Neutral Citation Number [2025] UKUT 00406 (TCC)

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Appellants: The Commissioners for His Majesty's Revenue and Customs	**Tribunal Ref: UT/2025/000035**
Respondent and Applicant: Bryan Robson Limited	

RECONSIDERATION OF APPLICATION BY RESPONDENT FOR PERMISSION TO APPEAL FOLLOWING ORAL HEARING ON 5 DECEMBER 2025

DECISION NOTICE

JUDGE THOMAS SCOTT

Representation

For the Applicant: James Rivett KC and Quinlan Windle, instructed by Ernst & Young LLP

For HMRC: Christopher Stone KC and Georgina Hirsch, instructed by the General Counsel and Solicitor to HM Revenue and Customs

Background

1. The Respondent was the personal service company of Bryan Robson, the former Manchester United and England footballer. Mr Robson acted as an "ambassador" for Manchester United under an Ambassador Agreement, which agreement contained various terms dealing with image rights. HMRC considered that IR35 (and the NICs equivalent) applied to all monies paid under the Ambassador Agreement.

2. The decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 20 January 2025 and reported at [2025] UKFTT 56 (TC) ("the Decision") determined two issues. The first (the "IR35 Decision") was that the intermediaries legislation applied to the Ambassador Agreement. The second (the "Image Rights Decision") was that, notwithstanding the IR35 Decision, part of the consideration payable under the Ambassador Agreement related to image rights and would need to be apportioned.

3. HMRC applied to the FTT for permission to appeal against the Image Rights Decision and the FTT granted permission.

4. On 15 May 2025 the Respondent filed a response to HMRC's notice of appeal (the "Response"). In addition to setting out the grounds on which the Respondent says HMRC's appeal should be dismissed, the Response also seeks permission to appeal against the IR35 Decision. That application is made under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Under Rule 24(1B)(a), a respondent who wishes to rely on any grounds on which it was unsuccessful in the proceedings which are the subject of the appeal must (subject to any Tribunal direction) provide a response. Under Rule 24(1C), in such a situation, to the extent that the respondent needs any permission the response must include an application to the Tribunal for such permission. The normal rule that a party seeking to appeal against an FTT decision must first apply for permission to the FTT is disapplied in relation to such an application: Rule 21(1A).

When can an appeal be made?

5. An appeal to this Tribunal can be made only on a point of law: section 11 of the Tribunals, Courts and Enforcement Act 2007. It must be shown that it is arguable that the FTT made a material error of law in reaching its decision. "Arguable" means that the argument stands a realistic as opposed to fanciful prospect of success.

6. Findings of fact by the FTT cannot be the subject of an appeal to this Tribunal unless they are such that no person acting judicially and properly instructed as to the relevant law could have made that finding, because, for instance, the finding failed to take account of relevant evidence or took account of irrelevant evidence or was perverse: *Edwards v Bairstow* [1956] AC 14. In relation to any challenge based on *Edwards v Bairstow* the staged approach in *Georgiou v Customs & Excise Commissioners* [1996] STC 463 should be followed.

Grounds of appeal

7. The Response sought permission to appeal against the IR35 Decision on the following grounds:

> (1) The FTT erred in law by including in the terms of the hypothetical contract aspects of the Ambassador Agreement that did not pertain to the obligation personally to perform services (ie those that pertained to the image rights).
>
> (2) Alternatively, if and to the extent that the image rights aspects of the Ambassador Agreement should be included in the hypothetical contract, the FTT erred in law by concluding that the hypothetical contract granted MUFC the exclusive right to use Mr Robson's image during the term of the hypothetical contract.
>
> (3) Further and alternatively, the FTT erred in law by concluding that MUFC would be entitled to a remedy under the hypothetical contract if Mr Robson failed to satisfy the minimum commitment in any six-month period simply as a consequence of his declining one or more requests (and as a result that MUFC

could compel Mr Robson to accept every request by offering him only sufficient appearances to satisfy the minimum commitment).

Written decision

8. I granted permission to appeal in respect of Grounds 1 and 2 and refused it in respect of Ground 3. My decision in relation to Ground 3 is the subject of this oral renewal hearing.

9. In my written decision I stated as follows:

> **Ground 3: the minimum commitment**
>
> This ground challenges the FTT's conclusion that under the hypothetical contract MUFC could have determined precisely which appearances Mr Robson had to make by offering him only sufficient appearances for him to meet the minimum commitment. It is said that this was the consequence of other conclusions reached by the FTT in relation to the hypothetical contract at [137(2)-(3)] and [138(1)]. It is said that "this conclusion was not…open to the FTT on the basis of the undisturbed evidence of BRL's witnesses. The FTT Decision does not give any good reason for rejecting that evidence". It also refers to "evidence of Mr Robson and MUFC working together to allow him to meet his minimum commitment". It is asserted that "the FTT's conclusions were not ones that a reasonable tribunal could properly reach and therefore amount to an error of law".
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> Ground 3 is an *Edwards v Bairstow* challenge. The principles applicable to such a challenge were summarised last month in *Nellasar Ltd v HMRC* [2025] UKUT 00164 (TCC) as follows:
>
> > 101. The *Edwards v Bairstow* principle is well known and has been summarised in a number of authorities. Briggs J (as he then was) summarised the position in *Megtian Ltd (In Administration) v HMRC* [2010] STC 840 at [11]:
> >
> > > "The question is not whether the finding was right or wrong, whether it was against the weight of the evidence, or whether the appeal court would itself have come to a different view. An error of law may be disclosed by a finding based upon no evidence at all, a finding which, on the evidence, is not capable of being rationally or reasonably justified, a finding which is contradicted by all the evidence, or an inference which is not capable of being reasonably drawn from the findings of primary fact".
> >
> > 102. We are also referred to the well-known decision of the Court of Appeal in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 ("*Georgiou*"), in relation to appeals said to involve points of law of the kind identified in *Edwards v Bairstow*…
>
> I consider that Ground 3 is the sort of roving selection deprecated in *Georgiou*. An arguable error of law is not identified for the purpose of an *Edwards v Bairstow* challenge by asserting that the FTT should have afforded more

weight to certain evidence or referred to other evidence. As to the latter, the Court of Appeal stated in *Barclays Bank PLC v Scott Dylan*, at [67]:

> It is pertinent, however, to recall that an appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration: *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 W.L.R. 2600 at [48] and [57]. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it: *Volpi* at [2].

In any event, the points made in support of Ground 3 are weak. An assertion as to what sort of contract Mr Robson would have agreed to is mere speculation, and what a witness did not say is irrelevant. The evidence that Mr Robson and MUFC worked closely and collaboratively together, including to meet his minimum commitment, was accepted by the FTT, but it does not render the FTT's findings irrational.

Ground 3 falls a long way short of identifying any arguable error of law and permission for it is refused.

Oral renewal hearing

10. The oral renewal hearing took place by remote hearing on 5 December 2025. At the Tribunal's direction, each of the Applicant and HMRC had filed written skeleton arguments in advance of the hearing. I was greatly assisted by the written and oral submissions of Mr Rivett, Mr Windle, Mr Stone and Ms Hirsch.

Ground 3

11. In his skeleton argument, Mr Rivett now formulated Ground 3 as follows:

> 21…the FTT in [FTT/137] held MUFC would have no obligation to make any requests of Mr. Robson or work together with him to arrange appearances and:
>
> (1) if Mr. Robson accepted every appearance offered to him and did not make 35 appearances in a six-month period, he would not be in breach of contract;
>
> (2) if Mr. Robson declined even a single appearance offered to him and did not make 35 appearances in a six-month period, he would be in breach of contract and MUFC would be entitled to a remedy. The FTT made no finding about what this remedy would be (i.e., whether it would simply be a pro rata refund of the portion contract fee or something more substantial).
>
> BRL'S PROPOSED GROUND OF APPEAL
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> 22. The FTT was faced with the unusual situation in which it had held that a key term of the actual contract would not be reflected in the hypothetical contract and therefore needed to determine a replacement term for the hypothetical contract. In its conclusion at [FTT/137], the FTT reached a conclusion on the terms of the hypothetical contract that was not advanced by either party.

23. One of the consequences of the FTT's conclusion is that it creates the following "flashpoint":

> If Mr. Robson attempted to decline a single appearance, it would have been open to MUFC to compel him to accept that appearance by saying he would otherwise only be offered a total of 35 appearances in the six-month period, in which case rejecting the offered appearance would inevitably result in him being in breach of the hypothetical contract.

24. This is the sort of hypothetical "flashpoint" that should have been considered by the FTT when considering its proposed replacement term in accordance with the guidance set out *RALC Consulting* at [37(5)]. It shows that the FTT's conclusion produces an outcome in some circumstances that is stricter than the term in the Ambassador Agreement or any term proposed by HMRC.

25. BRL's proposed third ground of appeal is that the FTT's conclusion as to the terms of the hypothetical contract and the consequences implicit in this conclusion are wrong in law because:

(1) The conclusion is contrary to the evidence given by both of BRL's witnesses in circumstances where they were not given an opportunity to comment on the FTT's analysis.

(2) The conclusion is wholly unsupported by the evidence before the FTT.

12. Mr Rivett clarified that by Ground 3 the Applicant sought permission to appeal against the FTT's findings at [**137(1) and (3)]:**

> 137…In my view, taking into account both the terms of the actual contract and the circumstances in which the services were performed, the terms of the hypothetical contract should be taken to have provided as follows in relation to Mr Robson's personal appearances:
>
> (1) **the club had no obligation under the hypothetical contract to make any requests of Mr Robson to make personal appearances or to work together reasonably with Mr Robson in order to ensure that Mr Robson was able to satisfy the minimum commitment in each six–month period**;
>
> (2) subject to the point set out in paragraph 137(3) below, the club had no remedy under the hypothetical contract in the event that Mr Robson chose to turn down any request for a personal appearance;
>
> (3) **the club was entitled to a remedy under the hypothetical contract if Mr Robson failed to satisfy the minimum commitment in any six–month period as a consequence of his declining one or more requests**; and
>
> (4) the club was not entitled to a remedy under the hypothetical contract if Mr Robson failed to satisfy the minimum commitment in any six–month period despite accepting all requests made of him by the club – in other words, solely

> because the club failed to request at least 35 personal appearances in the six–month period in question.

Submissions

13. Mr Rivett submitted as follows:

> (1) The FTT reached a conclusion on the terms of the hypothetical contract that was not advanced by either party.
>
> (2) A consequence of that conclusion was a "flashpoint" (set out above) which was not considered by the FTT.
>
> (3) The finding supporting this conclusion, at [138(1)], was contrary to the witness evidence:
>
> > the club would not have accepted any kind of contractual obligation to make requests for personal appearances from Mr Robson or to work together reasonably with Mr Robson to enable Mr Robson to satisfy the minimum commitment in any six–month period…
>
> (4) Both witnesses for the Applicant stressed the importance to Mr Robson of flexibility to turn down appearances.
>
> (5) The failure to put the conclusion to the MUFC witnesses was contrary to the guidance set out in *Griffiths v TUI (UK) Ltd* [2025] AC 374, at [70] of that decision. We cannot know what the witnesses would have said if it had been put to them. This was unfair and an error of law.
>
> (6) The evidence clearly showed that flexibility and collaboration in relation to the Ambassador Agreement were fundamental to Mr Robson. The FTT's conclusion was wholly unsupported by the unchallenged evidence and this was an error of law.
>
> (7) HMRC's assertion that the challenged conclusion was not material to the FTT's finding that IR35 applied to the hypothetical contract was wrong; it was clearly material to the FTT's finding that under the hypothetical contract there was a strong level of control by MUFC.
>
> (8) There are other good reasons for granting permission to appeal. In practice, other cases are stood behind this appeal and it would be appropriate for the Tribunal to give guidance on the "flashpoint" argument. General fairness and expediency support permission being granted. Permission on Ground 3 would make no material difference to the length of the hearing and would allow the Tribunal to consider all issues.

Discussion

14. Mr Rivett could not have argued his client's case more forcefully and skilfully, but I have decided following reconsideration that permission to appeal on Ground 3 should be refused, for the following reasons.

Materiality

15. First, permission to appeal should be granted only if an arguable error of law can be shown to have been arguably material to the challenged decision. I do not consider that Mr Rivett has established that the finding sought to be challenged was arguably material to the FTT's conclusion that IR35 applied to the hypothetical contract.

16. The FTT's conclusions in relation to the "disputed issue" in this respect as regards the hypothetical contract can be unpacked into these findings in relation to the relevant terms of the hypothetical contract:

> (1) Like the Ambassador Agreement, the hypothetical contract would have contained the obligation for a "minimum commitment" of 35 "appearances" by Mr Robson in every six-month period.
>
> (2) Breach of the minimum commitment would give MUFC a right of termination.
>
> (3) As long as the minimum commitment was satisfied, Mr Robson was free to decline any request from MUFC. The limit in the Ambassador Agreement of 3 such declines in any six-month period would not apply.
>
> (4) There was no obligation on MUFC to offer enough appearances to satisfy the minimum commitment, taking into account any declines by Mr Robson.
>
> (5) Notwithstanding (4), MUFC could not claim a breach of the minimum commitment which would arise solely because it had offered less than 35 appearances in any six-month period.

17. The FTT summarised its reasons for these conclusions at [138], set out the consequences at [141], and described the resultant relevant terms in the hypothetical contract at [164] as follows:

> 164. By way of summarising the conclusions set out in paragraphs 125 to 163 above, I find that the hypothetical contract included the following terms in addition to those set out in paragraph 123 above:
>
> (1) it specified that, without prejudice to his obligation to satisfy the minimum commitment in each six–month period, Mr Robson was free to decline any request for him to make a personal appearance that was made by the club;
>
> (2) it did not contain any obligation on the part of the club to make sufficient requests for personal appearances to enable Mr Robson to satisfy the minimum commitment in any six–month period despite his declining requests to do so (or to work together reasonably with Mr Robson to enable Mr Robson to satisfy the minimum commitment in any six–month period) although it specified that, if the club failed to request Mr Robson to make personal appearances on at least 35 days in a six–month period, then Mr Robson would not be in breach of the obligation to satisfy the minimum commitment in the relevant six–month period;
>
> …

18. In relation to the materiality to its conclusion of the five findings I have unpacked above, it is notable that in its meticulous and detailed decision, the FTT explained clearly which factors it considered to be indicative of employment, which to be indicative of self-employment and which to be neutral. It set out in detail the parties' submissions on that issue (at [199]-[202]), and correctly directed itself as to the law (at [204]). It then, relevantly to Ground 3, identified the following factors:

> *Features of the terms which are indicative of employment*
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> 206. In my view, the following features of the terms of the hypothetical contract are indicative of employment:
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> …
>
> (2) strong control – I agree with Mr Stone that the terms of the hypothetical contract entitled the club to control the "what", "when", "where" and "how" of the services to be provided by Mr Robson.
>
> Notwithstanding the point made in paragraph 207(2) below, Mr Robson could not continually refuse requests to make personal appearances indefinitely. If he was to satisfy the minimum commitment in each six–month period under the hypothetical contract, he would, sooner or later, have to accede to the club's requests to make personal appearances and, in so doing, he would be accepting the club's control of the "what", "when" and "where" of the services in question.
>
> …
>
> *Features of the terms which are indicative of self-employment*
>
> 207. In contrast, the following features of the terms of the hypothetical contract are indicative of self–employment:
>
> (1) limitation on mutuality of obligation – as long as he satisfied the minimum commitment in each six–month period, Mr Robson was entitled to refuse requests to make personal appearances. This flexibility is unusual in a relationship of employment and is a factor which served to diminish to some extent the mutuality of obligation in this case;
>
> (2) limitation on control – similarly, Mr Robson's ability to refuse requests to make personal appearances, albeit subject to his obligation to satisfy the minimum commitment in each six–month period, served to diminish to some extent the club's control over the "what", "when" and "where" of his activities. This is because, as noted by the UT in *Barnes* at paragraphs [78] to [81], a working agreement as to the putative employee's availability to perform the services goes beyond the mere existence of a co–operative working relationship and is, "as a matter of principle, a pointer away from employment".
>
> …

19. Pausing there, what matters in relation to the materiality of the parts of [137] to which Ground 3 relates is that they are not mentioned by the FTT as relevant factors. The FTT refers to element (1) at 16 above (the minimum commitment) as an indicator of strong control (indicative of employment) and element (3) (right to decline) as limitations on both mutuality and control, (indicative of self-employment). However, the FTT does not mention elements (4) or (5), which are the findings sought to be challenged under Ground 3.

20. Nor does the FTT mention elements (4) or (5) in explaining in detail its conclusions overall as regards the status of the hypothetical contract:

> 209…approaching this question, initially at least, solely by reference to the terms of the hypothetical contract and without regard to the circumstances in which the hypothetical contract arose, my view is that, on balance, the terms of the hypothetical contract as a whole tend to indicate that it was intended to be a contract of employment.
>
> 210. I say that because I think the factors set out in paragraph 206 above slightly outweigh the factors set out in paragraph 207 above and, to the extent that they point marginally in the direction of self–employment, paragraph 208 above.
>
> …
>
> 212. Turning then to the possible impact on that conclusion of the points set out in paragraphs 206 and 207 above in relation to mutuality of obligation and control, whilst I was initially attracted by the argument that Mr Robson's ability to refuse requests to make personal appearances might well be indicative that the terms of the hypothetical contract alone – before taking into account the circumstances in which the hypothetical contract arose – pointed to a conclusion of self–employment, I have, on reflection, concluded that that is not the case. My reasons for saying that are that, in my view:
>
> (1) the obligation under the hypothetical contract to satisfy the minimum commitment in each six–month period substantially negated the impact of that flexibility. It meant that Mr Robson could not decline requests for personal appearances indefinitely and therefore that mutuality of obligation and control were still present to a considerable extent;
>
> …

21. Mr Rivett suggested that the FTT's impugned findings in relation to the obligations, (and, more importantly) lack of obligations, on MUFC must have been material because the degree of control was one of the factors found to be important by the FTT in reaching its decision. However, it is the FTT's reasoning which matters, and where the FTT has carefully explained in detail the factors which it does regard as material, that is mere speculation. I have, therefore, concluded that it is not arguable with a realistic prospect of success that the impugned conclusions were material in the IR35 categorisation.

22. In case I am wrong on that, and in fairness to Mr Rivett's thoughtful submissions, I have also considered whether, in any event, Ground 3 identifies an arguable error of law.

Failure by FTT to consider a flashpoint

23. Importantly, the flashpoint said by the Applicant to arise as a consequence of the FTT's refusal to accept its submissions as to the obligations on MUFC was not one which was identified by the FTT. It was certainly not one which the FTT considered relevant to its categorisation of the hypothetical contract. In those circumstances, I do not consider that it was an arguable error of law for the FTT to have failed to formulate and consider it.

24. The FTT did take into consideration "the hypothetical 'flashpoint' in which Mr Robson declined a request to make a personal appearance in circumstances where the club objected": [136]. It was not obliged to formulate every possible permutation of such a flashpoint (even if that was feasible), and the postulation of a flashpoint is in any event no more than a helpful aid to the FTT's evaluation exercise: see *Barnes* at [45].

FTT formulation not put forward by either party

25. The FTT acknowledged that it was not accepting in its entirety the formulation put forward by either party. At [137] the judge stated "I have concluded that the position is a bit more nuanced than either party submitted".

26. There was no arguable error of law in the FTT reaching such a conclusion. The FTT's task, as it identified, was to carry out a multi-factorial evaluative assessment, in the course of which the determination of the terms of the hypothetical contract was a critical stage. It would have been an error of law for the FTT to have regarded itself as bound to make a binary wholesale choice between the two radically different formulations proposed by the parties.

Procedural unfairness: FTT formulation not put to witnesses

27. If it were to be an arguable error of law to consider a flashpoint which had not been put to the parties during the hearing, decisions as to IR35/employment status would become even more cumbersome and unworkable. There is no suggestion in the primary source of this suggestion, the *Atholl House* litigation, that this should be the procedural position.

28. In any event, I do not consider it arguable that there was any procedural unfairness such as to amount to an error of law on the facts in this case. At the heart of Ground 3 is the complaint that the FTT refused to accept Mr Rivett's proposed provision to the effect that MUFC would work with Mr Robson to ensure that he met the minimum commitment even if he had turned down other appearance requests in that period. The evidence of the witnesses as to the existence of the minimum commitment and the desire of Mr Robson for flexibility was accepted by the FTT. There was nothing to prevent either MUFC witness from being examined and cross-examined by counsel for either party on Mr Rivett's proposed provision, or on the competing formulation proposed by Mr Stone. Each party had notice of the other's case. The responses of the witnesses would have indicated not only their reaction to each party's position, but their likely reaction to something lying between those polarised positions, which was largely what the FTT's formulation was.

Findings at [137(1) and (3)] contrary to witness evidence/entirely unsupported by evidence

29. Ground 3 rests on the argument that the FTT's findings as to the obligations on MUFC amounted to errors of law on an *Edwards v Bairstow* basis. I reiterate what I said in my written refusal (extracts set out above) as to the high hurdle that this entails, even in establishing mere arguability.

30. I do not consider it arguable that the FTT erred in law in an *Edwards v Bairstow* manner in reaching the conclusions sought to be challenged by Ground 3. That is for the following reasons.

31. First, the FTT's overall conclusions at [137(1) and (3)] cannot be argued to be irrational. It was not disputed that the hypothetical contract would contain the minimum commitment, and it is a necessary corollary of that commitment that it has a "cliff edge", so that it is breached if less than 35 appearances are made in a six-month period for a reason other than MUFC's failure to offer 35 appearances. The FTT's decision was that MUFC would not have accepted a contractual obligation which eroded the protection afforded by this commitment. That cannot be argued to be irrational in an *Edwards v Bairstow* sense.

32. Second, the evidence of the MUFC witnesses to which I was taken by Mr Rivett address a different question, which is the importance to Mr Robson of flexibility in the practical operation of the Ambassador Agreement. That evidence was accepted by the FTT, and reflected in the FTT's finding at [137] that, subject to meeting the minimum commitment, Mr Robson could decline any number of appearance requests.

33. Third, the FTT's conclusions were not unavailable to it on the totality of the evidence. For example, the FTT's findings of fact included the following, at [28(19)]:

> (19) despite believing that he was free to decline any request, Mr Robson knew that he was required to make at least the minimum number of personal appearances in each six–month period and bore that requirement in mind when deciding how to respond to a request. He said that:
>
> (a) although he felt free to decline any request and regularly did so if it was inconvenient for any particular reason – for example, because he planned to be away – he liked to "get my 35 days in the bank early so I can have a comfortable time later in the year". For that reason, he always tried to attend the club's pre–season tours if he could because each day of the tour (including travel days) counted for this purpose;
>
> (b) in practice, with the exception of the pandemic year, as to which see paragraph 28(32) below, he always satisfied the minimum commitment in each six–month period and also received payments from MUFC for additional personal appearances, as described in more detail below. In fact, he was usually able to complete his 70 days for each year by March; and
>
> (c) on one occasion, he had belatedly realised that he had agreed to make a personal appearance on the same day as he had another engagement and the club had been very accommodating in replacing him with another ambassador;

34. The FTT carefully set out at [138] its reasons for reaching its conclusions on this issue. They show that its decision was both entirely rational and supported by evidence.

Other reasons to grant permission

35. I do not consider that the other "good reasons" suggested by Mr Rivett for granting permission alter my decision. I have rejected the argument that the FTT's decision was procedurally unfair. As to the desirability of granting permission in order to give guidance in relation to other appeals, I have already granted permission for Grounds 1 and 2, which may conceivably fall into this category, and Ground 3 is by definition a challenge which is entirely fact-specific.

Decision

36. Following reconsideration, permission to appeal is refused for Ground 3. Permission has already been granted for Grounds 1 and 2.

Signed: **Date: 09 December 2025** **Judge Thomas Scott**
Issued to the parties on: 09 December 2025