UT Neutral citation number: **[2025] UKUT 00094 (TCC)**

UT (Tax & Chancery) Case Number: UT-2024-000044

Upper Tribunal

(Tax and Chancery Chamber)

Hearing venue: The Rolls Building

London EC4A 1NL

Heard on: 23 January 2025

Judgment date: 17 March 2025

INCOME TAX – NATIONAL INSURANCE CONTRIBUTIONS – Intermediaries legislation, IR35 - whether FTT erred in finding that under the hypothetical contracts, Mr Thompson would be regarded for income tax and national insurance purposes as an employee of Sky UK Limited: see s. 49(1)(c)(i) ITEPA 2003 and Regulation 6 of the (Intermediaries) Regulations 2000- appeal dismissed

Before

JUDGE RUPERT JONES

JUDGE PHYLLIS RAMSHAW

Between

PD & MJ LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth KC instructed by Roy Baldwin Tax

For the Respondents: Mr Christoper Stone KC and Ms Georgina Hirsch, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. PD & MJ Ltd ("the Appellant") appeals against the decision ("the Decision") of the First-tier Tribunal ("FTT") dated 11 December 2023 dismissing its appeal. The FTT confirmed HMRC's decisions to assess the Appellant for PAYE and NIC in the sum of £294,306.68 for tax years 2013-14 to 2017-18 in reliance upon ss 48-61 of Chapter 8 of Part 2 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") (the "Intermediaries Legislation" (commonly referred to as IR35)) and Regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) ("the Intermediaries Regulations 2000").

2. The FTT concluded that the Intermediaries Legislation applied to arrangements for the Appellant to supply the services of Phil Thompson ("Mr Thompson") to Sky UK Limited ("Sky"). Mr Thompson was a football pundit on Sky, in particular on its weekly television programme variously known as Soccer Saturday, Gillette Soccer Saturday, and Gillette Labs Soccer Saturday (referred to by the FTT and in this decision as "Soccer Saturday").

3. The Intermediaries Legislation required the construction and consideration of hypothetical contracts between Sky and Mr Thompson, reflecting the periods of the actual contracts between Sky and the Appellant. The sole issue before the FTT was whether, under the hypothetical contracts, Mr Thompson would be regarded for income tax and national insurance purposes as an employee of Sky: see s. 49(1)(c)(i) ITEPA 2003 and Regulation 6 of the (Intermediaries) Regulations 2000[1].

4. The issue in this appeal is whether the FTT erred in law in concluding that that condition was satisfied: i.e. that Mr Thompson would be regarded as an employee of Sky under the hypothetical contracts.

5. The Appellant relies on four grounds of appeal to submit that the FTT made the following four overarching errors of law:

   A. The FTT's interpretation of the actual contract between the Appellant and Sky was wrong in law.

   B. The FTT's identification of the terms of the hypothetical contract was wrong in law.

   C. The FTT's decision as to whether the necessary framework of control existed was wrong in law.

   D. The FTT's application of the third stage of the employment test was wrong in law.

6. In summary, HMRC's position is that the FTT properly understood and applied the now-significant body of case law regarding the application of the Intermediaries Legislation and reached an evaluative judgment that was open to it on the evidence before it and with which it would be wrong for the Upper Tribunal to interfere.

[1] Regulation 6 and s. 49 ITEPA 2003 are to like effect. Despite some differences in the wording of the legislation, the parties did not contend that they produced a different outcome in this case. This decision will concentrate upon s. 49 of the Intermediaries Legislation.

7. At the hearing of the appeal Mr Michael Firth KC appeared for the Appellant and Mr Christopher Stone KC leading Ms Georgina Hirsch of counsel appeared for HMRC, the Respondents. We are grateful to them for the quality of their written and oral submissions.

THE LAW

8. The purpose of the Intermediaries Legislation is to ensure that persons cannot achieve a more favourable income tax and NICs treatment through adopting contractual arrangements using intermediaries, such as personal services companies ("PSCs"), through which to provide services to clients that would otherwise be classed as contracts of employment between the person and the client: *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945; [2002] STC 165 per Robert Walker LJ at [51].

9. The Intermediaries Legislation is set out in sections 48 – 61 of ITEPA 2003. The key provision is section 49, as in force during the periods under appeal, provided, as relevant:

> 49 Engagements to which this Chapter applies
>
> (1) This Chapter applies where--
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that-
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> (ii) the worker is an office-holder who holds that office under the client and the services relate to the office.
>
> ...
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

10. A materially similar but not identical test is applied for the purposes of NICs by Regulation 6 of the Intermediaries Regulations (as in force during the relevant tax years):

> (1) This Part applies where–
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client") who is not a public authority,
>
> …
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under arrangements involving an intermediary, and

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

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

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

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

…

(3) Where this Part applies

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

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

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

11. There was no dispute before the FTT that the conditions in sub-sections (a) and (b) of s. 49(1) were satisfied in this case. The only relevant issue was whether s. 49(1)(c)(i) was satisfied. It was for the Appellant to make out its case on appeal to the FTT, that the Intermediaries Legislation did not apply because Mr Thompson would not be regarded as an employee of Sky: see s. 50(6) TMA 1970.

12. In applying the legislation, the FTT at [21] of the Decision followed the guidance of the Court of Appeal in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] STC 837 (*Atholl House CoA*) in adopting a three-stage approach:

> "first, to identify the actual contractual arrangements;
> secondly to ascertain the terms of the hypothetical contract; and,
> thirdly, to consider whether the hypothetical contract would be a contract of employment".

13. At the first stage, the construction of the actual contract between Sky and the Appellant company, the FTT and UT are to apply the ordinary rules of construction in contract law.

14. At the second stage, the construction of the hypothetical contract between Sky and Mr Thompson, the UT has given guidance in *Atholl House v. HMRC* [2021] STC 588, [2021] UKUT 37 (TCC) ("*Atholl House UT*") at [8] & [54]-[56]:

> [8] However, in order to put into context some of the later discussion, it is appropriate now to make some observations on the process by which the hypothetical contract is

constructed at Stages 1 and 2, before reaching Stage 3, where the hypothetical contract is characterised:

(1) It is clear that, for income tax purposes at least, this is not simply an exercise in pure "transposition" of terms from the actual contract into the hypothetical contract. As the Upper Tribunal (Mann J and UTJ Thomas Scott) said in *Christa Ackroyd Media Ltd v Revenue and Customs Comrs* [2019] UKUT 326 (TCC), [2019] STC 2222, at [36]:

> "Section 49 explicitly requires the tribunal not to restrict the exercise of constructing the hypothetical contract to the terms of the actual contract, but to assess whether "the circumstances" are such that an employment relationship would have existed if the relevant services had been provided by the individual directly and not via a service company, and s 49(4) provides that "the circumstances … include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements" …" (emphasis added).

(2) It follows from this that it is not necessary to defer all analysis of the hypothetical contract, at Stage 2, until all terms of the actual contract have been comprehensively determined at Stage 1. It may often be appropriate –in the iterative way identified by Lord Hodge JSC in *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619, at [77] – to construe the actual contractual arrangements (using the usual canons of construction) whilst considering at the same time how these arrangements would work when determining the content of the hypothetical contract. That approach is suited to the task of synthesising a single hypothetical contract from relevant "circumstances" that include the terms of two distinct contracts. That said, care must still be taken to ensure that ordinary principles of contractual interpretation are correctly applied at Stage 1 since, if the terms of actual contracts are wrongly construed, any error has the potential to infect the ascertainment of the terms of the hypothetical contract at Stage 2.

(3) Section 49(4) expressly directs attention to the terms of the actual agreements between the relevant parties. Plainly, the terms of such contracts will, generally speaking, be highly material; and what the contracts actually mean will have to be construed according to the ordinary principles of contractual interpretation. But the application of ordinary canons of contractual interpretation will not, of itself, determine the contents of the hypothetical contract. The fact that the hypothetical contract may be built out of more than one contract (eg, one contract between A and B and another contract between B and C) means that great care must be taken in the following (purely illustrative) regards:
(a) The relevant factual matrix may very well be different for the hypothetical contract than for either the contract between A and B and B and C).
(b) An entire agreement clause in the contract between A and B will be unlikely to operate in the case of the hypothetical contract.

(4) When ascertaining the terms of an actual contract between A and B, matters such as A's subjective views of the meaning of that contract, or ignorance of the contract's terms, will typically be irrelevant to questions of interpretation. Equally, unless giving rise to a variation or some form of waiver or estoppel, the manner in which the actual contract is performed is typically irrelevant to its construction. However, we do not consider that these matters can be regarded as necessarily irrelevant when it comes to determining the terms of the hypothetical contract in the context of the "intermediaries legislation" and are, in our judgment, matters that can appropriately be taken into account. This should not be taken as a suggestion that the terms of the actual contract can be disregarded by the simple expedient of focusing solely on parties' beliefs, or the

way they actually performed the contract. If, applying ordinary principles of contractual interpretation, the actual contracts are found to have a particular term, that will often be a strong indication that the term should be found in the hypothetical contract as well. We simply highlight the injunction in s 49(1)(c) to consider "the circumstances", which we consider extends to circumstances beyond those relevant to the construction of an actual contract concluded between A and B.

…

[54] In short, whilst the terms of [t]what[sic] the relevant parties in fact agreed remains highly material to the content of the hypothetical contract, we do not consider that it is appropriate for a Tribunal to consider itself bound by the ordinary contractual rules (as interpreted by *Autoclenz* or otherwise), as opposed to these rules being a highly material factor. To put the same point another way, the parties' subsequent conduct might amount to a relevant "circumstance" (for the purposes of s 49(1)(c) of ITEPA 2003 and reg 6 of the Regulations) such that different terms should be imported into the hypothetical contract.

[55] However, it would not, in our judgment, be correct simply to construct the hypothetical contract by reference to Ms Adams's and Mr Paterson's imperfect, and sometimes incorrect, understanding of the terms of the Written Agreement. That would be to place too much weight on matters not necessarily relevant to the construction of the hypothetical contract which –after all – will have governed the hypothetical legal relationship between Ms Adams and the BBC from its inception.

[56] The construction of the hypothetical contract involves the court in a "counter-factual" exercise: if Ms Adams and the BBC had concluded the contract directly between themselves, what would its terms have been? In this case, the Written Agreement represents a safe starting point, since it was what the BBC agreed with the Company and what the Company (controlled by Ms Adams) agreed with the BBC. However, the following additional points must be borne in mind:

…

(3) In short, in considering the terms of the hypothetical contract regard must be had to what can be drawn from certain hypothetical "flashpoint" scenarios, like the one described. There is nothing particularly artificial in this. The fact is that in the real world, when a genuine and not a hypothetical contract is being construed, there will likely be a "flashpoint" where the parties' intentions will be manifested for the court (as appropriate) to take into account.

15. At the third stage, considering whether the hypothetical contract would be a contract of employment, the FTT applied the further three-stage test for determining whether a contract is a contract of service (employment) as set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 ("*RMC*"). In accordance with the relevant case law, the FTT considered:

    (i) whether there would have been sufficient mutuality of obligation in the hypothetical contracts between Mr Thompson and Sky ("*RMC1*");
    (ii) whether there would have been a sufficient framework of control in the hypothetical contracts ("*RMC2*"); and
    (iii) other relevant factors, both contractual and non-contractual ("*RMC3*").

16. Before the FTT, the Appellant accepted that the hypothetical contracts would have sufficient mutuality of obligation between the hypothetical parties, Mr Thompson and Sky, to satisfy RMC1 [33(3)(a)].

17. The Appellant denied that *RMC2* and *RMC3* were satisfied.

18. As far as *RMC2* is concerned, the sufficient framework of control necessary for a contract of employment, the Supreme Court has given guidance on how this to be understood in *Professional Game Match Officials Ltd v HMRC* [2024] UKSC 29, [2024] ICR 1480 ("*PGMOL*"). We agree with Mr Stone's summary of the principles set out in that judgment:

    (1) A "*sufficient framework of control*" is essential to the existence of a contract of employment: at [61], [66].

    (2) The bar to the existence of a finding of a sufficient framework of control "*need not be set at an unduly high level*", once it is appreciated that control is not a determinative factor: at [33].

    (3) There is a need for flexibility in applying the test of control, having regard to the particular working environment: [35], [39]-[40]. Depending on the environment, control may be exercised in many different forms; it is not confined to the right to give direct instructions: at [76].

    (4) As a result of developments in the patterns of work, there are now a greater number of cases in which a sufficient degree of control is found notwithstanding the absence of some *or all* of the factors identified by MacKenna J in *RMC*: power to decide what is to be done, the way in which it shall be done, the means to be employed in doing it, and the time and the place where it shall be done: at [64].

    (5) There are individuals who possess skills and are required to exercise judgement in the exercise of those skills who are not susceptible to intimate direction by an employer. In such occupations, the employer may not have the practical ability nor legal right to intervene during the performance of at least some of the duties so as to direct the manner in which they were performed. It would be an error to hold that for this reason the individual is not an employee: at [70]. It is therefore wrong to consider that control always requires a contractual right to intervene in every aspect of the performance by the employee of his or her duties: at [71]-[72].

    (6) A contractual power of control which is only exercisable after the performance of the service is a relevant element of control: at [88]

19. As far as *RMC3* is concerned, the Upper Tribunal has recently addressed this in *HMRC v S & L Barnes Ltd* [2024] UKUT 262, [2024] STC 1813 *("Barnes UT")* which we take into account in considering Ground D below.

THE FTT DECISION AND THE EVIDENCE

20. Numbers referred to hereafter in square brackets [] are to paragraphs of the Decision of the FTT unless stated otherwise or context requires a different interpretation. Numbers referred to in standard brackets () are to paragraphs of the witness statements of Mr Ian Condron and Mr Thompson.

21. We are grateful to Mr Firth for his summary of the factual findings and evidence the FTT received, which we adopt as follows.

The background leading up to Mr Thompson's work for Sky before 2013

22. The FTT noted at [3] that there was no real dispute as to the relevant factual background in terms of what happened and what the documents said.

23. Mr Thompson is a former footballer and manager with an impressive record ([4]). He appeared on Sky's Soccer Saturday as one of a panel of high profile former professional footballers to provide analysis and punditry of football. This happened between 1994 and 1998, when he was paid per show ([5]). In 1998, Mr Thompson returned to Liverpool Football Club ("LFC") as assistant manager/manager until 2004 and returned to appearing on Soccer Saturday ([4]).

24. It was on the plane home from covering LFC's victory in the Champions League final in Istanbul in 2005 that Andy Melvin ("AM"), Sky's head of football, spoke to Mr Thompson. AM asked what Mr Thompson was going to do next year and that he would like Mr Thompson to come on contract with Sky. He said that Sky would pay Mr Thompson £80,000 and that Mr Thompson could do what he wanted, pick his shows – the figure was there for him. Mr Thompson agreed ([8]).

The contracts with the Appellant company and their operation from 2013

25. Initially, Mr Thompson provided his services directly to Sky, but in 2013 the Appellant was incorporated, and, in the relevant period, services were provided to Sky (as well as others) through the Appellant ([6]).

26. There are two contracts between the Appellant and Sky covering the relevant period. One dated 11 June 2013, covering the period from 1 August 2013 to 31 July 2015, and one signed in June 2015, covering the period from 1 August 2015 to 31 July 2017.

27. Arrangements for the programme were relatively informal ([10]). Mr Thompson's view was that he did not need permission from Sky to miss a programme but he would in practice give notice if he was unavailable so that Sky could obtain a replacement [10]. Mr Thompson would inform Ian Condron ("IC"), Soccer Saturday's producer, if he was not available out of respect, and IC would agree ([10]). In practice, Mr Thompson rarely missed a programme. IC's evidence as to the way in which the contract worked in practice was consistent with Mr Thompson's ([16]).

28. Mr Thompson's preparation largely involved him watching football matches during the week. He would receive a pack of statistics, but that was for information purposes rather than Mr Thompson being told to say anything in particular on the programme ([11]). The format of the show was three hours of general discussion, following which the panellists would put on headphones and discuss features of a live match as they arose. These were the panellists' own opinions rather than commentating ([12]). The Host, Jeff Stelling, would lead the discussion.

29. Mr Thompson did not wear an earpiece to receive instructions and would not be given any direction other than the floor manager signalling to him to wrap up ([12]). Mr

Thompson would usually be filmed at Sky's studios in London. On occasion, he was asked to go to Anfield to cover a big story relating to Liverpool. If Mr Thompson was available, he would agree ([13]).

30. On average about 80% of the Appellant's income came from Sky. Other activities included work for Sky Betting and Gaming, speaking engagements, tours of Liverpool's stadium, television interviews with LFC's television channel ([14]). Mr Thompson would seek Sky's permission if he was going to do anything for another broadcaster. IC would say no if it related to the Premier League, but a show looking back at Mr Thompson's career would be fine ([14]).

The terms of the actual contract between Sky and the Appellant company

31. The terms of the actual contract between Sky and the Appellant company governed the manner in which the Appellant was to provide Mr Thompson's services to Sky. The FTT decided that the terms of the actual contract reflected the terms of the written agreements ([45]) with the following additional points.

32. The Key Terms provided that the Services were to be provided to Sky "On an ad hoc as and when required basis". This did not give the Appellant or Mr Thompson a right to refuse any request or that appearances would be by mutual agreement ([46]). Instead, it meant the services "were to be provided whenever Sky required them".

33. To avoid the conclusion that Sky was entitled to require services every hour of every day, the FTT found that there was an implied term of reasonableness ([47]).

34. The contract was not too vague – Sky was entitled to have the services "as and when Sky requires" ([49]).

35. Sky had the contractual right to require Mr Thompson to express opinions which he did not believe ([50]) but that was subject to a further implied term of reasonableness ([51]), which may in practice amount to the same thing.

36. Mr Thompson did not have any right to object to the location of the required provision of the services, but that, too, was subject to an implied term of reasonableness ([52]).

The terms of the hypothetical contract between Sky and Mr Thompson

37. As to the terms of the hypothetical contract between Sky and Mr Thompson, the FTT transposed the terms of the actual contract between Sky and the Appellant with the following modifications.

38. The services would be provided by Mr Thompson in his own right ([56]).

39. The services would be Soccer Saturday, mid-week games, associated marketing and publicity events, and relevant interviews ([57)].

40. The implied terms of reasonableness would be express terms because they were "so obvious as to go without saying" ([58]).

41. Mr Thompson would not have the right to refuse any request to provide services because that is not what the actual contract said and "there is no basis for establishing that a different agreement would be reached in the event of a hypothetical contract" ([59]). Mr Thompson signed the Schedule and there was "no reason to believe that a direct negotiation…would have resulted in substantially different terms" ([59]).

42. What happened in practice did not "detract from those contractual rights and there is no suggestion that there was any agreement that those contractual rights did not apply or were varied" ([60]).

43. Given that Mr Thompson agreed to the actual contract on behalf of the Appellant company, it was reasonable to assume that no term requiring his agreement regarding location would be provided in the hypothetical contract ([61]).

44. Mr Thompson signed the Schedule and so the terms of the actual agreement must have been agreeable to him, as well as Sky ([62]).

45. Preparatory work could be carried out at places and times and for durations of Mr Thompson's choosing ([64]). Mr Thompson would be expected to fit his punditry into the running order of the programme and follow reasonable directions as to the subject matter, but the content would be determined solely by Mr Thompson ([64]).

Whether the hypothetical contract was one of employment

46. As to whether the hypothetical contract was a contract of employment, the FTT found as follows.

47. In relation to *RMC1*, the FTT found that "Mr Thompson's obligation under the hypothetical contract would be to provide the services in accordance with the terms of the contract, and Sky's obligation would be to pay the agreed fee" ([66]). The Appellant submits that this is an issue that relates to whether a contract is an "overarching" contract of employment, being an issue that is irrelevant to this appeal. Nonetheless, the Appellant accepted that mutuality of obligation was satisfied on the basis that some work was done and paid for.

48. In relation to *RMC2*, the FTT found a sufficient framework of control necessary for employment on the basis of ([67]) that: Sky had the right to decide when and where the services were to be provided; Sky had the right to prevent Mr Thompson working for competitors; and Sky retained control over confidential information and intellectual property arising out of the services (albeit not Mr Thompson's opinions).

49. In relation to *RMC3*, the FTT found that all the circumstances meant that the hypothetical contract would have been one of employment of Mr Thompson by Sky [68]:
    (1) The control that Sky had over the provision of Mr Thompson's services was considerable.
    (2) Mr Thompson's role of giving his own opinion was consistent with employment.
    (3) The manner in which Mr Thompson prepared was not inconsistent with employment.
    (4) The hypothetical contract restricted Mr Thompson's ability to exploit his opinions and analysis.

(5) The contract provided for termination by Sky but not Mr Thompson.
(6) Mr Thompson had his own status and character, but had become associated with Soccer Saturday.
(7) The block fee was neutral.
(8) Although Mr Thompson's work for Sky took up a relatively small amount of his time and was one method of capitalising on his status and character, the Sky contract provided 80% of his earnings.
(9) That Mr Thompson had the potential to increase his income through efficient use of time was neutral.
(10) Mr Thompson's risk to his reputation was neutral and he did not take financial risk during appearances.
(11) The absence of perks offered to Mr Thompson pointed against him being treated as an employee but this was outweighed by all the other factors.

THE GROUNDS OF APPEAL

50. We turn to address each of the Appellant's grounds of appeal against the FTT's Decision – A to D.

A. The FTT's interpretation of the actual contract between Sky and the Appellant

A(1) Erroneous approach to and interpretation of "on an ad hoc as and when required basis".

The express terms of the contract on how often Mr Thompson's services were to be provided

51. Each contract between Sky and the Appellant consisted of: i) Key Terms; ii) Terms and Conditions; and iii) a Schedule (which although described as a Non-Disclosure Agreement, was a deed entered into between Sky and Mr Thompson directly, and which included the grant of rights, the giving of warranties, and Mr Thompson's agreement to non-solicitation and non-compete clauses) (see [6]). There was no material difference in the terms of the two contracts.

52. There was no express statement recording the minimum or maximum time commitment required of Mr Thompson.

53. The terms "Assignment" and "Services" were defined in the Key Terms as follows:

Assignment	The Assignment will be from 1st August 2013 to 31st July 2015 on an ad hoc as and when required basis …
Services	The Company shall provide the services of the Personnel as a commentator, presenter, interviewer, guest and/or other participant in the making of any editorial programme and/or video whether in vision or audio and/or whether in a studio or on location, live or recorded during the Assignment…

[emphasis added]

54. By clause 2.1 of the Terms and Conditions, the Appellant was required to procure that Mr Thompson provided "*the Services*" to Sky "*during the Assignment* …". Clause 2.6 required the Appellant to procure that Mr Thompson shall travel to and

perform the Services "*at any destination both inside and outside the Territory and at such time and dates (including bank holidays and weekends and anti-social hours) as may be required by BskyB*". Clause 2.7 provided that Sky had "*first call*" on Mr Thompson for the provision of the Services. Clause 5.1 provided for termination of the contract by Sky if services were not provided for a period in excess of 4 weeks.

The FTT Decision

55. The FTT decided that "ad hoc" meant that there were no contractually defined or fixed occasions for the provision of the Services under the Assignment clause ([46]). It held that "as and when required" meant required by Sky. It did not accept that this is to be construed as meaning that Mr Thompson or the Appellant had a right to refuse any request by Sky or that appearances would be by mutual agreement as the Appellant had argued. It found that the proper construction is that the Services were to be provided whenever Sky required them. At [47] it implied a term of reasonableness, such that the Assignment would be on an "ad hoc as and when reasonably required basis."

The Appellant's submissions

56. Mr Firth submitted that the FTT's approach and conclusion on this requirement were wrong in law.

57. First, it rendered the wording "ad hoc" completely otiose and irrelevant.

58. Second, there is a fundamental inconsistency between a contract that provides for services to be provided on an "ad hoc" basis and an interpretation that would permit the service user to demand that they be provided continuously, all the time (which the FTT accepts is the result of its interpretation of the actual words ([47]). That is plainly not ad hoc provision of service. The FTT's interpretation thus directly contradicts the actual terms of the contract.

59. Third, the FTT failed to address the meaning of "required" and seemed to interpret it as being the same as "requested". "Required" connotes the services being necessary, not just desirable.

60. Fourth, the FTT stated that "as and when required" means required by Sky, but that is not what the contract says (and it would have been very easy to say that, if that was what was meant). The principle of contra proferentum applies against Sky in this respect, as the provider/drafter of the contract, particularly when taken with what the completely unacceptable consequence of the interpretation (ability to require service all day, every day) and when read alongside the phrase "ad hoc".

61. Fifth, "first call" simply means that the Appellant could not provide Mr Thompson's services for another commercial engagement in preference to Sky if Sky had already requested services, it did not mean that the Appellant had to provide Mr Thompson whenever Sky wanted, for however long Sky wanted. Indeed, that would be an unworkable construction for the further reason that the Company would not itself have the right to demand that PT work on such terms.

62. Sixth, clause 2.1 only means that when the Services are to be provided, the Appellant will procure that Mr Thompson provides them. It is not concerned with when the Services are to be provided.

63. Seventh, Mr Firth maintained that the phrase "ad hoc as and when required basis" is so vague and lacking in substance as to mean that a Court (and Tribunal) could not reach any conclusion as to what was in the parties' minds in terms of binding enforceable obligations.

64. Finally, and the point Mr Firth concentrated upon in oral submissions, the FTT attempted to solve the problems caused by its interpretation by implying a term of reasonableness, but that is wrong in law. The frequency or quantity of the Services to be provided was a fundamental term of the contract.

65. A term of reasonableness cannot be imposed because there are no objective criteria by which the court could assess reasonableness – see *Baird Textile Holdings Limited v. Marks & Spencer plc* [2001] EWCA Civ 274:

> "[30]…The alleged obligation on M&S to acquire garments from Baird is insufficiently certain to found any contractual obligation because there are no objective criteria by which the court could assess what would be reasonable either as to quantity or price…"

66. Thus, Mr Firth argued that implying a "reasonableness" requirement is avoiding the difficulty rather than solving it. The Court would be making the contract for the parties. It pushes all the problems and arguments, caused by the FTT's interpretation of the express wording, back into an implied term that does not resolve anything.

Discussion and Analysis

67. We agree with Mr Stone that there was no error of law in the FTT's construction of the "*ad hoc* as and when required" term of the actual contract. The FTT gave five reasons supporting its interpretation of this clause at [46] and these are unimpeachable.

68. We reject each of the submissions made by Mr Firth, accepting the submissions of Mr Stone.

69. First, the FTT's interpretation of "*ad hoc*" does not render the term otiose or irrelevant. It gave meaning to the words "*ad hoc*", i.e. the occasion of the service was not fixed in advance.

70. Second, there is no inconsistency between the occasion for the service not being pre-determined and the service provider having to provide the service "as required" by the party procuring those services.

71. Third and fourth, "as and when required" has been given its natural meaning. The FTT's interpretation of "required" was not that it means "requested". It found it to mean that the party providing the services (i.e. the Appellant) must provide the services when the party paying for them (i.e. Sky) decides that the services are required. There is no need to add the words "*by Sky*" in order to make this clear. In

any event, the 2015 contract did use the phrase "… *on an ad hoc as and when required basis by Sky …*" in its definition of Services. The Appellant did not, and does not, suggest that the interpretation of that contract should be different from the 2013 contract. As there is no real doubt or ambiguity when the clause is interpreted against the background and commercial purpose of the contract, there should be no application of the *contra proferentum* rule: see *Lewison, The Interpretation of Contracts*, 8th Ed ("*Lewison*"), at 7.88.

72. Fifth, and sixth, the FTT's construction of "ad hoc as and when required" accords with the contract read as a whole. For example, the following clauses are particularly relevant:

    i. The purpose of the contract, which was for the Appellant to procure the provision of the Services to Sky (see clause 2.1).

    ii. Clause 2.6, which required the Appellant to procure that Mr Thompson would travel to and perform the Services at such time and dates as may be required by Sky.

    iii. Clause 2.7, which gave Sky first call on Mr Thompson for the provision of the Services.

    iv. Clause 4 which provides for the Appellant and Mr Thompson to comply with Sky's directions and requests.

    v. Clause 5.1(a), which gave Sky the right to terminate the agreement if the Appellant was unable to provide the Services for a period in excess of four weeks (i.e. the Appellant and/or Mr Thompson cannot have had an unfettered right to refuse to provide the Services).

73. The Appellant's interpretation, which either would not oblige Mr Thompson to provide any Services at all or to provide the Services only on occasions agreed between Sky and Mr Thompson, gives no meaning to the word "required", replacing it instead with the word "agreed". That is an impossible construction because it directly contradicts the express terms. The FTT correctly concluded that no such term could be implied into the contract, as it would be inconsistent with the express terms of the contract and not necessary for business efficacy. As the FTT noted [46] there is no term in the contract or in the definition of services that states that the Appellant's or Mr Thompson's agreement is necessary.

74. Further, it gives no meaning to clause 2.6, or the concept of "first call" and the Appellant's interpretation would give it the unfettered right to turn down any, or indeed all, work. In circumstances where the Appellant was entitled to a fixed fee equal to or greater than £150,000 per annum, that is very unlikely to have been the bargain reached between the parties.

75. Seventh, the FTT recognised that the parties cannot have agreed that Mr Thompson would be required to work on all days and at all hours. It found that there was an implied term that the assignment would be on an ad hoc as and when "*reasonably* required" basis: [47] (having already given itself a correct self-direction of the test for implication of a term at [23]). Such a clause is not inconsistent with the express

terms of the contract. The FTT's interpretation was consistent with common sense in a business arrangement.

76. Mr Firth submits that such an approach is impermissible as there are no objective criteria by which reasonableness can be determined. We agree with Mr Stone that this fails to recognise how "reasonableness" clauses are commonly deployed in contracts for personal service. By way of example a reasonableness term is implied as a matter of law into *every* contract of employment "*the employee should carry out the reasonable instructions of the employer*"[2]. In *Eagland v British Telecommunications plc* [1993] ICR 644, Parker LJ envisaged an employment contract being terminable on "*reasonable notice*" (at 652H).

77. Outside the employment context, Mr Stone drew our attention to *Wells v Devani* [2019] UKSC 4, [2020] AC 129 ("*Wells*"), where the Supreme Court unanimously held that it is possible to imply a term into an agreement to render it sufficiently certain or complete to constitute a binding contract; and that in default of agreement it may be appropriate to imply a term that, "… *a reasonable price must be paid*." (per Lord Kitchin at [33]).

78. In those circumstances, the FTT was not required to identify any objective criteria by which reasonableness was to be determined in order to imply the term. Nonetheless, as Mr Stone pointed out during the hearing, the reasonableness of the frequency or timing of Sky's requirements for the Appellant to provide Mr Thompson's services could be judged objectively. For example, by reference to the extent, frequency and timing of his previous provision of services to Sky in respect of Soccer Saturday under earlier direct contracts since 2005.

79. Mr Firth referred to Mr Thompson's witness statement and his understanding of the contract – essentially that he could pick his shows and do what he wanted. He contends that the small risk that Mr Thompson might decide never to provide services was one that Sky had decided to take[3] and would simply lead to non-renewal of the contract. As held in *Atholl House UT* at 8(4)

> When ascertaining the terms of an actual contract between A and B, matters such as A's subjective views of the meaning of that contract, or ignorance of the contract's terms, will typically be irrelevant to questions of interpretation. Equally, unless giving rise to a variation or some form of waiver or estoppel, the manner in which the actual contract is performed is typically irrelevant to its construction….

80. As part of his submissions Mr Firth also contends that the clause is void for uncertainty. However, Mr Stone directed us to Rule 10 of Chapter 8 of *Lewison* which states:

> "*A contract, or a provision in a contract, may be uncertain if it is unintelligible; if it is meaningless; if the court is unable to select between a variety of meanings fairly attributable to it, and the circumstances are not such that one or other party to the contract may elect between meanings;*

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[2] *Harvey on Industrial Relations and Employment Law*, Division AII, paragraph 155. To like effect, *Chitty on Contracts*, 35th Ed, at 43-063.

[3] We were not directed to the evidence of Sky that it had decided to take such a risk.

where the court is unable to discern the concept which the parties had in mind; or where the terms of the contract require further agreement between the parties in order to implement them."

81. None of those conditions applies in the present case. In any event, as Lord Kitchin said in *Wells*, at [18], "*… the courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement*."[4] Sky and the Appellant clearly had an intention to create legal relations and acted on the two agreements for the four years they covered. A court or tribunal should strive to uphold bargains already performed and be reluctant to strike them down for uncertainty.

82. For these reasons there was no error of law by the FTT in its interpretation of the "*ad hoc* as and when required" clause in the actual contract between Sky and the Appellant.

83. Further and in any event, there would be no material error in implying a reasonableness term as the FTT found at [47] that the implied term of reasonableness was not material to rejecting the Appellant's interpretation of the Assignment clause: "In any event, even if we did not imply such a term of reasonableness, the clause remains unambiguous and would be inconsistent with Mr Firth's implied terms as to [Mr Thompson having] a right of refusal or a requirement of mutual agreement."

84. In further alternative, any error was not material as the FTT was entitled to conclude when constructing the hypothetical contract between Sky and the Appellant that Mr Thompson would have been required to provide his services on "*an ad hoc as and when reasonably required*" basis, and in any event with appearances limited to "*only Soccer Saturday, mid-week games, associated marketing and publicity events, and relevant interviews (such as news items relevant to Liverpool)*" ([57]). There is no challenge to the FTT's finding on the extent of the more limited services to be provided under the hypothetical contract.

A(2) Erroneous approach to interpreting "all directions and requests…will be complied with"

The express terms of the contract

85. Clause 4.1 of the Terms and Conditions was a warranty from the Appellant that "*the Services will be rendered to the best of the Company's and the Personnel's abilities and all directions and requests given by BSkyB or its nominees will be complied with*".

The FTT Decision

86. The FTT addressed the phrase in the clause in that "all directions and requests given by BSkyB or its nominees will be complied with". It found at [50]: "We do not accept

[4] See also *Lewison* at 8.75 "*Courts, at least in modern times, do their utmost to resolve this dilemma in favour of upholding bargains, particularly when the parties have acted on the basis of the agreement*". And see 8.83 – 8.89 and 8.93 – 8.97

Mr Firth's submission that this is to be construed as meaning that Sky is unable to require Mr Thompson to express opinions which he did not believe or otherwise to control what he says or to restrict his opinions. This paragraph is unambiguous and does not make any reference to Mr Thompson's opinions. As such, there is no room for Mr Firth's construction".

87. At [51] it found: "However, we do agree that it cannot be that the parties intended there to be no fetter at all upon the directions and requests. We find that in such circumstances there is an implied term of reasonableness... This is necessary in order to give business efficacy to the Contract as otherwise Mr Thompson could be required to comply with inappropriate directions and requests or directions and requests."

The Appellant's submissions

88. Mr Firth submitted that the FTT decided that clause 4.1 meant that Sky could require Mr Thompson to express opinions he did not believe demonstrating that it failed to place the contract in its full context or interpret it from the point of view of a person with all the knowledge of the parties. It was irrational to hold that the parties intended the contract to mean that Mr Thompson could be required to express opinions which he did not believe.

89. He further argued that the FTT's attempt to solve this by implying another reasonableness term failed again. It simply pushed back all the problems caused by the literal construction to having effectively the same arguments under the heading of "reasonableness" without any objective criteria to decide those disputes. For instance, on the FTT's approach, it was not clear whether Mr Thompson could be required to express an opinion that he did not believe if it was, objectively, a reasonable opinion.

Discussion and Analysis

90. We are satisfied that there was no error of law in the FTT's construction of clause 4.1 of the actual contract. We accept Mr Stone's reasons for rejecting the argument.

91. The Appellant's submission to the FTT had been that (whether by interpreting the express words or by means of implying a restriction), clause 4.1 did not apply to what Mr Thompson said by way of analysis/opinion/reaction during the programme.

92. However, there was no error in the FTT finding that there was nothing in the words agreed by the parties that could be read as restricting the application of clause 4.1 in that way. Further, there is no commercial reason why the obligation of Mr Thompson to comply with Sky's directions and requests should be limited only to matters outside the production of Soccer Saturday. For example, it was necessary for Sky to have a *right* to provide directions to its presenters in order that it can comply with its obligations to OFCOM.

93. In our view, the FTT properly appreciated that the parties cannot be taken to have agreed that Mr Thompson would have to comply with *unreasonable* directions from Sky. Accordingly, it interpreted the clause as containing an implied term of reasonableness and there was no error in doing so.

94. The Appellant again criticises the "reasonableness" test as having no objective criteria. Nonetheless, the clause reflects the term which is implied by law into every contract of employment and is workable as we have explained above.

95. There was therefore no error of law in the FTT's Decision.

96. In the alternative, any error was not material because the FTT would have been entitled to conclude that the hypothetical contract between Sky and Mr Thompson would have required Mr Thompson to comply with all "*reasonable directions and requests*" – as accepted by Mr Firth in the FTT, see [51].

A(3) Erroneous construction of the provision relating to travel and destination

The express terms of the contract

97. Clause 2.6 said, "*The Company shall procure that the Personnel shall travel to and perform the Services at any destination both inside and outside the Territory and at such time and dates (including bank holidays and weekends and anti-social hours) as may be required by BSkyB*".

The FTT's Decision

98. The FTT decided that the clause was unambiguous in giving Sky control over the location at which the services would be provided and did not give the Appellant a right to object to that location ([52]): "However, for the same reasons as set out in respect of the directions and requests, we find that this is subject to an implied term of reasonableness."

The Appellant's submissions

99. Mr Firth submitted that the FTT assumed without checking that the Appellant accepted that clause 2.6 of the Terms gave Sky the right to require (through the Appellant) Mr Thompson to travel to any location without objection. The FTT was wrong. It failed to understand that on the Appellant's interpretation that Mr Thompson only had to provide services when the Company agreed meant that the Appellant/Mr Thompson did not have to agree to any occasion for the provision of services that would involve travelling to somewhere he did not want to go.

100. He contended that the FTT's interpretation was, once again, absurd. By the FTT's logic, the meaning of the contract (ignoring the "reasonableness" clauses the FTT again invoked to avoid absurdity) is that Sky could require Mr Thompson to go and work in some far-flung part of the world (and, indeed, require that to be done full time, all the time, doing whatever Sky demanded).

Discussion and Analysis

101. Again, we accept Mr Stone's reasons in rejecting this ground.

102. It is impossible to read clause 2.6 as meaning that the location and dates of programmes were subject to agreement between Sky and Mr Thompson, with Mr Thompson therefore having an effective veto. It is contrary to the express term.

103. The FTT decided that the clause should be limited by requiring the Appellant to provide Mr Thompson's services only on the times and dates "*reasonably required*" by Sky. For the reasons set out above, the reasonableness term is unobjectionable and discloses no error of law.

104. There was no error of law in the FTT's Decision but, in the alternative, any error was not material. The FTT would have been entitled to conclude that the hypothetical contract between Sky and Mr Thompson would have required Mr Thompson to comply with all instructions to perform the services at locations and times "*reasonably required*", in the context also of Mr Thompson's services being limited in the hypothetical contract only to those identified at [57].

B. The FTT's interpretation of the hypothetical contract between Sky and Mr Thompson

B(1) Wrong approach to establishing hypothetical contract

The express terms of the actual contract

105. Mr Thompson signed the Schedule to the contract between Sky and the Appellant and thereby agreed personally to "*comply with the terms of the Main Agreement and all directions and requests given by or on behalf of BSkyB or its nominees*" (clause 3.1 of the Schedule).

The FTT's Decision

106. At [59] of the Decision the FTT found:

> "59. We reject Mr Firth's submission that the hypothetical contract would have included a term that Mr Thompson would have the right to refuse any request by Sky to provide the services. For the reasons set out above in respect of the express and implied terms of the actual Contract, this is not what was agreed between the Company and Sky and there is no basis for establishing that a different agreement would be reached in the event of a hypothetical contract between Mr Thompson and Sky. Indeed, Mr Thompson signed the Schedule in which he gave undertakings to Sky through which he agreed to carry out the Services (as defined in the Contract and so including the provisions as to "as and when required" and "first call") in accordance with the Contract between the Company and Sky (as set out in paragraphs 3.1 and 8.2 of the Schedule). As such, there is no reason to believe that a direct negotiation between Mr Thompson and Sky would have resulted in substantially different terms, still less terms diametrically opposed to those in the Contract as regards Sky's ability to require performance."

The Appellant's submissions

107. Mr Firth submitted that the FTT's errors were:

i) Failing to apply the correct approach to determining the hypothetical contract.

ii) Failing to apply the correct approach to determining the relevance of the actual terms to the hypothetical contract.

iii) Impermissibly concluding that Mr Thompson had understood the terms and effect of the actual contract in the same way as the FTT decided it should be interpreted and have effect, notwithstanding that that point was not raised by HMRC, put to the witnesses and contradicted the FTT's own earlier conclusion on the (unchallenged) evidence.

108. He contended that the hypothetical contract is not a question of simply transposing the terms of the actual contracts into a direct contract. Relevant circumstances include but are not limited to those terms (*Atholl House UT* at [8]). Matters which may not affect the terms of the actual contract may well influence the terms of the hypothetical contract (*Atholl House UT*, [54] – [55]).

109. Ultimately, the FTT needed to decide what agreement the Appellant and Sky would have reached if they had negotiated and concluded a contract directly (*Atholl House UT*, [56]). In conducting that exercise, regard should be had to how the parties would have reacted to hypothetical flashpoint scenarios ([56(3)]).

110. Although the terms of the actual contracts may be highly material, the enquiry will take into account matters such as the subjective views of the parties and the way the contract was actually performed.

111. In relation to the subjective views of the parties, how material the terms of the actual contract are will depend upon whether they were negotiated and agreed with a full understanding and acceptance of what they meant (or have now been held to mean).

112. If the terms were fully understood and accepted, that may provide strong grounds for carrying them across. If not understood or accepted (whether by one or both parties), they will be of little weight, given that their potential relevance lies in providing evidence of what the parties would actually have agreed when negotiating the terms of the hypothetical contract, which needs to reflect what they actually would have agreed to (understanding and intending the terms).

113. The FTT entirely failed to identify or apply this approach. It does not even mention the *Atholl House UT* decision.

114. Mr Firth criticised the FTT's reliance at [59] on Mr Thompson signing the schedule to the actual contracts. This was never put to him in cross examination. It was never suggested to him that he understood the contract and the Company's legal obligations in the way that the FTT has interpreted it. It was never suggested that he would have accepted such terms, once spelled out, in a hypothetical contract.

115. The suggestion that the fact that he signed the schedule was evidence of this was never put to Mr Thompson or even submitted by HMRC. Indeed, the FTT's own finding of fact contradicts the conclusion that Mr Thompson understood the contract in the way the FTT did. The FTT found, earlier, that "Mr Thompson stated in his witness statement that he was of the view that he did not need permission from Sky to miss a programme" and would tell IC "out of respect" (FTT, [10])

Discussion and analysis

116. It is right to note that the FTT did not expressly cite the guidance of the Upper Tribunal in *Atholl House UT*. However, that is not by itself an error of law. The question is whether in the approach that it did adopt, the FTT erred in law. We are satisfied it did not for the reasons submitted by Mr Stone.

117. The process of creating a hypothetical contract involved the FTT conducting a "counterfactual exercise" – if Mr Thompson and Sky had concluded a contract directly between themselves, what would its terms have been: *Atholl House UT* at [56].

118. The FTT was entitled to rely on the fact that Mr Thompson negotiated the terms of the actual contracts in his position as sole director of the Appellant. In that role, he agreed to enter into the actual contracts. The negotiation of the hypothetical contract would have been between the same people, just this time with Mr Thompson negotiating on his own behalf rather than on behalf of the Appellant. The FTT was entitled to find that the terms negotiated between the parties would not have been substantially different. This was a case involving a three-party chain (i.e. the individual, his PSC and the client) so the actual contracts represent "*a safe starting point*", per *Atholl House UT* at [56], for constructing the hypothetical contract.

119. The relevance of Mr Thompson entering into the Schedule directly with Sky is that he thereby agreed personally to "*comply with the terms of the Main Agreement and all directions and requests given by or on behalf of BSkyB or its nominees*" (clause 3.1). That was support for the finding that if he had negotiated a direct contract with Sky, he would have been content to enter into the same terms as are found in the actual contracts.

120. Hence, the FTT was entitled to conclude, at [59], "*As such, there is no reason to believe that a direct negotiation between Mr Thompson and Sky would have resulted in substantially different terms, still less terms diametrically opposed to those in the Contract as regards Sky's ability to require performance*". The same point was put in different terms at [62], "*... both Sky and Mr Thompson were in fact agreeable to those terms and so there is no reason why they would not be agreeable to them in the event of a direct agreement between them by way of the hypothetical contract*."

121. The FTT was entitled at [59] to reject the Appellant's submission that the hypothetical contract would have included a term that Mr Thompson would have the right to refuse any request by Sky to provide the services.

122. This is for the three reasons Mr Stone gave. First, it is not what the actual contracts provided. A particular term within the actual contract "*will often be a strong indication that the term should be found in the hypothetical contract as well*": *Atholl House UT* at [8(4)].

123. Second, a contractual right for Mr Thompson to refuse Sky's request to work would have been a term that makes no commercial sense – it is very unlikely that Sky would not have agreed to pay over £150,000 a year to Mr Thompson if he had the right to turn down any or all requests to work.

124. Third, it was not how the parties operated the contracts in practice – the FTT found that Mr Condron (of Sky) agreed to accommodate Mr Thompson's rare non-attendances on the show and both he and Mr Thompson treated notification of absence as a matter of respect rather than a matter of agreement- see [10]:

> "Although Mr Thompson stated in his witness statement that he was of the view that he did not need permission from Sky to miss a programme, in practice he would always give Sky notice when he was unavailable in order to ensure that Sky could obtain a replacement… If Mr Thompson was not able to attend for any particular week, Mr Thompson would tell Mr Condron in advance out of respect, who would agree. This did not happen often as Mr Thompson would holiday out of season and enjoyed being on the programme so much that he did not want to miss it…"

125. This finding was also reflected in the Decision at [60] as set out below. There was nothing inconsistent in the FTT's findings at [10] and its rationale at [60].

126. Mr Firth criticises the FTT for not having regard to Mr Thompson's understanding of the terms of the actual contracts. However, that was not a material error of law. We do not agree with Mr Firth's submissions that the construction of the hypothetical contract must or "*will*" always take into account the subjective views of the parties or that the subjective views will always be relevant. It will depend on the facts of the case before the FTT – just because they are relevant in one case does not mean they will always be.

127. The Upper Tribunal in *Atholl House UT* said, at [8(4)] that matters such as the subjective view of the parties cannot be regarded as "*necessarily irrelevant*" to determining the terms of the hypothetical contract and "*can appropriately be taken into account*". What will be appropriate will vary between cases depending on many factors and may include, the extent to which any subjective view was taken as to any particular term in the actual contract, the significance of the actual contractual terms in issue and the extent of the difference between what the terms provided and what they were understood to provide or how they were performed.

128. Even if the subjective views and performance of the parties were required to be taken into account when constructing the hypothetical contract, the FTT made no error of law.

129. The Upper Tribunal in *Atholl House UT* warned of the dangers of focussing too heavily on the parties' "*imperfect, and sometimes incorrect, understanding of the terms of the Written Agreement*", at [55]. In this case, the only witness for Sky, Mr Condron, had no understanding of the terms of the actual contract as set out in the written agreement. His understanding was not imperfect, it was absent. Furthermore, there was no evidence that Mr Condron was a person who would or could have properly represented Sky in any contractual negotiation or agreement – he was simply the producer of Soccer Saturday. What is accepted by the parties is that terms of the actual contracts agreed between Sky and the Appellant were standard terms that applied to all similar agreements for providing the services of on-screen commentators, presenters, interviewers or guests.

130. Therefore, the FTT, in this case was entitled to and gave sufficient reasons at [60] for not deviating from the terms of the actual contracts based upon the parties' performance or understanding of the contracts in the way invited by the Appellant when constructing the hypothetical contracts:

> "60. We do not accept that the evidence of the informal arrangements for Mr Thompson's appearances on Sky affect the position. In practice, Mr Condron agreed to accommodate Mr Thompson's rare non-attendances. Both Mr Thompson and Mr Condron treated this as Mr Thompson notifying Mr Condron in advance out of respect rather than requiring agreement. Nevertheless, as set out above, the contractual rights and obligations in the actual contracts did not give Mr Thompson the right of refusal and did not require mutual agreement. The pragmatic and consensual approach taken to non-attendance does not detract from those contractual rights and there is no suggestion that there was any agreement that those contractual rights did not apply or were varied. Indeed, Mr Condron's evidence was that he did not consider the terms of the Contract. Given that Sky did not provide for a right of refusal for Mr Thompson or mutual agreement in the 2013 Contract and the 2015 Contract and given that Mr Thompson himself agreed to the terms of the 2013 Contract and the 2015 Contract by virtue of the Schedule, it is reasonable to assume (and we find) that no such terms would be provided for in a hypothetical contract between Mr Thompson and Sky."

131. It was therefore not inappropriate, nor a material error, for the FTT not to take into account Mr Thompson's understanding of the terms of the actual contracts when the FTT explicitly found at [60] that IC, the only witness from Sky, did not have any understanding of the terms: "*Indeed, Mr Condron's evidence was that he did not consider the terms of the Contract*." Thus, the FTT could not have formed any realistic view of the parties' subjective views of the actual contracts (and hence what they might have agreed hypothetically based upon this) on the evidence before it. It made a finding that the only witness for Sky had no knowledge of, and hence could not understand, the terms of the actual contract.

132. We reject Mr Firth's submission that there was procedural unfairness in Mr Thompson not being cross-examined on his subjective understanding of the actual contracts, and hence what might have been agreed in a direct hypothetical negotiation. The FTT found that Mr Thompson agreed for the Appellant to enter into the contracts and agreed the terms of the Schedule thereto personally. The FTT was therefore entitled to find that this was powerful evidence when constructing the hypothetical contract and that there was no good reason to deviate from it.

133. The burden was on Mr Thompson to prove otherwise and he did not give any explicit evidence in writing that he did not understand or agree the actual terms of the contract on behalf of the Appellant and he would have negotiated diametrically opposed terms in any hypothetical negotiation with Sky that would require HMRC challenging his evidence in cross examination. There was no error in the FTT not having regard to Mr Thompson's subjective understanding of the actual terms of the contract, as opposed to his evidence on how they were performed in practice.

134. Further, the FTT made no findings, and there was no evidence, that the performance of the actual contracts contradicted their written terms and the "flashpoints" never arose because of the harmonious conduct of the agreements. The FTT was entitled to find that the informal working arrangement provided no evidence of the testing of the rights under the actual contracts which might inform a different approach to the hypothetical contracts. It was entitled to take into account that there was no reliable evidence as to the rights/obligations under the hypothetical contracts being any different to those under the actual contracts. The FTT hence gave sufficient reasons for importing the terms of the actual contracts into the hypothetical.

135. There was no error of law in the FTT's approach to constructing the hypothetical contract in this regard.

(B2) Failure to take into account relevant evidence

Appellant's submissions

136. Mr Firth submits that the FTT failed to take into key evidence of Mr Thompson, including that relating to 2005, which provided good evidence as to what would have happened in the hypothetical negotiation:

> "[8] I remember the discussion about my signing a contract with Sky well. Sky had put on a private plane to take the people, including myself, covering the 2005 Champions League final between Liverpool and AC Milan, to Istanbul in Turkey. We were flying back after the game and I spoke to Andy Melvin, Sky's head of football and no.2 in the Sky Sports hierarchy. He asked what I was going to do next year and said that he would like me to come on contract with Sky. He said that Sky would pay me £80k and that I could do what I wanted, pick my shows – the figure was there for me. I agreed." [150]

137. He contended that the evidence that Mr Thompson had been told, when agreeing the first contract, back in 2005, that he could do what he wanted, pick his shows was highly relevant to the determination of the hypothetical contract.

138. Mr Firth also suggested that the FTT had failed to take into account further unchallenged evidence in Mr Thompson's witness statement at (10)-(13):

> 10. The contract refers to me providing services on an ad hoc, as and when required basis by Sky. Although the agreement does not say so, I could not and would not have worked 9 – 5, even if Sky had asked me to.
> 11. In practice, what I understood was that I would be mainly doing the Soccer Saturday show. I also did some mid-week work, providing punditry on mid-week matches from time to time – around 10 to 15 a year.
> 12. There was a lot of flexibility about the way the arrangement worked. If I had personal or other business arrangements which coincided with the Saturday show, I did not need to ask for permission from Sky to miss the programme but did give them notice when I would be unavailable so that they could ensure they had a replacement. Examples of when that might happen would be weddings and similar for family and close friends. I would only do the mid-week punditry if I was free to do so.
> 13. Whilst I knew that if I did not want to do/could not do a show, it would not be a problem, I tried to keep these absences low in line with the professional attitude that I have displayed throughout my working life. I also enjoy doing the Soccer Saturday show and would be unlikely to have had the contract renewed if I had a lot of absences.

139. Likewise, he submitted that the FTT failed to take into account IC's evidence which was consistent. IC, the producer of Soccer Saturday for Sky, explained in his witness statement (5) that in these early years, each time that a pundit came to the studio to do a show they would have to sign a contract and issue an invoice to Sky and wait to be paid. There were significant problems dealing with the large volume of paperwork this produced and ensuring that people got paid – paperwork would get lost and things would be missed. After a while, Sky decided that it would be simpler to have a single contract for people that they were using most regularly, with those persons putting in a monthly invoice (6) – (7). IC confirmed that that the contract simplified the invoicing side of things but how it operated in practice remained the

same and "it was made explicitly clear that the person did not have to do a certain number of shows – if they were available, great, if they had something else to do, that was fine" (8). If a guest had done only a few shows, the upshot would have been that they would not have been offered a new contract (11).

140. Mr Firth submitted that this was all unchallenged evidence from both sides of the contractual fence. At the very least, the FTT's conclusion on this matter "might" have been different if it had applied the correct test and addressed this evidence.

Discussion and Analysis

141. This ground gives rise to no material error of law.

142. As touched on above, the FTT explicitly took into account the relevant passages from the witness statements of Mr Thompson and IC at [10] on the performance of the contracts in practice and considered it at [60] by reference to the "informal working arrangements" as set out above. It made no error of law in this regard.

143. We also accept that the evidence of the contractual discussions in 2005 is not explicitly referred to anywhere in the decision but do not accept it was material evidence. We do not accept it was "*highly relevant*" to the determination of the terms of hypothetical contracts entered into in 2013 and 2015.

144. The purported discussion on a plane in 2005 could not realistically be taken as the basis of the 2013 and 2015 agreements. Even if it were admissible evidence on the hypothetical contracts, about which there is room for doubt, it would carry almost no weight. There was no evidence as to what written terms were agreed between Sky and Mr Thompson directly between 2005 and 2013 and whether they qualified that discussion. The FTT did not have evidence of the contracts entered into between Mr Thompson personally and Sky between 2005 and 2013. There was no evidence as to whether the terms were varied over the years.

145. The FTT's findings of what did happen in performing the actual contracts between 2013 and 2017 directly contradicted Mr Thompson being able to "do what he wanted" and "pick his shows". If that is what happened in 2005, it is not what happened during the relevant period. There was no evidence that there was any such agreement between Sky and the Appellant or Mr Thompson when entering the 2013 and 2015 contracts.

146. Thus, there was no material error of law in the FTT not referring to or even taking into account the evidence from 2005.

(B3) Approach to the "informal arrangements" evidence

Appellant's submissions

147. Mr Firth criticised that part of the FTT's decision at [60], which states:

> "Nevertheless, as set out above, the contractual rights and obligations in the actual contracts did not give Mr Thompson the right of refusal and did not require mutual agreement. The pragmatic and consensual approach taken to non-attendance does not detract from those contractual rights and there is no suggestion that there was any

agreement that those contractual rights did not apply or were varied. Indeed, Mr Condron's evidence was that he did not consider the terms of the Contract."

148. He argued that this is simply not the right test. The test is not that one transposes the actual contract terms (irrespective of how absurd they are) unless there was a further agreement that those contractual rights had been varied or did not apply. Such a test makes even less sense where Mr Thompson's understanding of his obligation to accept work, or lack thereof, was different to what the FTT decided the contract actually provided.

149. Mr Firth contended that the FTT needed to consider what would actually have been agreed in a hypothetical negotiation, with both parties understanding and accepting what they were agreeing. The way that both parties understood the arrangement to operate in practice was good evidence as to how that negotiation would have gone (and, indeed, combined with the 2005 agreement, the only evidence – none of which supported the FTT). It is possible that there might be reasons for concluding that even though the parties agreed to the arrangement in practice, one party would have insisted, and the other party would have accepted, something different in a binding contract. But that would need to be considered and a reasoned conclusion reached. The FTT erred in failing to carry out this exercise.

Discussion and analysis

150. At [60], the FTT decided that the evidence of the informal arrangements made for Mr Thompson's appearances on Sky did not support the proposition that Mr Thompson would have an unfettered right to refuse to perform the Services. In so doing, it did not err in law.

151. We, again, agree with Mr Stone's arguments. First, as we have described above, the FTT's findings on how the arrangements worked in practice do not support a conclusion that Mr Thompson had a right to refuse work.

152. Secondly and in any event, the FTT's approach is consistent with the guidance in *Atholl House UT* at [56(1)], which warns against the danger of seeking to derive the terms of a hypothetical contract from how a harmonious and reasonable working relationship was conducted in practice. The fact that in practice Sky was willing to accommodate the rare occasions on which Mr Thompson was unavailable for a programme is not an indication that Sky would have agreed that Mr Thompson had the contractual right not to work. Nor is it evidence that Sky would not have insisted on the same contractual rights to determine when and where Mr Thompson would perform the services, in case this were needed to deal with a "flashpoint".

153. Third, it cannot reasonably be inferred that the views of IC, a producer of Soccer Saturday, on how the contracts operated would prevail over Sky's corporately decided standard terms in any hypothetical negotiation. Even if IC's view might have informed any negotiation, it cannot be sensibly suggested that he would determine Sky's position. There was no evidence from Sky that IC would have had authority over or responsibility for Sky's negotiation of and agreement to the contracts.

154. This ground does not disclose any error of law on the part of the FTT.

(B4) Reasonableness not a permissible shortcut

Appellant's submission

155. Mr Firth argued that the FTT sought to deal with the problems that its construction of the actual contract led to by importing the same three reasonableness terms into the hypothetical contract. It sought to deal with the same problems in the hypothetical contract by making those terms express.

Discussion and analysis

156. This ground covers much the same ground as the arguments in relation to the actual contracts. There was no error of law in the FTT finding that the implied terms as to reasonableness that it found would have been in the actual contracts would have been express in the hypothetical contracts. As stated above, such terms are permissible and regularly used in employment contracts (ones of personal service).

157. In the specific context of how much work Mr Thompson would be required to perform, on the FTT's findings this was not in any event controlled simply by the requirement that requests should be "reasonable". The FTT found (against which there is no appeal) that the scope of work that Mr Thompson would be required to perform was specific and limited within the hypothetical contract to that of Soccer Saturday and few other specified commitments [57].

158. The FTT impliedly found that if Sky had sought to insist on Mr Thompson doing a different show every weekday, Mr Thompson would not have agreed to this. However, provided the shows were limited to Soccer Saturday, mid-week games, associated marketing and publicity events and relevant interviews, the parties would have agreed that Sky had the contractual right to give reasonable directions about when and where the Services would be performed.

C. The FTT's decision as to whether the necessary framework of control existed was wrong in law

The FTT Decision

159. As noted above, at [67] of the Decision the FTT found a sufficient framework of control in the hypothetical contract between Sky and Mr Thompson on the basis that Sky had the right: (1) to decide when services were to be provided and this would be on a first call basis without Mr Thompson having a right of refusal; (2) to decide where the services were to be provided; (3) to prevent Mr Thompson working for competitors; and (4) to control confidential information and intellectual property arising out of the services (albeit not Mr Thompson's opinions).

The Appellant's submissions

160. Mr Firth submitted that the FTT's decision on sufficient framework of control might have been different if it had not erred in relation to deciding the terms of the hypothetical contract because two out of the four points it relied on to support its conclusion would not be available (i.e. [67](1) and (2)). The FTT's errors in relation to interpreting the terms of the hypothetical contract on control over when and where Mr Thompson's services were to be provided, directly fed into its analysis of whether

there was a sufficient framework of control necessary for a contract of employment. Its conclusion was based on material errors of law.

Discussion and analysis

161. This ground of appeal is premised upon the Appellant succeeding in its earlier grounds on the terms of the hypothetical contract. The Appellant does not argue that if the terms of the hypothetical contract were those as found by the FTT, it was not open to the FTT to find that there was a sufficient framework of control so as to satisfy the second stage of the test for a contract of service in *Ready Mixed Concrete - RMC2*.

162. Given our findings that there was no error of law in the FTT's construction of the hypothetical contract between Sky and Mr Thompson, we likewise find there to be no error of law in it finding that there was a sufficient framework of control necessary to found a contract of employment. Therefore, attention then turns to the third stage of the *Ready Mixed Concrete* test, *RMC3*, on other relevant factors, both contractual and non-contractual, pointing towards or away from an employment relationship.

D. The FTT's application of the third stage of the employment test was wrong in law

163. The latest guidance on the proper approach to considering *RMC3* is provided in *HMRC v S & L Barnes Ltd* [2024] UKUT 262, [2024] STC 1813 *("Barnes UT")*. That decision was promulgated after the FTT's Decision in this case.

164. The Upper Tribunal in *Barnes UT* at [108(3)] suggested that tribunals should divide material provisions of the contract and other circumstances into: i) those which are consistent with an employment relationship; ii) those which are inconsistent; iii) and those which are neutral. Further, as confirmed, at [54]-[57], the question of whether a particular factor is potentially relevant or irrelevant to the employment status of a hypothetical contract is a matter of law. The weight to give to the factors in the multifactorial evaluation is matter for the Tribunal with which the Upper Tribunal will be reluctant to interfere.

165. We do not consider *Barnes UT* to be wrong in its guidance on *RMC3* and follow it. It is consistent with the higher authority of *Atholl House CoA* at [75]:

> …Whether the third condition is one of consistency or inconsistency with a conclusion of employment strikes me as a largely arid debate. The court or tribunal will in any event have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment. Given that mutuality of obligation and control are necessary elements of employment, there will inevitably have to be factors pointing in the opposite direction, but it is, in my view, no more than that…

166. Mr Firth submits that the FTT erred in relation to each one of the ten factors it considered at [68] of the Decision in its overall assessment of whether the hypothetical contract between Sky and Mr Thompson would be a contract of employment.

167. We address in turn each of the factors considered by the FTT as part of its reasoning at [68], accepting Mr Stone's submissions.

68(1) "The control set out above was considerable. In particular Sky's…right to require Mr Thompson's performance of the services at location of their choosing is consistent with an employment relationship…"

The Appellant's submission

168. Mr Firth submitted that the FTT's errors in relation to the hypothetical contract directly fed into its analysis of the third stage. It follows that that conclusion on control as a material factor is also based on errors of law. But for those errors, in particular on the existence and extent of control (which was one of the few factors the FTT actually found pointed towards employment), the Decision might have been different.

Discussion and analysis

169. This ground adds nothing to the alleged errors we have rejected above – there was no error of law in the FTT finding there was a considerable degree of control in the hypothetical contract between Sky and Mr Thompson.

68(2) "Mr Thompson's role as a pundit and a guest giving his own opinion does not tend against the hypothetical contract being an employment contract."

The Appellant's submission

170. Mr Firth argued that this conclusion was wrong. The possibility that a person engaged solely to deliver their own opinions may, depending on the other circumstances, amount to an employee does not mean that this is not a factor tending against employment. It is such a factor because it means that there is no right of control over the essential subject-matter of the service. The extent of the control is a relevant factor at *RMC3* (*PGMOL*, [32]).

171. He submitted that the evidence in the case demonstrated the difference with Mr Thompson having no instruction during the program and control of his own opinions (Decision at [51], [67(5)]), whereas, for example, Jeff Stelling, the presenter was being spoken to "all the time throughout the 6 hours" (see the agreed record of IC's evidence, page 205 of the hearing bundle). The role of Mr Thompson was comparable to a guest interviewee who, no doubt, would have agreed with the programme makers the topic of the interview but what they are being paid to provide is their own analysis and opinions.

Discussion and Analysis

172. We reject this ground.

173. As found in *PGMOL* there are individuals who possess skills and are required to exercise judgement who are not susceptible to intimate direction by an employer. The employer may not have the practical ability to intervene during the performance of the duties so as to direct the manner in which they were performed.

174. The FTT's approach was consistent with the guidance in *Barnes UT* for the reasons it gave at [65]-[70]. Providing one's own opinions is consistent with both employment and self-employment. The Upper Tribunal in *Barnes UT* determined that there is no rational basis for finding that someone being engaged as a pundit to provide analytical insights (rather than a commentator who does more talking) is a factor that points away from the hypothetical contract being an employment.

175. We do not only follow *Barnes UT* out of judicial comity but because we agree with it. Someone engaged as one of the panellists on Soccer Saturday can be engaged as either an employee or self-employed person, depending upon the terms of the engagement and relevant surrounding circumstances. The role, including the giving of one's own personal opinion, itself does not determine the status. There was no error of law by the FTT.

68(3) "The manner in which Mr Thompson prepared for and provided these services is not inconsistent with an employment relationship. The same is true of the fact that Mr Thompson would leave as soon as he had finished the programme."

The Appellant's submissions

176. Mr Firth submitted that the fact that Mr Thompson determined how much preparation to do, what type of preparation, when to do it and where to do it, is a matter that tends against employment. It should have been taken into account as such. The same applies to the fact that he would just leave after a show finished - no debrief, no future planning, no going back to one's desk to work on the next task. He argued that this is more in the nature of someone who is self-employed but required to be physically in the studio at certain times by the nature of the service and otherwise free to do as he pleases.

Discussion and Analysis

177. We reject this ground. Again, Mr Thompson was required to render his services to the best of his abilities (see cl. 4.1). The FTT was entitled to find the same and ensuring that he was adequately prepared for the highly-skilled work was a requirement of achieving this. The fact that Mr Thompson was able to determine when he did this preparation and how much he needed to do is not a factor inconsistent with employment. This was consistent with the guidance in *Barnes UT*. It demonstrates no error of law.

68(4) "The fact that Mr Thompson's opinions and analysis remained his does not affect the employment relationship. Crucially, the hypothetical contract restricted Mr Thompson's ability to exploit those opinions and analysis (and intellectual property more generally) other than in accordance with its terms."

The Appellant's submissions

178. Mr Firth submitted that the FTT failed to explain or consider what the actual restriction was. It was not on Mr Thompson exploiting his opinions, but on providing "similar services to other television, radio or media organisations" (FTT, [7(5)(a)]). Accordingly, Mr Thompson could use his opinions for anything that was not similar, and even for things that were similar, with consent not to be unreasonably withheld.

Sky in no sense owned his opinions and analysis. Mr Firth argued that if Mr Thompson wanted to write a book full of his analysis and opinions, there would be nothing Sky could do about it. In *Barnes UT*, this ability was accepted as an indicator against employment ([77]). The FTT did not even explain why it was "crucial". There was a clear gap in the FTT's logic.

Discussion and Analysis

179. We reject this ground. The facts of this appeal were different from *Barnes UT*, because there was evidence that Mr Barnes did commercially exploit the opinions expressed when working for Sky in the preparation of newspaper articles for *The Times* and *Sunday Times*. There was no such evidence of similar exploitation in the present case.

180. The FTT was entitled to find that the hypothetical contract would have restricted Mr Thompson's ability to exploit his opinions and analysis, and intellectual property more generally. That is a finding supported by the evidence (see in particular clause 2.1). The contract would not have prevented or precluded Mr Thompson from doing those things in all circumstances such as when Sky agreed, and the FTT did not find that it would have. There was no error in the FTT finding that this factor did not support the contract being one of self-employment. An employer may wish to place such a restriction on an employee as much as a client may wish to place such a restriction on an independent contractor.

68(5) "The hypothetical contract provided for termination by Sky but not by Mr Thompson."

Appellant's submissions

181. Mr Firth submitted that the FTT does not explain how or why the termination clause is relevant to employment status. He argued that the clause points against employment as employees generally have the right to terminate upon notice. It certainly does not point towards employment. This is another clear gap in the FTT's logic.

Discussion and analysis

182. We accept that the FTT did not state whether this was a factor consistent with employment or whether it was simply neutral – although it is to be inferred that it was saying that it supported a conclusion that the contract was one of employment because the FTT stated that it was giving reasons for this conclusion at the outset of [68].

183. In any event, the FTT did not err in law in finding that the termination provision in the hypothetical contract (which would have given Mr Thompson no power to terminate and which gave Sky power to terminate only for cause (as defined)) was a factor consistent with employment because it required a strong mutual obligation for Mr Thompson to work for Sky during the course of the contract which Mr Thompson had no right to get out of. The FTT was entitled to find that Mr Thompson agreeing to "throw in his lot" with Sky during the contract period without being able to "walk away" easily was a significant commitment to Sky and inconsistent with a self-employment relationship.

184. The Upper Tribunal explained in *Barnes UT*, at [117(1)], when considering the identical termination provisions, that the length of a fixed term contract is also a relevant factor. A two-year fixed term contract terminable only in restricted circumstances provided Mr Thompson with significant economic security and imposed significant mutual obligations on both parties, effectively tying them together for each two-year period.

68(6) "Whilst Mr Thompson had his own status and character as a result of his expertise and professional background, he had become associated with Soccer Saturday. This was recognised in the wording of the non-compete clause at paragraph 4.2 of the Schedule. Mr Thompson also acknowledged this in his evidence as he noted that the viewing public would expect him to be on their screens on a Saturday."

Appellant's submission

185. Mr Firth submitted that there was no evidential basis for the conclusion that Mr Thompson was "more closely associated with Sky" than other professional activities. Mr Thompson's evidence was that he was not seen as part and parcel of Sky – instead, his image was that of a former Liverpool and England footballer who used that image to generate income in a number of ways (36). This included personal appearances, after dinner speaking and hosting tours of Liverpool FC's stadium (29). That evidence was not challenged.

186. Mr Firth argued that the FTT failed to address that evidence and instead simply asserted that Mr Thompson had become associated with Soccer Saturday. Mr Thompson is associated with Liverpool Football Club but that does not make him an employee of LFC when giving a club tour.

Discussion and Analysis

187. This ground discloses no error of law. The FTT was entitled to find that Mr Thompson had his own status and character as a result of his background but nonetheless he had become associated with Soccer Saturday. The FTT neither made irrational findings nor failed to take into account relevant evidence in coming to its conclusion.

188. The FTT recorded two facts it had found based upon documentary and oral evidence: a) In paragraph 4.2 of the Schedule, Mr Thompson recognised, "*… during the Assignment I will have become associated in the minds of the public with Sky Sports …*"; and b) Mr Thompson stated in his evidence that the viewing public would expect him to be on their screens on Saturday. This more than reasonably justified the FTT's evaluative conclusion.

189. At [71] of the Decision, in distinguishing *Barnes FTT, but* not forming part of its core reasoning, the FTT found that Mr Thompson was more closely associated with Sky than any other professional activities "*that he was carrying out at the time*". This was not simply a rational finding but strongly supported by the evidence. Apart from his work for Sky, Mr Thompson's other professional activities were "*work for Skybet … speaking engagements, tours of Liverpool's stadium at Anfield, and television interviews with Liverpool's television channels*". The FTT was entitled to

find that Mr Thompson was better known in the period 2013 – 2017 for his role on Soccer Saturday than for those matters.

68(7) "The fact that the payment was paid as a block fee regardless of air time is neutral. Whether this is a salary or a fee depends upon whether the arrangement was an employment contract or not rather than being dependent upon the actual Contract's or hypothetical contract's choice of label."

Appellant's submissions

190. Mr Firth submitted that a block fee regardless of time worked indicates self-employment. Employees are typically paid based on time worked/normal working hours (hence national minimum wage based on an hourly rate). Employees are not typically paid a set fee without any normal working hours and irrespective of how much or little time they spend on the employer's work. Mr Thompson was paid the same amount, even if he did no work in a month which happened from May to August.

Discussion and Analysis

191. We disagree. In *Barnes UT* at [73], the Upper Tribunal said, "*Mr Stone said in his skeleton argument that "payment of a fixed fee in equal monthly instalments, paid irrespective of days worked … was consistent with employment status, and certainly not inconsistent with it". We agree*". The fixed annual fee, not calibrated to the number of days worked, was found by the Upper Tribunal when it remade the decision to be one of the strongest factors in favour of the hypothetical contract being one of employment (see [117(5)]). By virtue of this clause, Mr Barnes was exposed to very limited financial risk in the performance of the services but guaranteed a monthly amount of money which was consistent with the security and stability of an employment relationship.

192. The FTT did not err materially in finding that this same factor was neutral in Mr Thompson's case and was not an indicator of self employment. It was not inconsistent with employment status and the FTT might have gone further in finding it was positively consistent with it.

68(8) "It is right that Mr Thompson's work for Sky took up a relatively small amount of his time and that this was one method of capitalising on Mr Thompson's own status and character. However, this must be balanced against the fact that his work was the substantial majority (an average of 80% during the relevant periods) of the Company's earnings. This was the main element of Mr Thompson's professional income. As such, his services for Sky did not take place against a background of the majority of Mr Thompson's professional income coming from a range of self-employed engagements."

The Appellant's submissions

193. Mr Firth submitted that the fact that the Sky contract would take up a relatively small amount of Mr Thompson's time was an important factor because it meant that he had plenty of time to take up other engagements to exploit his image as an entertaining and knowledgeable former footballer (see *Atholl House Productions Ltd v. HMRC* [2024] UKFTT 37 (TC), [135(4)(c)] referred to as a helpful summary in *Barnes UT*, [108(6)]). To what extent he did so was a matter for him. This presented

a contrast to other situations where the worker provides services every working day and would have limited ability to take on other engagements.

194. Conversely, the extent of Mr Thompson's earnings from other engagements was not relevant and should not have been taken into account because it would not be known to Sky (*Atholl House CoA*, [123]). The FTT did not identify any evidential basis for finding that Sky would have known what proportion of Mr Thompson's income its contract constituted and there was none. That constituted an error of law by the FTT.

Discussion and Analysis

195. We accept that the precise percentage of an individual's income that is attributed to one source would not have been known at the commencement of a contract and is therefore not a matter that can properly be taken into account and as such the FTT erred in law. The precise percentage of income the contracts represented would not have been known to Sky at the outset of the contracts in 2013 and 2015 but Sky would have known that this was Mr Thompson's only broadcasting contract and he only had a specified number of other work commitments. Sky would have known the extent of the other work commitments Mr Thompson was likely to be performing outside the contracts and the number of other clients (for instance, the FTT found he was also doing tours of LFC).

196. Therefore, the error by the FTT on specific percentage of income was not material because the degree of financial dependency that Mr Thompson had upon Sky during the currency of the contract *is* a relevant factor: *Barnes UT* at [98]. By analogy with the Upper Tribunal's finding in that paragraph, Sky would have had an understanding of Mr Thompson's business interests outside his work for Sky and an awareness that he was significantly dependent upon it as the one paymaster for the exploitation of his talents, rather than deriving significant income from varied sources. That was consistent with employment.

68(9) "The fact that Mr Thompson had the potential to increase his income through the efficient use of his time is neutral. This is saying no more than the fact that Mr Thompson could earn money from engagements other than Sky if he used his time wisely. As it is possible to be employed by one principal and self-employed for engagements with other principals, the ability to increase the amount of self-employed work does not cause the employed engagement to change its nature."

Appellant's submission

197. Mr Firth submitted that the FTT was wrong to treat the potential to increase profit as neutral. The factor demonstrated the lack of link between the fee earned and the time spent. An employee will typically have working hours and be paid for those hours. There is no potential to increase overall income through efficiency. It is well recognised that "how far the person providing the services has an opportunity to profit from sound management in the performance of his task" is a factor that can point against employment (*Hall v. Lorimer* [1992] 1 WLR 939 and *Atholl House CoA* [93] – [94]).

Discussion and Analysis

198. We do not accept that this reveals an error of law on the part of the FTT.

199. In *Barnes UT*, the FTT had found that Mr Barnes could profit from the sound management of his business through efficient use of his time. At [91] of that the decision, the Upper Tribunal agreed with HMRC's submissions (which relied in part on the FTT's decision in this case) that that was an error of law. It said, "*We agree with Mr Stone that* [this factor] *was not, as a matter of principle, a pointer away from employment under the hypothetical contract*."

200. Even if it may be a factor that can point against employment in some cases, the FTT was entitled to find it was not so in this case but was neutral. The FTT had already partly addressed Mr Thompson's opportunity to profit at [68(8)] when considering the other work commitments he enjoyed and recognising the reality that this was his only broadcasting contract and at [68(10)] that he was not exposing himself to any financial risk under the contracts. An employee can serve more than one employer or can be employed by one employer but be in business on their own account in relation to other clients as recently affirmed in *Red White & Green Ltd v Revenue & Customs Commissioners [2023] UKUT 83 (TCC)* at [137(2)]. In our view there is plainly no error in the FTT's decision, on the facts of this case, in terms of balancing the weight to be afforded to the limited services provided to other clients concurrently with services to Sky.

Overall assessment lacking in logic and outside the reasonable range

201. Mr Firth did not challenge the FTT's conclusion at [68(10)] that "Mr Thompson's risk to his reputation and profile during appearances is neutral."

202. Instead, he submitted that overall, the FTT's conclusion was lacking in logic and unreasonable. The FTT essentially found that there was employment because there was a considerable control by Sky and Mr Thompson was associated with Soccer Saturday. Out of the list of factors the FTT purported to consider, very few are actually said to support employment and one is left with the appearance that the FTT reasoned that if there is control and nothing inconsistent with employment, that is employment, which is not the right test (and seems to amount to an impermissible presumption see *Atholl House CoA*, [113] and Basic Broadcasting Limited UT, [60]). He argued that once the correct factors are identified (as set out above), the FTT's conclusion on employment status was outside of the reasonable range.

Discussion and analysis

203. We reject this ground of appeal challenging the evaluative exercise conducted by the FTT, which we have accepted contained no material errors of law and was well within a reasonable range of conclusions that could have been reached for the reasons given. Although the UT decision in *Barnes UT* was not promulgated until after the FTT's decision in this case, the FTT's approach was nevertheless in accordance with the guidance of *Barnes UT*. The FTT identified those factors consistent with employment and those factors not inconsistent with employment (or "neutral" to use the language of *Barnes UT*). It was entitled to find that none of the terms of the hypothetical contract was inconsistent with an employment contract (other than [68(11)] – the absence of perks offered to Mr Thompson which other

employees enjoyed – but which it found did not outweigh its overall conclusion). Its conclusions were rational.

204. After having considered the factors identified by the parties, the FTT then also "stood back" to see what picture emerged at [69] weighing all the factors together. There is no proper basis for the Upper Tribunal interfering with that exercise. There was, accordingly, no error of law in the FTT's consideration of the factors relevant to determining the status of the hypothetical contracts.

Conclusion

205. This appeal must be dismissed because the grounds of appeal do not disclose a material error of law by the FTT in making its Decision. For the reasons addressed above, when the Decision is read as a whole, there was no material error of law in the FTT's conclusion that the Intermediaries Legislation applied to Sky's engagements of Mr Thompson through the Appellant because he would have been regarded as an employee under direct hypothetical contracts with Sky.

UPPER TRIBUNAL JUDGES

JUDGE RUPERT JONES
JUDGE PHYLLIS RAMSHAW

RELEASE DATE: 17 March 2025