

Spc00655

Income tax – Worker supplied through intermediaries – “IR 35” – Schedule 12 FA 2000 – Whether circumstances were such that had the services been provided under a contract directly with the worker the worker would have been an employee – Held : yes

National Insurance – Worker supplied through intermediaries – “IR 35” – SI 2000/727 Regulation 6 – Whether circumstances were such that had the arrangements taken the form of a direct contract with the worker the worker would have been an employee – Held : yes

THE SPECIAL COMMISSIONERS

DRAGONFLY CONSULTING LTD

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE & CUSTOMS Respondents

Special Commissioner: CHARLES HELLIER

Sitting in public in London on 20 and 21 September 2007

**Dave Smith and Nicola Smith of Accountax Consulting Ltd, Chartered Tax Advisers,
for the Appellant**

Mike Faulkner of HMRC Appeals Unit for the Respondents

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DECISION

5 1. Dragonfly Consulting Ltd appeals against the following decision and determinations made by the Respondents under what are commonly known as the IR 35 provisions:

- 10 (i) a decision issued on 30 April 2004 for the period 6 April 2000 to 5 April 2003 in respect of National Insurance Contributions; and
(ii) determinations issued on 18 June 2004 in respect of PAYE for the same period.

15 By these determinations and this decision the Respondents seek some £99,000 from the Appellant.

20 2. In the relevant period Mr Jon Bessell who was the director of, and owner of 50 per cent of the shares in, the Appellant had, via arrangements between (1) him and the Appellant, (2) the Appellant and an agency, DPP International Ltd (DPP), and (3) between DPP and the AA, provided his services to the AA.*

25 3. In outline, the IR 35 legislation, which I shall describe later, provides that if the circumstances are such that, had Mr Bessell performed his services under a contract directly between him and the AA, that contract would have been one of employment, then the Appellant will be liable for NI contributions and PAYE calculated broadly on the basis that the payments it received were emoluments it paid to Mr Bessell. The Appellant contends that under such a contract Mr Bessell would not have been an employee.

30 4. The argument before me related to the nature of the hypothetical contract, and whether or not Mr Bessell would have been an employee in relation to it, and not to the amounts involved. This is therefore a preliminary decision.

35 5. In the remainder of this decision I shall first discuss the evidence and set out my findings of fact, then address the relevant law, and then reach my conclusions on the appeal.

Evidence and Findings of Fact

40 6. There was a joint bundle of documents. I heard oral evidence from Mr Bessell; 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 in the period October 2002 to April 2003; from Alan Palmer who was an employee of the AA in the relevant period acting as an IS
45 Test Manager, and responsible for part of the projects on which Mr Bessell worked between February and July 2000, and between May 2002 and September 2002; and
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* The AA was [acquired] during the relevant period by Centrica. I have used 'the AA' to refer to companies in the combined group.

from Alan Kersley who in the relevant period was Head of Change Delivery at the AA. All of them provided witness statements. In the days before the hearing the Appellants produced a letter from Christine White who described herself as The AA Commerce Programme Manager. Ms White did not give oral evidence.

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General Findings of Fact

7. I find the following facts:-

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(i) Mr Bessell is a highly skilled IT system tester. His principal expertise is designing and implementing tests on IT systems software which will give the user of the software the required level of confidence that the software will work as intended or required. This work involves determining the expectations of the users translating those expectations into requirements of the system and testing the system (for example by creating a large number of test usings of the system) to assess whether it meets those requirements. Mr Bessell does this job well and his skills were appreciated by those with whom he worked at the AA. Those skills are both analytical and personal, for the first stage of the exercise in particular requires interaction with other people.

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(ii) Mr Bessell is the sole director and the holder of 50 per cent of the shares in the Appellant.

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(iii) Under the contractual arrangements which I shall describe shortly, in the period April 2000 to January 2003 Mr Bessell provided his services to the AA. These services were predominantly directed to the testing aspects of three IT projects then being undertaken by the AA:-

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(a) the first project lasted 7 months from January 2000 to July 2000 and related to the replacement of an 'Ingres' database with an 'Oracle' database;

(b) the second project lasted 22 months from August 2000 until April 2002 and related to the AA.com website;

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(c) 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.

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(iv) It was in October 1998 that the Appellant first contracted with DPP for the supply of Mr Bessell's services. In the period 1 April 2000 to 28 February a series of fixed term contracts were made between the Appellant 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 every day 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

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later). The schedule indicated that it set out the principal terms and conditions on which the Appellant 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 the Appellant: "Jonathan Bessell".

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(v) DPP contracted with the AA to provide consultancy services and temporary staff to the AA. There was in the bundle before me a copy of such a contract dated 12 October 1998. Clause 2 provided that the contract should continue for no more than 12 months. This document provided for details of the services to be provided to be set out in a schedule. There were, in the bundle, copies of schedules (not to that agreement but conforming with its terms) covering the period 3 January 2000 to 2 July 2000. I find from the evidence of Mr Palmer and Mr Kersley and from the copy invoices from DPP to the AA that for the period under appeal Mr Bessell's services were provided through DPP. I find that it is more likely than not that those services were provided under agreements between DPP and the AA which, so far as is material, contained the same general terms as the agreement dated 12 October 1998. The two schedules I have mentioned state "Name of individual: Jon Bessell; Job Title: consultant", and set out rates of payment and the period of the contract.

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(vi) There was no written contract between Mr Bessell and the Appellant.

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(vii) During the relevant period Mr Bessell worked mainly at the AA's premises (but see also paragraph 28 below in relation to the AA.com project). In relation to all three projects it was necessary to spend time there to talk to those for whom the system was being tested (those who would use it) and other members of the development teams; in relation to the first and third projects it was also necessary to work mainly at the AA's premises in order to work on the AA's computer system. During the second project, the AA.com project, Mr Bessell could access the AA's computer from home. In this period he had an ISDN telephone line installed at home to access the AA mainframe computer and was provided with a customised laptop by the AA.

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(viii) When working at the AA's premises (which changed from time to time) Mr Bessell was provided with a desk and computer and worked alongside other employees (and other contractors). He required a pass to enter the buildings. The pass bore a "C" which differentiated the bearer as a contractor rather than an employee. He was able to use the onsite canteen. He would be invited to events such as the project Christmas Party. Towards the end of the relevant period Mr Bessell provided at his own expense or that of the Appellant a special chair to use at the AA offices to help with problems with his back.

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(ix) At home Mr Bessell had a designated office room with a desk, two laptop computers, fax, scanner and office furniture. The laptops were not

bought specifically for the AA work but the ISDN line referred to previously was, and was installed at the Appellant's expense.

5 (x) During the period of the second project the Appellant paid some £400 for a training course undertaken by Mr Bessell. The course was undertaken for the benefit of his work on the AA.com project. The cost was not reimbursed by the AA.

10 (xi) During the period under appeal the only other work undertaken by the Appellant was some assistance given to a nursery near Mr Bessell's home. Mr Bessell solved a problem it had with a software package and the Appellant was paid. I find that the sum paid was modest in comparison to the Appellant's annual income from DPP. After the end of the period under appeal, the Appellant, through Mr Bessell, embarked on a joint venture project
15 with the nursery for the creation of a new software system which could be widely marketed to nursery operators.

20 (xii) During the relevant period, the Appellant would invoice DPP and DPP would invoice the AA for work done. The invoiced amounts were calculated by reference to an hourly or daily rate multiplied by the hours or days charged for.

25 (xiii) Mr Bessell would complete and submit to persons at the AA records of time worked and charged for. Two different records were submitted : one indicated the time Mr Bessell had actually been engaged on the work he was doing, and the other the time for which a charge would be made. The first record was used for the AA's control and forecasting purposes; the second for the authorisation of payment by the AA to DPP. The times could differ. From the evidence of Miss Tooze, and Mr Palmer I find that there was an
30 understanding that generally the hours (or days) charged for would be those indicated in the schedule to the contract between DPP and the AA so that a few extra hours actually worked one week could cancel out a few fewer hours actually worked another week, but that it was expected that Mr Bessell would have worked on average for at least the time billed for. Where the work
35 demanded substantially more time, then additional time could be, and was, billed.

40 Mr Palmer told me, and I accept, that those in the testing function were "tail end charlies" and that as a result it was rare that they would find themselves with nothing to do on a project. If one stage in the testing of a project had been completed more expeditiously than planned then Mr Bessell would not be expected to sit around and do nothing : there would always be something else to be done on the project, and Mr Bessell, I find, would set about that something and his billed time would reflect the time actually spent working
45 (subject to the comments in the previous paragraph) rather than billing a fixed larger amount for the stage finished ahead of time.

5 (xiv) During the relevant period Mr Bessell took holidays. He did not submit time sheets for, nor did DPP or the Appellant bill in respect of the time spent on holiday. The times of holidays were agreed between Mr Bessell and those at the AA working on the project. Mr Bessell took care not to arrange holidays at busy times for the project. Sometimes plans could be remade and responsibilities reassigned but there was not a time when Mr Bessell took a holiday at a seriously inconvenient time for the project on which he was engaged.

15 (xv) Mr Bessell had problems with his back towards the end of the third project. He was unable to work. No payment was made to DPP or the Appellant in respect of this period.

(xvi) Mr Bessell occasionally travelled to visit suppliers. When he did so his expense of travel would be reimbursed by the AA.

20 (xvii) There was no evidence that Mr Bessell had made errors which he had had to rectify.

25 (xviii) The AA did not consider itself obliged, and Mr Bessell did not consider that the AA or DPP were obliged, to offer a new contract at the end of the term of any existing contract. Neither DPP nor the Appellant was obliged to accept any offer of a new term.

30 (xix) During the first project and part of the second project Mr Bessell's activities were contracted to be paid for at an hourly rate. During the second project this changed to a rate per day. At the time of this change Mr Bessell negotiated a higher daily rate than had initially been offered on the basis that, as he said to me, he should be "compensated for not being able to charge 60 hours per week." From an hourly rate of £50 per hour he moved to a daily rate of £480 per day. Later on, market rates for IT expertise fell, and the AA paid only £375 per day. Mr Bessell believed to have no contractual right to insist on the maintenance of the higher rate in subsequent contracts.

40 (xx) The Appellant submitted invoices by reference to the number of days worked at a daily rate. This was the case even when the contracts provided for hourly rates.

Substitution

45 8. At no time in the relevant period did the Appellant or DPP supply any other person in place of Mr Bessell.

9. I should now describe some of the evidence relating to the issue of whether or not in practice a substitute could have been provided for Mr Bessell by DPP and the

Appellant. I am here discussing the oral evidence and not the formal contractual documents.

10. The AA engaged a number of 'contractors' – at times 50 or more people –
5 who were not its employees. Jane Tooze and Mr Palmer recalled one such contractor who had been engaged under arrangements pursuant to which a substitute could be, and was provided in place of the original individual. I accept that evidence.

11. Mr Kersley said he was aware that substitutes had been used. He said that if a
10 contractor wished someone to substitute his attitude would depend on the circumstances and upon who recommended the substitute; he would almost always want a second opinion from someone he trusted and would want to see a C.V. He said that he would be unhappy if a substitute turned up unannounced and unforeshadowed : that just would not happen. In any event to work on the premises a security card was
15 needed. I accept that evidence.

12. Mr Palmer's evidence was that he expected Mr Bessell to do the work
personally and would not have expected him to send a substitute. If Mr Bessell had
been unable to perform then he thought that he would have been replaced by a worker
20 engaged through the normal procedures including interviews with new workers. I accept that as evidence of what Mr Palmer would have done.

13. I also find that towards the end of the third project Mr Bessell and Miss Tooze
discussed the staffing of the next phase of OATI. It was plain that Miss Tooze wished
25 Mr Bessell to be engaged for it. But Mr Bessell had been having back problems and he agreed with Miss Tooze that he could provide a substitute for the period for which he was not available. (In the event the second phase was cancelled and this did not happen.)

30 14. Mr Bessell, when asked if Miss Tooze could have decided that she did not want a substitute, replied "absolutely".

15. The letter from Christine White offered in evidence by the Appellant indicated
that on one occasion she was approached by one of the contractors in her team, and
35 that it had been agreed that a substitute whose work the contractor had guaranteed could be provided while he was away. This she said had worked well in practice and she had been content to allow it again with other contractors. The letter did not indicate the dates or period when this was done. Given the evidence of Mr Kersley and Miss Tooze I accept that there was an occasion when a substitute was agreed but I
40 do not regard this letter as compelling evidence that in the relevant period substitution was generally permitted or permitted without prior consent.

16. There was in the bundle a copy of a letter from Lyn Lake who was the IS
Resource manager at the AA, and who administered the contracts with agencies for
45 the supply of contractors. The letter was written to the Appellant and made various statements about the relationship between the Appellant and the AA. In the fourth paragraph she said that the Appellant "will vet and supply a suitable substitute for the

assigned consultant. [The Appellant] will manage the selection process with input from the assigned consultant. Any training costs ... would be ... at [the Appellant's] expense.”. The letter was dated 28 April 2003, after the end of the period under appeal, and was in a form which had been used to send to a number of other
5 contractors who had requested confirmation of the matters contained in it (for tax purposes or otherwise). Although the letter did not indicate that the AA would wish to approve the substitute first, it was not to my mind absolutely clear that the writer intended to say that the AA did not regard itself as being entitled to require that it approved the substitution or that it would in practice wish to do so in the relevant
10 period. Ms Lake did not give oral evidence.

17. I conclude that, in the period under appeal, unless the Appellant 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
15 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
20 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.

25 Control

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.

30 20. In the first project he worked as part of a team of two testers, himself and Mr Palmer. The test manager was Alan Palmer. In the second project he worked as part of a team of 5 testers. In the third project he again worked as part of a team of testers reporting initially to Alan Palmer and later to Miss Tooze.

35 21. From Mr Palmer's evidence I find that at the outset of a test analyst's involvement with a project the first task would be to settle a plan for the testing of the application. The Test Manager would draw up an initial strategy, and the testers, having got to grips with what the organisation wanted from the application and the
40 background to its implementation, would work as a team to improve and settle that plan, and plan the detailed testing programme. When the application was made available to the test team Mr Bessell would then undertake some of the planned tests. The allocation of tasks to the members of the team was usually done through a communal review taking into account what was available to test, what tests were to be
45 done and who preferred to do which tests. It was a group effort under the co-ordinating influence of the team manager to determine the best division of labour to tackle the work to be done. If having decided on a timetable for testing the delivery

of part of the application was delayed, or if problems arose with parts of it then the tasks would be reallocated in the same way.

22. Thus, once the initial phase of settling the plan had been completed, on a
5 typical day Mr Bessell would have had allocated to him in the project plan as
modified by the group discussions a number of aspects of the application to test, and
would continue testing those he had started to test and perhaps commence the testing
of one or more other aspects of those parts of the application that had been made
available. He was not told how to conduct the tests but he was expected to conduct
10 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
15 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
20 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
25 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
30 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
35 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
40 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. The testing however
was undertaken by people engaged or employed by the AA. There were five testers
including Mr Bessell; one was an employee of the AA. In the earlier stages Mr
Bessell would report to someone on Net Decisions' staff, and in the later stages to
45 persons engaged or employed by the AA. 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. In addition there were times when Mr Bessell made himself available in the late evening during the course of the project to discuss problems with the website on the phone with those to whom he reported at the AA.

15 The Statutory Provisions

29. For the relevant periods the legislation relating to direct tax was contained in Schedule 12 FA 2000. It provided so far as relevant to this appeal that where an individual or an associate receives from an intermediary (it is accepted that the Appellant is an intermediary for those purposes) or has rights to receive from an intermediary a payment or benefit not taxable under Schedule E then the intermediary is to be treated as making a payment chargeable to Schedule E of the amount of that payment or benefit. The provisions apply where para 1(1) Schedule 10 applies, namely where:-

25 “(a) an individual (“the worker”) personally performs, or is under an obligation personally to perform, services for the purposes of a business carried on by another person (“the client”).”

30 Pausing there, this provision was clearly satisfied. Mr Bessell personally performed services for the purposes of the AA's business.

35 “(b) the services are provided not under a contract between the client and the worker but under arrangements involving a third party (“the intermediary”).”

Pausing again, this condition was also satisfied: Mr Bessell had no contractual relationship with the AA. His services were provided under arrangements involving the Appellant and DPP. Each of them were third parties.

40 “(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.”

45 It was this last condition which was in dispute in the appeal.

30. Before leaving the income tax provisions of Schedule 10, I should note the provision of paragraph 1(4):

“(4) The circumstances referred to in sub-paragraph (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.”

5 31. The National Insurance provisions, to be found in regulation 6 of SI 2000/727, provide that a worker will be treated as in employed earner’s employment and receiving benefits calculated in accordance with regulation 7 of that statutory instrument where the three conditions in regulation 6(1) are satisfied. Subparagraphs (a) and (b) of regulation 6(1) are identical to subparagraphs (a) and (b) of paragraph 1(1) Schedule 10 set out above. Paragraph (c), the third condition, is, strangely, phrased differently:

15 “(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 earners employment.” (My italics).

20 32. There is to my mind a potential difference between the effect of paragraph 1(1)(c) Schedule 10 and regulation 6(1)(c). It is this: regulation 6(1)(c) appears to require the notional contract between the client and the worker to be constituted by the arrangements: “had the arrangements taken the form of a contract”. Thus potentially there is no requirement to consider whether anything else would have been included in the notional contract. By contrast paragraph 1(1)(c) Schedule 10 may require a wider enquiry into what the terms of a direct contract between client and worker would have been had there been such a contract: there is no limitation in the words “if the services were provided under a contract directly between the client and the worker” to contract terms which are encompassed in the arrangements or the circumstances.

30 33. In *Usetech Ltd v Young (HM Inspector of Taxes)* 2004 TC 811, Park J did not however see any difference between the two formulations. At paragraph 35, after reciting the relevant extracts he said:

35 “The two wordings are not identical, but the meanings are. There was not a direct contract [between the parties in that case] but the provisions require it to be assumed that there was. What would it have contained? ...”.

40 It seems to me that Park J is there saying that both provisions require a determination of what such a contract would have contained from a consideration of all the circumstances, rather than the construction of a contract where content was limited to the arrangements. Likewise at paragraph 9 he says:

45 “subpara (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring into what the consequences would have been if it had existed. There may be room in some cases for dispute about what the hypothetical contract would contain, and in the present case there is ...”.

34. On the other hand in *Synaptek v Young (HM Inspector of Taxes)* (2003) 75 TC 51, Hart J seem to adopt the more limited approach. That case however dealt only with the provision of regulation 6 and Hart J makes no reference to the corresponding provisions of Schedule 10. At paragraph 11 he says:

“... 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.*” (my emphasis).

This is potentially a different approach from considering what would the contract have contained. It seems to me that this difference exists at least in theory even when it is acknowledged that the ‘arrangements’ are not limited to the words of the formal contracts between the relevant parties but include all relevant circumstances (see para 47 in *Usetech*). What actually happened will be part of the arrangements: the practice may indicate a variation in the formal agreements; it may also illuminate the formal agreements and be something which falls short of contractual rights and duties. But even where account is taken of all the actual arrangements there may be a difference between the notional contract formed by encapsulating those arrangements and the notional contract whose terms would be determined by asking “What would have been agreed?”

35. I shall return to this issue later but I note that Park J said, at paragraph 1(4): “However no-one has suggested to me, nor do I consider, that that [difference] or the other minor differences between the two statutory provisions affects this case or opens a possibility of the case being decided one way for NICs and another way for income tax and corporation tax.”

Employment – the Case Law

36. I was referred to a number of authorities and there was some difference in the parties’ approach to them. I set out below my understanding of the principles to be derived from these authorities. I hope that in doing so I will have dealt with the points made to me in relation to them by Mr Smith and Mr Faulkner.

37. In *Ready Mixed Concrete v Minister of pensions and National Insurance* (1967) 2 QB 497, MacKenna said that “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;

5 (iii) The other provisions of the contract are consistent with its being a contract of service.

10 38. In 2001 Buckley J in the Court of Appeal in *Montgomery v Johnson Underwood Ltd* (2001) EWCA Civ 318 indicated that this passage was the safest starting point in considering whether a person was an employee, and showed how it had been approved by the House of Lords and the Court of Appeal as setting out the irreducible minimum by way of legal requirement for a contract of employment to exist. He continued at paragraph 23:

15 "It permits tribunals appropriate latitude in considering the nature and extent of 'mutual obligations' in respect of the work in question and the 'control' an employer has over the individual. It does not permit these concepts to be dispensed with altogether. As several recent cases have illustrated, it directs
20 tribunals to consider the whole picture to see whether a contract of employment emerges. It is though important that 'mutual obligation' and 'control' to a sufficient extent are first identified before looking at the whole."

25 39. I shall refer to the three links of MacKenna's test as the 'mutual obligations condition', the 'control condition' and the 'consistency condition'. Whilst the nature of the last two of these flow directly from the words of MacKenna J, there is possibly something in the use made in the cases and before me of the term 'mutual obligations' which may encompass something more than the words of paragraph (i). I shall return later to discuss mutuality and control. But when I came to consider whether the
30 notional contract was one of employment my first steps must be to consider whether 'mutuality' and 'control' are present in sufficient degree to be able to say that the contract could be one of employment.

35 40. In *Market Investigations Limited v Minister for Social Security* [1969] 2 QB 173 at 184-185 Cooke J said that the fundamental test to be applied was this: Is the person performing these services as a person in business on his own account? He said this after referring to the conditions laid out by MacKenna J set out above and noting that the first condition was in that case, fulfilled. He had then considered the 'control' condition and found it was not determinative. His "business on his own account" test
40 was the next step in his judgment. It is clear to me that, having considered mutuality and control, I should then address this test. It is in my view comparable with MacKenna J's consistency condition.

45 41. In *Hall v Lorimer* (1993) 66 TC 349 at 375F, Nolan LJ said:

"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity.

This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informal, considered qualitative appreciation of the whole ... Not all details are of equal weight ... The details may also vary in importance from one situation to another.”

42. The authorities indicate that the consideration of certain indicia which may point one way or the other may be helpful in considering that picture. (*Lee Ting Sang v Chung Chi-Keung* 2 AC 374, and *Hall v Lorimer*). Those indicia include those mentioned by Cooke J in *Market Investigations*. The following may be relevant:-

- (a) does the taxpayer provide his own equipment?
- (b) does the taxpayer hire his own helpers?
- (c) what degree of financial risk does the taxpayer bare and what opportunity for profit does the taxpayer have?
- (d) what degree of responsibility for investment and management does the taxpayer have?
- (e) is the taxpayer part and parcel of his “employer’s” organisation (see *Hall v Lorimer*);
- (f) the degree of control to which the taxpayer is subject (rather than the mere existence of a right of `control`);
- (g) termination provisions – termination on notice may be a pointer towards employment in some cases (it was found to be so in *Morren v Swinton* (1965) 1 WLR 576 but found to be neutral in *McManus v Griffiths* 1997 70 TC 218);
- (h) the intention of the parties.

43. I now turn to the mutual obligations condition and the control condition identified by MacKenna J.

Mutuality

44. There are two relevant aspects to the condition. The first flows directly from MacKenna J’s words: does the putative employee agree to provide “his own work and skill”. If he does not the condition is failed. But if he agrees to provide his own work and skill but also or in some circumstances alternatively that of another, then when does that cause the condition to be failed? I discuss that below under the heading “substitution”.

45. The second aspect of this condition I need to discuss is the extent to which it can be regarded as imposing a precondition that there must be obligations imposed upon the employer other than merely to pay remuneration for what is done. There are statements in some of the cases which can be read as if they had that import, and that

was the stance taken by Mr Smith before me. I discuss this issue under the heading “Employer’s obligation – Mutuality” below.

Substitution

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46. Mr Smith drew my attention to Peter Gibson LJ’s statement in his judgment in *Express Echo Publications v Tanton* 1999 IRLR 367 at paragraph 31:

10 “It is in my judgment established ... 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.”

15 However, following the setting out of his three conditions in *Ready Mixed Concrete MacKenna* J added some words of explanation. He said that freedom to do a job either by one’s own hands or by another’s is inconsistent with employment “though a limited or occasioned power of delegation may not be.”

20 47. Mr Faulkner relied upon the review of the case law conducted by Park J in *Usetech*. Park J set out his conclusions at paragraph 53. He repeated that whether a relationship is one of employment depends upon all the circumstances: that the context is one where the answer depends upon the relative weight of a number of potentially conflicting indicia, and said:

25 “The presence of a substitution clause is a 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.”

30 Mr Smith cautions against taking this extract out of context. He says that in *Usetech* there was a relatively weak substitution clause: in that context Park J was saying that the clause was merely another factor to be considered.

35 48. It seems to me that if there is a right to substitution then that may be relevant at two stages. First one asks: is that right such that this cannot properly be treated as a contract for personal service? If the answer is yes, that is an end of the matter. If the answer is no, then, if the other precondition hurdles are surmounted, the existence of the right goes into the pot – or the overall picture – to be evaluated along with other relevant features.

Control

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49. MacKenna J’s test required a “sufficient degree” of control. Mr Smith took me to Buckley J’s statement in the Court of Appeal in *Montgomery* at paragraph 23:

45 “mutuality of obligation and the requirement of control are the irreducible minimum for the existence of a contract of employment.”

1 I accept that there must be something in the contract which can reasonably be called a
right for the employer to control the employee. But such a right need not be a right to
control every aspect of what is done: what is done, how it is done, when and where it
5 is done; instead a restricted right may be adequate. MacKenna J accepted that in
many cases the employer or controlling management have no more than a general
idea of how the work is done are no inclination to interfere, but “some sufficient
framework of control most surely exist” (paragraph 19), and at paragraph 23 indicated
10 that tribunals should exercise appropriate latitude in determining the question of
control.

Mr Smith suggested that control exercised through an independent agent such as Ms
Tooze was not sufficient. He pointed to the comments of the Special Commissioner
15 in *MAL Scaffolding* at paragraph 49. But those comments were directed to whether
site agents exercised control over scaffolders such as to make them employees; the
Special Commissioner was not considering the position of agents generally. It seems
to me that a company can only exercise control through the agency of real people and
when considering whether or not the company has exercised control it matters not
20 whether those people are agents because they are employees or agents because a
specific power has been delegated to them. To my mind the actions of the company
are those of its agent Ms Tooze. (See also *Morren* at page 351).

Employer’s obligation – Mutuality

25 50. In *Ready Mixed Concrete* MacKenna J’s first condition was:

“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
30 master.”

This first condition is often referred to as a requirement for mutual obligation, but as
described by Mackenna J that mutuality is fairly one sided: his condition relates to an
obligation of the employee to perform a service for a consideration. There is nothing
35 in these words suggesting that the putative employer must be obliged to provide work
or even to pay if there is no work to be done; all that is clear from condition (i) is that
the employer must be bound to pay for the service performed.

40 51. In *Nethermere (St Neots) v Taverna* [1984] 1 RLR 240 the Court of Appeal
considered the finding of an Industrial Tribunal that two women who worked as home
workers sewing garments were employees. At paragraph 18 Stephenson LJ asked
“does the law require any and what mutual obligations before there can be a contract
of service?” At paragraph 19 he considers employers’ obligations and says “[b]ut
45 later cases have shown that the normal rule is that a contract of employment does not
oblige the master to provide the servant with work in addition to wages”. At
paragraph 20 he considers employees’ obligations and treats MacKenna J’s three
conditions in *Ready Mixed Concrete* as an expansion of the nature of a true
employee’s obligation to serve. At paragraph 22 he says that there must “be an

irreducible minimum on each side to create a contract of services. I doubt if it can be reduced any lower than the sentences I have just quoted ...”. In the judgments of Kerr and Dillon LJ the need for mutuality is asserted but I can find nothing which points to either Lord Justice dissenting from or agreeing with its description by Stephenson LJ. Kerr LJ’s dissenting judgment makes clear that in his view the absence of an obligation on the employee to work is fatal, but that much is also clear in the phrases I have quoted from Stephenson LJ.

52. Thus in *Nethermere* I find support for the three conditions in *Ready Mixed Concrete* as regards the employee’s obligations but no clear indication as to the nature of the obligation which the employer must bear as a prerequisite of the contract being one of employment.

53. In *Carmichael and another v National Power plc* [1999] 4 All ER 897, the House of Lords agreed that Mrs Lease’ and Mrs Carmichael’s argument that they were employees “founder[ed] on the rock of mutuality”. These ladies worked from time to time as part time guides at a Power Station. Lord Irvine noted that no issue arose as to their status when they were actually working as guides: the question was whether they were employees when they were not working. He held that there was no contractual relationship of any kind when they were not working, and it was on that rock that their case foundered. But in the course of his speech he considered whether a certain construction of particular documentation might determine the appeal and said that he construed it so that ‘no obligation on the part of the CEGB to provide casual work, nor on Mrs Lease and Mrs Carmichael to undertake it was imposed’. Referring to Stephenson LJ in *Nethermere* and to *Clark v Oxford Health Authority* he said that therefore on that basis there would be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.

54. It is clear to me that Lord Irvine considered the obligation of an employer to provide work (or to pay a retainer) as an important consideration, but given, in particular, his citation of Stephenson LJ in *Nethermere* – whose comments reproduced above indicate a lesser prerequisite for the employer’s obligation than that of being obliged to provide work, it seems that Lord Irvine may not have considered such an obligation as a necessary condition for the existence of an employment.

55. In *Propertycare Ltd v Gower* 2003 UKEAT/0547/03, the EAT said at paragraph 9:

“The cases, starting with *Ready Mixed Concrete* ... show that mutuality of obligations means more than a simple obligation on the employer to pay for the work done; there must generally be an obligation on the employer to provide work and the employee to do the work. That is how we understand the first of MacKenna J’s tests in *Ready Mixed Concrete*. In *Clark v Oxfordshire* ... Sir Christopher Slade allowed of the possibility that paying a retainer when no work was available might give rise to mutuality of obligations, but there must be some mutuality of obligations. The principle

was affirmed by the House of Lords in *Carmichael* and subsequently by the Court of Appeal in *Montgomery* ...” (my emphasis).

56. As can be seen from the discussion of *Ready Mixed Concrete*, *Carmichael* and *Montgomery* above, I cannot find in the judgments a statement of principle as wide as that which the EAT found in *Propertycare*. (The example given by Sir Christopher Slade in *Clark* was in relation to a ‘global’ contract spanning periods of engagement.) It is clear to me that a condition is that the employee is obliged to render personal service for a reward, but the extent of the condition applicable to the employer’s obligation is less clear. The fact that Lord Irvine considered that the CEGD’s lack of obligation to provide work was, when coupled with the ladies’ lack of obligation to perform, fatal suggests strongly that he puts the condition somewhat higher than did Stephen LJ in *Nethermere*. The formulation adopted by Buckley J in *Montgomery* suggest some flexibility in the application of this condition in any event.

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57. In *Usetech* at paragraph 28 the tribunal said:

“... certainly there must be mutuality of obligation, but that does not imply that the “employer” is required to provide work : so much was made clear by Stephenson LJ in *Nethermere* ... the requirement of mutuality is satisfied by the obligation on the one hand, to work and, on the other to remunerate. That was the position in the *Market Investigations* case.”

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Park J commented thus at paragraph 11:

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“I would accept that it is an over simplification to say that the obligation of the putative employer to remunerate the worker for the services performed in itself always provides the kind of mutuality which is the touchstone of an employment relationship.”

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I note that Park J speaks of a “touchstone” rather than a necessary condition. He continues at paragraph 64:

“The cases indicate ... that the mutuality requirement for a contract of employment to exist would be satisfied by a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not actually provided that the want of mutuality precludes the existence of a binding contract of employment.”

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58. That statement would I believe conclude the matter for me were it not for the observations of the Court of Appeal some 18 months later in *Cornwall County Council v Prater* [2006] EWCA Civ 102. The issue in this case was whether a home tutor engaged by the council to teach particular pupils was employed by the council. The teaching assignments were for particular pupils and were of durations from a few months to 5 years. The council maintained that she had a series of short fixed term discrete individual teaching engagements which individually lacked the requisite

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irreducible minimum mutual obligations: the mutuality created by Mrs Prater being contractually obliged to work during each successive engagement was not enough for the irreducible minimum – there had to be a continuing obligation to guarantee and provide more work and an obligation on the worker to do that work (see para 30).
5 Mummery LJ held that the tribunal was entitled to find that there was mutuality of obligation in the individual contracts between Mrs Prater and the council. Summing up, at paragraph 40, he said:

10 “(5) Nor does it make any difference to the legal position that, after the end of each engagement the Council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the Council were under an obligation to pay her for teaching the pupil made available to her by
15 the Council under that contract. That was all that was necessary to support the finding that each individual teaching assignment was a contract of service ...”

I accept that at paragraph 11 of his judgment Mummery LJ had said that the “Council was obliged to continue to provide that work [tutoring the particular pupil] until the
20 particular engagement ceased”, but in the summary set out above that factor is not treated as relevant to his conclusion. Longmore LJ, at paragraph 43, said he could not accept the submission that mutuality required an on-going duty to provide work and an on-going duty to accept work. He said:

25 “There was mutuality of obligation in each engagement namely that the County Council would pay Mrs Prater for the work which she, in turn, agreed to do by giving tuition to the pupil for whom the Council wanted her to provide tuition. That to my mind is sufficient “mutuality of obligation” to
30 render the contract a contract of employment if other appropriate inclinations of such an employment contract are present.”

There is no hint here that “mutuality of obligation” required any obligation on the part of the Council other than to pay for work done.

35 Lewison J was yet more direct: “I would have thought that the question of mutuality of obligation goes to the question of whether there was a contract at all, rather than what kind of contract there was, if a contract existed.” He agreed with Mummery and Longmore LJ.

40 59. The sentiments expressed by the Court of Appeal in this case are to my mind more aligned with the approach taken by the tribunal in *Usetech* than the judgment of the EAT in *Propertycare*. In these circumstances it is with some diffidence that I set out my conclusions in relation to mutuality:-

45 (i) For there to be an employment contract there must be a contract. That requires some mutual obligations.

(ii) That contract cannot be an employment contract unless the 'employee' is obliged to provide his labour.

5 (iii) An obligation on the employer to provide work or in the absence of available work to pay is not a precondition for the contract being one of employment, but its presence in some form (such as for example an obligation to use reasonable endeavours to provide work, to allocate work fairly, or not to remove the ability to work e.g. by removing the pupil to be taught) is a touchstone or a feature one would expect to find in an employment contract and where absence would call into question the existence of such a relationship.

Discussion

15 60. I now turn to consider what the terms of the hypothetical contract between the AA and Mr Bessell would have been. I shall then consider whether, in the circumstances I have identified, had Mr Bessell been engaged under that contract, he would have been an employee.

20 61. It is important to consider the terms of the notional contract because some of the conditions for employment (e.g. control and mutuality) and other important indicia of employment or otherwise flow from the legal rights and duties of the parties rather than from the general relationship between them.

25 62. Mr Bessell was the sole director of the Appellant. It seems to me, as it did to the Special Commissioner in *Netherlane* SpC 457 that in the absence of any formal contract between him and the Appellant, straightforward to treat him as effectively a party to the Appellant's contract with DPP in conducting this exercise.

30 63. I approach this question by asking first, what would the contract 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).

35 64. In my opinion the terms of the notional contracts would have been these:

(1) There would be a series of contracts each with a fixed term. The term of each contract would match the periods of the DPP/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.

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I reach the same conclusion on the embodied arrangement basis.

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

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I reach this conclusion because: (1) clause 9.2 of the DPP/AA agreement of 12 October 1998 (see para 7(v) above) provides that "either party may give the

5 other 28 days' notice to terminate this Agreement and/or any Schedule", and I have found that provision is likely to have applied for the whole of the period under approval; (2) clause 8.1 of the Dragonfly/DPP agreement provides that DPP may give Dragonfly 28 days notice, but Dragonfly has no clear right of early termination during an assignment; (The Special Terms in the Schedule to all the contracts bar one provide that 4 weeks notice may be given; but it is not clear by which party.); and (3) had there been a contract between Mr Bessell and the AA it seems very likely to me that it would have encompassed the 28 day termination right of the AA, and, given that the AA conceded such a right to DPP, it seems likely that the AA would have been conceded it to Mr Bessell.

10 On the embodied arrangements basis it is clear that the AA could give 28 days notice; but read together the arrangement would not permit that right to Mr Bessell.

15 (3) Each contract would also be terminable by written notice if Mr Bessell's performance was unsatisfactory. That is because (1) clause 8.2 of the AA/DPP agreement of 12 October 1994 provides that DPP shall on notification remove a staff member whose service is unsatisfactory or for misconduct, (2) clause 8.2.1 of the DPP/Dragonfly agreement permits that agreement to be terminated early if there is unsatisfactory performance, and (3) I would therefore expect such a provision to be included in the notional contract.

20 My conclusion on the embodied arrangements basis would be the same.

25 (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.

30 That is for the following reasons.

35 First, it seems to me that the DPP/AA agreement contains no right for DPP to supply a substitute, and the agreement or sub-agreement made via the Schedule is an agreement for the supply of a particular individual. Clause 3 of the Agreement sets out the framework for the supply by DPP of a person to the AA: the AA is to indicate its need; DPP sends CVs of persons it proposes to fill the need, and the AA selects the persons it requires. A schedule is completed to record the agreement in respect of the person selected. Where Mr Bessell's name appears on such schedules (and I have found it is more likely than not that it did throughout the relevant period) there was an agreement between DPP and the AA for the supply of Mr Bessell. There is no clause or provision of the agreement which deals with substitution. Clause 8.4 deals with the replacement of an unsatisfactory employee but that is a far cry from a right of any sort to substitute.

5 Clause 3.2 of the Dragonfly/DPP agreement provides that Dragonfly has the right to substitute a suitably qualified person. But clause 3.3.1 restricts that right to circumstances where DPP has given prior written consent (for contract up to 2 January 2002), or where the AA has been satisfied that the “new consultant is trained and suitable to undertake the services” (for contracts between 2 January 2002 and 1 January 2003), or without satisfying both DPP and the AA that the new consultant is suitable (thereafter).

10 In the first period it seems to me that the combined effect of these clauses is that DPP would not consent to a substitute unless it obtained the specific agreement of the AA – without which it would be in breach of its agreement. In the later periods Dragonfly could not substitute unless the AA were satisfied of the substitute’s suitability. Given that DPP had no right to substitute it seems to me that a coalescing of these agreements into one could only be one wherein substitution was permissible only if the AA agreed to the substitute. And if one asks at this stage what would have been agreed? then, given what was agreed by the AA it seems to me that no right of substitution would have been conceded other than substitution with formal consent at the AA’s discretion.

20 Second, it seemed to me that there was no course of conduct between DPP and the AA from which it could be concluded that the AA/DPP agreement had been varied. The evidence that there had been one or two substitutions was not enough to convince me that the AA permitted substitution at will rather than substitution in circumstances where it had agreed specifically to the substitute. Christine White’s letter to my mind did not clearly indicate that specific agreement to a substitute was not required, and Lyn Lake’s letter did not clearly relate to the period of the appeal nor to my mind unambiguously indicate that the consent of the AA to the person substituted would not be required. Without hearing their evidence in person I am unwilling to take a broader view of their statements.

30 Third, I concluded at paragraph [17] above, that in practice the AA would not have accepted a substitute unless either it expressly agreed to a particular substitution, or it could be shown it was contractually obliged to agree. I conclude above that it was not so contractually obliged.

40 Therefore if I ask the question what would the notional contract have contained? I answer: only a provision under which substitution could be made only with the express agreement of the AA. Coalescing the arrangements into a contract I come to the same conclusion.

45 (5) ‘Control’

The Schedule to the first agreement between Dragonfly and DPP provides at the top of the page:

“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.” (my emphasis)

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Mr Smith, in his skeleton argument, described this as “the engagement of [Dragonfly] to provide a consultant to perform the services under [Dragonfly’s] direction supervision and control.” I do not agree. The language is not clear, but the “you” for whom the services are to be performed is not [Dragonfly], and the “your” does not therefore suggest to me that [Dragonfly]’s control is intended. In my view what was intended by those words is what appears at the top of the next schedule in the sequence of engagements namely:

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“to provide a consultant to perform certain services for the Client under the client’s direction.”

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The Client being the AA. This formulation appears in the second and third schedules. In the remaining four schedules (April 2001 onwards) the words “under the Client’s direction” are omitted.

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Mr Smith 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.

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Clause 3.8 of the AA/DPP contract provides 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”.

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Up until 2 January 2002 Clause 2.1.1 of the Dragonfly/DPP contract provided that Dragonfly would procure that the consultant would comply with the AA’s customary rules and regulations and working procedures. For contracts on and after 2 January 2002, clause 3.1.1 merely requires that the consultant will comply with the AA’s health and safety and similar regulations, adding “(the company’s method of working shall be its own)”.

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It seems to me that for the period up to 2 January 2002 the effect of these arrangements was to give the AA an indirect contractual right to require that Mr Bessell comply with the AA’s customary rules and regulations and working procedures. There was no evidence to indicate any variation in these contracts by conduct.

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In the period after 2 January 2002 the provisions of the two sets of contracts do not give such an indirect right to the AA: although the AA/DPP contract gives control to the AA, the Dragonfly/DPP contract does not. Thus control cannot be spelt out of the words of the formal contracts.

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.

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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).

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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/AA contract.

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(6) Payment

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 8 hours' work).

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The schedule to the DPP/AA contract indicates:

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"Hours per week	40 hours ...
Other information	10% maximum overtime."

This is a schedule recording the details for the "supply [of] temporary staff". I read the contract as making provision for staff to be made available to the AA for at least 40 hours per week in return for payment. What the AA does with the staff made available is irrelevant: payment is made for making them available. The provision of a 4 week notice period suggests to me that the parties recognised that the work might run out and the AA would no longer wish to pay for the supply of staff it was no longer able to use. Taken together those provisions suggest to me that so long as Mr Bessell was present and available, the AA had to pay whether or not work was available for him to do. If however Mr Bessell was working for more than 40 hours then overtime payments would be due.

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The Dragonfly/DPP contracts provided that Dragonfly should 'provide the Services of a Consultant to the Client'. "Services" was defined by reference to the description in the schedule which normally read "specialist tester". The schedule specified "Standard Weekly Hours : 40 hours" and set an overtime

rate. It seems to me that the draftsman's use of the capitalised "Services" was a mistake or at best confusing, but that the intent was that payment should be made for the supply of Mr Bessell by reference to the time for which he was provided.

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Putting these together it seems to me that the terms of the notional contract would (on the embodied arrangement approach – and at this stage considering only the formal contracts) have provided for payment for Mr Bessell's availability for work rather than simply for his working hours, together with payment when he worked overtime. That conclusion is in particular consistent with the notice periods in the relevant contracts – without an obligation to pay for availability what was the point of the notice periods?

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It seems to me that in practice (see 7(xiii) above) Mr Bessell was very rarely left twiddling his thumbs and so payment was hardly ever made in respect of 'availability' rather than work. His billed time generally reflected only time spent working although there may have been some flexibility or averaging in some weeks. Thus there was no conduct materially varying these formal contract terms.

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In relation to this heading of the notional contract the two approaches lead me to different conclusions. If I ask: what would have been agreed? I conclude that Mr Bessell would have been paid only for the days (or hours) actually worked: he would have accepted that so both sides would have so provided in the contract.

25

But if I ask what the arrangements were I find that nothing in the practice varied the agreement between the parties because the requirement to pay simply for availability never arose and was never tested. Thus the "arrangements" included payments for availability rather than just for work done and the notional contract in that basis would have had the same provision.

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(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. To be there was necessary to make any of the contracts in relation to that period work. It would have been an implied term of the contracts and would on any view have been a term of the notional contract. 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.

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

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

65. I now turn to consider whether, under each of these notional contracts Mr Bessell would have been an employee.

5 Preconditions

66. I find that the first two *Ready Mixed Concrete* preconditions were satisfied:-

10 (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;

15 (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 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
20 right of control.

I therefore conclude that subject to the third condition it was possible for these contracts to be contracts of employment.

25 Mutuality

67. In relation to the question of mutuality in relation to any one of the series of notional contracts the question of obligations to offer or accept extensions or further contracts is irrelevant.

30 68. I concluded at para 59 above that the mutuality condition was satisfied by an obligation to work in return for an obligation to remunerate. That condition is satisfied by the notional contracts. I also concluded that a requirement to make work available (or to pay when it was not) was a significant pointer (a touchstone) towards
35 employment. At paragraph 64(6) above I conclude on the embodied contract approach that such a requirement would have been included in the notional contract. Thus on that basis (and so far income tax purposes) there was a clear pointer towards employment.

40 But on the what-would-it-have-contained approach I concluded that the notional contract would have obliged the AA to pay only for work done. That may therefore point away from, or put a doubt over, whether it was a contract of employment. However in these circumstances it is not in my view a serious doubt because it is compensated by the fact that work always was available to the “tail end charlies” and
45 that it was known that it would be available during the period of the contract.

69. I note that if I am wrong in my conclusion of law and an obligation on the employer to provide work or to pay where there is no work is a necessary condition for there to be employment, and if I am right at paragraph 64(6) above about what the contract would have contained, and if the what-would-it-have-contained is the right approach at least for income tax purposes, then for income tax purposes (but not for NI purposes) the condition for the application of schedule 12 FA 2000 would have failed.

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 point 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.

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**CHARLES HELLIER
SPECIAL COMMISSIONER**

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RELEASED: 11 December 2007

20 Authorities referred to in skeletons and agreed bundle of authorities and not referred to in the decision:-

Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property [1954] 2 WLR 867

Global Plant Ltd v Secretary of State for Health and Social Security [1971] 3 All ER

25 *Massey v Crown Life Insurance* [1978] 2 All ER 576

Barnet v Brakyn (HMIT) [1996] STC 716

McManus v Griffiths [1997] 70 C 218

Stuncroft v Havelock [2001] EAT/1017/00

Tilbury Consulting Limited v Giltens [2004] STC (SCD) 72

30 *FS Consulting Limited v McCaul* (2002) STC (SCD) 138

Lime-IT Limited v Justin (2003) STC (SCD) 15

Ansell (2004) UKSC SPC 425

Parade Park Hotel v HMRC (2007) UKSC SPC 599

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