[2020] UKUT 0236 (TCC)

Appeal number: UT/2019/0067

VAT – Whether supply of academic work made by Appellant – agency – commercial and economic reality

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ALL ANSWERS LIMITED **Appellant**

-and-

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

TRIBUNAL **JUDGE JONATHAN RICHARDS**
JUDGE GUY BRANNAN

Sitting in public by way of remote video hearing treated as taking place in London on 6 and 7 July 2020

Timothy Brown, instructed by Richard Nelson LLP, for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

1. The Appellant operates a largely internet-based business. Customers accessing its website (who we will refer to as "Customers") can, in return for payment which is made to the Appellant, order academic work such as essays, dissertations or pieces of coursework which are then written by third parties ("Writers"). The Writers tend to be teachers, lecturers and PhD students who are not employed by the Appellant. The Appellant does not disclose the Writers' identities to the Customers and *vice versa*.

2. The Appellant and a Writer of a particular piece of work share the fee paid by the purchasing Customer between them. The Appellant generally retains around two thirds of that fee with the Writer obtaining the remaining one third. Therefore, if a Customer pays £240 for a piece of work, and ignoring VAT for the time being, the Appellant will typically retain £160 of that and will pay £80 to the Writer.

3. These proceedings concern the VAT treatment of the above transactions. HMRC contend that the Appellant makes a single standard-rated supply of the academic work to a Customer and should, in the above example, account to HMRC for VAT on the full £240 paid by the Customer. The logic of HMRC's case is that, when the Appellant pays the Writer £80, it is paying the Writer consideration for a separate supply made by the Writer to the Appellant. However, since Writers tend not be registered for VAT purposes, the Appellant is not entitled to credit for any input tax incurred in respect of this separate supply.

4. The Appellant argues that it is acting as a Writer's agent in relation to the supply of the academic work. Therefore, it argues that the supply of the academic work is made by the Writer to the Customer and the Appellant is not obliged to account for VAT in respect of that supply. The Appellant acknowledges that it makes a supply (of agency services) for a consideration of £160 in the above example and accepts that it is obliged to account for VAT in relation to that supply.

5. Therefore, the difference between the parties is whether, using the above illustrative figures, the Appellant is obliged to account to HMRC for VAT on £240, or just for VAT on £160. In a decision released on 3 December 2018 (the "Decision"), the First-tier Tribunal (the "FTT") determined the above issue in HMRC's favour. With the permission of the FTT, the Appellant appeals against that conclusion. The hearing before us took the form of a "virtual" hearing at which all parties participated by video conference from different locations. The parties were content with a hearing in that form.

The Decision

6. Most relevant facts were not in dispute. We would summarise the undisputed facts as follows, with references to numbers in square brackets being to paragraphs of the Decision.

7. The Appellant's business is largely internet-based. Customers wishing to order academic work, such as essays or dissertations, or who wish to obtain feedback on

their own written work are able to access the Appellant's website to make an order. The Appellant trades under various names with Customers; one such name is "UK Essays.com" ([6]).

8. The Appellant's website generates a price for most "standard" orders by reference to information that the Customer provides as to, for example, the nature of the work (for example an undergraduate essay), the standard required (for example 2:1) and its length (for example 1000 words). A small minority of orders (1% to 2%) require bespoke pricing ([7], [8] and [29]).

9. Before an order can be submitted over the website, a Customer must tick a box confirming acceptance of standard terms and conditions ([9]). We will consider these terms, and their effect, later in this decision. In addition, at the same time as placing an order, a Customer must pay a deposit of at least 50% of the price due, or if the work is required for urgent delivery, full payment in advance. The Customer pays this by card, over the Appellant's website, at the time the order is placed.

10. The Appellant has available to it a "pool" of Writers who are not its employees, but are generally third-party lecturers, teachers and PhD students ([30]). Before the Appellant will put a Writer on its books, it requires the Writer to go through an application process that involves the Writer, providing details of his or her academic qualifications, signing up to terms and conditions (which we will consider later in this decision) and providing samples of written work.

11. Once the Appellant has received an order from a Customer, the Appellant posts details of that order on a portal to which only its pool of Writers have access. Those Writers are invited to indicate whether they are prepared to take on the assignment for the price quoted being the Writer's share of the total fee. Thus, as part of the process of offering work to its Writers, the Appellant does not tell Writers the total fee that the Customer will pay, just the share of the fee that will be payable to the Writer who produces the work. However, Writers could work out the gross fee since, in most cases, it will be three times what the Writer is offered. In any event, a Writer could always go to the Appellant's website and key in details of the work in question to see what price the Appellant would be quoting the Customer for that work ([42]). If multiple Writers indicate that they are prepared to do the work, the Appellant chooses one.

12. The Appellant is concerned to ensure that, except in wholly exceptional circumstances, a Customer is not aware of the identity of the Writer who produced work that was ordered, and a Writer is not aware of the identity of the Customer for whom work is being produced. That concern for confidentiality is demonstrated in some of the contractual provisions we will consider in the next section: for example, Writers are contractually obliged not to identify themselves in the written work that they produce. The FTT concluded that the concern for confidentiality was driven by at least two factors: Writers would not want their employers to know that they were "moonlighting" ([25]) and the Appellant would not want Customers to be able to cut the Appellant "out of the loop" by obtaining further work direct from a Writer.

13. Once the Writer has prepared the work, he or she uploads it to the Appellant's portal. In periods material to this appeal, the contract between Writer and Appellant provided that the act of uploading the work operated to transfer copyright in the work to the Appellant ([27]). At this stage, the work is not yet available to the Customer and, before releasing it, the Appellant performs some quality control measures ([43]) and obtains payment of the balance, if any due on the order.

14. The FTT made some findings at [47(7)] as to the form of invoices that were issued, observing that the Writer issued no invoice to the Customer. In view of some of the submissions that were made to us on invoices, we will provide a slightly fuller summary of the various invoices that are issued:

> (1) The Appellant would issue a "sales receipt" to the Customer. We were shown an example of such a receipt for a job that involved marking and proof-reading a 2,500 word essay. That receipt showed the total paid for the work (£75). The "researcher fee", being the amount payable to the Writer, was shown as £26[1]. To that is added the "agency fee" of £40.83 and VAT on that agency fee of £8.17 thus reconciling with the total fee of £75.
>
> (2) The Appellant would issue what was described as an "invoice" to a Writer. Describing those documents as "invoices" was something of a misnomer because they set out amounts due from the Appellant to the Writer. It appears that these "invoices" were issued on a monthly basis capturing work done by that Writer in the 30 days or so ending around the middle of the month in question. The invoices disclosed the fees payable to the Writer for work done in this period but did not mention the total fees paid by the Customer for all work undertaken by that Writer.

15. In the Decision, the FTT also made some observations as to what it regarded as the unethical nature of the Appellant's business. At [30], for example, it expressed the view that the Appellant's business "thrives upon providing essays, dissertations and coursework to cheats". The Appellant does not accept that the FTT's criticisms are justified. We will not, however, say any more about this aspect of the Decision because both parties were agreed that the issues in this appeal do not turn on whether the Appellant's business assists cheats or not. Rather, the question we have to determine is whether or not that business involves the Appellantmaking standard-rated supplies of academic work.

16. At [11] to [28], the FTT made some findings as to the terms of the contract between the Customer and the Appellant dealing with provision of the work (which we will refer to as the "Customer Contract") and the terms of the contract between the

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[1] We do not understand why this is slightly more than one third of the total fee, but nothing turns on this.

Appellant and a Writer (to which we will refer as the "Writer Contract"). However, its findings were not very detailed largely because the FTT evidently viewed those terms as "artificial" and has having been designed to give a misleading picture (see [11] and [14]). Since we will perform our own detailed analysis of these contracts, we will not summarise the FTT's findings as to the terms of the contracts.

17. The FTT's ultimate conclusion was that HMRC were correct and the Appellant, and not the Writer, supplied the academic work to the Customer. The core of the FTT's conclusion was set out at [46]:

> 46. When we stand back and consider the totality of the relevant evidence in the round, we are left in no doubt that both the commercial and the economic reality of the factual situation that we have set out above, dictates that there is only one supply to the client and that that supply is made by the appellant. We agree with Miss Vicary that notwithstanding the smokescreen which the appellant has attempted to create when it drafted the two different sets of Terms and Conditions, to which we have referred above, the commercial reality leans heavily in favour of there being only a single relationship which is a contractual arrangement between the client and the appellant for the supply of a finished product, for which the client pays a single price to the appellant. In our judgement, the introduction of the notion of agency is wholly artificial and was/is intended to disguise the reality that the appellant engages a sub-contractor to produce each product which it has contracted to supply. We acknowledge that each set of Terms and Conditions is deliberately written so as to dictate a different outcome. Those Terms and Conditions are not, in the strict sense, shams, but if we are convinced, as we are convinced, that they have been deliberately honed by the appellant in a bid to achieve an outcome which is wholly artificial, we need not be beguiled by the content thereof.

18. With the permission of the FTT, the Appellant appeals to this Tribunal on the ground that the FTT erred in law in concluding that the academic work was supplied by the Appellant and that the FTT should have concluded that it was supplied by the Writers, through the agency of the Appellant.

Relevant principles of VAT law

19. By Article 2(1)(c) of Council Directive 2006/112/EC on the common system of value added tax (the "Principal VAT Directive"), the "supply of services for consideration within the territory of a Member State by a taxable person acting as such" is subject to VAT.

20. In *Adecco (UK) Limited and others v HMRC* [2018] EWCA Civ 1794, Newey LJ, with whom both other members of the court agreed, set out the following propositions on the scope of Article 2(1)(c) of the Principal VAT Directive:

> 38. The following propositions can, I think, be derived from the case law:

> i) The concept of a "supply" is "an autonomous concept of the EU-wide VAT system" (the *Airtours* case[2], at paragraph 20, per Lord Neuberger);
>
> ii) A supply of goods or services "for consideration", within the meaning of article 2(1) of the Principal VAT Directive, "presupposes the existence of a direct link between the goods or services provided and the consideration received" (Joined Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd and Baxi Group Ltd v Revenue and Customs Commissioners* [2010] STC 2651, at paragraph 51 of the judgment of the Court of Justice of the European Union ("CJEU"); see also Case 102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the judgment);
>
> iii) A supply of services "is effected 'for consideration', within the meaning of art 2(1) of [the Principal VAT Directive], and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-653/11 Revenue and Customs Commissioners v Newey [2013] STC 2432, at paragraph 40 of the CJEU's judgment; see also Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the judgment);

21. The essence of the dispute between the parties revolves around the concept of "reciprocal performance" described in *Tolsma*. The Appellant says that, in relation to the provision of the academic work, the legal relationship is between, and only between, the Writer and the Customer. Therefore, although in our hypothetical example, the Customer pays the full £240 to the Appellant it is said that this is not consideration for a taxable supply made by the Appellant.

22. That therefore leads to the secondary question of how to determine relevant aspects of the legal relationships between the parties in order to determine whether the £240 is consideration for a taxable supply made by the Appellant. The CJEU determined this question in *HMRC v Paul Newey* (Case C-653/11) [2013] STC 2432 where one of the questions referred was:

> In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?

[2] *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] UKSC 21,

23. The answer to that question was given in paragraphs 42 to 44 of the CJEU's judgment as follows:

> 42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).
>
> 43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.

24. In the light of that guidance, we will adopt the following approach:

> (1) First, we will ascertain the meaning and effect of relevant contractual terms so as to determine whether those terms impose an obligation on the Appellant or the Writer (or both) to provide the academic work to the Customer in return for the payment that the Customer makes to the Appellant.
>
> (2) Second, we will consider whether the contractual terms reflect commercial and economic reality.
>
> (3) In the light of our answers to questions (1) and (2), we will determine whether the Appellant made a supply of the academic work so as to become subject to an obligation to account for VAT.

The contracts

Agency – introductory remarks

25. Paragraph 1-001 of *Bowstead and Reynolds on Agency* (21st edition) describes the concept of "agency" in the following terms:

> Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts

> pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party

26. The Appellant's case to a significant extent rests on the proposition that it entered into contracts for the provision of academic work as agent for the Writer producing it. Therefore, one aspect of our examination of the contracts will involve ascertaining whether Writers gave the Appellant authority to make contracts on their behalf and, if so, whether the Appellant exercised that authority by entering into contracts for the provision of academic work as agent for the Writers.

27. However, that will not be the end of the examination. If the Appellant did enter into a particular contract as agent for a Writer, that does not itself demonstrate that only the Writer was liable under that contract. As Lord Scarman said in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation* [1981] AC787 at 795:

> …it is not the case that, if a principal is liable, his agent cannot be. The true principle of law is that a person is liable for his engagements (as for his torts) even though he acts for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability.

28. In *Teheran-Europe Co. Ltd v S.T. Belton (Tractors)* Ltd [1968] 2 WLR 523, Donaldson J set out the ways in which an agent could conclude contracts on behalf of a principal as follows[3]:

> An agent can conclude a contract on behalf of his principal in one of three ways:
>
> (a) By creating privity of contract between the third party and his principal without himself becoming a party to the contract. The principal need not be named but the contract must show clearly that the agent was acting as such. Familiar examples are contracts made by X as agents and signed by X, the signature being claused "as agents only." The consequence of such an arrangement is that the third party can only sue, and be sued by, the principal.
>
> (b) By creating privity of contract between the third party and his principal, whilst also himself becoming a party to the contract. The consequence of this arrangement is that the third party has an option whether to sue the agent or the principal, although this is of little practical value if he does not know of the principal's existence. Equally the third party is liable to be sued either by the agent or by the principal. Where both agent and principal are privy to the contract,

[3] Donaldson J's summary of the law in this regard was not doubted in the decision of the Court of Appeal reported at [1968] 2 All ER 886

> questions of election can arise (see *Clarkson Booker Ltd. v. Andjel*), but no such question arises in this case.
>
> (c) By creating privity of contract between himself and the third party, but no such privity between the third party and his principal. In other words, in relation to the third party he is a principal, but in relation to his principal he is an agent. The consequence of this arrangement is that the only person who can sue the third party or be sued by him is the agent.

29. In *Maritime Stores Ltd v HP Marshall & Co Ltd* [1963] 1 Lloyd's Rep 602, at 608, the following summary of the law set out in Bowstead & Reynolds on Agency was approved:

> The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and, if so the extent of his liability, depends on the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances, including any binding custom

30. Therefore, even if the Appellant did contract to supply academic work as agent for the Writer who produced that work, it remains possible that the Appellant was itself liable to the Customers under that contract. There being no suggestion in this case that there was any particular trade usage or custom, we will seek to discern the extent of the Appellant's liability, if it did contract as agent, from the terms of the particular contracts and surrounding circumstances.

31. Both the Writer Contract and the Customer Contract suffered from a lack of clarity as to their precise legal effect. Moreover, some of the provisions of those contracts contradicted each other. We will therefore start our analysis by analysing provisions of those two contracts to ascertain their meaning and to resolve apparent contradictions. Having done so, we will step back and set out our overall conclusions on the relevant legal effect of those two contracts.

The Writer Contract

32. A Writer would enter into a contract, which we will call the "Writer Contract" as on or around the time that he or she was accepted to join the Appellant's pool of Writers. Moreover, by Clause 1.4 of the Writer Contract, by making a "bid" to perform work, the Writer agreed to be bound by the terms of the contract.

33. Clause 4.1 to 4.3 of the Writer Contract provided:

> 4.1 We agree to act as your Agent for the direct supply and sale of your services to clients under the terms in this contract.
>
> 4.2 You authorise us to set pricing and commission structures on your behalf and enter into relationships with clients on your behalf through the marketing methods of our choice.
>
> 4.3 You authorise us to collect payment from clients on your behalf and forward these, minus commission and any relevant deductions per

> this contract, to you (details of our usual fees are set out in the help section of the control panel[4]).

34. HMRC observed that this clause set out no parameters governing the terms on which the Appellant could contract on behalf of a Writer and submitted that this absence indicated that Writers could not have intended to give the Appellant an effectively unfettered right to bind Writers into contracts as their agent. We do not accept that submission. In our judgment, these clauses expressly constituted the Appellant as the Writer's agent and empowered the Appellant to bind the Writer into contracts on the Writer's behalf. We acknowledge that Writers might have been well advised to seek to limit the terms on which the Appellant could contract on their behalf. However, the Writer Contract contains no such limitation, perhaps because the Appellant was in a stronger bargaining position than the Writers. In any event, to the extent that the Appellant was appointed as agent under the Writer Contract, it would have owed fiduciary duties to the Writer which would have offered the Writer some protection against unreasonable exercise of its power to contract on a Writer's behalf.

35. By Clause 2 of the Writer Contract, the Writer confirmed that the details provided of his or her academic qualifications were correct. Clause 2.5 provided that:

> By agreeing to this contract, you agree that you are liable to pay the Agency £5,000 for any fraudulently false representations regarding academic or professional qualifications.

36. HMRC submitted that this clause indicated an intention that the Appellant would contract with Customers as principal as it suggested that, if a Writer mispresented their academic qualifications, the Appellant would incur liability to a Customer for which the Appellant would seek compensation from a Writer. We accept that this clause is consistent with the Appellant contracting with Customers as principal. However, it is just as consistent with the Appellant contracting as agent but seeking protection against damage to its own goodwill and reputation that might arise if its pool of Writers were perceived not to have the qualifications they claimed to have.

37. A similar point can be made as regards Clauses 12.2 and 12.4 of the Writer Contract respectively. By Clause 12.2, a Writer agreed that if he or she missed the deadline for delivery of the work, and the Customer sought a refund, the Writer would be liable for a "penalty equalling the full brief fee". Clause 12.4 provided that:

> 12.4 We guarantee to clients that you will provide the project to the standard they ordered the first time. If the work is subsequently shown to be below that standard on an objective and informed assessment, and the client seeks a refund under this guarantee, you will be liable for a penalty equalling the full brief fee.

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[4] This is a reference to a section of the Appellant's website on the portal which Writers could access.

38. Clause 12.3 referred to the "no plagiarism guarantee" that also appeared in the Customer Contract as discussed below as follows:

> 12.3 We also guarantee to clients that you will provide 100% original projects and this is supported by the 5,000 GBP no-plagiarism bond. If plagiarised work is submitted and the client seeks to claim the no-plagiarism bond, you undertake you are liable personally to the client to the sum of £5,000.

39. Clause 12.3, therefore, by contrast with Clauses 2, 12.2 and 12.4 purported to make a Writer personally liable to a Customer (not to the Appellant) if the Writer produced plagiarised work. We will analyse the "no plagiarism guarantee" in more detail below when we consider corresponding provisions of the Customer Contract. However, for the time being we simply note that the Customer was not party to this contract. The Writer Contract (by contrast with the Customer Contract) contained no term that prevented third parties acquiring rights under the Contracts (Rights of Third Parties Act) 1999. Neither party made any submissions as to whether a Customer could acquire direct rights against a Writer pursuant to Clause 12.3. Even if a Customer did not acquire such direct rights, we conclude that Clause 12.3 gave the Appellant a right to require a Writer to make a payment to a Customer if plagiarism were detected in work produced by that Writer.

40. Clause 13 of the Writer Contract obliged the Writer to respond to requests for amendments to a piece of work that a Customer requested after receipt of that work. The clause acknowledged that Customers might submit requests for amendment some of which might be justified (for example where a Writer had failed to use the referencing style requested or had failed to refer to an essential source) and some of which might be unjustified (for example if the Customer provided new information that should reasonably have been provided at the time the order was placed). While Clause 13.6 required a Writer to amend a piece of work if it was not to the standard requested, a Writer enjoyed a good degree of discretion in relation to other amendments. Very broadly, the Writer was required to consider requests for such amendments and if the Writer decided that the request was unjustified, to give reasons and check the Appellant's internet portal regularly for copies of correspondence on the issue if the Customer remained dissatisfied with the response.

41. Clause 14 of the Writer Contract dealt with intellectual property issues. Clause 14.1 provided as follows:

> 14.1 You agree that the intellectual property rights to the work submitted transfers to All Answers Ltd upon submission.

42. The parties seemed agreed that "submission" for the purposes of Clause 14 meant submission of the work by the Writer to the Appellant (effected by the Writer uploading a document to the Appellant's portal) prior to the work being subjected to the Appellant's quality control process and so prior to the work being submitted to the Customer. The effect of this was that from the point at which a Writer provided a draft of the work to the Appellant, the Writer no longer owned any copyright in that work. It follows that from this point on, a Writer could not grant a Customer any intellectual property rights in that work. Therefore, when the work was sent to a

Customer later in the process (after the Appellant had performed quality control), the only person who could grant the Customer intellectual property rights in the work was the Appellant. We will return to this issue when we consider the intellectual property provisions of the Customer Contract.

The Customer Contract

43. Clauses 1 and 2 of the Customer Contract immediately introduced a degree of confusion as to its overall effect. That clause provided:

> **1 Our Agreement to Act as Agency for You (the "Customer")**
>
> 1. UK Essays acts as an agent for qualified experts to sell original work to their customers.
>
> 2. The Customer appoints UK Essays (the "Agency") to locate an expert (the "Expert") in order to carry out research and/or assessment services (the "Work") to the Customer during the term of the agreement in accordance with these provisions…
>
> 5. In the event that the Customer is not satisfied that the Work meets the quality standard they have ordered, the Customer will have the remedies available to them as set out in this agreement.
>
> 6. The Customer is not permitted to make direct contact with the Expert – the Agency will act as intermediary between the Customer and the Expert.
>
> **2 Term of Appointment**
>
> 1. The agreement between the Customer and the Agency (collectively the "Parties") shall commence once the Agency have both confirmed that a suitable expert is available to undertake the Customer's order ("Order") and have obtained payment from the Customer (the "Commencement Date"
>
> …

44. Thus, the heading of Clause 1 suggests that the Appellant might be acting as agent for the Customer, Clause 1.1 suggests that the Appellant might be acting as agent for the Writers. It is not clear whether Clause 1.2 is indicating that the Appellant is acting as principal, or as the Customer's agent, in helping a Customer to locate a suitable qualified writer. The confusion is increased by Clause 2.1. If, pursuant to Clause 1.2, the Appellant is providing the service of locating an expert, it is not clear how that is consistent with the agreement commencing only once such an expert has been found.

45. Clause 3 of the Writer Contract deals with the allocation of a Writer to a Customer's order as follows:

> **3 Agency Services**
>
> 1. In order to provide research and/or assessment services to fulfil the Customer's Order, the Agency will allocate a suitably qualified Expert

> which it deems to hold appropriate levels of qualification and experience to undertake the Customer's Order.
>
> 2. The Agency undertakes to exercise all reasonable skill and judgement in allocating a suitable expert having regard to the available experts' qualifications, experience and quality record with us and to any available information the Agency has about the Customer's degree or course.

46. It is clear, therefore, that by this clause the Appellant was accepting a degree of personal liability to the Customer. If the Appellant asked a Writer to prepare work for a Customer and negligently failed to appreciate that the Writer was not equal to the task, the Appellant could itself incur liability to that Customer.

47. Clause 4 was headed "Co-operation". It required the Customer to provide the Appellant with clear briefings as to what work was required. It also imposed obligations on the Appellant as follows:

> 2. The Agency will co-operate fully with the Customer and use reasonable care and skill to make the Order provided as successful as is to be expected from a competent research agency. The Customer will help the Agency do this by making available to the Agency all relevant information at the beginning of the transaction and co-operating with the Agency throughout the transaction should the Expert require any further information or guidance …
>
> 3. The Customer acknowledges that failure to provide such information or guidance during the course of the transaction may delay the delivery of their Work and that the Agency will not be held responsible for any loss or damage caused as a result of such delay. In such cases, the 'Completion on Time Guarantee' will not apply.

48. These two clauses therefore indicate that the Appellant is accepting a <u>personal</u> obligation to use reasonable care and skill in delivery of the work. That is emphasised by the fact that the Appellant is to be judged by the standard of a "competent research agency". The clause does not suggest, for example, that the Writer has the sole obligation to deliver the work, or that the Writer's conduct is to be assessed by reference to the standard of a competent academic. It does not even suggest that there is to be <u>any</u> claim against a Writer for a failure to deliver work to an acceptable standard. The only liability mentioned in Clause 4.2, and the only liability limited in Clause 4.3, is that of the Appellant.

49. Clause 6 deals with the time of delivery of work and contains the "completion on time guarantee" referred to in Clause 4.3 as follows:

> **6 Delivery – "Completion on Time Guarantee"**
>
> 1. The Agency agrees to facilitate delivery of all Work before midnight on the due date …
>
> 2. The Agency undertakes that all Work will be completed by the Expert on time or they will refund the Customer's money in full and deliver the work for free….

> 7. The Agency is not liable under this guarantee where any delay is caused by death or illness of the Expert or immediate family.

50. Like Clauses 4.2 and 4.3, this clause suggests that only the Agency is to be liable if work is not delivered on time. If the clause was intended to provide that the Writer was to be liable if work was delivered late, Clause 6.1 would have stated that the Writer would "deliver" work on time. The statement that the Appellant is to "facilitate delivery" indicates that it has responsibility for timely delivery, not the Writer. Similarly, if the Writer was to be liable under the "completion on time guarantee", the Writer would scarcely need to exclude liability for his or her own death (see Clause 4.7). The fact that death of the Writer operated to exclude liability under the "completion on time guarantee" emphasises that this was a promise given by the Appellant.

51. The conclusion that the Appellant, and not the Writer, was to be liable to the Customer for late delivery of the work is reinforced by other provisions of Clause 6. Clause 4.8 required a Customer who had not received work by the due date to contact the Appellant the next working day and clause 4.9 operated to limit the liability of the Appellant (with no reference to a liability of the Expert) if the Customer waited longer than this. Moreover, Clause 1.6 of the Customer Contract precluded the Customer from contacting the Writer and so a Customer's only port of call if the work was delivered late was the Appellant.

52. Clause 7 of the Customer Contract contained the "no plagiarism guarantee". It provided, so far as relevant, as follows:

> 7. Plagiarism –"£5,000 No Plagiarism Guarantee"
>
> 1. The £5,000 No Plagiarism Guarantee applies when the Customer detects plagiarism in the Work.
>
> 2. Where the Customer detects plagiarism in the Work, the Expert will pay the Customer the sum of £5,000.

Clause 7.3 provided a definition of "Plagiarism" and Clause 7 then continued:

> 4. Where there is a discrepancy as to whether the Customer's findings constitute Plagiarism or not, the Agency will carefully review the Work and make a decision, having regard to all relevant circumstances and making reference to a qualified expert where they deem it necessary to do so. In such circumstances, the Agency's decision will be final.
>
> …
>
> 9. The Agency agrees that if any expert responsible for a confirmed Plagiarism offence fails to award the £5,000 compensation, that they will provide all reasonable assistance to the Customer including the provision of the Expert's contract with the Agency, and the Expert's name and address, for the Customer to bring a remedial action directly. The Agency is not responsible for reimbursing the Customer with the £5,000 compensation. However, if the plagiarism bond becomes payable and the Agency holds sums that are due to the Expert, the

> Agency undertakes to retain those funds until the Expert has paid the plagiarism bond or, if this is not forthcoming, to release those funds (up to the value of the plagiarism bond) to the Customer after a reasonable period of time and on reasonable notice to the Expert. If the Agency is subsequently involved in litigation as a result of holding these funds, it reserves the right to pay these into Court.

53. This clause differs from Clauses 4 and 6. It is expressly stated that the Customer's remedies, in the event of plagiarism are solely against the Writer. HMRC submit that because Clause 19.14 prevented non-parties to the Customer Contract from obtaining any rights to enforce its provisions under the Contracts (Rights of Third Parties) Act 1999, Clause 7 could not fix the Writer, who was not a party to the contract, with liability in cases of plagiarism. We do not accept that submission. On any view, the Customer was party to the Customer Contract and therefore Clause 19.14 could not limit the Customer's right to enforce Clause 7.

54. HMRC also submitted that, since the Writer was not party to the Customer Contract, under the general principle of privity of contract, Clause 7 could not make the Writer directly liable to the Customer. However, while we have noted that Clause 1, read in isolation was somewhat unclear, when Clause 1 and Clause 7 are read together, we consider that the effect was that the Appellant gave the "no plagiarism guarantee" in Clause 7 as agent for the Writer so as to establish privity of contract between the Writer and the Customer. That is not the conclusion we have reached in relation to Clauses 4 and 6 for reasons that we have given. However, there are material differences between Clauses 4 and 6 on one hand and Clause 7 on the other. In particular, Clause 7 states expressly that the Writer is to be liable for the "no plagiarism guarantee" and that the Appellant will not be liable.

55. The fact that a Customer would not know, in almost every case, the identity of the Writer preparing the work does not prevent the Appellant from giving promises, as agent, that establish privity of contract with that Writer. Clause 1 of the Customer Contract indicated that the Appellant was, at least in some respects, giving promises as agent for a Writer, and it is well established that where it is disclosed that an agent is acting on behalf of a principal, promises can be binding on that principal even where the identity of the principal is not disclosed.

56. Clause 9 dealt with amendments to work in process. It permitted a Customer to provide additional information about an order shortly after full payment or a deposit is taken, but did not permit wholesale amendments to an order after this point. Clause 9.3 provided:

> 3. If the Customer provides additional information after full payment or a deposit has been taken and this does substantially conflict with the details contained in the original Order specification, the Agency may at their discretion either obtain a quote for the changed specification or reallocate the Order, as soon as reasonable, to a different expert without consulting the Customer. The Customer understands that this may result in a delay in the delivery of their Work for which the Agency will not be held responsible. Under these circumstances, the 'Completion on Time' Guarantee will not be payable.

57. HMRC submits that this clause made the Writer "entirely replaceable". In our judgment, that submission somewhat overstates matters. However, we regard this clause as consistent with the conclusion we have drawn from Clause 4 and Clause 6 that the Appellant, and only the Appellant, was liable for delivery of a timely suitable work product since a change in the specification of an order is expressed to trigger rights exercisable by the Appellant and a modification to the Appellant's liability.

58. Clause 10 dealt with the procedure for amendments to work once delivered. It provides for the Customer to have the right to request amendments and for the Writer to decide whether to make the amendments or not. Clause 10.3 provided for the Appellant to make a final determination if the Writer and Appellant could not agree on whether amendments should be made.

59. Clause 16 dealt with copyright. Clause 16.1 provided that a Customer would not obtain copyright in the work supplied. Clause 16.2 required a Customer to treat work supplied in a manner consistent with the Customer having no copyright and, in particular, precluded a Customer from passing off the work as their own.

60. However, although Clause 16 did not say so expressly, it is clear that the Customer Contract resulted in a Customer obtaining some licence to use the work supplied – as we have seen, the Customer did not obtain the full copyright in the work. At the very least, a Customer was entitled to read the work, for example. Given what we have said at paragraph [42] above, only the Appellant was able to grant the Customer that licence, however, limited. The Writer could not do so since, by the time the work was provided to the Customer, the Writer had already assigned the copyright in the Work to the Appellant. Moreover, what was provided by the Appellant to the Customer was different in nature (i.e. some form of limited licence to use the work) from what was provided by the Writer to the Appellant (i.e. the entire copyright in the work). We agree with HMRC that these factors strongly point in favour of the conclusion that the obligation to deliver the work rested solely on the Appellant and that the supply of the work was made by the Appellant to the Customer rather than by the Writer through the agency of the Appellant.

61. Clause 17 set out the "level requested guarantee". Clause 17.1 provided that:

> 1. If the final product does not meet the ordered grade, we guarantee a refund of the order price in full.

Significantly, there was no suggestion that the refund would be made by the Writer. The rest of Clause 17 set out a procedure consistent with the "delivery on time guarantee". The Customer had a limited period in which to notify the Appellant of a claim that the work was not to the requisite standard and no right, or practical ability, to make that claim against the Expert.

Conclusion on the effect of the contracts

62. Our conclusions on the effect of the Writer Contract and the Customer Contract are as follows:

(1) By the Writer Contract, a Writer gave the Appellant authority to enter into contracts as agent on behalf of the Writer.

(2) However, in the Customer Contract, the "core" obligations, to deliver the academic work, to the requisite standard and by the applicable deadline, were obligations that were binding on the Appellant only.

(3) The "no plagiarism guarantee" was an exception. By Clause 7 of the Customer Contract, the Appellant agreed, as agent for the Writer, that if plagiarism was detected in the work provided, the Writer would pay the Customer £5,000. That obligation was binding on the Writer and not on the Appellant.

(4) Pursuant to the Writer Contract, a Writer transferred the entire copyright in the relevant academic work to the Appellant. Having divested itself of that copyright, a Writer would be incapable of providing any licence to use that work to a Student, or indeed to anyone else.

(5) Pursuant to the Customer Contract, the Appellant provided the Customer with only a limited right to use the work. That was different from the interest the Appellant obtained under the Writer Contract, namely the whole copyright in the work.

63. In urging us to a different conclusion, Mr Brown relied on the case of *Music and Video Exchange Limited* v HMRC [1992] STC 220. In that case, the taxpayer company sold second hand musical instruments that were originally owned by members of the public who were not registered for VAT. If it had simply bought those instruments from the individual sellers and sold them for a margin, the taxpayer would have been liable to account for output tax on the full purchase price received but, having purchased them from private sellers, would not obtain any input tax credit. Therefore, the taxpayer adopted a business model under which it would first provide the owner of the instrument with a "valuation" of the musical instrument. If the owner was content with that valuation, the taxpayer and the owner would enter into an agreement under which the taxpayer agreed to accept the instrument for sale on the owner's behalf, acting as the owner's agent. Under that agreement, the taxpayer was entitled to a fee equal to the difference between the "valuation provided" and the price at which the instrument was eventually sold. The revenue authorities challenged this arrangement. They argued that, in substance, the taxpayer company was purchasing the instruments for a price equal to the "valuation" that they provided and reselling as principal and that the "fee" was, in reality, the profit made on resale.

64. It is clear from the report of the decision that much of the argument centred on whether particular aspects of the arrangement were consistent, or inconsistent, with the taxpayer selling the instruments as the original owner's agent. Accordingly, understandably, in his oral submissions Mr Brown pointed to features of the Appellant's arrangement that were also present in *Music and Video Exchange Limited* and argued that those features pointed in favour of the conclusion that the Appellant was acting as agent for a Writer. So, for example, Mr Brown pointed out in his oral submissions that the owner of the instrument in *Music and Video Exchange Limited* was not aware of the price at which the instrument was ultimately sold, just as the

Writer was not formally notified of the price a Customer paid for the work that Writer produced. He also noted that in *Music and Video Exchange Limited*, the taxpayer would occasionally effect repairs to instruments before selling them even though the original owner granted no express right for it to do so with the result that the instrument as sold by the taxpayer was somewhat different from the instrument that the owner originally presented to it. That, he submitted, was analogous to the fact that the Appellant in this case acquires copyright to the work from the Writer, but the Customer does not do so and so should not point against a conclusion that the Appellant sold academic work as agent for the Writer.

65. However, the task of ascertaining the meaning and effect of the relevant contracts between the parties does not involve a process of reasoning by analogy with conclusions that have been expressed on different contracts. In this case, by contrast with *Music and Video Exchange Limited*, there were reasonably full, if not always entirely clear, contracts set out in writing and we are not, therefore, seeking to infer the meaning of contractual provisions from the conduct of the parties. For the reasons we have given, a close reading of those written contractual terms leads, in our judgment, to the conclusion that the "core" obligations, of delivering a product, in the appropriate timescale, to the requisite standard were imposed on the Appellant, and not on the Writer. Therefore, while we accept the Appellant's general point that there were some similarities between its case and that of *Music and Video Exchange Limited*, that is not of great assistance in determining the meaning and effect of the contractual provisions at issue in this appeal.

66. We would make a similar point in respect of the Appellant's reliance on the decision of the Supreme Court in *Secret Hotels 2 Limited v HMRC* [2014] UKSC 16. That case concerned a question of whether a tour operator was acting solely as an "intermediary" for the purposes of Article 306 of the Sixth VAT Directive. The Supreme Court held (see paragraph [27] of the judgment) that in most cases an "intermediary" for these purposes would be the equivalent of an agent in English law and so proceeded to analyse the arrangements under which the tour operator made rooms available to its clients by considering whether it offered those rooms as principal or as agent for the hoteliers. Mr Brown pointed out that, in *Secret Hotels 2*, the Supreme Court concluded that the fact that the tour operator incurred expenses that would benefit customers staying in the hotels (for example the costs of employing local agents to deal with problems arising) was not inconsistent with the tour operator acting as agent. The Supreme Court reasoned that the tour operator incurred the expenses in order to protect its own goodwill and Mr Brown urged us to reach a similar conclusion in relation to certain of the provisions of the contracts at issue in this appeal. However, ultimately, we derived little assistance from a consideration of features of the (different) contracts in *Secret Hotels 2*. Indeed, it seems to us that in *Secret Hotels 2*, the contractual terms made it abundantly clear, not only that the tour operator was acting as agent for the hotelier, but also that all liability for performance of the contract lay with the hotelier and not the tour operator. At [42] of the Supreme Court's decision, for example, it is noted that the contract between the tour operator and the consumer contained the following provision:

> the [tour operator] provides information concerning the price and availability of hotels [and]…any reservations you make on this site will be directly with the company whose hotel services you are booking.

The Customer Contract in this appeal contained no provision setting out the position as unambiguously as this.

67. In a similar vein, we derived relatively little assistance from the parties' references to the contracts and facts of *Adecco and others v HMRC* [2018] EWCA Civ 1794. HMRC submitted that the Writers were in a similar position to the "non-employed temps" whose position was considered in that case. By contrast, the Appellant argued that their situation was analogous to that of "contract workers" described in paragraph 5(3) of the judgment of Newey LJ in *Adecco*. However those submissions shed relatively little light on the effect of the contracts at issue in this appeal.

68. Finally, we deal with an argument that the FTT considered the Appellant to be making on the effect of the contracts, even though we are not convinced that formed part of the Appellant's arguments before us. At [47(4)] of the Decision, the FTT said:

> When we invited Mr Brown to identify the terms of the contract said to come into existence between the client and the writer, facilitated by the appellant agent, he was initially unable to do so. With a little assistance from us, his position became that a contract was to be implied between the client and the writer notwithstanding that he was unable to identify the terms to be found within this implied contract - save to the basic extent that this implied contract would be for the writer to provide the requested piece of written work, to the requested standard, within the required time frame, for an unspecified consideration. He also contended that because each set of Terms and Conditions referred to the £5000 plagiarism guarantee, that guarantee was to be carried forward into this implied contract. The submission overlooked the fact that a guarantee is not binding unless section 4 of the Statute of Frauds 1677 is satisfied.

69. However, before us, we did not understand the Appellant to be arguing that there was a separate contract, consisting purely of implied terms, between the Writer and the Customer. Rather, as we understood the argument, the Appellant's case was that certain of the provisions of the Customer Contract, whose terms were express and reduced to writing, were entered into by the Appellant as agent for the Writer and so became binding on the Writer, and not on the Appellant. We would agree with the FTT that no separate contract, consisting entirely of implied terms, came, into existence between a Writer (through the agency of the Appellant) and a Customer not least because it was not explained to us the offer and acceptance that could lead to such a contract or indeed what the terms of such a contract would be.

Economic and commercial reality

70. As we have noted, the FTT did not perform a detailed analysis of the contracts because it considered that they were a "smokescreen" (see [46]) that had been

"fashioned quite deliberately" to deflect attention from the true nature of the services that the Appellant was providing (see [11]). Rather, the FTT's analysis was based largely on its conclusions as to the economic reality of the situation.

71. We respectfully consider that this was not the correct approach. Given the guidance of the CJEU in *Newey,* whatever its reservations about the contracts, the FTT should have first decided what their meaning and effect was. Having done so, it should have considered whether the meaning and effect of the contracts reflected economic and commercial reality, duly noting the CJEU's observation in *Newey* that the contractual position normally does reflect economic and commercial reality.

72. It follows, therefore, that a number of the FTT's statements as to "economic and commercial reality" lacked a sound foundation as they were insufficiently rooted in the actual terms of the contract. For example, there was force in Mr Brown's criticism of the following passages of the Decision:

> (1) The FTT's view as to commercial and economic reality was clearly based, at least in part, on its conclusion that the Appellant's business (at [30]) "thrives upon providing essays, dissertations and coursework to cheats". But whether or not that statement was correct (as to which we express no view), the relevant question was what supplies the Appellant was making in its business and to whom. That question fell to be determined by reference to the contracts under which the Appellant operated as considered in the light of economic and commercial reality and not by reference to a high level analysis of whether the FTT regarded the Appellant's business as ethical or not.
>
> (2) At [14], the FTT concluded that the Customer Contract was "misleading" insofar as it described the Appellant as being obliged to locate an expert to provide "research and assessment services" since that was not the intention of the Customer in requesting the work, or of the Appellant in placing it with the Writer. However, the question was not one of subjective "intention", but rather of the effect of the arrangements viewed in a manner consistent with economic and commercial reality.
>
> (3) At [47(1)], the FTT stated that it was significant to its assessment of economic reality that Customers "would not care" whether the Writer was acting as agent or not, since their only interest was in obtaining the required piece of work. The FTT made a similar observation at [34] when it noted that the Appellant's contracts were offered on a "take it or leave it" basis. However, as Mr Brown observed in his oral submissions, contracts are routinely not negotiated line by line and many contracts involve one party simply accepting the other's standard terms. The question is not how the contract was concluded, or whether one party "cared" about its terms or not. Rather, the question was as to the effect of the contracts refracted through the prism of economic reality.

73. In our judgment, the contracts governing the provision of work to a Customer were consistent with commercial and economic reality. As we have found, those contracts imposed the "core" obligations to provide the work, on time and to a

requisite standard on the Appellant alone. That was consistent with the fact that the Customer ordered the work from the Appellant, paid the Appellant for it, and, unless the "no plagiarism guarantee" was called, could only address concerns about the quality of the work or its timeliness to the Appellant. Furthermore, we could see nothing uncommercial or artificial in the fact that the Appellant retained the copyright in the work which it had acquired from the Writer and only supplied the Customer with a more limited right to use the work.

74. We therefore, respectfully, do not share the FTT's conclusion that the Appellant's contracts were "artificial", a "smokescreen" or inconsistent with economic and commercial reality. Rather, in our judgment, the conclusion that the contracts imposed the "core" obligations on the Appellant, and not on a Writer, was entirely consistent with commercial and economic reality.

Conclusion and disposition

75. Having considered the effect of the contracts and the question of commercial and economic reality, we can now answer the central question raised by this appeal, namely whether the supply of academic work is made by the Appellant, or by a Writer.

76. As we have concluded, there is a legal relationship between the Appellant and a Customer under which the Appellant, and only the Appellant, assumes liability for the obligation to provide a limited right to use the academic work of suitable quality within the stipulated timescale. In return for the Appellant assuming such liability, a Customer pays the Appellant a sum of money. Moreover, the terms of that legal relationship are consistent with commercial and economic reality. In our judgment, applying the principle set out in *Tolsma*, the supply of the academic work is made by the Appellant to a Customer. It follows that, when the Appellant pays over the Writer's share of that fee (£80 in the example set out at the start of this decision), the Appellant is paying consideration to the Writer for a separate supply made by the Writer to the Appellant, consisting of the service of preparing that academic work.

77. The fact that a Writer, and not the Appellant, could be directly liable to a Customer under the "no plagiarism guarantee" does not alter that conclusion. The effect of that guarantee was to provide an assurance to a Customer that the work provided was original. It was not expected to be called and indeed, in his witness evidence on behalf of the Appellant, Mr David Spencer, who had worked for the Appellant for some 8 years by the time he gave his witness statement, was only able to recall a single occasion on which a Customer had even attempted to invoke the guarantee. Therefore, the fact that the Writer would be liable in the unlikely event that the "no plagiarism guarantee" was called does not alter the fact that it is the Appellant, and only the Appellant, who makes the supply of the academic work.

78. The Appellant argues that the conclusion set out at paragraph [77] above is inconsistent with Parliament having chosen to enact s47(3) of the Value Added Tax Act 1994. That section provides that:

> Where services other than electronically supplied services and telecommunications services, are supplied through an agent who acts in his own name, the Commissioners may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent[5].

79. The Appellant's argument was that s47(3) would be redundant if supplies made by agents acting in their own name were necessarily to be treated as supplies made by those agents rather than of the principal. We do not, however, accept that submission. We have concluded, in the circumstances of this case, that although Writers did constitute the Appellant as their agent, the supply of the limited interest in the academic work was made by the Appellant, and not by Writers. If either the terms of the contracts, or considerations of economic reality, had been different we might have reached a different conclusion, to the effect that the supply was by the Writers. Had we done so, s47(3) would have permitted HMRC to treat the transactions as involving a supply to the Appellant followed by a supply by the Appellant. Our conclusion, therefore, does not render s47(3) redundant. It simply means that s47(3) is of no practical effect in the circumstances of this appeal given that we have concluded that, independently of s47(3), there is in any event a supply both by, and to, the Appellant.

80. As we have noted, there were some flaws in the way the FTT approached the question of who made the supply. However, its overall conclusion at [46], that the work was supplied by the Appellant, and not by the Writers, was correct.

81. The appeal is dismissed.

JUDGE JONATHAN RICHARDS

JUDGE GUY BRANNAN

RELEASE DATE: 30 JULY 2020

[5] We understand that, in practice, HMRC do not exercise the power conferred by s47(3) as they see fit, but rather typically treat supplies falling within s47(3) in the manner requested by the agent.