounts for the Appellant for each of the financial years ending 31 March 2014 to 31 March 2019 (inclusive). These showed that Mr Parry received from the Appellant:

(1) dividends;

(2) in each financial year apart from the financial year ending 31 March 2019, a director's salary; and

(3) in each financial year up to and including the financial year ending 31 March 2016, pension payments.

The accounts for each financial year up to and including the financial year ending 31 March 2017 also included an entry for wages, which Mr Parry explained were paid to his secretary, Ms Linda Tandy, although the employment records of the Appellant produced by the Respondents at the hearing suggested that the amounts shown as wages had been paid instead to Ms Gillian Haines. The detailed profit and loss account for each financial year showed that, apart from Mr Parry's salary and pension payments and the wages, the expenses of the Appellant were relatively modest and administrative in nature, comprising items of office overheads such as depreciation on a computer, payments for the use of Mr Parry's home as an office, post, stationery, travel, accounting and entertainment.

Conclusion

55. Each party pointed to deficiencies in the quality of the evidence which was provided by the other.

56. Mr Leslie observed that the Respondents had not called anyone from BSkyB to attend the hearing as a witness in order to be cross-examined, whilst Mr Randle pointed out that Mr Parry had provided inconsistent testimony in his two witness statements, with WS1 emphasising that the Contracts did not properly record the agreed contractual rights and obligations of the parties to the Contracts and WS2 saying that, at least so far as the right to propose a substitute was concerned, the Contracts did properly record the agreed contractual rights and obligations of the parties.

57. I am not inclined to accord much weight to either of these allegations.

58. In the case of the evidence from BSkyB, this was provided initially in correspondence and then in the form of written notes which were signed by three of the BSkyB representatives who attended the meeting. Moreover, Mr Leslie was given the opportunity to comment on the written notes in advance of, and at, the hearing. His objections to the notes, which I have set out in paragraph 48 above, do not seem to me to be particularly persuasive. I consider it to be irrelevant that the format of the notes produced at the hearing was different from the format of the notes provided to him for comment. What mattered was the content of the notes, which Mr Leslie accepted was the same in both cases. Similarly, I do not think that it matters that Mr Leslie had not had sight of the questions raised with the BSkyB representatives or that Mr Parry was not represented at the meeting. What mattered was the information given by the BSkyB representatives (and the views which those representatives held about the arrangements with Mr Parry) and Mr Leslie accepted at the hearing that the BSkyB representatives at the meeting, Mr Hughes and Mr Smith, were in a good position to know and understand the terms of the arrangements between the parties. Finally, Mr Leslie's refusal to comment on various paragraphs of the notes on the basis that they referred only to a "commentator" and not to a "lead commentator" is mystifying, given the clear statements in

paragraphs 4 and 41 of the notes to the effect that references in the notes to a "commentator" were to be read as including references to a "lead commentator" unless expressly indicated otherwise. I therefore do not accept Mr Leslie's criticism of the notes on that score.

59. In the case of the evidence from Mr Parry, I am prepared to accept that Mr Parry, as a layman, was not in a position necessarily to understand the difference between the arrangements which operated in practice and the legal rights and obligations of the parties. This could be seen in the way that, in dealing in WS1 with the right to propose substitutes, he seemed to be focused on the obligation of the Appellant to provide substitutes and not the right of the Appellant to propose substitutes for BSkyB's consideration. I am therefore not inclined to question the credibility of Mr Parry as a witness on the basis of the discrepancies between the two witness statements.

DISCUSSION

The submissions of the Appellant

60. Mr Leslie accepted that, in this case:

(1) the two conditions set out in Sections 49(1)(a) and 49(1)(b) of the ITEPA 2003 were satisfied and therefore the sole issue was whether the condition set out in Section 49(1)(c) of the ITEPA 2003 was also satisfied; and

(2) in relation to that condition, it was necessary:

(a) to determine the terms of the hypothetical contracts between BSkyB and Mr Parry by reference to the terms of the actual Contracts which existed between BSkyB and the Appellant and the circumstances surrounding those Contracts; and

(b) then to apply the RMC test to the hypothetical contracts to see whether it gave rise to a relationship of employment between BSkyB and Mr Parry.

61. Mr Leslie recognised that that much was common ground between the parties. However, the reason why the present proceedings had arisen was that the parties differed in relation to both:

(1) the identification of the terms of the hypothetical contracts; and

(2) the conclusion to be drawn from the application of the RMC test to those terms.

62. In relation to the terms of the hypothetical contracts, Mr Leslie said that:

(1) the starting point in determining the terms of the hypothetical contracts was to determine the terms of the actual contractual arrangements. In this case, each Contract contained an "entire agreement" clause and therefore it was appropriate to conclude that each Contract set out the terms of the actual contractual arrangements between BSkyB and the Appellant;

(2) in construing the terms of each Contract, it was the task of the relevant court or tribunal to take account of the injunction in *Wood* to the effect that, where the drafting of a written agreement can give rise to rival meanings, the court can give weight to the implications of the alternative constructions "by reaching a view as to which as to which construction is more consistent with business common sense" (see *Wood* at paragraph [11]);

(3) applying that approach in the present case, it was apparent, despite certain infelicities in the drafting, that each Contract contained the right for the Appellant to propose a substitute for Mr Parry to provide the services and that BSkyB was bound to accept the proposed substitute as long as the substitute was suitable. Those rights and obligations were to be read into the related hypothetical contract;

(4) Mr Parry's evidence showed that the hypothetical contracts did not require the Appellant to provide the services "on an ad hoc basis as and when required" – ie as BSkyB might determine unilaterally from time to time - which is what the Contracts specified. Instead, the process was consensual and collaborative and the services were required to be provided only if and when Mr Parry agreed to provide them from time to time; and

(5) Mr Parry's evidence also showed that, notwithstanding the provisions in each Contract which gave BSkyB first call over the services of Mr Parry and precluded Mr Parry from entering into other engagements with other television, radio and/or media organisations (and, in the case of each of Contracts 2 to 4, print and betting organisations) without obtaining the prior written of BSkyB, the hypothetical contract arising once one took into account all the circumstances in which the relevant Contract had been executed did not contain those restrictions.

63. In relation to the application of the RMC test to the terms of the hypothetical contracts as so determined, Mr Leslie said that:

(1) the case law showed that each of mutuality of obligation and control was a necessary but not sufficient condition precedent to an employment relationship;

(2) Sir David Richards in *Atholl House* at paragraph [74] had said that, in order for there to be mutuality of obligation, there needed to be both an obligation on the part of the client to offer work and an obligation on the part of the worker to carry out the work and to carry out the work personally;

(3) there was no mutuality of obligation in this case because:

(a) BSkyB was under no obligation to provide engagements for the Appellant. The express terms of the Contracts (and hence the hypothetical contracts) contained no such obligation and no such obligation could be implied from the conduct of the parties. As had been noted by Sir John Donaldson in *O'Kelly*, a course of conduct could be attributable to market forces, goodwill and/or mutual benefit without being attributable to contractual rights and obligations – see *O'Kelly* at 762H to 763A and *St Ives Plymouth Limited v Mrs D Haggerty* UKEAT/0107/08/MAA. Thus, an expectation of work was not the same as a right to require it to be provided;

(b) the Appellant would not get paid unless it performed the services. That was made particularly clear in Contracts 2 to 4, where the relevant Contract provided for a pro rata reduction in the fee if the services were not performed. Accordingly, there was no obligation on BSkyB to pay the Appellant the specified amounts of fees unless and until the Appellant performed the relevant services;

(c) there was no obligation on the Appellant to provide any services if requested to do so by BSkyB. The Appellant was free to decline any request to do so;

(d) even if such an obligation did exist, there was no obligation on the part of the Appellant to procure that Mr Parry himself provided the services – ie no obligation of personal service on the part of Mr Parry - because the Appellant had the right to propose a substitute for Mr Parry provided that the substitute was suitable.

In the Court of Appeal decision in *Pimlico Plumbers*, Sir Terence Etherton MR at paragraph [84] of the decision had set out some basic principles in relation to the obligation of personal performance which he said could be determined from prior case law and the fourth such principle was that "a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance". The Appellant's right of substitution in this case fell squarely within that language; and

(e) each Contract (and therefore each hypothetical contract) contained a provision to the effect that the Appellant would not, and would procure that the Personnel would not, assume, create or incur any liability or obligation on behalf of BSkyB without the prior written consent of BSkyB;

(4) there was no control in this case because:

(a) as outlined by the Employment Tribunal in *Troutbeck* and upheld by the Court of Appeal in *Troutbeck CA*, the correct approach to the control test did not require a formal analysis as to an implied term in the hypothetical contracts but was simply an exercise in contractual construction. In *Ackroyd* at paragraph [47], the Upper Tribunal, referring to the test upheld in *Troutbeck CA*, said that "[the] court or tribunal must address 'the cumulative effect of the totality of the provisions in the agreement and all the circumstances of the relationship created by it' (per the Court of Appeal at para [38]) and decide whether as a matter of construction ultimate control by the recipient of the services exists, notwithstanding the absence of an express provision in the contract";

(b) adopting that approach in this case, and considering the totality of the provisions in the hypothetical contracts:

(i) Mr Parry at all times retained control of the style, content, delivery, tone and nature of the services. He was not subject to any editorial guidelines and could commentate as he wished;

(ii) similarly, there was no control by BSkyB over:

(A) where the services were performed; or

(B) when the services were performed

- because the services could be conducted only from the ground where the match was played and at the time when the match was played and those matters were set by the Premiership or the Champions' League; and

(iii) the fact that BSkyB had first call on Mr Parry's services was a neutral factor. It did not mean that BSkyB could control what Mr Parry did because Mr Parry was free to take on other engagements. It merely reflected the fact that BSkyB had paid the Appellant a retainer;

(5) the case law showed that, at the third stage of the RMC test, the intentions of the parties were critical – see *Atholl House* at paragraph [123];

(6) in this case, each Contract (and therefore each hypothetical contract) included a term to the effect that it was the intention of the parties that no relationship of employment should arise between BSkyB and Mr Parry;

(7) the exercise to be conducted at the third stage of the RMC test was to paint a picture from the accumulation of all the details, as outlined by Mummery J in *Hall*. It was a multi-factorial approach;

(8) when one did that in this case, it was plain that each Contract (and therefore each hypothetical contract) contained a number of clauses which were inconsistent with a contract of employment. For example:

(a) the Appellant had to ensure that it fulfilled all employment legislation in relation to the Personnel;

(b) BSkyB could terminate the contract with immediate effect at any time at will;

(c) the Appellant had to correct defective work at its own time and expense;

(d) the Appellant agreed to indemnify BSkyB for costs arising out of breaches of the contract or out of the Personnel's being treated as employees of BSkyB;

(e) the Appellant was responsible for any personal injury suffered by the Personnel unless it was caused by the negligence of BSkyB; and

(f) the Appellant was responsible for maintaining confidentiality and for adopting data protection measures;

(9) in addition, there were various omissions from the hypothetical contracts where the omissions were inconsistent with a contract of employment. For example:

(a) the hypothetical contracts made no provision for holiday pay and sick pay;

(b) Mr Parry was not made subject to the BSkyB editorial guidelines; and

(c) no provision was made for Mr Parry to receive a copy of, or to receive training in relation to, the OFCOM regulations; and

(10) finally, case law showed that it was necessary to take into account not only the terms of the hypothetical contracts but also the circumstances in which the hypothetical contracts were made (see *Atholl House* at paragraph [123]). In this case, the surrounding circumstances showed that Mr Parry was in business on his own account and enjoyed a great deal of autonomy in the way he conducted his profession and in his ability to win work. It would be myopic to disregard those facts when considering whether the parties intended to create a relationship of employment – see *Atholl House* at paragraph [124].

Conclusion in relation to the Appellant's submissions

64. For the reasons set out in the paragraphs which follow, I do not agree with the conclusions set out above. I consider that the submissions made by Mr Leslie involve:

(1) errors in construing the express terms of the Contracts and the impact on those express terms of the circumstances surrounding the execution of the Contracts, with inevitable consequential errors in determining the terms of the hypothetical contracts; and

(2) errors in applying the RMC test to the terms of the hypothetical contracts when those terms are determined and properly construed.

65. In my view, when one determines the terms of the hypothetical contracts and then applies the RMC test to the hypothetical contracts and the circumstances in which they arose, the only proper conclusion to be drawn is that the hypothetical contracts would have been employment contracts and therefore the appeals must fail.

Analysis

Introduction

66. The starting point in the analysis is to identify the terms of the actual contractual arrangements at Stage 1 of the process identified in *Kickabout* at paragraph [6] and then to identify the terms of the hypothetical contracts at Stage 2 of that process. Although there may be circumstances in which it is appropriate for those two stages to be applied iteratively, as the Upper Tribunal noted in *Atholl House UT* at paragraph [8](2), the facts in this case suggest that it is preferable to conduct Stage 1 of the process first and to determine the terms of the actual contractual arrangements before moving on to conduct Stage 2 of the process and determining the terms of the hypothetical contracts. This is for essentially two reasons as follows:

(1) the first is that each of the Contracts contained an "entire agreement" clause, which made it clear that the intentions of the parties to the relevant Contract were that the terms of their agreement were set out in the relevant Contract; and

(2) the second is that, following the decision of Court of Appeal in *Atholl House* at paragraphs [140] et seq., it is now clear that the approach in *Autoclenz* has no part to play at Stage 1 of the process and that there is no need to look beyond the terms of the written agreement to find the parties' "true agreement" (see paragraphs 23(1) to 23(5) above).

These two features mean that Stage 1 of the process is straightforward in this case. It is simply a matter of construing the written provisions of each Contract and there is no reason to apply the two stages iteratively.

Stage 1

67. Turning then to Stage 1 of the process, the actual contractual arrangements in this case at any relevant time comprised, first, the contract between BSkyB and the Appellant and, secondly, the contract between the Appellant and Mr Parry, pursuant to which Mr Parry performed the services which the Appellant had agreed to provide to BSkyB under the Contracts.

68. I was provided with no evidence in relation to the terms of the contracts between the Appellant and Mr Parry.

69. As for the contracts between BSkyB and the Appellant, the terms of those contracts were set out in writing in the form of the Contracts and they are to be determined by reference to the well-established rules on the interpretation of contracts in general, as described in *Wood* (see paragraph 25 above).

70. The starting point in the process of interpreting the Contracts is to observe that, unfortunately, the Contracts contain a number of drafting infelicities. The two which are of most significance to the question which I have to address in this case are:

(1) first, inconsistencies in relation to the identification of the "Personnel" under each Contract; and

(2) secondly, inconsistencies in relation to the identification of the "Services" to be provided under each of Contracts 3 and 4.

71. As regards the first of these:

(1) in Contract 1, the "Services" were defined as "the services of Alan Parry" but then clauses 2.1 to 2.4 stipulated that the Appellant was merely required to "use its best endeavours to use Alan Parry to provide the Services", that the Appellant could propose

a substitute for Mr Parry for BSkyB to consider and that any person involved in the provision of the "Services" from time to time would be the "Personnel" for the purposes of the Contract; and

(2) similarly, in each of Contracts 2 to 4, the Key Terms provided that the "Personnel" was "Alan Parry" but then clauses 1.1 to 1.4 of the Terms and Conditions stipulated that the Appellant was merely required to "use best endeavours to use the Personnel specified in the Key Terms to provide the Services", that the Appellant could propose a substitute for the Personnel for BSkyB to consider and that any person involved in the provision of the "Services" from time to time would be the "Personnel" for the purposes of the Contract. Moreover, in each of Contracts 2 to 4, the Key Terms were said to take priority over the Terms and Conditions in the event of any inconsistency between the two.

72. The anomalies described above suggest that there is a reasonable case for concluding that, notwithstanding the express right to propose a substitute for Mr Parry for BSkyB to consider which was set out in each Contract, each Contract should be construed on the basis that no such right existed. After all:

(1) under Contract 1, services performed by a substitute who was acceptable to BSkyB were not within the definition of "Services" (as defined) so that any substitute accepted by BSkyB would be incapable of providing the "Services" (as defined); and

(2) under each of Contracts 2 to 4, there were two conflicting definitions of "Personnel" and the definition in the Key Terms, which limited the "Personnel" solely to Mr Parry, was said expressly in the relevant Contract to take precedence (or "prevalence", as Contract 2 put it) over the definition of 'Personnel" in the Terms and Conditions, which provided for the "Personnel" to include a substitute. Thus, it might reasonably be said that the "Personnel" could never include anyone other than Mr Parry and, again, that the "Services" could be performed only by Mr Parry.

73. As regards the second of these, the "Services" in each of Contracts 3 and 4 were defined as being limited to a maximum of twenty matches per year but the "Fee" was defined as including both the fixed specified amounts and a specified amount for each match over the twenty matches specified in the definition of "Services". That anomaly suggests that there is a reasonable case for concluding that, under Contracts 3 and 4, if the Appellant were to provide services in any year in relation to more than twenty matches, then its services in relation to the excess matches would not have formed part of the "Services", as defined.

74. Although the inconsistencies which I have outlined above do give pause for thought, the decision in *Wood* demonstrates the importance of eschewing an approach which is too literalist and the need to construe contracts in a way which is consistent with business common sense (see paragraphs 25(2) and 25(3) above). In adopting that approach in the present case, I have concluded that:

(1) the terms of each Contract between should be construed as including the right on the part of the Appellant to propose a substitute for Mr Parry to BSkyB for BSkyB to consider. After all, if the parties really did not intend that the Appellant could propose a substitute to BSkyB for BSkyB to consider, they would hardly have gone to the trouble of inserting into the relevant Contract the lengthy provisions dealing with that possibility. I have therefore concluded that the contrary indications in each Contract are simply drafting errors and that each Contract should be construed on the basis that such right existed; and

(2) for similar reasons, I have concluded that, under Contracts 3 and 4, were the Appellant to have provided its services to BSkyB in an year in relation to more than twenty matches, then its services in relation to the excess matches would have formed part of the "Services" as defined. That was clearly the intention of the parties, as shown in the definition of "Fee" in each Contract and, again, the contrary indication should be put down to a drafting error.

75. As for the other terms of the Contracts, I have concluded that they were as follows (distinguishing in appropriate cases where a term was included in one or more Contracts but not others):

(1) the services which the Appellant was required to provide:

(a) were required to be provided "on an ad hoc basis as and when required";

(b) could include roles other than commentator (such as presenter, interviewer, guest or "other participant"), as requested by BSkyB from time to time; and

(c) could be required to be provided in the BSkyB studio or on location, as and when required by BSkyB;

(2) the Appellant was required to procure that Mr Parry (or any substitute proposed by the Appellant to BSkyB whom BSkyB considered to be suitable for providing the services and, in the case of a sub-contractor, approved in writing):

(a) travelled to any destination required by BSkyB and at any time or date required by BSkyB in order to perform the services;

(b) attended at BSkyB's request for the purpose of recording trailers and/or promotional material;

(c) did not incur any liability or obligation on behalf of BSkyB without the prior written consent of BSkyB;

(d) did not do anything which might bring BSkyB into disrepute and complied with all directions and requests made by BSkyB, including, in the case of Contracts 3 and 4:

(i) wearing only clothing supplied or approved by BSkyB and not wearing anything capable of being perceived as an advertisement or of a commercial or advertising nature or anything that might be inconsistent with BSkyB's regulatory and/or legal obligations; and

(ii) observing all rules and regulations in force at the locations where the services were provided;

(e) maintained the confidentiality of the confidential or proprietary information which they obtained in the course of providing the services;

(f) in the case of each of Contracts 2 to 4, did not use any social media service to discuss BSkyB or its staff, agents or contractors and/or any sports rights holder and/or any related matter "other than in accordance with any direction and/or with the prior written consent of [BSkyB] from time to time";

(g) executed a non-disclosure agreement in the form of a schedule to the relevant Contract in which he:

(i) accepted obligations mirroring the obligations of the Appellant in respect of intellectual property rights, data and confidential information

arising in relation to the provision of the services as described in paragraph 75(6) below;

(ii) gave personal covenants in relation to the matters described in paragraphs 75(2)(d) and 75(2)(e) above; and

(iii) acknowledged his reputation in the marketplace and gave personal covenants in relation to the matters described in paragraph 75(5) below;

(3) in return for providing the services, the Appellant was entitled to receive:

(a) specified amounts as fees, to be paid in instalments each month during the term; and

(b) reimbursement of expenses, provided that the expenses were reasonable and agreed with BSkyB in writing before being incurred;

(4) in the case of each of Contracts 2 to 4, the fee would be reduced pro rata if the services were not provided in accordance with the relevant Contract;

(5) BSkyB would have first call on Mr Parry (or any substitute proposed by the Appellant to BSkyB whom BSkyB considered to be suitable for providing the services and, in the case of a sub-contractor, approved in writing) for the provision of the services and the Appellant would procure that:

(a) Mr Parry (or such substitute) would not provide services which were the same as or similar to the services which the Appellant was required to provide to BSkyB under the Contracts to other television, radio and/or media organisations and, in the case of each of Contracts 2 to 4, print and betting organisations, without the prior written consent of the Head of Sky Sports; and

(b) in the case of Contract 4, Mr Parry (or such substitute) would not work for, endorse or promote in any way the products or services of any entity involved in betting or gaming activities which could reasonably be considered to be a competitor in respect of the products or services of Sky Bet without the prior written consent of the Managing Director of Sky Sports;

(6) all intellectual property rights, data and confidential information arising out of the provision of the services would belong to BSkyB;

(7) in the case of each of Contracts 2 to 4, the Appellant would procure and maintain all necessary insurances required for the provision of the services;

(8) the parties agreed that there was no employment agreement or relationship between BSkyB and Mr Parry (or any substitute proposed by the Appellant to BSkyB whom BSkyB considered to be suitable for providing the services and, in the case of a sub-contractor, approved in writing) and the Appellant was responsible for the salaries, benefits and holiday pay of Mr Parry (or such substitute);

(9) the Contract would terminate if:

(a) the Appellant was unable to provide the Services for a period exceeding 4 weeks for any reason or if the facial or physical appearance or voice of the Personnel became altered in such a way that, in BSkyB's reasonable opinion, it would affect his performance of the Services and the Appellant was unable to provide a substitute suitable to BSkyB;

(b) the Appellant suffered an insolvency-related event;

(c) the Appellant was in material breach of the Contract and failed to remedy or persisted in the breach within seven days of being required by BSkyB to remedy or desist from the breach;

(d) production or transmission of the programmes in respect of which the Services were to be provided were prevented, interrupted or delayed for a prolonged period for a cause outside BSkyB's control or BSkyB were to cease to hold the broadcasting rights for the matches; or

(e) the Personnel was guilty of serious or persistent misconduct or convicted of a criminal offence or brought himself, BSkyB or Sky Sports into disrepute

(10) the Appellant would correct defective work in its own time and at its own expense and would indemnify BSkyB and its associated companies for any losses suffered by reason of its breach of the Contract;

(11) BSkyB would not be liable for any personal injury, ailment or death of the Personnel arising out of the provision of the Services except to the extent that it arose as a result of BSkyB's negligence;

(12) the terms of the Contract comprised the whole agreement between the parties and superseded all prior agreements or understandings between the parties;

(13) the Appellant could not assign, novate, sub-contract or otherwise dispose of the Contract or any part thereof without the prior written consent of BSkyB; and

(14) the Contract was governed by English law.

Stage 2

Introduction

76. Having determined the terms of the actual contractual arrangements as set out above, it is then necessary to consider, under Stage 2 of the process, whether any of the above terms is not a term of each hypothetical contract, bearing in mind the injunctions in *Atholl House UT*, set out in paragraph 28 above to the effect that:

(1) although the terms of the actual contractual arrangements are the starting point in considering the terms of the hypothetical contracts, they are not determinative and it is necessary also to take into account for that purpose the circumstances in which the services have been provided (see paragraphs 28(1) and 28(2) above);

(2) the ordinary canons of contractual interpretation do not apply and the parties' subjective beliefs and conduct are relevant circumstances in that exercise (see paragraphs 28(3) and 28(5) above);

(3) however, it is not correct to construct the hypothetical contracts simply by reference to the understanding by one of the parties of the terms of the actual contractual arrangements. That is to place too much weight on matters not necessarily relevant to the construction of the hypothetical contracts. Instead, the appropriate manner in which to approach the task of determining the terms of the hypothetical contracts is to consider what the terms of the hypothetical contracts would have been if BSkyB had contracted directly with Mr Parry. In so doing, the terms of the Contracts are a safe starting point because the Appellant was under the control of Mr Parry (see paragraph 28(6) above). (In that regard, I consider that it does not matter that no evidence has been provided of the actual contractual arrangements between the Appellant and Mr Parry – as both parties recognised implicitly in failing to make any submissions or provide any evidence in relation to those arrangements, it is the terms of

the contractual arrangements between BSkyB and the Appellant which are the significant ones in this case); and

(4) in considering what the terms of the hypothetical contracts would have been if BSkyB had contracted directly with Mr Parry, it is helpful to consider what might have happened in the event of certain "flashpoints" where one of the parties wished to insist on asserting a particular right against the wishes of the other – for example, if the Appellant had wished to insist that it had the right to propose a substitute to BSkyB and the right to require BSkyB to consider the suitability of the substitute and BSkyB had denied that the Appellant had that right (see paragraph 28(7) above).

77. In particular, it is necessary to bear in mind that the mere fact that a party did not exercise a right does not mean that it did not have the legal right to do so. As Smith LJ noted in the Court of Appeal in *Autoclenz*, "the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right…"

78. Given the direction in *Atholl House UT* to the effect that the terms of the actual contracts forming part of the arrangements, although not determinative, should be regarded as highly material, I consider that the terms of the hypothetical contracts should be regarded as being the same as the terms of the Contracts unless there is something in the circumstances of the arrangements – including the parties' subjective beliefs and conduct - which compels the contrary conclusion.

79. As regards most of the terms of the Contracts summarised in paragraphs 67 to 75 above, there is nothing in the circumstances of the arrangements to indicate that a contrary conclusion might be appropriate. Where there is nothing in the evidence summarised above which is inconsistent with a term of the Contracts I have set out above, I have concluded that the hypothetical contracts should also be treated as containing the relevant term. However, the evidence suggests that not every term of the Contracts I have set out above can simply be transposed into the related hypothetical contract. In that regard, in the light of the evidence, the following terms of the Contracts need specifically to be considered:

(1) the right on the part of Mr Parry to propose a substitute to BSkyB for BSkyB to consider;

(2) the obligation on the part of Mr Parry to provide services to BSkyB "on an ad hoc basis as and when required";

(3) the roles which Mr Parry could be required to play by BSkyB;

(4) the obligation on the part of Mr Parry to seek the consent of BSkyB before entering into certain other engagements; and

(5) the obligation on the part of Mr Parry to accept direction from BSkyB when performing the services.

80. I should make two preliminary general observations in relation to how the directions in relation to the application of Stage 2 of the process described in paragraphs 76 to 78 above apply on the facts in this case.

81. The first is that there were a number of reasons why neither BSkyB nor Mr Parry would be interested in enforcing the precise terms of the Contracts. These were that:

(1) first, Mr Parry was (and is) a highly-skilled commentator who had provided his services to BSkyB for many years before the period to which the appeals relate. The evidence reveals that BSkyB clearly valued its relationship with Mr Parry as much as

Mr Parry valued his relationship with BSkyB and there was a considerable amount of trust between them;

(2) secondly, it was in the commercial interests of BSkyB to ensure that Mr Parry continued to be willing to provide his services to BSkyB and it was in the commercial interests of Mr Parry to ensure that BSkyB continued to be willing to acquire his services;

(3) thirdly, as a professional, Mr Parry naturally wished to ensure that his services were provided to the desired standard. As such, it was inevitable that BSkyB would neither wish nor need to exert a meaningful amount of control over Mr Parry in the performance of his services; and

(4) finally, the nature of commentary services is such that they are not susceptible to a meaningful amount of hands-on external control in any event. Once Mr Parry had control of the microphone, there was little that BSkyB would have been able to do by way of directing the behaviour of Mr Parry.

82. These features of the relationship between the parties meant that Mr Parry's engagements with BSkyB and the manner in which he performed those engagements were bound to be largely consensual in nature and without regard to the precise terms of the Contracts. As such, this is a case where many of the rights set out in the Contracts did not need to be exercised and there were no "flashpoints", where one of the parties wished to insist on asserting a particular right against the wishes of the other. Whilst that makes it harder to determine the terms of the hypothetical contracts, it cannot be assumed that the absence of those "flashpoints" means that the relevant right as set out in the Contracts did not exist (as to which, see paragraph 77 above).

83. The second observation is that, notwithstanding the warning by the Upper Tribunal described in paragraph 28(6) above to the effect that the understanding of just one party (as opposed to both parties) is not a tool for constructing the terms of the hypothetical contract, I think it is important to note that this instruction is more apposite in a case where there is a difference between each party's understanding of the contractual arrangements and a party is expressed in the contractual arrangements to have an obligation but believes, unilaterally, that he does not than it is in a converse case – ie where a party is expressed in the contractual arrangements to have a right and the other party believes, unilaterally, that the first-mentioned party does not. In other words, it is not appropriate to say that, where there is a difference between each party's understanding in relation to whether or not the actual contractual arrangements give rise to a right for one of the parties, the understanding of the party who is expressed in those contractual arrangements to be entitled to the right that that right exists should be discounted. On the contrary, the fact that the party to whom the right is expressed to belong believes that he has that right is persuasive evidence that the right should be read into the hypothetical contracts too.

84. With those general observations in mind, I now turn to the various provisions of the Contracts which might not have formed part of the hypothetical contracts.

The right to propose a substitute

85. There are indications within the evidence that the hypothetical contracts might not have included a right on the part of Mr Parry to propose a substitute to BSkyB to perform the services instead of him. For example:

(1) in WS1, Mr Parry made it plain that:

(a) BSkyB had entered into each Contract because it wanted to secure his services personally; and

(b) the way that each Contract operated in practice was that, if he could not perform the services, BSkyB would obtain similar services from someone else from within its talent pool and engage that person either directly or through that person's personal services company;

(2) in their meeting with officers of the Respondents on 17 January 2019, the representatives of BSkyB who were present described the right of the Appellant to propose a suitable substitute as "hypothetical", noting that it was at BSkyB's discretion to determine whether a substitute proposed by the Appellant was suitable and that, in practice, instead of continuing to engage the Appellant with the proposed substitute in place, BSkyB would engage someone else from its talent pool;

(3) in practice, the Appellant never sought to nominate a substitute for Mr Parry; and

(4) on the one occasion during the period of the Contracts that Mr Parry was unable to commentate on a match on which he was due to commentate, BSkyB engaged someone else from its talent pool to do so.

86. In contrast:

(1) in WS2 and in his evidence at the hearing, Mr Parry expressed the view that he did have the right to propose a substitute for BSkyB to consider, as set out in the Contracts; and

(2) the terms of the termination rights in each Contract described in paragraph 37(14)(a) above make express reference to the ability of Mr Parry to propose a substitute acceptable to BSkyB as a means of avoiding termination of the relevant Contract by reason of Mr Parry's incapacity, which suggests that such a right must have existed if the drafting of the relevant termination right was to make sense.

87. After weighing up these conflicting features of the evidence, I have reached the conclusion that the factors described in paragraph 85 above are not sufficient to lead to the conclusion that the hypothetical contracts did not include the right to propose a substitute, as set out in the Contracts. I say that because:

(1) first, none of the factors described in paragraph 85 above points decisively to the conclusion that the relevant right did not exist as a matter of law. Instead, they are dealing with what happened in practice; and

(2) secondly, it was the Appellant which was expressed in the Contracts to have the right and, as I have noted in paragraph 83 above, the fact that Mr Parry considered that he had the right (at least by the time he executed WS2 and gave his evidence at the hearing) is persuasive evidence that the right did in fact exist.

88. It is worth noting in this regard that the right was very limited in scope. It was not a right to compel BSkyB to accept a substitute but only a right to propose a substitute which BSkyB might or might not consider suitable. BSkyB was free to determine the suitability of the substitute at its own discretion. Given the limited nature of the right, it is not surprising that it was never exercised by the Appellant and that, in practice, a different route was adopted on the one occasion when Mr Parry was unable to provide the services himself. However, that is not the same as saying that the right did not exist. I have therefore concluded that each hypothetical contract did include a right on the part of Mr Parry to propose a substitute to perform the services whose suitability for the engagement BSkyB could then consider.

89. Having said that, the factors described in paragraph 85 above are highly relevant in the context of considering, at the first stage of the RMC test, whether the right on the part of Mr

Parry to propose a substitute negated the existence of an obligation on his part to perform the services personally and I consider those further in paragraphs 114 to 116 below.

The obligation to provide services "on an ad hoc basis as and when required"

90. Arguably, the area in which the terms of the Contracts diverge most markedly from what happened in practice was the provision in each Contract which specified that the services would be provided "on an ad hoc basis as and when required". The evidence showed that the way in which the services were in practice required to be provided was highly collaborative. BSkyB would contact Mr Parry and ask him if he was able to commentate on specified matches and Mr Parry would say whether or not he could do so. Thus, there was never an occasion when BSkyB formally required Mr Parry to commentate on a match against Mr Parry's wishes.

91. However, that is in no way determinative of the question of whether, had it wished to do so, BSkyB would have been entitled under the hypothetical contracts to compel Mr Parry to provide the services for a specified match. A right which remains unexercised is nevertheless a right. I have no doubt that, given:

> (1) the broad manner in which the Appellant's obligation in this regard was expressed in each Contract – which is to say, the obligation to provide its services "on an ad hoc basis as and when required"; and
>
> (2) the fact that BSkyB agreed under each Contract to pay the Appellant specified fixed amounts over the term of the relevant Contract in return for entering into that obligation,

Mr Parry could not have refused to provide any services to BSkyB at all under the terms of any of the hypothetical contracts. Had he sought to do so, BSkyB would have been entitled under the terms of the hypothetical contracts to have compelled performance of Mr Parry's services, at least to some extent, as I outline below.

92. A more difficult question is whether BSkyB would have been entitled under the terms of the hypothetical contracts to compel Mr Parry to provide his services for a number of matches which was significantly in excess of the matches in relation to which Mr Parry actually provided his services in practice. Whilst the express terms of each Contract suggested that, under the terms of the related hypothetical contract, BSkyB could have compelled Mr Parry to provide his services in relation to every match on BSkyB's roster, no matter what the number, the circumstances surrounding each Contract suggest that the understanding between the parties was that this would not be the case. In that regard, I would note the following:

> (1) in his evidence, Mr Parry said that he would tend to commentate for BSkyB on one or two live matches in each week during the football season although the number of matches on which he commentated fluctuated over the period covered by the appeals. For example, when BSkyB lost the rights to the Champions' League matches, the number of matches reduced and they also reduced at his request when his partner became terminally ill and he wished to reduce his commitment to BSkyB in order to spend more time with her;
>
> (2) in Contract 2, the definition of the "Fee" included an acknowledgement by the Appellant and BSkyB that the Fee was lower than the Fee which had been payable under Contract 1 "as a result of the reduced amount of time in which BSkyB shall require provision of the Services during the Assignment compared with [Contract 1]"; and

(3) in each of Contracts 3 and 4, the definition of the "Services" specified that the "Services" were on an ad hoc as and when required basis for up to twenty matches per year and the "Fee" was not simply defined as a specified fixed amount for each year of the Contract but included an additional specified fixed amount per match for each match in a particular year which was over and above the twenty matches for that year to which reference was made in the definition of the "Services".

93. Each of the above suggests that there was, at the very least, an understanding between the parties that there was a limit on the number of matches in relation to which BSkyB could require Mr Parry's services. The question that then arises is whether that understanding ought to be reflected in the terms of the hypothetical contracts between BSkyB and Mr Parry. In my view, if the requirement to take into account all of the surrounding circumstances - as distinct from the terms of the actual contractual arrangements - in determining the terms of the hypothetical contracts is to have any practical effect, then this is such a case. Accordingly, I have concluded that the understanding between the parties ought to be reflected in the terms of the hypothetical contracts such that, under the hypothetical contracts, Mr Parry was obliged to provide his services to BSkyB as and when required but only for a limited number of matches per year. For present purposes, it is unnecessary to decide on exactly what that limit was under each hypothetical contract. All that can be said is that it would not have been the same under each of them. For example, the limit under the hypothetical contract derived from Contract 2 would have been lower than the limit under the hypothetical contract derived from Contract 1. It suffices to say only that, despite the all-embracing expression of BSkyB's right under each Contract to require the Appellant to provide its services under the relevant Contract, the related hypothetical contract between BSkyB and Mr Parry contained a limit on that right and Mr Parry could have refused to provide his services in relation to matches which exceeded that limit, whatever that limit was.

The roles Mr Parry could be required to play

94. At the hearing, Mr Parry said that, notwithstanding the terms of the Contracts, BSkyB had no right to compel him to provide services other those of a commentator. He accepted that he did once stand in for a delayed reporter in conducting an interview but he said that he had done that voluntarily because he was a professional and wished to be helpful. The same view was expressed by Mr Leslie when commenting on Mr Parry's behalf to the notes of the meeting between BSkyB and the Respondents on 17 January 2019.

95. However, at that meeting, the representatives of BSkyB who were present and who were responsible for managing the live football programmes said that:

(1) it was the responsibility of the producer to decide what roles the relevant personnel, including the lead commentators, would play in relation to a particular match; and

(2) lead commentators were vastly experienced and had the ability to perform other tasks such as conducting pre-match interviews, if asked.

Moreover, in his replies on 7 December 2018 to questions raised with him by the Respondents on 24 October 2018, Mr Parry said that he could be required to conduct interviews by the producer.

96. In the circumstances, I can see no reason to conclude that the right set out in the Contracts whereby BSkyB might compel Mr Parry to perform roles other than that of a commentator should not be included also in the hypothetical contracts. That right belonged to BSkyB and the relevant representatives of BSkyB believed that it existed and could be

enforced. As such, Mr Parry's understanding that it could not carries insufficient weight to exclude the transposition of the right into the hypothetical contracts.

The obligation on the part of Mr Parry to seek consent before entering into other engagements

97. In his responses to enquiries before the proceedings commenced, Mr Parry said that he did not always make BSkyB aware of his other engagements with Talk Sport or IMG. In WS1 and again in giving his oral evidence at the hearing, Mr Parry went further and expressed the view that BSkyB were not entitled to insist on his obtaining its prior written consent to other engagements. He described it at the hearing as an "unwritten agreement" based on precedents set before he had started to provide his services to BSkyB.

98. I do not doubt for one moment that BSkyB were aware that Mr Parry provided his services to other organisations and took no steps to put a stop to it. However, that was in keeping with the relationship of mutual trust and understanding between BSkyB and Mr Parry to which I have alluded in paragraphs 81 and 82 above. It is quite another matter to conclude from those facts that BSkyB would not have been able to compel Mr Parry to seek its prior written consent had it wished to do so insofar as the other engagements were for any of the organisations specified in the relevant provisions of the Contracts. After all:

(1) it was reasonable for BSkyB to wish to retain this right given that it was paying the Appellant such significant fees to provide services as and when required and given the close association in the minds of the public between BSkyB and Mr Parry (as mentioned in each non-disclosure agreement). BSkyB would naturally wish to retain the right to fetter those activities of Mr Parry which might prevent Mr Parry from fulfilling the Appellant's contractual obligations to BSkyB or which might cause any of BSkyB's goodwill to pass to its competitors;

(2) the importance of this contractual right to BSkyB can be seen in the fact that each Contract expressly provided that damages would not be an adequate remedy for breach of this obligation and that BSkyB would instead be entitled to injunctive relief; and

(3) at the meeting between BSkyB and the Respondents of 17 January 2019, Mr Hughes said expressly that a commentator could not provide services to anyone else without BSkyB's approval and therefore BSkyB could restrict the commentator's other engagements at its discretion. He added that the commentator would need to contact Mr Hughes before accepting any other engagement to obtain Mr Hughes's consent and, if this was not done, then Mr Hughes would contact the commentator to remind him of the relevant contractual obligation and the ultimate sanction for infringing this obligation would be termination of the contract or a refusal to renew the contract.

99. For the three reasons set out in paragraph 98 above, I have concluded that the obligation on the part of Mr Parry to seek the prior written consent of BSkyB before accepting engagements with the organisations described in the relevant Contract should be regarded as being included in the hypothetical contract relating to the relevant Contract. I have no doubt that, had there been hypothetical contracts between BSkyB and Mr Parry and had BSkyB wished to enforce this right against Mr Parry, it would have been entitled to do so.

The obligation on the part of Mr Parry to accept direction from BSkyB

100. The Contracts contained provisions making it clear that BSkyB had broad powers of control over the manner in which the Appellant provided its services. For example, BSkyB:

(1) could determine the matches for which it required the services;

(2) could determine whether the services were to be provided from the BSkyB studio or the ground;

(3) could direct the Personnel to travel to the desired location at any time and date "including bank holidays and weekends and anti-social hours";

(4) could direct the Personnel to attend at its request to advertise BSkyB's programmes and services;

(5) could direct the Personnel in relation to the manner in which the Personnel provided the services, including, in Contracts 3 and 4, in relation to what the Personnel could wear; and

(6) in each of Contracts 2 to 4, could direct the content of the Personnel's social media insofar as it related to BSkyB and its staff, agents or contractors, any sports rights holder and/or any related matter.

101. In his evidence, Mr Parry suggested that the rights in question might be somewhat weaker than was suggested in the express terms of the Contracts. For example, he said that:

(1) no control was ever exercised over his commentaries. Once he started a commentary, the content of the commentary was up to him and, once the match started, his interactions with the producer and director were minimal;

(2) the time of his arrival before a match was up to him, he was not given a running order and he was able to use his own stats pack;

(3) any meeting held with the producer before a match was informal in nature and part of a collaborative process; and

(4) there was no restriction placed on him over the content of his social media.

102. This is an area in which the difficulties that I outlined in my preliminary observations in paragraphs 81 and 82 above are particularly relevant. There was clearly a great deal of common interest in the manner in which the services were provided and also a great deal of trust on both sides. This makes it somewhat hard to determine the level of control enjoyed by BSkyB under the terms of the hypothetical contracts. However, I place considerable weight in this context on the views of the representatives of BSkyB because it was BSkyB which held the rights under the Contracts and I see nothing in the replies given by BSkyB on 8 February 2018 to the Respondents' questions of 20 October 2017 or in the notes of the meeting between BSkyB and the Respondents on 17 January 2019 to suggest that the rights of control set out in the Contracts should not also be read into the hypothetical contracts. The fact that there was no reason for BSkyB to exercise its rights of control because Mr Parry was acting in a manner of which BSkyB approved does not mean the BSkyB would have been unable to compel Mr Parry to act at its direction in relation to the matters described above had Mr Parry been unwilling to do so.

103. I have therefore concluded that the hypothetical contracts would have contained the same rights of control as those set out in the Contracts.

Conclusion

104. I have therefore concluded that, taking into account all of the circumstances in addition to the terms of the Contracts, the terms of the hypothetical contracts between BSkyB and Mr Parry would have been the same as the terms of the Contracts, with the exception that there would have been a limit on the number of matches in relation which BSkyB would have been entitled to ask Mr Parry to commentate.

Stage 3

Introduction

105. Now that I have determined the terms of the hypothetical contracts, it is necessary to apply the RMC test to the terms of the hypothetical contracts as so determined. This requires me to consider:

(1) whether the hypothetical contracts contained the "irreducible minimum", as it was described in *Montgomery*, of mutuality of obligation and control; and

(2) whether, if they did, the terms of the hypothetical contracts, when viewed in all the circumstances, were consistent or inconsistent with their being contracts of employment – that to which MacKenna J referred in *RMC* as the "negative condition".

Mutuality of obligation

106. As I have already noted in paragraph 32(2) above, there are two aspects to the question of mutuality of obligation, namely:

(1) whether the obligations of BSkyB were sufficient to satisfy the test (the client limb of the mutuality of obligation stage); and

(2) whether the obligations of Mr Parry were sufficient to satisfy the test (the worker limb of the mutuality of obligation stage).

107. Starting first with the client limb of the mutuality of obligation stage, Mr Leslie submitted that the fact that BSkyB was under no obligation to provide work for Mr Parry meant that the test was failed. I agree with Mr Leslie that an expectation of work is not the same as a right to require it and that, under the hypothetical contracts in this case, Mr Parry had no right to require work from BSkyB and BSkyB was under no obligation to provide work to Mr Parry. However, BSkyB was obliged under the hypothetical contracts to pay Mr Parry the fixed amounts specified in the Contracts and the authorities demonstrate clearly that the obligation to pay remuneration is sufficient, in and of itself, to satisfy the client limb of the mutuality of obligation stage. There is no need for the client to have an obligation to provide work where the client is obliged to make payments come what may – see *Clark* at paragraph [41], *Usetech* at paragraph [64] and *Atholl House* at paragraph [73]. Indeed, in *RMC* itself, MacKenna J said that "a wage or other remuneration" was all that was required in order for the client limb of the mutuality of obligation stage to be satisfied. He made no reference to the need for an obligation to provide work. In that regard, Mr Leslie's reliance on the judgment of Sir David Richards in *Atholl House* at paragraph [74] (see paragraphs 62(2) and 62(3) above) is misplaced. In that paragraph, Sir David Richards made it plain that the client limb of the mutuality of obligation stage could be satisfied either by an obligation to provide work or by an obligation to pay remuneration.

108. Mr Leslie's submission to the effect that the client limb of the mutuality of obligation stage was negated by the fact that BSkyB would not have been obliged to pay the specified amounts in the event that Mr Parry chose not to commentate on any matches (and that Mr Parry was free to do that) was similarly misplaced. It is true that:

(1) had Mr Parry declined to commentate on any matches under the hypothetical contract relating to Contract 1, BSkyB would potentially have had a claim in damages to set off against its obligation to pay the relevant fee; and

(2) had Mr Parry declined to commentate on any matches under the hypothetical contract relating to each of Contracts 2 to 4, BSkyB would have had the contractual right to reduce the relevant fee pro rata.

However, those were remedies which would have arisen as a result of Mr Parry's breach of contract and thus, in the present context, they are neither here nor there. The key point is that, under each hypothetical contract, Mr Parry was legally obliged to provide his services and BSkyB was legally obliged to pay Mr Parry the specified amounts.

109. Turning then to the worker limb of the mutuality of obligation stage, Mr Leslie made two submissions in relation to why this limb was not satisfied.

110. The first was that Mr Parry was not obliged to accept any engagements from BSkyB during the term of each hypothetical contract. On that basis, he said, Mr Parry was not obliged to do any work under the relevant hypothetical contract and therefore the worker limb of the mutuality of obligation stage was failed. For the reason which I have already given in paragraph 108 above, I consider that this submission by Mr Leslie is based on a misconstruction of the Contracts (and, hence, of the hypothetical contracts). It is clear that Mr Parry did have an obligation to provide services to BSkyB under each hypothetical contract, even if the extent of that obligation – which is to say, the number of matches on which Mr Parry was obliged to commentate – may not have been quite as extensive as the express terms of the Contracts suggested.

111. Mr Leslie's second submission was that, even if there was an obligation on the part of Mr Parry to provide services to BSkyB, that obligation did not require Mr Parry to perform the services personally. Instead, Mr Parry could procure that the services were provided by someone else. Mr Leslie made two arguments to support this proposition. The first was that the right on the part of Mr Parry under the hypothetical contracts to propose a substitute whom BSkyB would have to accept as long as the substitute was qualified to perform the services meant that Mr Parry was free to procure that the services were provided by someone else. In that regard, Mr Leslie sought to rely on the fourth principle of the five principles in this area set out by Sir Terence Etherton MR in the Court of Appeal decision in *Pimlico Plumbers*. Mr Leslie's second argument in support of his thesis that there was no obligation of personal service on the part of Mr Parry was that this conclusion arose as a result of the provision in each hypothetical contract which specified that Mr Parry would not assume, create or incur any liability or obligation on behalf of BSkyB without the prior written consent of BSkyB.

112. I am unable to agree with either of these arguments.

113. The second of them is based either on a misconstruction of the relevant drafting or on a misunderstanding of the legal effects of that drafting. All that the relevant provision was saying was that Mr Parry had no authority to create obligations for BSkyB without BSkyB's prior written consent. The provision was saying nothing about, and consequently sheds no light upon, whether Mr Parry had an obligation to perform the relevant services himself.

114. As for the first argument, it is based on a decision which has been superseded by the Supreme Court's decision in that case, which instead outlined the "dominant feature" test. Moreover, the Court of Appeal in *Stuart* expressly rejected the approach which Sir Terence Etherton MR had adopted in *Pimlico Plumbers* of trying to impose rigid rules based on the facts of prior cases as to when a right of substitution would or would not negate the existence of an obligation of personal performance. Instead, the Court of Appeal in *Stuart* held that each case needed to be considered on the basis of its own facts and in the light of the injunction by the Supreme Court in *Pimlico Plumbers* to consider whether the "dominant feature" of the contract in question was one of personal performance (see *Stuart* at paragraphs [47] to [58]).

115. In applying the "dominant feature" test in *Pimlico Plumbers* in the context of the present facts, it is clear to me that the "dominant feature" of the hypothetical contracts in this

case was one of personal performance by Mr Parry and that this was very far from "a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done" (see *Pimlico Plumbers* at paragraph [34]). I say that for the following reasons:

(1) the right on the part of Mr Parry under the hypothetical contracts to propose a substitute was extremely limited in scope. He was able to propose a substitute but it was always up to BSkyB as to whether or not to accept that the proposed substitute was suitable. The very limited nature of the right to propose a substitute serves to emphasise the importance of the obligation to provide the services personally. The First-tier Tribunal made a similar observation in *Paya Limited and others v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 583 (TC) at paragraph [616];

(2) the terms of the non-disclosure agreement executed by Mr Parry pursuant to the hypothetical contracts made apparent Mr Parry's understanding that it was his reputation in the market as an expert commentator which BSkyB was seeking to harness, that he was closely associated with BSkyB in the minds of the public and that BSkyB's commercial interest would be damaged if he were not to provide the relevant services himself;

(3) in addition, the definition of "Services" in the hypothetical contract relating to Contract 1, with its express reference specifically to the services of "Alan Parry", showed by implication that it was Mr Parry's services which were critical to BSkyB in entering into the Contract. (The definition of "Services" in the other three hypothetical contracts referred to the services of the "Personnel", as opposed to "Alan Parry", but, as each of those hypothetical contracts then specified in the definition of 'Personnel" in the Key Terms that the "Personnel" was Mr Parry, the position under those hypothetical contracts was effectively the same);

(4) Mr Parry in his evidence made it clear in WS1 that what BSkyB wanted was his own personal services and not the services of any other commentator whom he might propose;

(5) it was unrealistic to expect BSkyB to accept a substitute proposed by Mr Parry when it had a pool of other commentators with whom (or with whose personal services companies) it had also contracted and who were therefore available to provide their services directly to BSkyB in the event that Mr Parry was unable to provide his services;

(6) in the meeting between BSkyB and the Respondents on 17 January 2019, the representatives of BSkyB confirmed that the right to propose a substitute was really only "hypothetical" as, in practice, instead of continuing to engage the relevant personal services company but with the suggested substitute in place, BSkyB would source its own replacement from the pool of talent which it already had; and

(7) on the one occasion that, as a result of illness, Mr Parry was unable to commentate on a match in relation to which he had agreed to commentate, he had not proposed a substitute and BSkyB had instead found a replacement itself.

116. I have therefore concluded that the "dominant feature" of each hypothetical contract was that BSkyB were engaging Mr Parry for his own personal services and were not indifferent as to whether the services under the relevant hypothetical contract were performed by Mr Parry or instead by someone else.

117. That, in turn, means that, in my view, the mutuality of obligation test was satisfied in the case of each hypothetical contract.

118. For completeness, I should say that there was a brief discussion at the hearing in relation to whether each hypothetical contract should be seen as an overarching contract pursuant to which there was a series of match-by-match engagements or whether there was just a single engagement comprising the whole term of each hypothetical contract. I consider that that is a question which is highly relevant to cases involving an overarching contract that provides for consideration to be paid for services only as and when those services are requested to be delivered. In such cases, the question of whether the overarching contract includes an obligation on the part of the client to provide work and an obligation on the part of the worker to do the work when requested can be highly relevant to whether or not the overarching contract satisfies the mutuality of obligation test (see *Clark*). However, the same is not true where the overarching contract includes an obligation on the part of the client to pay remuneration to the worker come what may and an obligation on the part of the worker to do work as and when requested. As the Court of Appeal noted in *Clark* at paragraph [41], it was an "obvious example" that "an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would ... be likely to suffice".

Control

119. Turning then to the control stage, it is clear to me that each hypothetical contract did confer on BSkyB control over the "what, how, when and where" in accordance with the prior authorities (see paragraph 32(5) above). For example:

(1) BSkyB agreed with the Premiership or the Champions' League which matches it was going to feature and BSkyB then had the power under the relevant hypothetical contract to determine which matches it was going to require Mr Parry to cover – see paragraphs 37(2), 37(3) and 39 above. It also had the power under the relevant hypothetical contract to decide whether Mr Parry was going to provide his services from the ground or from the BSkyB studio and to require Mr Parry to travel to any destination which it required – see paragraphs 37(2) and 39 above. It therefore had the power to control the "when and the "where".

I do not agree with Mr Leslie's submission to the effect that, because the services could be conducted only from the ground where the match was played and at the time when the match was played and those matters were set by the Premiership or the Champions' League, as the case may be, BSkyB had no control over those matters.

In the first place, the choice of matches and the times when they fell to be played were not things which the Premiership or the Champions' League determined unilaterally. Instead, those things were agreed in discussions with BSkyB.

More significantly, even if that were not the case, the critical issue in this respect is not whether BSkyB had control over those things vis-à-vis the Premiership or the Champions' League but rather whether BSkyB had control over those things vis-à-vis Mr Parry and, whatever role BSkyB might have played in setting the dates and times of matches, it is clear that, once the schedule of matches was established, it was up to BSkyB to determine the matches on which it wished Mr Parry to commentate. It was therefore up to BSkyB to determine where and when Mr Parry provided his services;

(2) BSkyB also had the power under the relevant hypothetical contract:

(a) to determine whether Mr Parry's services were to be solely those of a commentator or were to encompass other activities such as presenting or interviewing – see paragraphs 37(2) and 39 above; and

(b) to require Mr Parry to record trailers and promotional materials for its programmes – see paragraphs 37(12) and 39 above.

BSkyB therefore had the power to control the "what"; and

(3) finally, BSkyB had the power under the relevant hypothetical contract to direct the manner in which Mr Parry's services were to be provided.

The hypothetical contract required Mr Parry to comply with all directions and requests of BSkyB when providing his services - see paragraphs 37(13), 37(16)(b) and 39 above. BSkyB's powers under the hypothetical contract relating to each of Contracts 2 to 4 extended that right to include the power to determine whether the clothing worn by Mr Parry in providing the services was appropriate - see paragraph 39(2)(b) above.

BSkyB therefore had the power to control the "how".

I need to expand on exactly what I mean in saying that BSkyB had the power to direct the manner in which Mr Parry's services were to be provided.

I have already explained in paragraph 32(5)(b) above that, in the case of a highly-skilled job, the test should be focused more on ultimate authority than on close direction by actual supervision. The examples given in *Montgomery* of this were the master of a vessel, a surgeon or a science and technology expert. Football commentating is somewhat similar to these examples in that it is both highly-skilled and, because of its very nature, not susceptible to hands-on control while it is happening. The critical question therefore is not whether BSkyB was entitled to direct exactly what Mr Parry said in his commentaries but rather whether BSkyB (as represented by its producer and director) had ultimate authority over Mr Parry when Mr Parry was providing his services.

I believe that the evidence shows that BSkyB did have that ultimate authority in that Mr Parry had to comply with the directions of the producer from time to time, if and when those directions were forthcoming. In addition, BSkyB had the ability to sanction Mr Parry retrospectively by either terminating the existing hypothetical contract or refusing to renew the hypothetical contract in the event that Mr Parry acted in a manner which was contrary to BSkyB's wishes. That was what the relevant hypothetical contract said and it was also what BSkyB understood to be the case – see paragraphs 47(7) to 47(15), 47(17) and 47(18) above. Mr Parry's evidence in relation to the question of control was somewhat more equivocal, based it was in many cases on what happened in practice (as opposed to the contractual position) and reflecting in many cases a misunderstanding of the contractual position. However, even Mr Parry accepted in WS2 that the Contracts, as written, reflected the actual agreement between the parties – see paragraph 51(1) above – and accepted in his oral evidence at the hearing that ultimate responsibility for the programmes rested with BSkyB – see paragraph 52(5) above.

I therefore do not agree with Mr Leslie that, because Mr Parry at all times retained control of the style, content, delivery, tone and nature of the commentary, BSkyB had no control over the "how".

120. I have therefore concluded that the control stage was satisfied in the case of each hypothetical contract.

The negative condition

121. Since the first two stages of the RMC test have been satisfied, it is necessary to consider whether, taking into account the terms of the hypothetical contracts and the wider

circumstances in which the hypothetical contracts arose, the hypothetical contracts should be seen as contracts of service or as contracts for services. In other words, should the relationship between BSkyB under the hypothetical contracts be seen as a relationship of employer or employee or should the relationship between them be seen instead as a relationship of client and independent contractor? This might alternatively be phrased – see paragraph 32(6) above – as a question of whether Mr Parry should be seen as having entered into the hypothetical contracts as an employee or instead as a person acting in the course of a business on his or her own account.

122. The case law shows that, in answering this question:

(1) the terms of the hypothetical contracts are central to the enquiry but not determinative in and of themselves. Instead, all of the circumstances surrounding the hypothetical contracts should be taken into account to the extent that those circumstances were known or reasonably available to both BSkyB and Mr Parry. Those circumstances are the "admissable factual matrix" to which Arnold LJ referred in *Atholl House* at paragraph [123];

(2) that means that the fact that there was both mutuality of obligation and control by BSkyB over Mr Parry are to be included in the factors which are to be taken into account at this stage although control is not the sole determining factor;

(3) there should be no presumption that the hypothetical contracts were contracts of employment merely because mutuality of obligation and control by BSkyB over Mr Parry existed. Instead, the question should be approached from the neutral perspective;

(4) other factors which may be important in this regard include:

(a) whether Mr Parry used his own equipment to perform the services;

(b) whether Mr Parry hired people to help him provide the services;

(c) the degree of financial risk taken by Mr Parry;

(d) the degree of responsibility for investment and management which Mr Parry had in his engagement under the hypothetical contracts;

(e) the extent to which Mr Parry had the opportunity to profit from sound management in the performance of his task;

(f) the understanding and intentions of the parties, noting in this respect that a statement in the hypothetical contracts to the effect that no relationship of employment was intended by the parties will generally be neutral or carry minimal weight;

(g) the degree of continuity in the relationship between BSkyB and Mr Parry;

(h) the number of Mr Parry's other engagements. The extent to which Mr Parry's working life prior to, and at the time of, the periods over which the hypothetical contracts operated generally involved entering into a series of engagements in the course of self-employment is "an important contextual circumstance" to be taken into account – see *Young* at paragraph [20] and *Atholl House* at paragraph [124]; and

(i) the extent to which Mr Parry should be seen as accessory to the business of BSkyB or instead as "part and parcel" of BSkyB's organisation; and

(5) above all, this should not be a mechanical exercise of running through items on a checklist but instead the painting of a picture from the accumulation of detail, in the manner described in *Hall* at 944 and 945 and *Atholl House* at paragraphs [92] to [96]

- see paragraphs 32(7) to 32(16) above.

123. Applying the principles I have described in paragraph 122 above and painting a picture from the accumulation of detail before standing back in order to make an informed, considered, qualitative appreciation of the whole, this question permits of only one answer and that is that the hypothetical contracts in this case were contracts of service. Indeed, I can think of very few differences between the terms and circumstances of Mr Parry's engagement by BSkyB under the hypothetical contracts and the terms and circumstances of Mr Parry's engagement by BSkyB had he been employed by BSkyB under an employment contract.

124. In reaching this conclusion, I have taken into account the following features of the terms and circumstances of Mr Parry's engagement by BSkyB which are consistent with the existence of an employment relationship between them:

(1) there was mutuality of obligation between BSkyB and Mr Parry in that, over the term of each hypothetical contract, BSkyB agreed to pay specified amounts of remuneration to Mr Parry and, in return, Mr Parry agreed to perform services for BSkyB – see paragraphs 106 to 118 above;

(2) in relation to the provision of Mr Parry's services, BSkyB had control over the "what, how, when and where" – see paragraph 119 above;

(3) BSkyB provided the equipment which Mr Parry used to carry out the services - see paragraphs 42(9) and 47(16) above;

(4) Mr Parry had provided his services to BSkyB for a considerable length of time before the period to which the appeals relate and therefore the relationship between the parties was long-standing in nature – see paragraph 42(1) above;

(5) the income derived by Mr Parry from BSkyB in the tax years to which the appeals relate comprised all, or nearly all, of the income derived by Mr Parry in the relevant tax years – see paragraphs 53 above;

(6) BSkyB had first call on Mr Parry's time and Mr Parry could not seek engagements with other television, radio and/or media organisations (and, in the case of the hypothetical contract relating to each of Contracts 2 to 4, print or betting organisations) without obtaining the prior written consent of BSkyB. This severely curtailed Mr Parry's ability to obtain other engagements– see paragraphs 37(8), 37(16) and 39(1)(c) above;

(7) BSkyB could not terminate the hypothetical contract at will but only for cause or because of an extraneous event which was beyond BSkyB's control. I do not agree with Mr Leslie's submission that the terms of the Contracts (and hence the hypothetical contracts) allowed BSkyB to terminate each Contract at will at any time – see paragraphs 37(14) and 39 above;

(8) in the hypothetical contracts relating to each of Contracts 2 to 4, BSkyB had control over Mr Parry's use of social media insofar as that social media related to BSkyB, its staff, agents or contractors and/or any sports rights holder and/or any related matter – see paragraph 39(1)(d) above;

(9) in the hypothetical contract relating to Contract 4, BSkyB had the ability to prevent Mr Parry from working for, endorsing or promoting in any way the products or

services of any entity involved in betting or gaming activities which could reasonably be considered to be a competitor in respect of the products or services of Sky Bet – see paragraph 39(4) above;

(10) BSkyB retained the rights to all intellectual property deriving from the provision of Mr Parry's services – see paragraphs 37(15) and 37(16)(a) above;

(11) Mr Parry did not take any meaningful commercial risk in carrying out the services. He received monthly instalments of the fees to which he was entitled and he was reimbursed for almost all of his expenses. He had a minimal amount of unreimbursed overheads which he had to bear himself out of the fees received from BSkyB (such as the wages recorded in the accounts which were paid to Ms Tandy or Ms Haines) but, apart from his exposure to the credit of BSkyB, he took very little in the way of entrepreneurial risk; and

(12) the impression given was that Mr Parry was "part and parcel" of the BSkyB organisation. He was part of a team which worked collaboratively in the production of the programme relating to each match under the overall control of the producer.

In that regard, it was interesting that Mr Parry's response when he was asked whether BSkyB had the power under the Contracts to compel him to conduct the interview on the one occasion that he did so was that BSkyB did not have that power contractually but that, as a professional member of the team, he was happy to step in voluntarily to help out. Although I have concluded that that response did not accord with the contractual position under the hypothetical contracts, it is revealing in showing that Mr Parry saw himself as very much part of the BSkyB team on match day.

In similar vein, in responding to a question as to why he had done so much of his work exclusively for BSkyB, Mr Parry pointed out that BSkyB had the lion's share of the live football market and paid well and therefore asked rhetorically "why would I show any interest in BT Sport – indeed why would they show any interest in me?" To my mind, that exchange demonstrated the closeness of the relationship between BSkyB and Mr Parry.

The nature of that relationship was also reflected in the term of each non-disclosure agreement which referred to the fact that, in the minds of the public, Mr Parry was associated with Sky Sports.

In short, in his relationship with BSkyB, Mr Parry was very much part and parcel of the BSkyB live football team and not working independently on his own account.

125. As for the features of the terms and circumstances of Mr Parry's engagement by BSkyB which might be said to point away from the existence of an employment relationship, there were certain factors in this case which I regard as being neutral.

126. For example:

(1) I accord no weight to the statement in each Contract – and hence in each hypothetical contract - to the effect that the relationship between BSkyB and Mr Parry was not intended to be a relationship of employment or to the provisions in each Contract which made the Appellant responsible for any employment benefits such as holiday pay and sick pay. Those were statements which reflected the parties' belief that the Contracts created a relationship between BSkyB and the Appellant of client and independent contractor but they did not reflect the relationship which actually existed when viewed objectively.

In *Atholl House* at paragraph [123], Sir David Richards made it clear that the question of whether the parties intended to create a relationship of employment must be "judged objectively". By that he meant that the relevant court or tribunal should determine the parties' intentions by considering objectively the terms of the contracts and the circumstances in which the contracts were made. He did not mean that a statement in the contracts to the effect that no relationship of employment was intended should be determinative, as Mr Leslie alleged in his submissions. Moreover, in *Kickabout* at paragraph [92], the Upper Tribunal discounted the relevance of similar statements in the contracts in that case, noting that "the question whether a contract of employment has been created arises frequently in employment tribunals with employers not infrequently relying on carefully crafted contracts to deny workers rights to holiday pay, sick pay and paternity leave. The absence from such contracts of terms providing the very rights that are sought to be denied should not, in that context, count greatly in the balance";

(2) for similar reasons, I also regard as being neutral the fact that Mr Parry took out loss of earnings insurance in relation to part of the period which is the subject of the appeals. This merely reflected the fact that, based on his understanding of the position, Mr Parry was not an employee of BSkyB and therefore, if he became incapacitated, he would not be entitled to receive sick pay;

(3) similarly, although Mr Randle submitted that the fact that the fee under each Contract was paid monthly without regard to the number of commentaries performed by Mr Parry in the relevant month was an indication of employment, I see that as a neutral factor. There were sound commercial reasons why Mr Parry wished to spread his income over the course of each year and I do not see that as pointing in either direction although, as I have mentioned in paragraph 124(11) above, the fact that the fees were paid in regular instalments and not irregularly as and when Mr Parry performed his commentaries contributes to the absence of entrepreneurial risk which is a factor pointing toward employment; and

(4) finally, contrary to Mr Leslie's submission, I see nothing in Mr Parry's obligation to maintain confidentiality or to take data protection measures which points in either direction. Those obligations could just as easily be imposed on an employee as on an independent contractor.

127. However, as Mr Leslie pointed out, there were some features of the terms and circumstances of Mr Parry's engagement by BSkyB which were more consistent with a relationship of client and independent contractor than a relationship of employer and employee. For instance:

(1) Mr Parry was not obliged to undergo training in relation to the OFCOM regulations or the BSkyB editorial guidelines and was not subject to formal appraisals – see paragraphs 42(8), 46(5), 46(7) and 47(20) above.

However, I would note that the Upper Tribunal in *Kickabout* at paragraph [93] considered that the weight to be accorded to this factor in that case was slight, noting that the client in that case had obtained the services of the worker for a fixed period and that, if the worker's performance was unsatisfactory, the client could always choose not to renew the contract. In addition, in relation to the present proceedings, the representatives of BSkyB said at the meeting between BSkyB and the Respondents of 17 January 2019 that BSkyB did provide some training in certain matters such as the video assistant referee system – see paragraph 47(20) above;

(2) Mr Parry was required to correct defective work at his own time and expense and was required to indemnify BSkyB for costs arising out of breaches of the hypothetical contracts – see paragraphs 37(10) and 39 above;

(3) Mr Parry agreed to be responsible for any personal injury which he might suffer unless caused by the negligence of BSkyB – see paragraphs 37(10) and 39 above; and

(4) in the hypothetical contract relating to each of Contracts 2 to 4, Mr Parry was required to procure and maintain his own insurances – see paragraph 39(1)(e) above.

I agree with Mr Leslie that these provisions point away from the conclusion that the relationship between the two parties was one of employment.

128. Notwithstanding the features which I have mentioned in paragraph 127 above, when I follow the instruction of Mummery J in *Hall* and stand back to appreciate the detailed picture which has been painted, the overall impression is that the relationship between BSkyB and Mr Parry was one of employment. Mr Parry was not carrying on business on his own account when he provided services for BSkyB. Instead, he was providing his services under contracts of service. The factors which I have summarised in paragraph 124 above easily outweigh the contrary indications outlined in paragraph 127 above.

129. I should say for completeness that, whilst it has played no part in the decision I have reached on this question, I consider that the fact that BSkyB now contracts with Mr Parry as his employer is an accurate reflection of the relationship which existed between them over the period which is the subject of the appeals.

DISPOSITION

130. For the reasons set out in paragraphs 66 to 128 above, I hereby dismiss the appeals.

131. In so doing, I should say that I mean no disrespect to Mr Randle in failing to set out in any detail his submissions in relation to the matters which are the subject of the appeals. I am indebted to him for the clarity of those submissions and, as the terms of this decision make clear, I agree with virtually all of them.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

132. 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.

TONY BEARE
TRIBUNAL JUDGE

Release Date: 16 JUNE 2022