



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Case No: 4113691/2021 Heard at
Edinburgh on the 21st November 2022

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Employment Judge J G d'Inverno

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Mrs L Mason

Claimant
In Person

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Carnegie Cars Ltd

Respondent
Represented by:
Mr J Boyle - Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is:-

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(First) That the claimant was an employee of the respondent, in terms of
section 230(1) and (2) of the Employment Rights Act 1996 ("ERA") and
section 83(2) of the Equality Act 2010 at the material times for the purposes
of her respective complaints, that is in the period from an indeterminate date
in 2009 up to and including the Effective Date of Termination of her
employment on 29th of September 2021 .

(Second) The Employment Tribunal has Jurisdiction to consider the claimant's complaints of Unfair Dismissal and claims in respect of notice pay; holiday pay, arrears of pay, together with her complaints of discrimination because of the protected characteristic of sex.

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(Third) The case is appointed to a Final Hearing, of 3 days duration, at which the claimant will lead, the same to proceed at Edinburgh in conventional "In Person" form, before a full Tribunal chaired by any Employment Judge; and commencing at 10 am on dates to be afterwards fixed, by date listing stencil; and Directs that date listing stencils for the 10 3 month listing window February/March/April 2023 be issued to parties/their representatives, in that regard, forthwith.

(Fourth) Orders parties to liaise regarding the exchange of and to exchange 15 documents, and Orders the respondent's representative to compile, intimate and lodge with the Tribunal in paper form, a Joint Bundle of Documents to be referred to at the Final Hearing, together with sufficient copies for the Tribunal's use, in accordance with the following timetable:-

20 (a) Not later than 42 days prior to the commencement of the Final Hearing ("Hearing") the respondent's representative to send to the claimant a list of the documents which he proposes including in the bundle on the respondent's behalf;

25 (b) Not less than 28 days prior to the Hearing, the claimant to send to the respondent's representative, such additional documents as the claimant wishes included in the bundle;

30 (c) Not less than 14 days prior to the Hearing, the Joint Bundle, in its then anticipated final form, to be in the possession of both parties for Hearing preparation purposes;

- (d) Not less than 3 clear working days prior to the Hearing, the Tribunal copy bundles to be lodged.

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A **Employment Judge: J d'Inverno**
Date of Judgment: 02 December 2022
Entered in register: 12 December 2022
and copied to parties

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I confirm that this is my Judgment in the case of Mason v Carnegie Cars Ltd and that I have signed the Judgment by electronic signature.

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Reasons

1. This case called for "In Person" Open Preliminary Hearing at Edinburgh on 21st November 2022, for determination of the Preliminary Issue of the claimant's asserted "Employment Status" both for the purposes of her complaint of Unfair Dismissal and other claims arising out of the termination of her asserted employment, (ERA section 230(1) and (2)) and, in respect of her complaints of Discrimination because of the protected characteristic of sex (EqA 2010 section 83(2)).
2. The claimant appeared in person supported by a friend. The Respondent Company was represented by Mr J Boyle, Solicitor instructed by Mr J Astles, its Managing Director.

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Oral Evidence

3. The Tribunal heard oral evidence on oath or on affirmation as follows:-

5 (a) The claimant gave evidence on her own behalf

For the respondent the Tribunal heard evidence from

1.0 (b) Mr J Astles, Managing Director and respondent's instructing principal, who elected not to be present during the claimant's evidence

i5 (c) Mr J Gow, Chartered Accountant whose firm provided accounting services to the respondent's business including the drawing up and processing of payroll information and those liaison and communication with Her Majesty's Revenue and Customs on the Respondent Company's behalf.

Documentary Evidence

20 4. Parties lodged a Joint Bundle of Documents, comprising some 195 pages, to some of which reference was made in the course of Hearing and submission.

Placing Parties on an Equal Footing

25 5. In implement of the above and in furtherance of paragraph (Seventh) of the Tribunal's Orders of 14th April 2022, the respondent's representative had sent to the claimant, in advance of the Open Preliminary Hearing, a written skeleton of the contentions to be advanced on the respondent's behalf at the Hearing.

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Findings in Fact

- 5 6. On the documentary and oral evidence presented the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the Preliminary Issue of Employment Status.
- 10 7. From in or around 2009 the claimant and the respondent's Director Mr Astles were in a personal relationship which ultimately led to their cohabiting. That personal relationship subsisted until on or about the 26th of December 2020 at which point the personal relationship between the parties came to an end.
- 15 8. In the course of 2009 the respondent's Director Mr Astles set up the Respondent business together with a former work colleague as business partners. After a short period of joint operation, Mr Astles' colleague wished to set up his own business and accordingly Mr Astles bought out the interest of his business partner in the venture.
- 20 9. At or about the same time the claimant wished to give up her full time employment with a third party and join the respondent's Mr Astles in the respondent's business.
10. The respondent's business is that of trading in motor vehicles and in particular, second hand motor vehicles.
- 25 11. The claimant had no particular experience of such business. The respondent's Director did not have a particular need for an employee without relevant skills at that time. In consideration of the personal relationship in which he was with the claimant he, nevertheless, wished to accommodate her as an employee in the business in order to provide her with some protection going forward and pension provision through the vehicle of PAYE
30 tax and National Insurance contributions.

12. The respondent's Director had separately received advice from the respondent's accountant, Mr Gow, that it would be both tax efficient from the point of view of maximising the use of personal allowances, and entirely legitimate and common in "a business operated by family unit", such as the respondent's business now was, for his personal partner i.e. the claimant, to be "taken on the books" as an employee of the Company.
13. The claimant for her part wished to become an employee of the Company.
14. In consequence, in or around December of 2009, the claimant and the respondent (the latter through the agency of its Director Mr J Astles), entered into an express Contract of Employment in terms of which the claimant undertook to and,
- (a) in consideration of a wage paid to her on a monthly basis
 - (b) provided her own work and skill in the performance of services; in respect of which it was also expressly agreed
 - (c) that in the performance of that service the claimant would be subject to the control of the respondent's Director; and,
 - (d) where the other provisions of the Contract were consistent, (in the sense of not being incompatible with) a Contract of Service.
15. As the defendant's business was still in the process of being established, the express agreement made as to remuneration between the parties, at the time of their entering into the Contract, was that the respondent's Director, who was also an employee of the Company, and the claimant, would share between them on an ongoing basis the sums of money, after deduction of the business; running expenses and other necessary provisions, which were available to be paid to employees as wages; and further expressly agreed that the claimant's share of that available sum would be a lump sum amount

of £800 to be paid per month, at which amount it was to remain fixed until expressly varied by the respondent's Director.

- 5 16. The respondent's Director gave express consent to the claimant undertaking concurrent paid employment with a third party, (cleaning and housekeeping) for a period of up to 2 days per week and the claimant did so, with the respondent's knowledge and consent, throughout the period of her employment with the respondent.
- 10 17. The claimant also pursued the practice of buying and selling on, items of furniture and personal possessions for her own profit and that of the household in which she lived together with the respondent's Director. She did not do so in the capacity of a registered business venture. She had done so before commencing employment with the respondent and continued to do so with the full knowledge and consent of the respondent's Director, throughout the course of her employment with the respondent.
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18. The respondent's Director did not consider the contribution which the claimant was in a position to make to the business to be essential to its success. He was content for his part to give and gave the claimant the task of performing such general duties as she was from time to time required by him to undertake, including for example occasional washing of cars, driving him and on occasion other employees to car auctions in order that he might uplift vehicles which the respondent's business had purchased, the ordering of some file invoices, the dealing with customer enquiries both at the telephone and in the business premises when the claimant was present.
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19. Because of the personal regard in which he held the claimant the respondent's Director gave her general authority to discharge such tasks and functions as she was requested to undertake, at times which best suited her including attending at the business premises at times which best suited her.
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20. The claimant for her part, while pleased to have been permitted such a flexible approach to the discharge of her duties, understood that it was from the respondent's Director that she required to take direction, and instruction and obtain authority in the performance of her duties and, with the exception of the expressly agreed third party employment, considered herself to be under an obligation to attend at the business premises as and when directed to by the respondent's Director, notwithstanding the otherwise flexible approach to the discharge of her duties which he had authorised.
21. Both the respondent's Director and the respondent's Accountant intended the claimant to be an employee of the respondent notwithstanding her undertaking expressly and consented to part time employment with a third party and notwithstanding her continuing, on a personal basis, her carrying on her practice of buying and selling individual items of personal possession.
22. Her doing so with the full knowledge and consent of the respondent was not fundamentally inconsistent with her concurrently being an employee of the respondent.
23. The claimant's remuneration of wages were fixed by way of express agreement. They were not related to the amount of time which the claimant spent working in the business. They were not related to any specific number of hours which the claimant was required to work or to any specific number of hours which the claimant actually worked.
24. The above provisions, although in part different from those most commonly found in a Contract of Service, did not operate to undermine the mutuality of obligation between the parties or to prevent their creating a Contract of Employment which was their clear and unequivocal intention and which they expressly did.
25. There is no requirement to interpret the provisions as being so inconsistent with the creation and existence of the Contract of Employment because the explanation for their presence was clear on the face of the parties' agreement

from the outset, and remained clear until such time as the claimant's employment was terminated; namely that: because of the personal relationship in which the respondent's Director was in with the claimant and the favour and affection which he bore her, he wished, as the controlling mind of the Respondent Company, to extend to her the protections associated with being an employee, and to put in train for through the paying of both employee and employers National Insurance contributions some entitlement to pension provision for the future.

10 26. On the 22nd of December 2015 the claimant was appointed as a Co-Director of the Company.

15 27. The claimant's appointment as a Director on 22nd February 2015 which appointment subsisted until the termination of her employment on 29th September 2021, was wholly consistent with her continuing to be an employee. It did not impact upon, or otherwise vary, and nor did it bring to an end, her pre-existing Contract of Employment with the respondent.

20 28. During the Covid pandemic both parties acted in acknowledgement and continuing affirmation of the Contract of Employment. The respondent for its part furloughed the claimant accessing the emergency funding available to employers only in respect of their employees and, the claimant for her part accepted the furlough arrangement and received and retained payments under the Scheme.

25 29. Following the cessation of the parties personal relationship, on the 26th of December 2020, the respondent's Director Mr Astles was content to continue to see the claimant's employment and directorship with the respondent continue for a further period, considering, in due course, that the 29th of September 2021, the date upon which the furlough scheme was then scheduled to come to an end, was an appropriate time to terminate the claimant's employment and directorship with the Respondent Company.

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30. On the occasions when the claimant did attend the business premises, the respondent was under an obligation to allow her to work and she did so work. It was also the case that the respondent's Director, against the background of having agreed a generally flexible approach to work, was entitled to require the claimant to carry out specific tasks on demand, for example to accompany him or other employees to car auctions to allow them to uplift and drive back purchased vehicles, deal with telephone enquiries, etc and, the claimant for her part considered that she was obliged to and did attend at the premises and carry out tasks in accordance with such instructions as and when received.
31. The claimant was paid a salary in consideration of her personally performing work and services. The salary was expressly agreed between the parties as being set at a fixed amount which was not related to or dependent upon the amount of work or service which she performed in any particular pay period".

The Applicable Law and Parties' Submissions and Discussion

32. The relevant statutory definitions of employee for the purposes of conferring, upon the claimant, Title to Sue in relation to her complaints, and upon the Tribunal, Jurisdiction to consider them, are to be found respectively in:-

(a) section 230 of the Employment Rights Act 1996 ("ERA") and in

(b) section 83(2) of the Equality Act 2010 ("EqA")

33. Those sections are in the following terms:-

"230 Employees, workers etc.

(1) *In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

(2) *In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

5 (3) *In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

(a) *a contract of employment, or*

10 (b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

15 *and any reference to a worker’s contract shall be construed accordingly.*

20 (4) *In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*

(5) *In this Act “employment” —*

25 (a) *in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*

(b) *in relation to a worker, means employment under his contract.*

and “employed” shall be construed accordingly.

30 (6) *This section has effect subject to sections 43K, 47B(3) and 49(B); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, “worker”, “worker’s contract” and, in*

relation to a worker, “employer”, “employment” and “employed” have the extended meaning given by section 43K.
(7) This section has effect subject to section 75K(3) and (5).

5 **83 Interpretation and exceptions**

(2) “Employment” means-

- 10 fa) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
- (b) Crown employment;
- 15 (c) employment as a relevant member of the House of Commons staff;
- (d) employment as a relevant member of the House of Lords staff.”

20 34. To quote the EAT in *Bradley Ramford v Dorset Aquatics Ltd*: EA-2020-000123-BA to which the respondent’s representative referred the Tribunal, :-

“17 Other relevant provisions of law we draw from the authorities are these:

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(1) The primary underlying question in all these cases is one of statutory, rather than contractual, interpretation; the relevant statutory purpose of the Employment Rights Act 1996 and other employment legislation is the protection of workers who are vulnerable because they are in a relationship of subordination and dependence towards their employer; and a “touchstone” of subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by

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the individual concerned (see: Uber per Lord Leggatt JSC at paras [69], [71] and [87]);

5 (2) *It is open to an Employment Tribunal to take account of the "subjective" views of the parties as to their obligations and status in ascertaining the terms of any agreement between the parties (see Carmichael per Lord Hoffman at page 123(4)D-H.]*

10 (3) *A genuine right of substitution is inconsistent with an obligation to perform personal services; if there is such a right it does not matter if it is used in fact [see: Autoclenz per Lord Clarke JSC at para [19]].*

15 (4) *The payment of "salary" with payslips and PAYE National Insurance deductions is a relevant factor which would point towards employment but which is by no means decisive in itself; and it may be of little significance if, in a case like this, it is organised entirely by a company accountant for tax reasons without any particular awareness of the part of*
20 *the putative employee and covers only a small part of the total payments to a shareholder or Director (see: Dugdale at paras [23] and [47]). "*

25 35. In relation to section 230 of the Employment Rights Act 1996, the respondent's representative submitted that the instant case was one of "a// or nothing" that is to say, that the claimant was either an employee or she was a self-employed contractor. He did not contend, in the alternative, let it be assumed that the claimant was not an employee, that she was a worker in
30 terms of section 230.

36. The relevant definition contained in section 83(2) of the Equality Act 2010 covers both "employee" and "worker" within the meaning of ERA 230(1) - (3).

37. In submission, and under reference to the well known cases of Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] 2QB497, Carmichael v National Power [1999] ICR 1226 and Bradley Rainford v Dorset Aquatics Ltd: EA-2020-000123-BA, the respondent's representative invited the Tribunal to find, on the evidence, that the claimant was neither an employee, nor a worker, for the purposes of the unfair dismissal and or discrimination claims by reason of:-

(a) The absence of a written contract (Bradley v Dorset)

(b) No mutuality of obligation upon which a contract could be implied (for either employee or worker status)

(c) The claimant was an office holder (Director) at least for part of the period

(d) That the claimant was paid a salary, as was Mr Astles, in the same sum on the advice of an accountant, that should be regarded as a matter of little significance in line with paragraph 17(4) of Bradley v Dorset

(e) That the salary was not paid in consideration of the claimant personally performing any work or service

(f) There was no evidence of control exercised over the claimant and no mutuality of obligation

(g) The claimant says she was "available from 9 to 5 Monday to Sunday". But on the evidence, he invited the Tribunal to hold that there was no requirement for her to be available at these times nor was there any obligation for the respondent to give her work at these times.

38. The claimant, for her part, submitted that she was and had always been an employee both prior to and after her appointment as a Director on 22nd December 2015 and that that was what she and the respondent's Director had discussed and had agreed expressly all in accordance with the advice received from the Company's accountants.

Discussion

39. As stated above, it is against the statutory definitions of employee that the evidence adduced in any individual case, and the Findings in Fact made upon it, fall to be respectively assessed and applied.

40. The case of Ready Mixed Concrete articulates what have come to be described as the irreducible minimum that is the presence of 3 factors, absent which a Contract of Employment i.e. a "Contract of Service" cannot exist, i found on the evidence that these are present in the instant case.

41. Otherwise, the helpful guidance contained in that case and the other authorities reviewed in Bradley Rainford, is guidance developed to assist courts in the task of implying, or as the case may be not implying, the existence of a Contract for Service where no such Contract can be seen to have been expressly constituted between the parties.

42. The above, however, is not the case presented in evidence at Open Preliminary Hearing. The Tribunal heard oral evidence on oath or affirmation from the two principal parties to the "Contract" that is to say from the claimant and from the respondent's Director, and also from the Respondent Company's accountant. The evidence of all 3 witnesses concurred to the effect that when the claimant was "taken on the books" it was done with the express intention of and with the express effect, as far as all 3 were concerned, of creating a legal relationship of employer and employee between the Respondent Company, on the one hand, and the claimant, on the other. That that was the subjective intention of the parties is a matter which I have found in fact established. I have further found that thereafter the

parties each acted, as did their professional adviser, in relation to the contractual relationship, in a manner wholly consistent with it being an established and subsisting relationship of employer and employee,

5 43. it is true that parties did not reduce their Contract in writing, but there is no requirement in law that a Contract of Employment be constituted in writing. While in circumstances were there to be a dispute between the parties as to what was agreed in relation to some material condition, the absence of a written Contract would be a matter of considerable importance. In
10 circumstances such as in the instant case, where the oral evidence of parties is clear and unequivocal, I find no difficulty in concluding that, in taking the claimant 'on to the books" parties intended to and expressly sought to create a Contract of Employment.

15 44. Parties, of course, may subjectively intend to create a Contract of Employment and indeed genuinely believe that they have done so, while, nevertheless, failing in law to achieve that effect in law.

20 45. At the end of the day, that was the essence of the submission advanced by the respondent's representative, who invited the Tribunal to find that all, some or at least one of the three elements which constitute the irreducible minimum content were/was absent.

25 46. In relation to the first necessary element, (personal service), he submitted that the claimant, while admittedly paid a wage was not, on the evidence, to be seen to be paid it in consideration of providing her own work and skill in the performance of any service.

30 47. In relation to the second element (control), he invited the Tribunal to conclude that what had been agreed between the parties in that regard was too general and too lacking in specification to subject the claimant to control of a sufficient degree to make the respondent her "master" for the purposes of a Contract of Employment.

48. In relation to the third element (other provisions consistent or not consistent with the presence of a Contract of Service), the respondent's representative pointed to the fact that the claimant had during almost the entirety of her period of asserted employment also carried out paid work of a housekeeping and cleaning type for a third party for between one and two days per week and had, further, also carried on for personal gain, her practice of buying and selling items of furniture, personal clothing etc on eBay.
49. While recognising that these submissions were all relevant and at first instance, of some force, I ultimately rejected them, being satisfied on the evidence presented and the Findings in Fact which I have made,
- (a) That the wage paid to the claimant was in consideration of her own work and skill in the performance of some services. There was no suggestion that she had any right of substitution.
 - (b) That the express agreement between the parties was such as to subject the claimant to a sufficient degree of control by the respondent. The fact that in general terms and subject to him giving specific direction from time to time as to the carrying out of particular tasks, the respondent's Director allowed the claimant a wholly flexible approach to the performance of her duties did not in my consideration, and in the particular circumstances of the existing personal relationship result in an absence of a sufficient degree of control for the purposes of there existing a Contract of Employment.
 - (c) In relation to the other provisions of the Contract, on the evidence presented, including the oral evidence of the parties which I accepted as both credible and reliable, these provisions, although in part not of a type which one would generally expect to see in a Contract of Employment, were expressly agreed between the parties with the intention, notwithstanding those

terms, of creating the legal relationship of employer and employee.

5 (d) That were these terms and provisions to be encountered in isolation, that is to say without any explanation, there would be force in the argument that to a significant extent they might be seen as pointing away from the existence of a Contract of Employment.

10 (e) That there is no need, however, to construe them in that way for, on the evidence presented, their presence is susceptible of another explanation.

15 50. Were it necessary to imply such conditions into a Contract of Employment, particularly those in relation to the large degree of flexibility allowed in relation to the performance of duties and attendance times and the fixed level of wages wholly unrelated to the number of hours worked; it may be said that they would struggle to pass the "business efficacy test", that is to say, that each of the parties would wish them to be included for their protection. There is, however, no need to undertake such an exercise here. The same because firstly, in the instant case they are terms which were expressly agreed between the parties; and, secondly, their presence, notwithstanding the business efficacy point, is explained entirely by the personal relationship then subsisting between the principal parties and the desire on the part of the respondent's Director to afford and accord to the claimant expressly the
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25 protections associated with the status of employee.

30 51. Although at the time of so doing neither party could have had in contemplation the impact of the Covid pandemic, those protections were ultimately to include access to the Government funded Furlough Scheme which both parties accessed to their mutual benefit and did so wholly on the basis, and in affirmation, of the subsisting existence between them of a valid Contract of Employment.

52. I hold, in the particular circumstances of this case, on the evidence presented and on the Findings in Fact which I have made, on the balance of probabilities, the claimant was an employee of the respondent at the material times for the purposes of her complaints. I further hold that the claimant has
5 Title to Present her complaints both in relation to unfair dismissal and sex discrimination, and the Tribunal jurisdiction to consider their merits, subject to the reserved challenge as to jurisdiction by reason of alleged time bar.

53. I accordingly remit the case to a Final Hearing at which the claimant will lead
10 and to which there is reserved for determination the Preliminary Issue of Jurisdiction by reason of asserted Time Bar, in terms of paragraphs (Third) and (Fourth).

54. Parties should note that it does not follow from the Finding made by the Tribunal as to, Employment Status, that the claimant's complaints will succeed, on their merits.

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Employment Judge: J d'Inverno
Date of Judgment: 02 December 2022
Entered in register: 12 December 2022
25 **and copied to parties**

I confirm that this is my Judgment in the case of Mason v Carnegie Cars Ltd
30 and that I have signed the Judgment by electronic signature.