Neutral Citation Number: [2008] EWHC 2113 (Ch)

Case No: CH/2008/APP/0061

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/09/2008

Before :

THE HONOURABLE MR JUSTICE HENDERSON

- -

Between :

DRAGONFLY CONSULTANCY LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Mr Andrew Stafford QC (instructed by **Nelsons Solicitors LLP**) for the **Appellant**
Ms Susan Chan (instructed by **the Solicitor to HMRC**) for the **Respondents**

Hearing date: 6 June 2008

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Judgment

The Honourable Mr Justice Henderson:

Introduction and Background

1. This is an appeal by Dragonfly Consultancy Limited ("Dragonfly") against a decision of a single Special Commissioner, Mr Charles Hellier, released on 11 December 2007 ("the Decision") after a two day hearing in September of that year. The Decision is reported at [2008] STC (SCD) 430. The appeal lies only on questions of law: see section 56A(1) and (4) of the Taxes Management Act 1970.

2. The Special Commissioner dismissed Dragonfly's appeals against a decision issued on 30 April 2004 in respect of liability to National Insurance Contributions ("NIC") for the period of three years from 6 April 2000 to 5 April 2003, and determinations of liability to PAYE income tax issued on 18 June 2004 in respect of the same period. The decision and determinations under appeal were made pursuant to what is generally known as the IR35 legislation, and related to arrangements whereby Dragonfly indirectly provided the services of its sole director and 50% shareholder, Mr Jonathan Bessell, to the AA group of companies during the relevant period.

3. Mr Bessell is a highly skilled IT system tester, and during the relevant period he worked almost exclusively for the AA. The Special Commissioner found that his services to the AA were predominantly directed to the testing aspects of three IT projects then being undertaken by the AA. The first project lasted seven months from January 2000 to July 2000, and related to the replacement of an "Ingres" database with an "Oracle" database. The second project lasted 22 months from August 2000 until April 2002, and related to the AA.com website. The third project was concerned with the AA's travel insurance product, OATI, and Mr Bessell was involved in testing between May 2002 and the end of January 2003: see paragraph 7(iii) of the Decision.

4. It is a complicating feature of the present case that Dragonfly did not provide Mr Bessell's services directly to the AA, but did so through arrangements with an agency company, DPP International Limited ("DPP"). DPP was unconnected with Dragonfly and Mr Bessell, and carried on a business which included the provision of consultancy services and temporary staff in the fields of data processing, computing and project management. On 12 October 1998 DPP had entered into an agreement with the AA (acting through a group company, The Automobile Association Developments Limited) whereby DPP agreed to supply the AA with such temporary staff as they might from time to time require in the fields mentioned above, subject to the detailed terms and conditions set out in the agreement. The agreement provided in clause 2 that it should continue for a period of 12 months only, and it contained no provision for renewal. However, no subsequent version of the agreement was produced in evidence, and having heard oral evidence from two senior AA employees (Mr Palmer and Mr Kersley) the Special Commissioner found on the balance of probabilities that throughout the period under appeal Mr Bessell's services were provided to the AA through DPP, and were provided under agreements which, so far as material, contained the same general terms as the October 1998 agreement: see paragraph 7(v) of the Decision. No challenge has been made to that finding.

5. The October 1998 agreement provided for the AA to notify DPP in advance of its requirements for temporary staff, following which DPP would supply full CVs for suitable candidates and the AA would then inform DPP which (if any) of them it

required DPP to provide, and the date on which they were to start work. Prior to the commencement of the work, DPP was obliged to supply the AA with a schedule in the form annexed to the agreement. Two of the schedules relating to Mr Bessell, covering the period from 3 January 2000 to 2 July 2000, were in evidence before the Special Commissioner. Each of them named Mr Bessell alone as the individual whose services were to be supplied, and gave his job title as "Consultant".

6. The relationship between Dragonfly and DPP was governed by a series of fixed term contracts, which are described as follows in paragraph 7(iv) of the Decision:

> "It was in October 1998 that [Dragonfly] first contracted with DPP for the supply of Mr Bessell's services. In the period 1 April 2000 to 28 February [2003] a series of fixed term contracts were made between [Dragonfly] and DPP. There were seven such contracts. With the exception of 1 April 2001, 29, 30 and 31 December 2001, 1 January 2002, and 28 and 29 September 2002, the combined period of these contracts includes everyday in the period between 1 April 2000 and 28 February 2003. Each contract took the form of a schedule which specified inter alia the period of the contract, the rate of payment and invoicing arrangements, and annexed General Terms and Conditions which were materially the same for each contract (save in those respects I discuss later). The schedule indicated that it set out the principal terms and conditions on which [Dragonfly] would provide a consultant to perform services for DPP's client. The first and the seventh schedules indicated the name of the consultant to be provided by [Dragonfly]: "Jonathan Bessell"."

7. There was no written contract at any stage between Dragonfly and Mr Bessell: see paragraph 7(vi) of the Decision.

8. The background to the IR35 legislation (so called because that was the number of the Inland Revenue press release in March 1999 which heralded its introduction) is fully set out in the judgment of Robert Walker LJ (as he then was) in R (Professional Contractors Group) v IRC [2001] EWCA Civ 1945, [2002] STC 165. In paragraph 51 of his judgment, with which Auld and Dyson LJJ agreed, he described the aim of both the tax and the NIC provisions as being:

> "to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation."

9. The method adopted by the legislation to achieve this aim, broadly stated, is to tax an individual worker (such as Mr Bessell) whose services are provided to a client (such as the AA) through an intermediary (such as Dragonfly) on the same basis as would apply if the worker were performing those services as an employee, provided that (in terms of the income tax test set out in paragraph 1(1) of schedule 12 to the Finance Act 2000):

> "(c) the circumstances are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client."

In other words, the legislation enacts a statutory hypothesis and asks one to suppose that the services in question were provided under a contract made directly between the client (here the AA) and the worker (here Mr Bessell). If that hypothetical contract would be regarded for income tax purposes as a contract of employment (or service), the legislation will apply. Conversely, if the hypothetical contract would not be so regarded, the legislation will not apply.

10. It is important to notice that the effect of the statutory hypothesis is not automatically to transform all workers whose services are supplied through a service company into deemed schedule E taxpayers. On the contrary, as Robert Walker LJ stressed in paragraph 12 of his judgment in R (Professional Contractors Group) v IRC:

> "The legislation does not strike at every self-employed individual who chooses to offer his services through a corporate vehicle. Indeed it does not apply to such an individual at all, unless his self-employed status is near the borderline and so open to question or debate. The whole of the IR35 regime is restricted to a situation in which the worker, if directly contracted by and to the client "would be regarded for income tax purposes as an employee of the client". That question has to be determined on the ordinary principles established by case law …"

11. For NIC purposes, the statutory hypothesis is framed in slightly different language. Regulation 6(1) of The Social Security Contributions (Intermediaries) Regulations 2000, SI 2000 No. 727, ("the 2000 Regulations") says that they apply where the services of the worker are supplied "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."

12. The nature of the exercise which the court has to perform under regulation 6(1) was helpfully described by Hart J in Synaptek Ltd v Young [2003] EWHC 645 (Ch), [2003] ICR 1149, in a passage which merits quotation in full. It is helpful not only for Hart J's analysis of the statutory language, but also for his rejection of the submission made by counsel for the taxpayer that the question was necessarily one of law because it involved the characterisation of a hypothetical contract. Hart J said this:

> "11. I do not accept that submission. The inquiry which regulation 6(1) directs is in the first instance an essentially factual one. It involves identifying, first, what are the

> "arrangements involving an intermediary" under which the services are performed, and, secondly, what are the "circumstances" in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that "the arrangements" are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact-finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact-finding tribunal. The fact that the tribunal is then asked to hypothesise a contract comprising those arrangements directly between the worker and the client does not, by itself, convert the latter question from being a question of mixed fact and law into a pure question of law.
>
> 12. The significance of the point is, of course, that if the question is characterised as one of fact, or of mixed fact and law, this court can only interfere if it concludes that the decision reached by the commissioners is an impossible one on the facts found by them or that they have misdirected themselves. If, on the other hand, it is a question of law this court is free to substitute its own opinion. In a context where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia, the distinction may be of critical importance: in the one case the decision of the commissioners is conclusive and in the other it is not."

13. Until the present case it appears to have been generally assumed that the difference in wording between the statutory hypotheses for income tax and NIC purposes was largely, if not wholly, immaterial. In R (Professional Contractors Group) v IRC, Robert Walker LJ said that the basic conditions in paragraph 1(1) of schedule 12 to the Finance Act 2000 and in paragraph 6(1) of the 2000 Regulations were "in almost identical terms" (see paragraph 11 of his judgment), while in paragraph 15 he said that the 2000 Regulations "produce the same effects [*as the income tax provisions*] for the purposes of Class 1 NIC", and that paragraph 6(1) of the 2000 Regulations was "a close parallel" to paragraph 1(1) of schedule 12. To similar effect, as the Special Commissioner noted in paragraph 33 of the Decision, Park J said in Usetech Ltd v Young [2004] EWHC 2248 (Ch), 76 TC 811, at paragraph 35:

> "The two wordings are not identical, but the meanings are. There was not in fact a direct contract between [*the worker and*

> *the client in that case*], but the provisions require it to be assumed that there was. What would it have contained?"

See further the judgment of Park J at paragraph 10.

14. In a thoughtful discussion in paragraphs 32 to 34 of the Decision the Special Commissioner considered the differences in the wording between the two hypotheses, read in their respective statutory contexts, and concluded that they could, at least potentially, lead to a different outcome depending on which test was applied. He saw the potential difference as lying in the fact that the NIC test (in regulation 6(1)(c)) requires the arrangements themselves to be incorporated into a notional contract, while the income tax test (in paragraph 1(1)(c)) does not in terms limit the content of the notional contract by reference to the arrangements, but rather poses the question "What would have been agreed?". That question has to be answered by reference to "the circumstances", which by virtue of paragraph 1(4):

> "… 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."

There is no equivalent to paragraph 1(4) in regulation 6.

15. Having identified this possible difference of approach, the Special Commissioner was careful when he evaluated the evidence to apply each test separately and see if it led to the same conclusion. In paragraph 63 of the Decision he said:

> "I approach this question by asking first, what would the contract [*i.e. the hypothetical contract between the AA and Mr Bessell*] have contained? And then I ask whether my answer would be any different if I simply reduced the arrangements to a contract (the embodied arrangements basis)."

16. In nearly all instances the two approaches led the Special Commissioner to the same conclusion, but in at least one case (to do with payment of Mr Bessell for making himself available for work, even if there was in fact no work for him to do) they did not: see the final two sub-paragraphs of paragraph 64(6). When he went on to consider the question of mutuality in paragraph 68, he concluded that the requirement of mutuality in a contract of employment would be satisfied on either approach (although he made a small error in referring to the embodied contract approach as being the basis which applied for income tax, rather than NIC, purposes).

17. Since there is no challenge to the Special Commissioner's findings or conclusions in relation to the question of mutuality, and since the difference of approach identified by him did not in fact make any material difference to his conclusions, it may not be strictly necessary for me to say whether I agree with his analysis of the two statutory tests. I will say, however, that he was in my judgment right to draw attention to the slight, but potentially significant, differences between the wording of the two tests. For whatever reason, the NIC test requires the arrangements themselves to be embodied in a notional contract, and then asks whether the circumstances (undefined) are such that the worker would be regarded as employed; whereas the income tax test directs attention in the first instance to the services provided by the worker for the

client, and then asks whether the circumstances (widely defined in paragraph 1(4) in terms which include, but are not confined to, the terms of the contracts forming part of the arrangements) are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded as an employee of the client. Nine times out of ten, perhaps ninety-nine times out of a hundred, the two tests will lead to the same answer. However, it cannot necessarily be assumed that this will always be the case.

18. It seems to me regrettable that these differences of detail should exist when the underlying statutory purpose is in each case exactly the same. Counsel for HMRC, Ms Susan Chan, who appeared on the hearing of the appeal but had not appeared below when HMRC were represented by a member of their in-house Appeals Unit, was unable to suggest any reason for the differences in wording. In many, if not most, IR35 cases both income tax and NIC will be in issue, and it greatly complicates the task of the tribunal dealing with the matter if the two different approaches have to be applied to the same underlying facts. In the absence of any intelligible reason for the differences, the added complication appears to be as pointless as it is burdensome. It is a measure of the care and conscientiousness with which Mr Hellier has discharged his task in the present case that he took the trouble to analyse the two tests, to perceive that they could not safely be treated as identical, and to apply each of them in turn when he came to construct the terms of the hypothetical contract.

19. I will also say that, if a choice were to be made between the two systems, I would regard the income tax approach as preferable. The problem with the NIC approach is that the "arrangements involving an intermediary" referred to in regulation 6(1)(b) cannot always be reformulated or collapsed into a notional contract between the worker and the client without a good deal of remoulding and evaluation of the surrounding circumstances, especially where (as in the present case) there is another party involved (such as DPP) and the arrangements include a chain of contracts with possibly conflicting provisions. In other words, the remoulding of the arrangements into a single notional contract will probably involve in practice very much the same process as the more open-textured income tax test expressly envisages.

The Decision

20. In paragraph 6 of the Decision the Special Commissioner recorded that he had heard oral evidence from Mr Bessell himself; from Jane Tooze, who had through her own service company provided services to the AA in the relevant period and who had been responsible for part of the project on which Mr Bessell worked between October 2002 and April 2003; from Alan Palmer who was an employee of the AA at the relevant time acting as an IS Test Manager, and was responsible for part of the projects on which Mr Bessell worked between February and July 2000 and between May 2002 and September 2002; and from Alan Kersley, who in the relevant period was Head of Change Delivery at the AA. All of those witnesses provided witness statements. In addition, shortly before the hearing Dragonfly produced a letter from Ms Christine White, who described herself as the AA Commerce Programme Manager. She did not, however, give oral evidence.

21. In paragraph 7 of the Decision the Special Commissioner made general findings of fact in 20 numbered sub-paragraphs, some of which I have already quoted or referred to in the introductory section of this judgment. He then made detailed findings of fact

relating to the issues of "substitution" and "control" in paragraphs 8 to 18 and 19 to 28 respectively.

22. After dealing with the IR35 statutory provisions (in paragraphs 29 to 35), and a comprehensive review of the case law on the question whether a contract of employment exists (paragraphs 36 to 59), concentrating in particular on the issues of mutuality, substitution and control, the Special Commissioner then turned at paragraph 60, in a section of the Decision headed "Discussion", to consider what the terms of the hypothetical contract between the AA and Mr Bessell would have been. In paragraph 64 he set out his findings under nine heads. Leaving aside for the moment the reasoning by which he supported his conclusions, his findings were as follows:

    (1) There would be a series of contracts each with a fixed term. The term of each contract would match the periods of the DDP/Dragonfly contracts. There would have been no requirement for the AA to offer renewal and no obligation for Mr Bessell to accept any offer of an extension.

    (2) Each contract would be terminable before the end of its fixed term by 28 days notice in writing by either party.

    (3) Each contract would also be terminable by written notice if Mr Bessell's performance was unsatisfactory.

    (4) Each contract would be for the services of Mr Bessell. The contract would provide that Mr Bessell could send a substitute in his place but only if the AA had given notice that that particular substitute was acceptable in place of Mr Bessell for such period as it should specify.

    (5) In relation to control, the contract would have contained a provision that Mr Bessell should undertake the tasks allocated to him with a specified but reviewable timeframe and should accept the AA's reasonable directions in relation to what he was doing (rather than how he did it). On the embodied arrangements approach, the position would have been the same up to 2 January 2002. Thereafter, the arrangements were that Mr Bessell should do the work allocated to him within the framework of the project timetable, and be subject to the guidance of the team and its manager. That requirement was part of the arrangements and would therefore form part of his notional contract notwithstanding the lack of a specific control provision in the Dragonfly/DPP contract (the Special Commissioner actually said "the Dragonfly/AA contract"; but as there was no contract between Dragonfly and the AA he clearly meant to refer to the contracts between Dragonfly and DPP, which did indeed contain no specific control provision).

    (6) Payment would be made for the number of days on which Mr Bessell worked at the relevant daily rate (for the engagements for which the schedules specified an hourly rate, the daily rate would represent eight hours' work). On the income tax approach, the parties would have agreed that Mr Bessell should be paid only for the days or hours actually worked by him. On the NIC approach, the contract would have included a

provision entitling him to payment for periods when he was available for work, and not just for work actually done.

(7) In relation to the first and third projects, Mr Bessell would have been required to work most of his time at the AA's premises. For the AA.com project, he would have been required to work at the AA's premises to the extent necessary to do the testing properly.

(8) There would have been no provision for pension, holiday pay or sick pay.

(9) There would have been no provision for appraisal.

23. The Special Commissioner then considered whether, under each of these notional contracts, Mr Bessell would have been an employee. He approached this question by reference to the well-known guidance in Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 at 515C, where MacKenna J said:

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

The Special Commissioner concluded in paragraph 66 that the first two of the above conditions were satisfied:

> "(i) the contracts would have been for the personal service of Mr Bessell in return for remuneration. The limited possibility of substitution would not have prevented them being for contracts for his services;
>
> (ii) The right of the AA to direct through the operation of the team and the guidance of the team manager seems to me to be enough, in the case of a skilled professional man, to be able to say that there was sufficient control. Mr Smith [*the tax adviser who appeared for Dragonfly*] argued that there is a difference between a right of control and simply co-ordinating the work of a worker. But I have found that the notional contract would contain provisions requiring Mr Bessell to be subject to the guidance of his team and team manager. That it seems to me is a sufficient right of control."

24. After dealing with the question of mutuality, the Special Commissioner then turned to the third condition in Ready Mixed Concrete:

> "70. I now turn to the other factors which may indicate employment or consistency or otherwise with employment:-

(i) the very limited right of substitution is not inconsistent with employment and does not point strongly away from it;

(ii) the degree of control was that which one would expect from a skilled professional employee and points towards employment;

(iii) the intention of the parties as regards whether or not there was to be an employment seems irrelevant;

(iv) the nature of the work required Mr Bessell to use the AA's computer and premises. That use therefore does not point to employment. Mr Bessell provided some of his own equipment. That points marginally away from employment;

(v) Mr Bessell, via Dragonfly, bore the costs of training and phone lines. These were not significant costs. They point only weakly away from employment;

(vi) Mr Bessell undertook work for only one other client, the nursery, in the period and that work did not provide a significant [part] of his income. This is a weak pointer away from employment.

(vii) Mr Bessell's ability to increase his profit during the period of a contract was limited. He suffered the risks associated with being paid on invoice but during the course of each contract in my view risked little economically and had little opportunity to increase his profit. He risked the costs associated with having no sick pay. He negotiated a higher daily rate of pay, and accepted lower rates when the market turned down. These factors point only weakly away from employment.

71. Overall I find nothing which points strongly to the conclusion that Mr Bessell would have been in business on his own account; by contrast when I stand back and look at the overall picture I see someone who worked fairly regular hours during each engagement, who worked on parts of a project which were allocated to him as part of the AA's teams, who was integrated into the AA's business, and who had a role similar to that of a professional employee. Mr Bessell did not get paid for, or go to work to provide, a specific product; instead he provided his services to the AA to be used by them in testing the parts of a project which from time to time were allocated to him. He was engaged in relation to the work to be done on a specific project but not to deliver anything other than his services in providing testing in relation to that project. In my opinion he would have been an employee had he been directly engaged by the AA.

72. I therefore dismiss the appeal."

The grounds of appeal

25. On its appeal to the High Court Dragonfly has been represented by Mr Andrew Stafford QC. In the grounds of appeal, which were settled by Mr Stafford, Dragonfly contends that the Special Commissioner erred in law in four respects:

    (a) He wrongly concluded that the right of substitution within the notional contracts would not have been inconsistent with employment. He should have concluded that the notional contracts would have contained provisions relating to substitution which would have prevented them from being contracts of service.

    (b) He wrongly concluded that the notional contracts would have contained provisions conferring upon the AA a sufficient right of control to justify the conclusion that the contracts would have been contracts of service. He should have concluded that they would not have contained provisions conferring sufficient rights of control to create a contract of service.

    (c) He wrongly concluded that the intentions of the parties were irrelevant. He should have taken their intentions into account, and had he done so he would have concluded that neither the AA nor Mr Bessell intended that he should be an employee of the AA.

    (d) He wrongly directed himself that the relevant dividing line lay between being in business on one's own account on the one side, and employment on the other side. He failed to allow for the fact that a person may be self-employed without necessarily being in business on his own account. The law recognises the concept of "worker" status. The Special Commissioner evaluated the circumstances without taking into account the fact that an individual might be a worker rather than an employee.

26. These grounds of appeal were amplified by Mr Stafford in his skeleton argument and in his oral submissions. I will now consider them in turn.

(1) Substitution

27. In Ready Mixed Concrete MacKenna J said ([1968] 2 QB 497 at 515E):

> "The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Tort (1967) pp. 59-61 and the cases cited by him."

28. More recently, in Express and Echo Publications Ltd v Tanton [1999] ICR 693, the Court of Appeal has held that a driver who agreed to provide his services to a

company could not be an employee because his contract included a provision in the following terms:

> "3.3 In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services."

In paragraph 46 of the Decision, the Special Commissioner cited a passage from the judgment of Peter Gibson LJ in Tanton at paragraph 31, to the effect that where "a person who works for another is not required to perform his services personally, then as a matter of law the relationship … is not that of employee and employer."

29. As Park J said in Usetech (76 TC 811 at 840B), there are sentences in the judgment of Peter Gibson LJ in Tanton which, taken by themselves, suggest that any contract for services containing any right for the worker to provide a substitute can never be a contract of employment. However, I respectfully agree with Park J that Tanton needs to be evaluated together with other cases, including Ready Mixed Concrete and two later decisions of the Employment Appeal Tribunal.

30. The two later cases in the EAT which ParkJ proceeded to consider in Usetech were McFarlane v Glasgow City Council [2001] IRLR 7 and Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 96, in each of which the decision in Tanton was considered. McFarlane concerned gym instructors who worked for the Council, and who were obliged to arrange replacements from a register of coaches maintained by the Council if for any reason they were unable to take a class themselves. The EAT reversed a decision of the tribunal below that this provision, read in the light of Tanton, meant that the instructors could not be employees of the Council. Lindsay J said this in paragraph 13 of his judgment:

> "The relevant clause in Tanton was extreme. The individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute. He could choose the substitute and then in effect he would be the master. Properly regarded, Tanton does not oblige the tribunal to conclude that under a contract of service the individual has, always and in every event, however exceptional, personally to provide his services."

As Park J points out, the actual decision in McFarlane was that the case should be remitted to the first instance tribunal for it to decide by reference to all of the circumstances whether the gym instructors were employed or self-employed.

31. In Byrne Brothers the issue was whether certain building workers were entitled to holiday pay under the Working Time Regulations 1998. Their agreements included the following provision:

> "13. Where the subcontractor is unable to provide the services, the subcontractor may provide an alternative worker to undertake the services but only having first obtained the express approval of the contractor."

Park J quoted some extracts from the judgment of the tribunal presided over by Mr Recorder Underhill QC:

> "In our view, it is plain that the contracts do require the applicants personally to perform work or services for Byrne Brothers. As a matter of common sense and common experience, when an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to do the work. In our view that consideration is admissible as part of the factual matrix. But even if that were not so … clause 13, which concerns the use of additional or substitute labour, only makes sense against the background of an understanding that, subject to its provisions, the services are to be provided by the subcontractor personally. It is, of course, true that the effect of the provisions of clause 13 is that in certain circumstances the services may be provided by someone other than the subcontractor himself. But the clause falls far short of giving the subcontractor a blanket licence to supply the contractual services through a substitute."

32. Having reviewed the authorities, Park J expressed his own conclusion in Usetech in paragraph 53 in terms which I would respectfully adopt:

> "As it seems to me the present state of the law is that whether a relationship is an employment or not requires an evaluation of all of the circumstances. In the words of Hart J in Synaptek …, the context is one "where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia". The presence of a substitution clause is an indicium which points towards self-employment, and if the clause is as far-reaching as the one in Tanton … it may be determinative by itself."

33. With these principles in mind, I now turn to the relevant contractual provisions in the present case. I begin with the series of agreements between Dragonfly and DPP. The first agreement, which ran from 1 April to 2 July 2000, had a schedule which named Mr Bessell as the consultant and the AA as the client. Clauses 3.2 and 3.3 of the general terms and conditions provided as follows:

> "3.2 The Company [i.e. Dragonfly] warrants and further undertakes that their consultant [i.e. Mr Bessell] has the requisite skill and expertise to perform the Services [i.e. the services for the AA specified in the schedule]. The Company has the right to substitute a suitable qualified representative of the Company to provide the Services.
>
> 3.3 The Company further shall:
>
> > 3.3.1 not disengage the services of the Consultant or terminate or consent to the termination of the Services

> of the Consultant or provide a substitute Consultant during the Assignment except with the prior written consent of DPP;
>
> 3.3.2 …"

Reading clauses 3.2 and 3.3.1 together, it seems clear to me that Dragonfly did not have an unqualified right as against DPP to provide a substitute to perform the services for the AA, but could do so only with DPP's prior written consent.

34. Later versions of the schedule, apart from the seventh and last one which covered the period from 1 January to 28 February 2003, did not name the consultant whose services Dragonfly was to provide. Since, however, Dragonfly was a one-man company, whose sole raison d'etre was to supply Mr Bessell's services, the omission was in my judgment immaterial. It was obviously the intention of both parties throughout the period under appeal that Mr Bessell would be the consultant, whether or not he was named on the schedules. Clause 3.3.1 (the provision which required DPP's prior written consent to a substitution) remained in place until January 2002, when it was replaced with the following:

> "3.3 The Company further shall:
>
> > 3.3.1 not use any substitute Consultant without having first having satisfied the Client that the new Consultant is trained and suitable to undertake the services, and give as much notice as possible to the Client before the Consultant is changed or before there is any temporary break in the provision of the Services;
> >
> > 3.3.2 …"

Finally, in January 2003 a yet further version appeared, which provided so far as material, in clause 3.3.1, that:

> "A substitute consultant may not be deployed without having first satisfied [DPP] and the Client that the new consultant is trained and suitable to undertake the services."

35. The written contractual arrangements between DPP and the AA were silent as to whether there was a right of substitution. However, as I have already pointed out, the October 1998 agreement set out a procedure under which the AA was to select the staff members whom it wished DPP to supply, and the two schedules in evidence both named Mr Bessell as the consultant.

36. In paragraphs 8 to 18 of the Decision the Special Commissioner made important findings of fact relating to the issue of substitution. He found that at no time in the relevant period did either Dragonfly or DPP supply any other person in place of Mr Bessell. He accepted the oral evidence of Mr Kersley that he "would be unhappy if a substitute turned up unannounced and un-foreshadowed: that just would not happen". He accepted the evidence of Mr Palmer that he expected Mr Bessell to do the work personally, and would not have expected him to send a substitute. Had Mr Bessell

been unable to do the work himself, Mr Palmer thought he would have been replaced by a worker engaged through the normal procedures, including interviews with any replacements. Having also considered the evidence of Mr Bessell himself and Miss Tooze, and two letters adduced in evidence by Dragonfly from Christine White and Lyn Lake, neither of whom gave oral evidence, the Special Commissioner concluded as follows:

> "17. I conclude that, in the period under appeal, unless [Dragonfly] could have shown that it (and DPP) was contractually entitled to send a substitute in place of Mr Bessell, the AA would have accepted (and paid for) a substitute only if the substitute's presence and person had been expressly agreed by it, and that the AA would not, unless as above, have acted as if it was bound to accept any substitute for Mr Bessell or even one who, when offered, was found to be acceptable.
>
> 18. Further it was clear to me that the AA regarded itself as having engaged the services supplied by Mr Bessell. He had been interviewed at the outset of his contracts with the AA. His services were highly valued. He was specifically sought by Miss Tooze and others. The AA did not want any competent tester, it wanted Mr Bessell."

37. In my judgment these findings of fact are unassailable, and they amply justify the Special Commissioner's conclusion in paragraph 64(4) that each of the notional contracts between the AA and Mr Bessell would have been for the services of Mr Bessell, and would have provided that he could send a substitute "only if the AA had given notice that that particular substitute was acceptable in place of Mr Bessell for such period as it should specify". Furthermore, in the light of the authorities reviewed above I have no doubt that a limited right of substitution in these terms would have been compatible with the existence of a relationship of employment between the AA and Mr Bessell. The situation is quite different from the extreme and unqualified right of substitution which the Court of Appeal considered in Tanton.

38. Although every case must turn on its own facts, I find some support for my conclusion in the fact that Park J in Usetech rejected a similar argument advanced by the taxpayer company in that case. Usetech was similar to the present case in that there was an agency company (NES) interposed between the service company and the client, with the result that there were three contracts, not two, which had to be subsumed into one notional contract. As in the present case, there was no written agreement between the worker and the service company, and the contract between the agency and the client was silent on the question of substitution. However, the contract between the service company and the agency did permit substitution with the agency's prior written consent, such consent not to be withheld if the proposed replacement had the appropriate skills, qualifications and abilities in the reasonable opinion of the client (the relevant clause is quoted in the judgment at 830B-C). In those circumstances Park J held that the only tenable inference which could be drawn from the facts was that the hypothetical contract would not have contained a substitution provision at all. Alternatively, if it had contained a substitution clause similar to that in the contract between the service company and the agency, it would have been insufficient to override the effect of all the other considerations which led

the Special Commissioner in that case to decide that the relationship would have been one of employment. I gratefully acknowledge the assistance which I have obtained from Park J's illuminating discussion of the whole question in paragraphs 34 to 54 of his judgment in that case.

39. Mr Stafford submitted that the contract between the AA and DPP could perfectly well have stipulated that no substitutes would be acceptable, but did not do so. The contract contained only a promise by DPP that it would use its best endeavours to supply staff competent to do the work (see clause 3.5), together with a selection procedure. If the person originally selected were not to be available, DPP would still have been obliged to use its best endeavours to supply suitable staff. Accordingly, Mr Stafford argued, the silence of the contract on substitution does not lead to the conclusion that substitution was impermissible. When taken together with the express right of substitution contained in the contract between Dragonfly and DPP, the notional contract should have been held to contain a clause which permitted Mr Bessell to supply his own labour or that of a suitably qualified substitute.

40. I hope that I have already said enough to explain why I am unable to accept this submission. In the light of the oral evidence which the Special Commissioner accepted, it is in my view unrealistic to suppose that the AA would ever have agreed to an unqualified right of substitution. As Mr Hellier says, "The AA did not want any competent tester, it wanted Mr Bessell". In these circumstances the only reasonable inference which can be drawn, in my judgment, is that any substitution for Mr Bessell would have required the consent of the AA. In order to displace such an inference, it would be necessary to find an express provision in the contract between DPP and the AA permitting substitution at the unfettered discretion of DPP; but any such provision is conspicuously absent. The Special Commissioner also considered whether there had been a course of conduct between DPP and the AA from which it might be concluded that their agreement had been varied, but for the reasons which he gave under paragraph 64(4) he found the evidence on this point either inconclusive or not clearly referable to the period under appeal. Without hearing the evidence of Christine White and Lyn Lake in person, he was understandably unwilling to take a broader view of their statements. In my view he was fully entitled to take this view, and his assessment of the evidence betrays no error of law.

(2) Control

41. Everybody agrees that control is in some sense an essential ingredient of a contract of employment. It is the second of the three conditions to which MacKenna J referred to in Ready Mixed Concrete. By way of amplification, he said at 515F:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. … To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does

> not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

42. In another equally well-known passage, Cooke J said in Market Investigations Limited v Minister of Social Security [1969] 2 QB 173 at 185A that "control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor". The fundamental question which has to be asked is whether the person who has engaged himself to perform the services in question is performing them as a person in business on his own account. If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. Cooke J said that there is no exhaustive list which could be compiled of the considerations which are relevant in answering that question, nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. Apart from control,

> "factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

43. In Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 the Privy Council (through Lord Griffiths) endorsed the approach of Cooke J in Market Investigations, saying at 382 that "the matter had never been better put".

44. The schedule to the first agreement between Dragonfly and DPP was headed with the following words:

> "This Schedule sets out the principal terms upon which we shall engage you to provide a consultant to perform certain services for you under your direct supervision and control."

The first "you" in that heading must refer to Dragonfly. Dragonfly therefore submitted to the Special Commissioner that the subsequent references to "you" and "your" must likewise refer to Dragonfly, with the consequence that the parties intended Mr Bessell to perform the services for the AA under Dragonfly's direct supervision and control. The Special Commissioner rejected this submission, and in my judgment he was quite right to do so. The second "you" cannot possibly have been intended to refer to Dragonfly. The notion that Dragonfly should have provided Mr Bessell as a consultant to DPP so that he could perform services for Dragonfly is absurd, in a context where the whole object of the exercise was for Mr Bessell to work for the AA. Accordingly, the second "you" must refer to the AA, as must the subsequent reference to "your direct supervision and control". Any possible doubt on this score is removed by reference to the second schedule in the series, which was headed as follows:

> "This Schedule sets out the principal terms upon which we shall engage you to provide a consultant to perform certain services for the Client under the Client's direction."

The Client was named in the schedule as the AA. As the Special Commissioner noted under paragraph 64(5), this formulation appeared in the second and third schedules. In the remaining four schedules, from April 2001 onwards, the words "under the Client's direction" were omitted. He then commented:

> "Mr Smith [*for Dragonfly*] suggested that the first formulation clearly indicated where control lies namely with Dragonfly. I do not think it does, if anything these phrases suggest that at least in the early contracts control was to lie with the AA."

I agree, and would add that if that was the original intention it seems inherently unlikely, in the absence of any express provision to the contrary, that the underlying reality was intended to change merely because the words "under your direct supervision and control" were first replaced with "under the Client's direction", and then left out altogether. It seems far more likely that the changes were made because somebody realised that an express reference to control by the AA would go a long way towards establishing that any hypothetical contract between Mr Bessell and the AA was a contract of service.

45. Until 2 January 2002 clause 3.1.1 of the contract between Dragonfly and DPP obliged Dragonfly to procure that the consultant whose services were provided to the AA, which in practice meant Mr Bessell, would "observe and comply with the Client's customary rules and regulations for the conduct of the Client's own staff and the Client's customary working procedures and security measures". Under the contracts from 2 January 2002 onwards, clause 3.1.1 was replaced with an obligation that the consultant should:

> "ensure that any officer, employee or representative which it may, from time to time, decide to use in the provision of the Services, will comply with the Client's health and safety and other similar regulations when carrying out work at the Client's site (the Company's [*i.e. Dragonfly's*] method of working shall be its own)".

Again, it is difficult to escape the impression that this change in wording owed more to anxiety about the possible impact of the IR35 legislation than to any real change in the position on the ground.

46. Turning now to the contract between the AA and DPP, clause 3.8 of the October 1998 agreement provided that the staff supplied by DPP

> "shall be under the full control and supervision of [the AA] on a day to day basis only regarding performance of duties".

47. Mr Stafford submitted that this clause is important because, while it conferred a degree of control upon the AA, it was clearly intended to be a qualified right of control limited to the day to day performance of the duties "only". He submitted that in the context of a contract which expressly disavowed an intention to create an employment relationship (see clause 7 of the October 1998 agreement), these words of limitation are significant. The contract involved the performance by an individual of personal services, often (but not always) at the AA's premises. Just as a

householder can expect to exercise a degree of control over a self-employed tradesman who works at his premises, for example telling him not to work on a particular day, so a client which is running a project can expect to exercise a degree of control over when and where the work is to be carried out. Mr Stafford submitted that the level of control envisaged by the contractual terms between the AA and DPP was deliberately expressed to be limited, and was insufficient to create a relationship of employment.

48. In evaluating this submission it is important to have regard to the further findings of fact which the Special Commissioner made on the basis of the oral evidence. These findings are set out in paragraphs 19 to 28 of the Decision. The following findings appear to me to be of particular significance:

> "19. Mr Bessell was a skilled man engaged in a complex task. He was not subject to detailed instructions as to how he should undertake what he did.
>
> …
>
> 22. … He was not told how to conduct the tests but he was expected to conduct the tests which had, in consultation with the team, been allocated to him.
>
> 23. The team manager would review the progress of the work being undertaken by members of the team. There were usually weekly team meetings to review progress. Mr Bessell attended those meetings. There were also ad hoc discussions to deal with more pressing issues. Mr Bessell participated in these.
>
> 24. Mr Bessell's progress through the tasks he was allocated would be monitored by the team manager. There was however no detailed review of the work he had undertaken. However it seems to me that Mr Bessell's reputation indicates that he worked effectively: he would not have had a high reputation if things he had tested and approved often turned out to be faulty, or if faults he identified were often found to be illusory. It seems to me that there was an ongoing informal appraisal of the quality of his work. Miss Tooze attended a meeting with HMRC on 10 May 2005. She approved a note of that meeting with her amendments. In those notes she indicated that work was not checked automatically but would be checked if there was a complaint. I accept that that would have been the case.
>
> 25. Mr Palmer said, and I accept, that as part of his management checks he would occasionally ask Mr Bessell to run a specific test so that he could be satisfied that his work was acceptable and to get a view on the quality of the application that was being delivered. It was clear however that Mr Palmer would not be involved in reviewing, or approving the technical detail of what Mr Bessell was doing. Miss Tooze indicated that no one told Mr Bessell how to do his work

> although in the approved notes of her meeting with HMRC she indicated that she "could spot check Jon's work if she had reason to".
>
> 26. The findings I make above are drawn principally from the evidence of Mr Palmer and Miss Tooze. Neither of them were responsible for Mr Bessell in the period of the second project. There was no AA test team manager for this project. In the earlier stages of this project, its management was outsourced by the AA to Net Decisions, but in July 2001 the AA took over its development … Mr Bessell was the senior tester on this project.
>
> 27. There was no evidence before me to suggest that in this period the way Mr Bessell's activities were guided, monitored or determined was any different from the position I have described above. I conclude that it is more likely than not that it was the same.
>
> 28. I should however note that the arrangements in relation to the place where Mr Bessell worked during the second project were different from those for the first and third projects: I find that he worked from home for about 25% of his time during the AA.com project …"

49. In the light of these findings of fact, and the contractual provisions which I have summarised above, the Special Commissioner concluded in paragraph 64(5) that control could not be spelt out of the words of the formal contracts, and then continued as follows:

> "In practice Mr Bessell worked as part of the team, undertaking the work on the project which was allocated to him as part of the team discussion and by the team manager. The engagement simply would not have worked if he did not do what was allocated to him. His work was also informally monitored.
>
> Putting this together it seems to me that if there had been a contract between Mr Bessell and the AA it would have contained a provision that Mr Bessell undertake the tasks allocated to him with a specified but reviewable timeframe and accept the AA's reasonable directions in relation to what he was doing (rather than how he did it).
>
> On the embodied arrangements approach I come clearly to the same conclusion as regards the period up to 2 January 2002. For the period thereafter it seems to me that the arrangements were that Mr Bessell should do the work allocated to him within the framework of the project timetable, and be subject to the guidance of the team and its manager. That requirement was part of the arrangements and would therefore form part of

> his notional contract notwithstanding the lack of a specific control provision in the Dragonfly/[DPP] contract."

Finally, in paragraph 70(ii) the Special Commissioner said that the degree of control was what one would expect in the case of a skilled professional employee, and pointed towards employment.

50. Mr Stafford took issue with this conclusion. He did not challenge any of the primary findings of fact made by the Special Commissioner, or his conclusion on the balance of probabilities that the position during the second project was essentially the same as it was during the first and third projects. He submitted, however, that Mr Hellier did not attempt to calibrate the degree of control exercised over Mr Bessell, or to compare it with the control one would expect to find in the case of a genuinely self-employed person in business on his own account, or a non-employed worker. He argued that Mr Hellier had misconstrued the heading to the schedule in the first Dragonfly/DPP agreement, and failed to appreciate the important distinction between "direction" and "control". Direction as to where and when the work is to be performed will be required whatever the employment status of the worker may be, and signifies less than the concept of "control". Accordingly, the limited degree of control in the present case was compatible with any one of three possibilities (genuine self-employment, worker status or employment under a contract of service), and the Special Commissioner erred in failing to distinguish between them. Indeed, submitted Mr Stafford, his reasoning suggests that he may have presumed the hypothetical relationship between Mr Bessell and the AA to be one of employment unless the contrary were established.

51. These submissions were attractively advanced by Mr Stafford, but I am unable to accept them. I have already explained why the heading to the first Dragonfly/DPP schedule must in my view be read as referring to "direct supervision and control" by the AA, not by Dragonfly. The Special Commissioner was in my judgment entitled to rely on this as a factor which coloured the more neutral reference to "direction" in the next two schedules. Furthermore, this is clearly a case where the question of control was not exclusively dealt with in the written contractual documents. Accordingly, as Hart J explained in Synaptek, the question was one of fact for the Special Commissioner, and in the absence of any error of law his findings are conclusive.

52. On the strength of the oral evidence, the Special Commissioner was in my view fully entitled to conclude that Mr Bessell's performance of his duties was subject to a degree of supervision and quality control which went beyond merely directing him when and where to work. In the case of a skilled worker, you do not expect to find control over how the work is done. Conversely, in the case of a self-employed worker in business on his own account you would not normally expect to find regular appraisal and monitoring of the kind attested to by Mr Palmer and Miss Tooze. The weight and significance to be attached to this evidence was a matter for the Special Commissioner, and in my view it was open to him to conclude that the nature and degree of the control by the AA under the hypothetical contract was on balance a pointer towards employment.

(3) The intention of the parties

53. Having dealt at some length with the issues of substitution and control, I can now deal more briefly with the two remaining grounds of appeal. The main reason for this, so far as intention is concerned, is that statements by the parties disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement between them. It is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other: see Ready Mixed Concrete at 513B and Massey v Crown Life Insurance Co [1978] 1 WLR 676 (CA). In the majority of cases, however, such statements will be of little, if any, assistance in characterising the relationship between the parties.

54. In the context of the IR35 legislation there is the added difficulty that, ex hypothesi, there is in reality no direct contractual relationship between the worker and the client, and therefore no actual contract in respect of which they can have stated their intentions. In particular, statements of intention made in relation to actual contracts with an agency (such as DPP) are in my judgment unlikely to throw any light on the proper characterisation of the notional contract between the worker and the client or end user. I say this because the characterisation of actual contracts involving agency work is a vexed subject which has given rise to much recent litigation: see for example the decisions of the Court of Appeal in Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217, [2004] ICR 1437 and Bunce v Postworth Ltd [2005] EWCA Civ 490, [2005] IRLR 557. In such a context any statements of intention are likely to be specifically directed towards the characterisation of the contract between the worker and the agency, or the worker and the end user, and to be of no value in any wider, or still less any purely hypothetical, context.

55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance.

56. In the present case, the contract between DPP and the AA contained a provision (clause 7) which said:

> "Nothing contained in or arising out of this Agreement is intended to create a contract of employment between [the AA] and any Staff member, and [DPP] shall inform Staff members accordingly."

The contracts between Dragonfly and DPP provided (in clause 12) that the relationship between the parties was that of independent contractors. Mr Stafford placed much emphasis on these provisions, and submitted that the notional contract between Mr Bessell and the AA should have contained a similar provision, or at least that its terms should be evaluated against the background that neither party wished to

create an employment relationship. However, for the reasons which I have given I respectfully disagree. It seems to me that Mr Hellier was right not to attempt to construct a hypothetical statement of intention as between Mr Bessell and the AA, because the material in question was at best inconclusive. Even if that is wrong, I would in any event not regard this as a case close enough to the borderline for the inclusion of such a term to have made any difference to the result.

57. The Special Commissioner dealt with the point in a compressed fashion, merely saying in paragraph 70(iii) that "the intention of the parties as regards whether or not there was to be an employment seems irrelevant". I read this as a conclusion that the question of intention is irrelevant in the circumstances of the present case, rather than as a proposition of law that statements of intention can never be relevant for the purposes of the hypothetical contract. So understood, there was in my judgment no error of law in his conclusion. If (contrary to my primary view) he did intend his statement to be read in the latter sense, he would in my view have erred in law; but there would be no point in remitting the matter to him because I am satisfied that in the present case the inclusion of a term in the hypothetical contract to the effect that the parties did not intend to create a relationship of employment could not by itself have reasonably permitted the Special Commissioner to reach the opposite conclusion about Mr Bessell's notional status as an employee.

(4) Worker status

58. Mr Stafford pointed out that in certain statutory contexts, such as the Working Time Regulations 1998, SI 1998 No. 1833, there is a special definition of "worker" which includes not only employees under a contract of employment but also an intermediate category of people who are neither in business on their own account nor employees. He submitted (correctly) that the statutory reach of the IR35 legislation is confined to (notional) employees, and suggested that the Special Commissioner's analysis was vitiated by his failure to consider the possibility that Mr Bessell might have fallen into a third intermediate category of this nature.

59. I am unable to accept this submission. Mr Stafford accepted that the general law of employment does not recognise any intermediate category between employment on the one hand and self-employment on the other. I can see no reason why the Special Commissioner should have taken into account other possible categories of worker which exist only for the purposes of very specific and self-contained statutory codes. I agree with counsel for HMRC that such categories only have meaning and relevance in the particular contexts in which they are found. In the context of IR35, the only distinction that matters is whether the notional contract would be a contract of service or not. Mr Hellier clearly had that distinction well in mind, and for the reasons which I have given I consider that his conclusion that Mr Bessell fell on the employment side of the line is unassailable.

Conclusion

60. This appeal must therefore be dismissed.