Neutral Citation: **[2024] UKUT 00099 (TCC)**

Case Number: UT/2020/000377

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, Fetter Lane,
London, EC4A 1NL

INCOME TAX – NATIONAL INSURANCE CONTRIBUTIONS – intermediaries legislation – sections 48 to 61 Income Tax (Earnings and Pensions) Act 2003 – Social Security Contributions (Intermediaries) Regulations 2000 – whether First-tier Tribunal erred in failing properly to construct hypothetical contract – yes – whether First-tier Tribunal erred in its application of the test of mutuality of obligation to the hypothetical contract – yes – appeal allowed – decision set aside and case remitted to First-tier Tribunal

Heard on: 14 and 15 December 2023
Judgment date: 12 April 2024

Before

MR JUSTICE RICHARDS

JUDGE ASHLEY GREENBANK

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

RALC CONSULTING LIMITED

Respondent

Representation:

For the Appellants: Christopher Stone, counsel, and Marianne Tutin, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Paulin, counsel, instructed by Tax Networks Ltd.

DECISION

INTRODUCTION

1. This is an appeal by the appellants, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), against a decision of the First-tier Tribunal (the "FTT") dated 3 March 2020 (the "Decision").

2. In the Decision[1], the FTT allowed the appeal of the respondent, RALC Consulting Limited ("RALC"), against a decision of HMRC to issue notices of decision and determinations charging RALC to income tax and national insurance contributions ("NICs") under the "intermediaries legislation" (commonly known as IR35), which is found in sections 48 to 61 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and the Social Security Contributions (Intermediaries) Regulations 2000 (the "SSCI Regulations").

3. The various notices of decision and determinations relate to the tax years 2010/11 to 2014/15. The amounts of income tax and NICs (excluding interest) at issue are £164,482 and £78,842 respectively.

4. HMRC appeals to this tribunal with the permission of the FTT.

BACKGROUND

5. We will need to approach the findings of fact as made by the FTT in more detail later in this decision. However, to set the scene, we will first describe the factual backdrop to this dispute, none of which, we understand, is in dispute.

6. RALC is the personal service company of Mr Richard Alcock, an IT consultant. At all material times, Mr Alcock was the sole director of, and the sole shareholder in, RALC.

7. During the relevant tax years, RALC provided the services of Mr Alcock for fixed periods of time under three sets of contractual arrangements that are relevant to this appeal. In each case, there were four parties to the chain of contracts: Mr Alcock, RALC, an agency, and the "end client". The end client in the case of two of the sets of contractual arrangements was Accenture (UK) Limited ("Accenture"), a management consultancy and professional services firm. The end client in the other case was the Department for Work and Pensions ("DWP"). The agency for the engagements with Accenture was Networkers Recruitment Services Limited ("Networkers") and the agency for the engagement with DWP was Capita Resourcing Limited ("Capita").

8. In all cases, the contractual arrangements involved: an agreement between RALC and the agency, to which the parties, and the FTT in the Decision, referred as the "lower level contract" or "LLC"; and a further agreement between the agency and the end client, to which the parties and the FTT in the Decision, referred as the "upper level contract" or "ULC". We have adopted the same terminology in this decision notice. There must also have been a further contract, between RALC and Mr Alcock, though the FTT made no findings as to the terms of that contract, no doubt because it proceeded on the basis that RALC could safely be viewed as an *alter ego* of Mr Alcock. No-one has suggested to us that the terms of any contract between Mr Alcock and RALC are significant.

[1] In this decision notice, we refer to paragraphs in the Decision in the format "FTT [xx]".

9. In summary, the contractual arrangements under which Mr Alcock's services were provided were as follows:

(1) between 8 November 2010 and 20 July 2012 and between 22 October 2012 and 28 April 2013, a LLC between RALC and Networkers and a ULC between Networkers and Accenture in relation to work on project undertaken by Accenture for DWP (referred to in the Decision as the "first contract");

(2) between 4 March 2013 and 7 December 2013, a LLC between RALC and Capita and a ULC between Capita and DWP in relation to work on a Universal Credit project for DWP (referred to in the Decision as the "second contract");

(3) between 16 December 2013 and 14 February 2015, a LLC between RALC and Networkers and a ULC between Networkers and Accenture in relation to work on project undertaken by Accenture for Police Scotland (referred to in the Decision as the "third contract").

THE RELEVANT LEGISLATION

10. The issue before the FTT which forms the subject matter of this appeal concerned the application of the intermediaries legislation to the contractual arrangements we have just described. In summary, if the intermediaries legislation applied, payments received by RALC under these arrangements would be treated for tax and NICs purposes as if they were employment income or earnings of Mr Alcock, but the liabilities to account for income tax and NICs would fall on RALC rather than Mr Alcock.

11. The circumstances in which the intermediaries legislation could apply for the purposes of income tax were set out in section 49 ITEPA. So far as material, at all relevant times, section 49 ITEPA provided as follows:

> **49 Engagements to which this Chapter applies**
>
> (1) This Chapter applies where—
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that—
>
> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> (ii) …
>
> (3) …
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.
>
> (5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1).

12. There is an equivalent provision in the SSCI Regulations, which determines when the intermediaries legislation applies for the purposes of NICs. It is found in regulation 6 of the SSCI Regulations.

13. The wording of section 49 ITEPA and regulation 6 of the SSCI Regulations is similar, but not identical. It was acknowledged by Henderson J in *Dragonfly Consultancy Limited v Revenue and Customs Commissioners* [2008] EWHC 2113 (Ch) ("*Dragonfly*") (at [13] to [19]) that, in some circumstances, the differences in wording may lead to different conclusions as to the applicability of the intermediaries legislation for income tax and NIC purposes. However, the parties have proceeded on the basis that, in this case, those differences in wording do not affect the analysis. The parties made their arguments before the FTT and this tribunal by reference to the income tax provisions (in section 49 ITEPA) and on the assumption that, if the intermediaries legislation applied for income tax purposes, it would also apply for the purpose of NICs. The FTT proceeded on the same basis (FTT [36]), and we will do the same.

THE FTT DECISION

14. The FTT decided that the intermediaries legislation could not apply to the contractual arrangements that we have described above.

15. The Decision is lengthy and detailed. It runs to some 90 pages and 488 paragraphs. For present purposes, we shall confine ourselves to a summary of the key aspects of the Decision and a summary of the FTT's conclusions. We will return to some of the more important paragraphs as and when we address the grounds of appeal.

16. As we have mentioned, the only issue in this appeal concerns the application of the intermediaries legislation. There was, however, another issue before the FTT. It concerned whether the determinations for income tax for the tax years 2010/11 and 2011/12 had been made in time and, in particular, whether any potential loss of income tax was brought about carelessly by Mr Alcock, RALC or their advisers so that the extended six year time limit in section 36 of the Taxes Management Act 1970 could apply (FTT [12(b)]). Having concluded that the intermediaries legislation could not apply to the contractual arrangements, the FTT did not need to decide that question and it did not do so.

17. The FTT summarized the approach that the Tribunals should adopt in these cases in the following terms (at FTT [41]):

> "41. The legislation requires the Tribunal to do the following:
>
> a. Make findings of fact about the actual terms on which the parties contracted and any other relevant "circumstances" for the purposes of s.49(1)(c)(i) and (4);
>
> b. Determine the terms of the hypothetical contracts;
>
> c. Apply the common law tests to determine whether the hypothetical contracts would have been contracts of employment."

18. The FTT then instructed itself in greater detail on the application of each of the steps in that approach. As regards the second step in the process (at FTT [41(b)]), it referred in particular to the guidance given by Park J in *Usetech Ltd v Young* [2004] EWHC 2248 (Ch) ("*Usetech*") regarding the construction of the "hypothetical contract" between the individual and the end client. This included the comments of Park J (at (*Usetech* [9]) that section

49(1)(c) involves an exercise of constructing "a hypothetical contract which did not in fact exist, and then enquiring what the consequences would have been if it had existed" and (at *Usetech* [43] – [47]) to the effect that the exercise requires a consideration of all the contracts in the chain, including where an agency is interposed, the terms of any contract between the agency and end client, even if the individual was unaware of those terms (FTT [43]).

19. In relation to the final step (at FTT [41(c)]) – the application of the common law tests to determine whether the hypothetical contract as found was a contract of employment – the FTT identified the correct test as being "the classic statement" of MacKenna J in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 at p515 ("*Ready Mixed Concrete*"). The FTT says this at FTT [44]:

> "44. There is no relevant statutory definition of employee or employment. The Tribunal is required to apply the common law in this respect. The classic statement on the conditions required for a contract of service is that of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:
>
> > "(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."

We will refer to the test identified by MacKenna J in *Ready Mixed Concrete* in this decision as the "*RMC* test". The first limb of that test is typically referred to as requiring "mutuality of obligation". We will also adopt that terminology in this decision.

20. The FTT then reviewed in some detail some of the principles derived from the case law authorities on the application of the three limbs in the *RMC* test (FTT [48] – [76]).

21. The FTT's findings of fact are set out in the Decision at FTT [89] – [230]. This is a lengthy and detailed section which, to the extent relevant, we will revisit in our analysis of the grounds of appeal. At this stage, we will confine ourselves to a description of the approach taken by the FTT and its key findings.

(1) The FTT began by setting out its findings on the background to the contractual arrangements with Accenture in relation to the first contract and the third contract (FTT [96] – [122]). It conducted an analysis of the LLCs and the ULCs in those cases by reference to the limbs in the *RMC* test that is, by identifying the aspects of the contractual arrangements that it considered to be relevant to the issues of mutuality of obligation (FTT [123] – [130]) and to questions of control (FTT [131] – [139]). Significantly, the *RMC* test is applied to the terms of the LLCs and ULCs and not to the terms of the "hypothetical contracts" to which Park J had referred in *Usetech*.

(2) The FTT performed a similar exercise in relation to the contractual arrangements with DWP in relation to the second contract. The background to the second contract is set out at FTT [144] – [147]; the identification of the key terms of the LLC and the ULC is found at FTT [148] – [166]; the issues that are relevant to questions concerning mutuality of obligation at FTT [167] – [175] and those relevant to the questions of

control at FTT [176] – [182]. Again, the tests of "mutuality of obligation" and "control" in these sections is applied to the ULC and LLC rather than any hypothetical contract.

(3) The FTT then set out its findings regarding the operation of the various contracts in practice (FTT [183] – [210]) before concluding with evidence relating to other issues that it considered relevant, such as other work done by Mr Alcock outside the contractual arrangements in the tax years in question.

22. Having set out the parties' submissions, the FTT turned to its discussion of the issues. Its main conclusions are set out below.

(1) The FTT found that there was insufficient mutuality of obligation between Mr Alcock and the end clients in the hypothetical contracts to establish an employment relationship. We will consider the analysis in some detail later in this decision, but, in summary, this conclusion was based on findings that there was no express contractual obligation on Accenture or DWP to provide Mr Alcock with any minimum amount of work and no contractual obligation on Mr Alcock to accept work offered.

(2) In the first instance, the FTT conducted its analysis by applying the relevant aspects of the first limb in the *RMC* test to the actual terms of the LLCs and ULCs (rather than the hypothetical contracts) for each contractual arrangement (in relation to the arrangements with Accenture, FTT [315] – [331]; in relation to the arrangements with DWP, FTT [333] – [346]).

(3) However, in both sections, there is an apparent change of emphasis right at the end. Having been focused on the LLCs and ULC relating to Accenture throughout its analysis at FTT [315] to [331], the FTT expresses an interim conclusion on the hypothetical contract at FTT [332]. Similarly, FTT [348] contains an interim conclusion on mutuality of obligation in relation to the hypothetical contract relating to the DWP engagement even though the analysis from FTT [341] to [346] was concerned with the actual LLC and ULC.

(4) The FTT then set out its overall conclusion in relation to the hypothetical contracts (at FTT [349] – [358]). The FTT concludes at FTT [355]:

> "355. … the Tribunal is not satisfied on balance that sufficient mutuality of obligations did exist between Mr Alcock and the end clients in the notional contracts to establish an employment relationship. Mr Alcock and the Appellant have discharged their burden of proof on the balance of probabilities in establishing a lack of mutuality of obligations sufficient to form an employment relationship with the end clients. Although there was some mutuality of obligations in respect of the requirement for payment if work was done, it did not extent beyond the irreducible minimum in any contract to provide services nor demonstrate the relationship was one of a contract of service."

(5) Although it forms part of the first limb of the *RMC* test, the FTT dealt separately with the question as to whether there was a contractual obligation to provide personal services on the part of Mr Alcock in the hypothetical contracts under the arrangements with both Accenture and DWP. It found that there was (FTT [380]). Although the contracts included provisions that entitled RALC to substitute another worker in place of Mr Alcock, that right was fettered. In each case, the end client, Accenture or DWP, had the right to refuse to authorize any substitute worker that they deemed to be

unsuitable. Once again, the FTT reached this conclusion by applying the *RMC* test to the actual terms of the LLCs and ULCs for each contractual arrangement (in relation to the arrangements with Accenture, FTT [359] – [362]; in relation to the arrangements with DWP, FTT [363] – [367]), before considering the operation of those terms in practice (FTT [368] – [371]). Even though that analysis focused on the LLC and ULC, the FTT expressed a conclusion on the effect of the hypothetical contract in the following terms at FTT [380]:

> "380. However, for the reasons set out above, the Tribunal is satisfied that the fettered rights of substitution points to there being a contractual right of personal service by Mr Alcock in his hypothetical contracts with both Accenture and DWP. This would have pointed towards them being contracts of service (employment) rather than contracts for services (self-employment) but for the Tribunal's conclusion on mutuality of obligations."

(6) As regards the questions of control, the FTT concluded that the rights within the arrangements exercised by the end clients were on balance more consistent with a contract for services. Although the rights of the end clients in the arrangements to control when and where Mr Alcock worked were consistent with a contract of service, these considerations were outweighed by the contractual arrangements relating to control of what Mr Alcock did and how he worked, which pointed more to the arrangements being a contract for services. The FTT sets out some conclusions at FTT [428] – [429] in passages that seem to be dealing with the ULCs and LLCs rather than the hypothetical contracts:

> "428. The Tribunal is satisfied that the right of control under the terms of the contracts and control exercised in practice by his clients, Accenture and DWP, over what and how Mr Alcock worked points towards a self-employed relationship (contract for services). However, the Tribunal is satisfied that the right of control under the terms of the contracts and control exercised in practice by his clients, Accenture and DWP, over where and when Mr Alcock worked points towards [a self-employed relationship (contract for services)]. The Tribunal has reminded itself that it is the right of control which holds primacy rather than how it was exercised in practice.
>
> 429. Nonetheless, the Tribunal does not conclude that the overall balance is neutral in each of the contracts. Assessing the matter qualitatively, by standing back and looking at the overall picture, the Tribunal is of the view that Mr Alcock's significant right of control over what and how he worked for the end clients outweighed their right over where and when he worked. He was not legally obliged and did not in practice perform all the roles that employees at DWP and Accenture would be required to perform. The end clients' rights of control over 'where and when' Mr Alcock worked were consistent with a contractor delivering project based arrangements rather than demonstrating a master-servant relationship, organisational position or role-based arrangement. The contractual rights of control over where and when Mr Alcock worked were required by the nature and deadlines of the tasks to be completed and the quality of the service to be provided for the end clients than the role or position to be performed or occupied."

(The square brackets in paragraph [428] are inserted by us. We infer from the context that the reference in those square brackets to "a self-employed relationship (contract for services)" should be to "an employment relationship (contract of service)".)

In this case, the FTT reached this conclusion by applying each aspect of the control test in the second limb of the *RMC* test to the actual terms of the LLCs and ULCs for each contractual arrangement, taking into account the manner in which those contracts were operated in practice; reaching an interim conclusion for each aspect on the position between Mr Alcock and the end client (although there is no express reference to any hypothetical contract in this section); and then reaching an overall conclusion (as set out above).

(7) The FTT then took into account various factors arising from the contractual arrangements and considered their consistency with employment or self-employment. These included:

(a) Mr Alcock had the right to carry out other work at the same time as carrying out the engagements under each of the arrangements, which he exercised "to a limited extent" (FTT [439]);

(b) all the contracts included a provision stating that there was no intention to create an employment relationship between the end client and Mr Alcock (or RALC) (FTT [440]);

(c) the contracts between the parties were negotiated at arm's length; Mr Alcock negotiated the daily rate and expenses (FTT [441]);

(d) Mr Alcock was in business on his own account (FTT [442] – [452]):

(i) Accenture and DWP treated Mr Alcock as a contractor and not as an employee; he was not responsible for employee performance, HR issues, training, or financial performance in the teams within which he worked;

(ii) Mr Alcock took steps to develop his own business, including marketing his expertise on LinkedIn;

(iii) Mr Alcock was responsible for his own professional indemnity insurance;

(e) Mr Alcock was not entitled to holiday pay and sick pay and the termination rights under the contractual arrangements differed markedly from those that applied to employees (FTT [452] – [461]);

(f) the ability of Mr Alcock to make a profit or loss from the arrangements (FTT [462] – [473]).

On balance, the FTT concluded that these factors were either neutral or pointed towards self-employment.

23. At this stage, the FTT set out its conclusion on the first issue – the applicability of the intermediaries legislation – and declared itself "satisfied, on balance, that the hypothetical contracts between Mr Alcock and his end clients… would be contracts for services" (FTT [477]). The FTT summarized its reasons as follows (FTT [478] – [484]):

> "479. The contractual rights in the case of DWP engagement (the second contract) indicate a contract for services (self-employment) in the notional contract with Mr Alcock (see for example the termination without notice

clause, the remedying own defects, the lack of mutuality of obligations clause etc) to a greater extent than in the Accenture contracts. The operation of the contract with DWP, as explained by Mrs Hartley and Read, also firmly indicates the same. Nonetheless, it is satisfied on balance that the notional contracts between Mr Alcock and Accenture would also be contracts for services based upon the rights and operation of the contracts – the early termination of the first contract is a good example of this.

480. In each of the contracts, the Tribunal is of the view that although Mr Alcock provided his services for payment, the lack or insufficiency of mutuality of obligation demonstrates the notional contracts to be ones for the provision of services. DWP and Accenture paid Mr Alcock a daily rate for the work carried out in accordance with the agreed rate as invoiced but there was no contractual obligation beyond that. The Tribunal is satisfied that there was no more than an expectation as to the days and hours that would be worked each week and it did not crystallise into an obligation. Mr Alcock would only be paid if he worked with no guaranteed obligation on the part of his end clients to provide him any work during the contracts.

481. While the personal service limb of the *RMC* test was satisfied, it is a necessary but not sufficient requirement for an employment relationship. Further, it was only on the basis of the ULCs that the Tribunal found that the rights of substitution were significantly fettered – these ULCs were not available to nor within knowledge of Mr Alcock but must be considered nonetheless.

482. The Tribunal is also satisfied that, on balance, the degree of control as of right and as exercised by the end clients over Mr Alcock indicates that the notional contracts would be ones for services (self-employment).

483. Finally, the other contractual terms indicate, on balance, (more so in the case of DWP contract) that the notional contracts would be ones for services.

484. The Tribunal has stood back, applied the three stages of the *Ready Mixed Concrete* test, considered all the relevant circumstances including "painting the picture" and taken into account whether Mr Alcock was in "business on own account", the Tribunal is satisfied the hypothetical contracts with his end clients would be ones for services and therefore not caught by the IR35 legislation."

24. Having expressed its conclusion on the first issue and the reasons for it, the FTT set out (at FTT [485]) its construction of the hypothetical contracts between Mr Alcock and his end clients.

"485. The Tribunal has weighed up all the evidence and come to the conclusion that the hypothetical contracts between Mr Alcock and each of the end clients would provide as follows:

(1) There would be no mutuality of obligation between Mr Alcock and DWP and Accenture expressly stated in the contract. There would be no obligation for Accenture nor DWP to provide a minimum amount of work (number of days or hours) to Mr Alcock during the course of the contract or thereafter. Mr Alcock had the right not to accept or refuse to accept work from each during the course of the contract. There would be an obligation for both Accenture and DWP to pay Mr Alcock only if work was offered and undertaken.

(2) The termination provisions of each contract would provide for no notice period needing to be given by DWP and 30-days notice by Accenture to Mr

Alcock. Notice could be given by either client without reason. There was no entitlement to any paid notice from either client nor would Mr Alcock have the right to claim payment for work done outside of the cancellation of the contract. Therefore, the contracts could be cancelled at any time by either client for any reason without financial obligation.

(3) There would be a substitution clause in both the Accenture and DWP contracts but it would be fettered in that each client would have the ability to consider and decide whether to accept substitutes offered by Mr Alcock based on the suitability, qualifications and expertise of the substitute. However, in relation to the Accenture contract, it would be able to refuse to accept a substitute unless Mr Alcock was unable to work. In DWP contract, it would have a further right of absolute and unqualified right to veto any proposed substitute.

(4) There would be not be any significant control over what work Mr Alcock performed and how he did so within the specific Accenture and DWP's projects for which he was contracted so long as he enabled the ultimate outcome to be delivered in collaboration with their teams. Mr Alcock was to collaborate with the clients to agree the best way in which to deliver those parts of the project for which he or his team was responsible. In the very unlikely event that a dispute arose between the parties which could not be resolved over what and how Mr Alcock's work was to be delivered, this would result in either party terminating the contract rather than any direction by the clients for Mr Alcock to perform work of a nature or in a manner he could not agree to.

(5) Any work for both Accenture and DWP was to be conducted mainly within business hours for an average of 40-45 hours per week but the contract would specify a working week with variable hours and provision to provide variable cover, in case Mr Alcock was indisposed.

(6) Any work for Accenture and DWP was to be conducted by Mr Alcock at the clients' office unless working at home or outside those hours was reasonable i.e.. did not interfere with delivery of his objectives. Mr Alcock would have to inform his clients of when he was working from home but they could not unreasonably refuse to let him do so.

(7) The hypothetical contract would have to have a clause, which enabled Mr Alcock to perform the consultancy services in the course of each assignment for Accenture and DWP at his own premises when reasonable. Mr Alcock would not be required to but could pay for commercially leased business premises, with broadband, web domain, business e-mail domain, conference call facilities, etc.

(8) Mr Alcock would have to give advance notice to both clients of any holidays or non-working days he was taking but it could not be unreasonably refused.

(9) Mr Alcock was permitted to work for other clients during the course of contracts with both Accenture and DWP so long as this did not interfere with the delivery of his projects within each of their assignments.

(10) Mr Alcock was to have no sick pay, paid holiday or pension entitlement from either Accenture or DWP.

(11) Mr Alcock was not to hold himself as working out for either DWP or Accenture. There was no intention that they be considered his employer. Mr Alcock could not represent, deputise or act on behalf of the clients.

(12) Mr Alcock was to carry his own professional indemnity insurance.

(13) Mr Alcock was not to attend DWP or Accenture internal meetings which were not specific to delivery of the projects in which he was engaged.

(14) Mr Alcock was not to have any responsibility or obligation for training himself or others, HR, pastoral or wider management responsibilities than those necessary to collaborate on projects. He was not subject to nor responsible for disciplinary procedures for either DWP or Accenture.

(15) Mr Alcock had no financial responsibilities, accountability or obligations for either DWP or Accenture.

(16) The contracts for DWP and Accenture would be for fixed terms and based upon delivery of specific projects rather than filling specific job roles or positions.

(17) The contracts with DWP and Accenture would be at an agreed daily rate of pay, which left Mr Alcock to deliver the projects, effectively and efficiently.

(18) Mr Alcock would be liable in certain circumstances in negligence to the Accenture and DWP for errors committed and in relation to DWP he would have to remedy errors at his own cost."

THE GROUNDS OF APPEAL

25. HMRC appeal on the following grounds:

(1) The FTT failed properly to determine what the terms of the hypothetical contracts would have been and apply the common law test of employment to those terms;

(2) The FTT erred in law in its approach to mutuality of obligation; and erred in law and/or reached a perverse conclusion in finding that, within the actual LLCs and ULCs, there was not sufficient mutuality of obligation;

(3) The FTT erred in law, took into account irrelevant considerations and/or reached a perverse conclusion in finding that Mr Alcock had significant control over 'what' work he did;

(4) The FTT erred in law, took into account irrelevant considerations and/or reached a perverse conclusion in finding that Mr Alcock had significant control over 'how' he did his work;

(5) The FTT erred in law, took into account irrelevant considerations and/or reached a perverse conclusion in finding that Mr Alcock's purported control over 'what' work he did and 'how' he did it could "outweigh" the contractual controls that the clients would have had over 'when' and 'where' the work was performed;

(6) The Tribunal erred in law, took into account irrelevant considerations and/or reached a perverse conclusion in finding that the other terms of the hypothetical contract would have been inconsistent with a contract of employment and/or that in performing the work for the clients, Mr Alcock would have been in business on his own account;

(7) The Tribunal erred in law and/or took into account irrelevant considerations in its approach to considering whether Mr Alcock was in business on his own account.

GROUND 1

26. We turn first to HMRC's first ground of appeal: that the FTT failed properly to identify the terms of the hypothetical contracts and to apply the common law test of employment status to those terms as required by section 49(1) ITEPA.

Background

27. The parties agree that a helpful structure for a tribunal to adopt on an appeal concerning the application of the intermediaries legislation is to follow the three-stage process set out by the Court of Appeal in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501 ("*Atholl House CA*") at [7]). That process involves:

> (1) Stage 1: Find the terms of the actual contractual arrangements and relevant circumstances within which the individual worked.
>
> (2) Stage 2: Ascertain the terms of the hypothetical contract postulated by section 49(1)(c)(i) ITEPA and the counterpart legislation as applicable for the purposes of NICs; and
>
> (3) Stage 3: Consider whether the hypothetical contract would be a contract of employment.

28. The parties agree that the FTT directed itself appropriately on the approach that it should take at FTT [6] and FTT [41] (see [17] above). The parties also agree that the FTT directed itself correctly to the guidance in the judgment of Park J in *Usetech* regarding the construction of the hypothetical contract between the individual and the end client at Stage 2 in the process (FTT [43]) and to the application of the common law test for employment status as set out by MacKenna J in *Ready Mixed Concrete* (i.e. the *RMC* test) for the purpose of determining whether that hypothetical contract is an employment contract at Stage 3 in the process (FTT [44]). At this point however, the parties diverge.

The parties' submissions

29. HMRC's case is that the FTT did not follow its own self-directions. Mr Stone says that the FTT identified sets of terms for the hypothetical contracts between Mr Alcock and his end clients (FTT [485]). However, it did so at the end of its decision notice and only after having applied the common law test for employment status to the terms of the actual contracts themselves (i.e. the LLCs and the ULCs). The FTT did not, as required by section 49(1)(c) ITEPA and the relevant case law, construct hypothetical contracts and then apply the common law test to the terms of those hypothetical contracts.

30. As a result, Mr Stone says:

> (1) the FTT did not properly engage in the tasks required of it by the guidance in case law (principally *HMRC v Atholl House Productions Ltd* [2021] UKUT 37 ("*Atholl House UT*", which was not available to the FTT when it made its decision) or the intermediaries legislation to construct the hypothetical contracts. For example, the FTT did not consider:
>
> (a) what terms the end clients and Mr Alcock would have agreed if they had been required to contract directly (*Atholl House UT* [56]); or

(b) what relevant "circumstances" might be taken into account in constructing the hypothetical terms, as required by sections 49(1)(c) and 49(4) ITEPA 2003;

(2) the FTT did not apply the common law test of employment status to the terms of the hypothetical contracts as found. Instead, it applied the test to the terms of the actual contracts.

31. Mr Stone says that these were material errors of law. For example, the FTT found (at FTT [485(5)]) that that the hypothetical contract would contain a provision to the effect that work for the end clients was "to be conducted mainly within business hours for an average of 40-45 hours per week". However, the FTT did not consider whether the inclusion of that provision in the hypothetical contract might affect its conclusions as to whether there was mutuality of obligation between the parties to the hypothetical contracts to constitute an employment relationship.

32. Mr Paulin, for RALC, submits that there was no material error in the FTT's approach. He makes three main points in response to HMRC's arguments.

(1) First, he says that HMRC's submissions do not properly reflect the FTT's approach. The Decision is consistent with the three-stage approach set out by the Court of Appeal at *Atholl House CA* [7]. The FTT: analyses the actual contracts – the LLCs and ULCs – and other relevant factors (at FTT [96] – [230]); constructs the hypothetical contracts (at FTT [315] – [348]); applies the common law test of employment status to the hypothetical contracts (at FTT [349] et seq); and sets out the terms of the hypothetical contracts that apply as a result of that analysis at FTT [485]).

(2) Second, the process set out in *Atholl House CA* [7] is simply a "helpful structure". It is accepted that the process of synthesising a hypothetical contract may be an iterative process (*Atholl House UT* [8(2)]). Even if the FTT does depart at some point from strict adherence to the three-stage process in *Atholl House CA* [7], the FTT completes the exercise of addressing the issues that are required for the purposes of the legislation.

(3) The challenges to the Decision raised by HMRC are challenges to evaluative judgments made by the FTT. There is limited scope to interfere with an evaluative decision of the FTT on an appeal (*Quashie v Stringfellows Restaurant Ltd* [2012] EWCA Civ 1735 ("*Quashie*") at [9]). It is inappropriate to over-analyse the process of the FTT's reasoning in such cases. The correct approach is to read the decision "in the round" (*Red White & Green Ltd v HMRC* [2023] UKUT 83 (TCC) at [36] – [37]).

Discussion

33. The principal question before the FTT was whether the intermediaries legislation could apply to the contractual arrangements in this case. There is no dispute between the parties that each of the relevant contractual arrangements met the requirements of section 49(1)(a) and (b). The only point that remained in issue was whether the condition in section 49(1)(c)(i) was also met.

Case law guidance on the correct approach

34. We have set out above the three-stage process that the Court of Appeal endorsed in *Atholl House CA* (at [7]) as an approach that the tribunal should adopt in addressing appeals under the intermediaries legislation. The Court of Appeal in that case referred to that process as a

"helpful structure". In *Kickabout Productions Limited v. HMRC* [2022] EWCA Civ 502 ("*Kickabout CA*") the Court of Appeal uses similar language.

35. The Court of Appeal in both *Atholl House CA* and *Kickabout CA* describes the three-stage process as a "helpful structure" and not in mandatory terms. However, a tribunal would be well-advised to follow it. It is an approach endorsed by the Court of Appeal that is designed to assist the tribunal correctly to address the questions that are before it under section 49(1)(c)(i) – namely whether the circumstances are such that if the services that are provided by the worker were provided under a contract directly between the client and the worker, the worker would be regarded as an employee for income tax purposes – having regard to the circumstances which the tribunal is required to take into account under section 49(4).

36. Furthermore, any approach that a tribunal adopts in such cases must answer the statutory question before it, namely whether 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. That requires, as Park J identified in *Usetech* at [9], "an exercise in constructing a hypothetical contract which does not in fact exist and *then* enquiring what the consequences would have been if it had existed"[2] (i.e. whether the relationship between the worker and the client would have been one of employment or self-employment). Any acceptable process must therefore involve: (i) the construction of the hypothetical contract and (ii) the determination of whether services provided under that hypothetical contract would be performed under a contract of service or a contract for services. This is not to impose a formalistic requirement on an FTT decision to the effect that the terms of the hypothetical contracts must be set out in earlier pages, rather than later pages. That said, the FTT decision must explain clearly why the hypothetical contract is, or is not, a contract of employment and this is most naturally done by first setting out what the terms of the hypothetical contract are, and then analysing them.

37. The Upper Tribunal in *Atholl House UT* also provided guidance on the process by which tribunals should set about constructing the hypothetical contract for the purposes of Stage 1 and Stage 2 of the three-stage process (*Atholl House* UT [8], and [55] – [56]). There is also some helpful guidance in the judgment of Park J in *Usetech* (*Usetech* [43] – [47]) on how the tribunals should approach this task in a case, such as this, where an agency is interposed in the contractual chain. The main points that we take from that guidance are as follows:

> (1) The construction of the hypothetical contract involves the tribunal in a "counter-factual" exercise. The tribunal must ask itself, if the worker and the client had concluded the contract directly between themselves, what would its terms have been?
>
> (2) Section 49(4) expressly directs the tribunal to have "regard" to the terms of the actual contracts between the parties. The terms of the actual contracts between the parties are therefore "a safe starting point". What the actual contracts mean has to be determined according to the ordinary principles of contractual interpretation.
>
> (3) That having been said, although the terms of the actual contracts will often be highly material, the process is not simply an exercise in the "transposition" of terms from the actual contracts into the hypothetical contract. The tribunal is required to assess whether "the circumstances" are such that an employment relationship would

[2] Our emphasis added.

have existed if the relevant services had been provided by the individual directly. Those circumstances are not limited to the actual contractual terms.

(4) Matters such as a party's subjective views of the meaning of an actual contract, a party's ignorance of its terms, or the manner in which an actual contract is performed, even if they are not relevant to the construction of the actual contract itself, can be relevant when determining the terms of the hypothetical contract if they can properly be regarded as part of "the circumstances" in which the services are performed.

(5) In constructing the terms of the hypothetical contract, the tribunal can usefully consider what might have happened in certain hypothetical "flashpoint" scenarios i.e. what would have been agreed if one of the parties sought to rely upon the terms set out in the actual contracts?

(6) It is important to have regard to all the relevant circumstances. This will include – in cases such as this where an agency is interposed in the arrangement – the terms of all the contracts in the chain, even if one of the parties to the hypothetical contract (i.e. the worker or client) was unaware of them.

The FTT's approach in this case

38. In the present case, the FTT clearly directed itself that it should adopt the three-stage process identified by the Court of Appeal in *Atholl House CA*. HMRC's case is that, having done so, it did not follow that approach.

39. We must therefore turn to the approach that the FTT actually took in this case. We set out a summary of the FTT's approach under the heading "The FTT Decision" above. However, we will now explore in a little more detail the manner in which the FTT came to its conclusions in this case.

40. As we have identified above, the FTT's approach was similar for each set of contractual arrangements and it applied the various limbs of the *RMC* test in a similar way to each of them. We therefore propose to set out our conclusions primarily by reference to the arrangements with Accenture (that is the first contract and the third contract). We will also focus primarily on the FTT's approach to the question of "mutuality of obligation" (that is the first limb of the *RMC* test) not least because it is insufficiency of mutuality of obligation in the hypothetical contract that was determinative in the FTT reaching its conclusion that the intermediaries legislation could not apply in this case. However, although there are some differences between the Accenture arrangements and the DWP arrangements, our conclusions should be regarded as equally applicable to the DWP arrangements and other aspects of the *RMC* test.

41. The first step that the FTT took was to make findings regarding the terms of the actual contracts that were material in each set of arrangements. By way of example, with reference to the Accenture arrangements, the FTT engaged in the following analysis.

(1) The FTT set out the background to the Accenture arrangements, identifying the role in relation to which Mr Alcock was engaged, the periods for which Mr Alcock worked under those arrangements, and the circumstances in which the arrangements were terminated (FTT [96] – [102]).

(2) At FTT [103] - [116], the FTT summarized the significant terms of the LLCs, at the same time, identifying those terms considered relevant to "mutuality of obligation" (the first limb of the *RMC* test) and those terms that were relevant to the questions of "control" (the second limb of the *RMC* test).

(3) The FTT performed a similar exercise in relation to the ULCs (FTT [117] – [122]).

(4) At FTT [123] – [126], the FTT addressed the contractual terms that were relevant to the question of "personal service" and in particular the right of substitution in both the LLCs and the ULCs.

(5) At FTT [127], the FTT expressed the view that "in terms of mutuality of obligation, there was no express contractual obligation upon Accenture to provide work on each working day during the course of an assignment". The FTT continued "There was an explicit term that there was no obligation to offer further work on the expiry of the assignment". The FTT then set out its reasons for this conclusion by reference to Mr Alcock's evidence and to the relevant provisions of the LLCs and ULCs at FTT [128] – [130].

(6) At FTT [131] – [139], the FTT deals with the contractual provisions in both the LLCs and ULCs that were relevant to questions of control including where and when Mr Alcock was obliged to work, and the ability of RALC to provide services to third parties at times during which the contracts were continuing.

42. This exercise was then repeated for the DWP arrangements.

43. The second step in FTT's analysis is found in the first part of the section of the decision notice headed "Discussion and Decision" which begins at FTT [312].

(1) As before, the FTT begins by directing itself on the approach that it should take. It refers to the need to construct the terms of a hypothetical contract and then to apply the *RMC* test to the terms of that contract (FTT [312] – [314]).

(2) The FTT then turns to the contractual arrangements with Accenture and to the aspects of those arrangements which are relevant to the question of mutuality obligation in the first limb of *RMC* test.

(a) At FTT [315] – [316], the FTT notes that there is no obligation in the contracts (being the LLCs and the ULCs) for Accenture to provide work to Mr Alcock and no obligation on Mr Alcock to work on a given day.

(b) At FTT [317], the FTT identified that the contracts were time limited by reference to the schedules in the relevant LLCs.

(c) At FTT [318], the FTT considers the operation of the LLCs in practice. It concludes that:

(i) even though it was expected that Mr Alcock would make himself available for work during the periods set out in the schedules to the LLCs and be paid for the work that he did, there was no guarantee of a minimum number of hours of work (FTT [318]);

(ii) the contracts could be cancelled at any time (FTT [319]);

(iii) on average Mr Alcock worked 40-45 hours per week for Accenture during the term of the contracts (FTT [321]);

(iv) there was an explicit obligation in the schedules to the LLCs for Mr Alcock to perform a specific role rather than achieve certain outcomes, but in practice, the contracts operated as contracts for the completion of particular projects requiring specific outcomes (FTT [322] – [323]).

(d) At FTT [324] the FTT concludes that the lack of a guaranteed minimum number of hours of work or work to complete a particular project suggests "there would be no contractual right for Mr Alcock to claim against Accenture were he not [to] have been offered work during the course of the contracts". It is unclear which "contracts" are referred to here. Mr Alcock certainly could not have had any contractual right of action against Accenture since he was not himself party to any contract with Accenture. This is perhaps a conclusion as to a term of the hypothetical contract.

(e) At FTT [326], the FTT refers to the termination provisions in the relevant LLCs and ULCs for the Accenture arrangements noting that the 30-day notice period in those contracts were illusory in that there was no obligation on Accenture to pay Mr Alcock during the notice period and no guarantee that Mr Alcock would be provided work during that period (for which he might be paid).

(f) At FTT [327], the FTT sets out a conclusion on its interpretation of the "contracts" (precisely which ones are not specified) relating to the obligations of Accenture to provide work and for Mr Alcock to do the work. The FTT says this:

> "327. For those reasons, I cannot accept HMRC's submission that applying a realistic commercial interpretation to the contract and/or as a matter of implication, and/or as a matter of practice and expectation, there was any obligation (i) for Accenture to provide work to Mr Alcock every day during the course of an assignment and (ii) for him to work on those days except by prior agreement, which was said to be the shared mutual understanding."

(g) At FTT [328], the FTT concludes that it is not possible to infer an obligation on Accenture to provide work from the other contractual terms. It supports this conclusion with references to provisions from the LLCs to the Accenture arrangements in paragraphs FTT [328] – [330].

(h) At FTT [331], the FTT confirms, once again, by reference to the structure of the schedules of the LLCs, that Accenture was not seeking to guarantee any minimum number of hours' or number of days' work and Mr Alcock was not required to accept any minimum number of hours' or days' work.

(3) The FTT then concludes as follows at FTT [332]:

> "332. On balance therefore, the contractual rights on mutuality of obligation point away from the hypothetical first and third contracts between Mr Alcock and Accenture being contracts of service (employment) but towards being contracts for services (self-employment)."

44. The exercise that the FTT is performing in this section is not entirely clear to us. The FTT directs itself to construct the hypothetical contract for the Accenture arrangements and then to apply the *RMC* test for employment status to that contract (FTT [312] – [314]). However, the analysis in this section is confined almost entirely to the interpretation of the actual contractual arrangements involved in the Accenture relationships – that is, part of Stage 1 of the three-stage process set out by the Court of Appeal in *Atholl House CA* at [7] albeit limited to those aspects of the Accenture arrangements that the FTT regards as relevant to the question of mutuality of obligation. With the possible exception of the references in FTT [324], which might be considered to be a reference to a hypothetical contract, the first reference to a hypothetical contract (or a "notional contract" to which the FTT refers at times in the decision notice) in this section of the Decision is at FTT [332] where the FTT sets out its conclusions on the question of mutuality of obligation in the hypothetical contract between Mr Alcock and Accenture. At this point, it would appear that the FTT is making a determination on the application of the *RMC* test to the hypothetical contract without, at this stage, having reached a conclusion about what the terms of that hypothetical contract should be.

45. The FTT then performs a similar analysis in relation to the DWP contractual arrangements (FTT [333] – [348]). It concludes as follows at FTT [348]:

> "348. On balance therefore, the contractual rights on mutuality of obligation, point away from the hypothetical contract between Mr Alcock and DWP being a contract of service (employment). They point towards a contract for services (self-employment)."

46. The section in the FTT Decision relating to the contractual arrangements with DWP suffers from the same issues as that relating to the Accenture arrangements. The FTT appears to conduct Stage 1 of the three-stage process set out by the Court of Appeal in *Atholl House CA* at [7] and then to reach a conclusion on sufficiency of mutuality of obligation in the hypothetical contract between DWP and Mr Alcock without first having determined the terms of that contract.

47. The third step in the FTT's analysis on these issues is to set out its "Conclusion on mutuality of obligations". This section is found at FTT [349] – [358]. We will set out this passage in full as we need to refer to it later in this decision.

> "349. As set out above, in *Usetech* at [60] the Court said:
>
> > "I would accept that it is an over-simplification to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the kind of mutuality which is a touchstone of an employment relationship. Mutuality of some kind exists in every situation where someone provides a personal service for payment, but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for freelance services."
>
> 350. It is fair to observe that the essence of Mr Alcock's relationships was that there was no continuing obligation on the part of the Accenture nor DWP to provide work within or beyond the dates specified in the renewal schedules. If DWP or Police Scotland (the fifth links) chose to abandon their projects there was no contractual basis upon which Mr Alcock could demand further work within or beyond the contracts. There was an example of this happening before the end of the first contract with Accenture. While the obligation to provide work beyond the date of the contract is irrelevant, the obligation to

provide work within the dates of the contract is highly relevant. I am satisfied that these factors point away from a contract of service.

351. I have accepted that the implementation of existing contractual terms, the operation of the contracts in practice, and the expectation from the manner in which the contracts came about – Mr Alcock seeking to work on delivering specific projects – meant that he was offered and accepted to be paid by the clients to perform substantial projects for each of the clients. It was hoped but not guaranteed that the work and payment would continue throughout the time periods set out in the schedules to the LLCs. However, there was no contractual guarantee nor legal obligation for this to happen. There was only an explicit obligation under the contracts for Accenture or DWP to pay for the work that was offered to and performed by Mr Alcock.

352. The contracts terms between RALC and Networkers or Capita did not make it explicit that there was a mutuality of obligation, a minimum offer of work and payment in return for Mr Alcock's services to Accenture or DWP.

353. While there was mutuality of obligation in the broad sense that if Mr Alcock was offered and performed the work, the end client was obliged to pay him, this is no more than explained in Usetech at [60] to be an indicator of either employment or self-employment. If Mr Alcock worked, there was a contractual right that he would be paid. However, as set out above, there was no contractual guarantee or right to be offered a minimum of work from the end clients– only a non-binding hope or expectation.

354. Further, and of equal importance, Mr Alcock was not contractually obliged to accept the work offered by the end clients. While it is likely to have been commercially unwise for him to have rejected work, because he may not have been offered further work within the contract or offered any further contracts as a result, Mr Alcock had the right to refuse the offer of work at any point during the course of the contracts. The fact that Mr Alcock did not refuse work offered in practice during the course of the contracts, does not help identify the right which Mr Alcock held, in the absence of any contractual term obliging him to accept work. The fact that he accepted the work offered throughout the contracts did not crystallise an expectation into a contractual obligation to accept work for the same reasons set out above.

355. Therefore, the Tribunal is not satisfied on balance that sufficient mutuality of obligations did exist between Mr Alcock and the end clients in the notional contracts to establish an employment relationship. Mr Alcock and the Appellant have discharged their burden of proof on the balance of probabilities in establishing a lack of mutuality of obligations sufficient to form an employment relationship with the end clients. Although there was some mutuality of obligations in respect of the requirement for payment if work was done, it did not extent beyond the irreducible minimum in any contract to provide services nor demonstrate the relationship was one of a contract of service.

356. Mutuality of obligation can exist in both a contract of services and contract for services. Relying on *JLJ Services Ltd v HM Revenue and Customs* [2011] UKFTT 766 (TC) at [51]:

> "There is a feature in this case where the phrase "mutuality of undertakings" has some resonance. A touchstone of being an employee is the hope and expectation that there will be some relationship of faithfulness between employer and employee. In other words, the employer will generally endeavour to keep staff employed even when work is short. Contract workers will be dispensed with first. Employees

> will commonly have several "employee benefits", and in particular pension rights. With short term engagements, none of this will be relevant with contract workers.
>
> 357. That there were notional contracts for services is supported by the fact that there was no attempt by Accenture to keep Mr Alcock engaged for the complete length of the first contract, he worked without payment after a project was terminated early, each renewal schedules were each of relatively short duration with no expectation of renewal, the termination periods were minimal or none and provided for no paid notice.
>
> 358. Despite the significance of this conclusion, the Tribunal nonetheless considers all the conditions and relevant circumstances pursuant to the authorities of *Ready Mixed Concrete*, *Hall v Lorimer* and *Market Investigations* in order to test the conclusion."

48. We also find it difficult to ascertain where this passage fits in the three-stage process outlined in *Atholl House CA* [7] that the FTT has directed itself to apply. At FTT [350] – [354], the FTT restates some of its conclusions from its previous separate analysis of the Accenture arrangements and the DWP arrangements regarding the obligations of the end client to offer work and the obligations of Mr Alcock to undertake the work that is offered. The conclusions are stated with fewer express references to the actual contracts and, for most part by reference to the position directly between Mr Alcock and the end client. The FTT then purports to apply the first limb of the *RMC* test to that position – notwithstanding that it has already reached a conclusion on the application of that limb of the *RMC* test to the separate arrangements with Accenture and DWP at FTT [332] and FTT [348] – and arrives at its conclusion in FTT [355] that there is insufficient mutuality of obligation in the arrangements as a whole to establish a contract of employment.

49. As we have described in our summary of the Decision, the FTT then goes on to adopt a similar approach to other limbs of the *RMC* test.

Conclusions

50. The FTT's conclusion at FTT [355] is an important one. Although there is a reference in FTT [358] to the FTT considering the remaining steps in the *RMC* test to test its conclusion, the FTT's conclusion that there is an absence of sufficient mutuality of obligation in the arrangements effectively decides the case in favour of Mr Alcock.

51. We have set out some criticisms of elements of the process that the FTT adopted in reaching that conclusion in our analysis above. However, in our view, more fundamentally, in adopting that process and applying a similar process to the other aspects of the *RMC* test, the FTT has not followed its self-direction to adopt the three-stage process it set out at FTT [41] nor has it engaged in the steps required of it to answer the question that was before it under section 49 (1)(c)(i). It has not constructed a hypothetical contract by asking itself what the contract terms would have been if Mr Alcock and the end clients had concluded their contracts directly. As a consequence, it has not properly considered whether the resulting hypothetical contracts would be employment contracts.

52. Our more specific concerns are set out below.

> (1) The FTT does not determine the terms of the hypothetical contract (or contracts) before applying the common law test for employment status. The FTT sets out a summary of the terms of the hypothetical contracts at FTT [485], but that is at the end

of the decision. The summary includes the conclusions that it has already reached on the issues of mutuality and control (at FTT [355] and [429] respectively) within the terms of the hypothetical contract (see FTT [485(1)] and FTT [485(4)]).

(2) The FTT does not, at any stage, apply the *RMC* test for employment status to the hypothetical contracts as a whole. Instead, the FTT chooses particular aspects of the arrangements that it considers relevant to the relevant limb of the *RMC* test (e.g. mutuality or control) and then applies the relevant limb of the *RMC* test to certain facts, predominantly the terms of the ULCs and the LLCs, with some analysis of the behaviour of Accenture, the DWP and Mr Alcock. The effect is that the implications of some aspects of the final hypothetical contracts are not taken into account in the application of the test of employment status.

(3) As we have mentioned in our summary of the FTT's approach, at least in relation to the separate assessment of the application of the mutuality of obligation test to the Accenture and DWP arrangements (i.e. in relation to the conclusions at FTT [332] and FTT [348]), the FTT has applied the *RMC* test to the terms of the actual contracts rather than the hypothetical contracts. As we have described above, the construction of the hypothetical contract is more than a transposition of the actual contract terms into the hypothetical contract. The process suggests that the FTT has not considered what other relevant "circumstances" need to be taken into account in constructing the hypothetical terms as required by section 49(1)(c) and section 49(4) ITEPA.

(4) Although it sets out a summary of the terms of the hypothetical contracts at FTT [485], the FTT fails to reach any final conclusion on the overall structure of the arrangements. There were various options conceptually open to it. For example:

(a) the hypothetical contracts could have been purely piecework arrangements under which Mr Alcock could turn up for work as he chose and be paid on an hourly basis for the work that he had done;

(b) the hypothetical contracts could have been a series of specific engagements for particular projects without any overarching framework agreement;

(c) the hypothetical contracts could have been a framework agreement which governed the terms of the individual engagements which were offered and accepted from time to time;

At various stages in the analysis, the FTT describes aspects of the arrangements that could fall within each of these options, but it does not resolve the inconsistencies between them and set out a coherent set of terms for the hypothetical contracts. Within the terms of the hypothetical contracts at FTT [485] many of these inconsistencies remain unresolved. For example, we struggle to understand how the suggestion that there is no mutuality of obligation (FTT [355]) sits comfortably with an understanding that Mr Alcock would work for 40-45 hours per week (FTT [485(1)]).

53. For these reasons, we agree with Mr Stone that the FTT erred in law in not properly constructing a hypothetical contract for each of the engagements and in failing to apply the employment status test to those terms. Those are fundamental steps dictated by section 49(1)(c). We reject Mr Paulin's submission that the FTT properly followed the three-stage test set out in *Atholl House CA* or should be regarded as meeting the requirements of section 49(1)(c).

54. Mr Paulin has quite properly drawn our attention to the injunctions in the case law to the effect that appellate courts and tribunals should be reluctant to disturb evaluative judgments of fact-finding tribunals. Those submissions give us pause for thought.

55. We accept that we should be slow to conclude that, having directed itself at FTT [41] that it should follow the same three-stage approach as was, after the Decision was released, endorsed in *Atholl House CA*, the FTT, a specialist tribunal, failed to follow that approach.

56. We acknowledge that the FTT's task in ascertaining the terms of the hypothetical contracts was a difficult one. A significant difficulty came from the fact that the ULCs and LLC were, viewed singly, very different arrangements. The ULCs between the end clients and the agency were concerned, to a significant extent, with setting a framework under which the end client could obtain, on an "as needed" basis, the services of skilled professionals to whom the agency had access. The LLCs, by contrast, needed to operate in circumstances where the end client had identified a need for skilled professionals for a particular identified task and the agency had agreed to provide those professionals. Thus, a key function of the LLCs was to ensure that skilled professionals such as Mr Alcock would actually be made available and would be able to perform the tasks that the end client had identified. It was therefore far from straightforward to distil the terms of hypothetical contracts from a combination of surrounding circumstances and the LLCs and ULCs whose preoccupations were very different.

57. The problem with the process of reasoning in the Decision, however, is not simply that the FTT's findings as to the terms of the hypothetical contracts appear in pages coming later in the Decision than apparent conclusions as to the nature of the hypothetical contracts. It would certainly have been more logical for the terms of the hypothetical contracts to be set out first, before being subjected to the *RMC* test, but the way in which the FTT chose to order the Decision does not itself demonstrate an error of law.

58. For reasons that we have given above, however, in our view, the FTT failed to follow its self-direction. More fundamentally, the FTT failed to address the questions posed by section 49(1)(c). It did not construct hypothetical contracts by asking itself what the contract terms would have been if Mr Alcock and the end clients had concluded their contracts directly, and, as a consequence, it did not properly consider whether the resulting hypothetical contracts would be employment contracts. In our view, those were material errors of law. The effect was that the FTT's conclusions were not appropriately grounded in findings as to the terms of the hypothetical contracts.

59. Having found that the Decision involves errors of law, we are required by section 12(2) of the Tribunals, Courts and Enforcement Act 2007 to consider whether to set aside the Decision. We can only reach a conclusion on that issue by considering whether the errors that we have found in the approach of the FTT have had a material effect on the outcome of this case. For that purpose, we need to consider other grounds of appeal.

GROUND 2

60. HMRC's second ground of appeal is that FTT erred in law in its approach to mutuality of obligation; and erred in law and/or reached a perverse conclusion in finding that, within the actual LLCs and ULCs, there was not sufficient mutuality of obligation.

Background

61. This ground of appeal relates to the first limb of the *RMC* test. This is the test set out in the judgment of MacKenna J in *Ready Mixed Concrete* in which he described the essential elements of a contract of employment as follows (at page 515C - D):

> "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."

62. The first limb of that test is often referred to as a requirement for "mutuality of obligation". MacKenna J explained this factor at page 515E:

> "There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. 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…"

63. This element of the *RMC* test has generated a considerable amount of comment in the case law. We will address the principles that are derived from that case law later in this decision.

The parties' submissions

64. Mr Stone, for HMRC, makes two main submissions in relation to this ground of appeal:

(1) First, he says that, in interpreting the actual written contracts as containing no obligation upon the end clients to offer work to Mr Alcock or for Mr Alcock to accept the work offered, the FTT failed to interpret the contracts in the context of their commercial reality. Instead, the FTT engaged in a search for express terms containing obligations to offer and accept work without regard to the true nature of the bargain reached between the parties, which was for the end clients to engage Mr Alcock to work full-time on identified projects for a fixed term.

(2) Second, he says that the FTT applied a concept of mutuality of obligation that was contrary to the principles established in the case law. In particular, the FTT incorrectly and contrary to authority (in particular, the Court of Appeal decision in *HMRC* v *Professional Game Match Officials Limited* [2021] EWCA Civ 1370 ("*PGMOL*") found that: (i) the right of an employer to terminate a contract at will was incompatible with mutuality of obligation (FTT [325] – [326]); and (ii) the lack of a contractual guarantee of a minimum number of hours of work was indicative of insufficient mutuality of obligation (FTT [353]).

65. Mr Paulin, for RALC, challenges both of these submissions:

(1) He says the FTT expressly found that the absence of any obligation to offer work or undertake work outside the periods covered by the contracts was not a relevant consideration (FTT [51]). Rather the FTT found that there was no obligation on the

end clients to offer work and Mr Alcock had a right not to accept work offered during the periods of the assignments (FTT [129] – [130], FTT [170] – [173]).

(2) The FTT followed case law authority, including *PGMOL*, and applied the relevant tests to the individual assignments (e.g. FTT [345]).

(3) HMRC's submissions were a challenge to an evaluative judgment of the FTT. The FTT's conclusions were not perverse and so should not be disturbed on appeal.

Discussion

66. As a starting point, we have to express some difficulty in addressing the issues in Ground 2 given our lack of confidence in the approach which the FTT took to constructing the hypothetical contracts. We have, however, approached this ground of appeal on the assumption that, contrary to our conclusions on Ground 1, the FTT's overall approach to the construction of the hypothetical contracts was sound. For the purposes of this ground of appeal, we have therefore focussed on the manner in which the FTT applied the test of mutuality of obligation at FTT [315] – [358].

67. As we have mentioned, HMRC raise two main challenges to the FTT's approach to the question of mutuality of obligation. We will deal first with the question of whether the FTT applied the correct principles as established by the case law authorities.

Relevant case law

68. We have been referred by the parties to various authorities on the application of the first limb of the *RMC* test including (amongst others): *Kickabout Productions Limited v. HMRC* [2020] UKUT 216 (TCC) ("*Kickabout UT*"); *Kickabout CA*; *Quashie*; *HMRC v Larkstar Data* [2008] EWHC 3824 (Ch). However, the judgment of Elisabeth Laing LJ in *PGMOL* contains a comprehensive summary of much of the relevant case law and we will refer primarily to that judgment.

69. *PGMOL* concerned the tax treatment of referees of professional football matches. The referees were engaged by the taxpayer company to officiate at football matches. They were appointed annually before the start of each football season. The company appointed the referees to officiate at matches at the start of each week. The referees could accept or reject the appointments that they were offered. The company could cancel any appointments that were made. The referees were paid fees and expenses for each match they officiated. They were not treated as employees by the company.

70. The FTT and the Upper Tribunal found that the referees were not engaged under contracts of employment. On appeal by HMRC, the Court of Appeal found that the FTT and the Upper Tribunal had erred in their approaches to mutuality of obligation. The fact that there was insufficient mutuality of obligation in the overarching contract between the referees and the company did not prevent the engagement for each match from being a contract of employment.

71. Elisabeth Laing LJ (who gave the leading judgment) undertook a comprehensive review of the case law, with a particular emphasis on those cases where a worker is engaged intermittently by a putative employer. She stressed the need to distinguish in any review of the case law between cases where there is a need to show continuity of employment – and so that an employment relationship exists at times in between the times at which the worker is

actually working on an engagement – and those where continuity of employment is not in issue and it is only necessary to show that the individual engagements involve an employment relationship (*PGMOL* [48]).

72. Her main conclusions are set out at *PGMOL* [118] and [119]:

> 118. *McMeechan*, *Clark*, *Carmichael* and *Prater*[3], which bind this Court, are all cases in which this Court considered, in one way or another, the relationship between mutuality of obligation in an overarching contract and in a single engagement. They establish at least three propositions.
>
> i. The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.
>
> ii. In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negativing such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.
>
> iii. A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.
>
> 119. Those authorities do not support any suggestion that the criterion of mutuality of obligation is the sole, qualifying test for the existence of a contract of employment, so that if there is some mutuality, but it is not the right kind of mutuality, there can be no contract of employment. On the contrary, those authorities, and the other authorities to which we were referred, suggest that the court has to look at all the circumstances in the round before deciding whether or not there is a contract of employment. The Court of Appeal in *McMeechan* specifically rejected a submission to that effect by the Secretary of State. The Court of Appeal in *Prater* rejected similar submissions by the appellant council in that case.

73. The key principles that we take from *PGMOL* and the case law to which Elisabeth Laing LJ refers in her judgment for the purposes of this decision are as follows:

> (1) Mutuality of obligation is not a test of employment status. It is an element of the test. If it is met the court or tribunal has to proceed to the other aspects of the test and look at all the circumstances in order to determine if a contract of employment exists (*PGMOL* [119]).
>
> (2) An individual engagement can involve mutuality of obligation if work which has been offered is in fact done for payment – and may give rise to a contract of employment if the other elements of the test are met (*PGMOL* [118(3)]). In order to meet the mutuality of obligation requirements in the first limb of the *RMC* test, it is sufficient for there to be mutuality of work-related obligation in relation to the individual engagements (*Quashie* [12] – [14]).
>
> (3) For the purposes of meeting this requirement alone, it is not relevant that the putative employer is not obliged to offer any further work at the end of each engagement or that the putative employee would not be obliged to accept it (*McMeechan v Secretary*

[3] *McMeechan v Secretary of State for Employment* [1997] ICR 549, *Clark v Oxfordshire Health Authority* [1998] IRLR 125, *Carmichael v National Power Plc* [1999] 1 WLR 2042, *Prater v Cornwall County Council* [2006] EWCA Civ 102.

of State for Employment [1997] ICR 549 page 565, *Prater v Cornwall County Council* [2006] EWCA Civ 102 ("*Prater*") [40(5)], *PGMOL* [57], [118(1)]).

(4) The fact that one party may be able to terminate the agreement before any work is done does not negate mutuality of obligation unless the option to terminate is in fact exercised. Unless the option is exercised, the contract subsists with its mutual obligations (*PGMOL* [68]).

(5) The authorities do not support a requirement for a degree of mutuality of obligation over and above the mutual obligations existing within the separate contracts for individual engagements (*Prater* [33], *PGMOL* [119]).

The FTT's approach to mutuality of obligation

74. On the question of mutuality of obligation – the first limb of the *RMC* test – the FTT directs itself in the following terms at FTT [51]:

> "51. The fact that Mr Alcock was engaged under a series of contracts and at the end of each one there was no obligation to offer further work outside of those contracts is not a relevant consideration. The question is whether the hypothetical contracts, covering the periods under review, would have been contracts of service: *HMRC v Larkstar Data Ltd* [2009] STC 1161 at [32]. In any event, it is sufficient that there was mutuality of obligation during the term of each contract: *Island Consultants Ltd v HMRC* [2007] STC (SCD) 700 at [11]."

75. The FTT therefore notes that the test of mutuality of obligation can be met by reference to the terms of each individual engagement.

76. We have summarized the FTT's approach to the question of mutuality of obligation as part of our summary for the purposes of Ground 1. As we have discussed, the FTT's analysis was divided into two parts: (i) an analysis of the arrangements with each of Accenture and DWP separately; and (ii) an overall assessment of the presence of mutuality of obligation in the arrangements as a whole.

77. In relation to the separate analysis of the Accenture and DWP arrangements, the FTT concludes at FTT [332] and FTT [348] that the contractual rights on mutuality of obligation point away from the hypothetical contract between Mr Alcock and the end clients being a contract of employment. The FTT reached that conclusion for various reasons including:

(1) the lack of any legal obligation on the end client to provide a guaranteed minimum number of hours of work (see FTT [315], [318], [324], [327], and [331] in relation to the Accenture arrangements, and FTT [337], [333], [339], and [342] in relation to the DWP arrangements);

(2) the lack of any legal obligation on Mr Alcock to accept work that was offered (see FTT [316] in relation to the Accenture arrangements, and FTT [333] in relation to the DWP arrangements);

(3) the lack of any obligation on the end clients to provide further work at the end of the individual engagements (see FTT [317] in relation to the Accenture arrangements, FTT [334] and [336] in relation to the DWP arrangements); and

(4) the fact that the contracts could be cancelled at any time (see FTT [319], [325], and [326] in relation to the Accenture arrangements, and FTT [340] in relation to the DWP arrangements).

78. In relation to its overall assessment of the arrangements, the FTT reached the view that "while there was mutuality of obligation in the broad sense" (FTT [353]), it was not satisfied that "sufficient mutuality of obligation did exist" between Mr Alcock and the end clients to establish a contract of employment (FTT [355]). It did so for the following reasons:

(1) there was no contractual obligation on the end clients to provide work (FTT [350]);

(2) there was no contractual obligation on Mr Alcock to accept work (FTT [354]);

(3) there was no contractual guarantee of a minimum number of hours' work (FTT [351], [353]).

Conclusions

79. In our view, this reasoning displays several errors in the concept of mutuality of obligation that is being applied.

80. As a starting point, the FTT's reasoning suggests that it regards some of the factors on which it relies as inconsistent with the concept of mutuality of obligation. This conclusion is not supported by the case law authorities.

(1) As we have identified above, the fact that the putative employer is not under any obligation to provide further work and the putative employees is not under any obligation to accept any further work that is offered does not prevent mutuality of obligation existing within an engagement under which work is offered, the worker does the work offered, and the worker is paid (*Prater* [40(5)], *PGMOL* [67]).

(2) For similar reasons, the lack of any guarantee of a minimum number of hours' work and the right of the putative employer to terminate the arrangement at will are not inconsistent with mutuality of obligation in relation to an individual engagement, if there is mutuality of obligation whilst the contract subsists (*Quashie* [13], citing *Stephenson v Delphi Diesel Systems* [2001] ICR 471, [12] – [14]).

81. In our view, the FTT erred in law to the extent that it regarded these criteria as inconsistent with mutuality of obligation. The FTT appears to recognize this point in some parts of the Decision (see for example FTT [336]). However, its regular repetition of the requirement for an express obligation to provide and to accept further work suggests to us that, in the application of the test, this self-direction has not been followed through.

82. Furthermore, in its conclusions in relation to its overall assessment of the application of the test of mutuality of obligation to the arrangements as a whole, the FTT refers to the offer and performance of work, which is paid for by the end client as "mutuality of obligation in the broad sense" (at FTT [353]) and concludes that "sufficient mutuality of obligation" does not exist between Mr Alcock and the end client to establish an employment relationship (at FTT [355]). In our view, this conclusion betrays an error of law.

83. As the Court of Appeal found in *PGMOL* (*PGMOL* [119]), the test of mutuality of obligation does not on its own determine whether an employment relationship exists. If

mutual work-related obligations exist within the individual engagement, the test is met. That will put the arrangements into "the employment field" (to adopt the terminology of Elias J in *James v Greenwich LBC* [2007] ICR 577 at [17][4]). A contract of service and a contract for services may equally meet that test. It is then necessary to move to the other limbs of the *RMC* test to determine whether a contract of employment exists (see the description of the process by Elias LJ in *Quashie* [10] – [14]). The other factors to which the FTT refers in its assessment may well be factors that have to be weighed in the balance in determining whether the resulting obligations give rise to an employment contract or a contract for services as part of the consideration of the other elements of the *RMC* test, but they are not determinative of whether mutuality of obligation exists.

84. As we have discussed, the FTT's conclusion at this stage of its analysis is important. That conclusion, in effect, decided the case. However, for the reasons that we have given, in our view, that conclusion was founded on errors of law.

85. Having reached that conclusion, we do not need to reach a view on the other aspects of Ground 2, which concerned the interpretation of the relevant contractual arrangements. We do not do so.

OTHER GROUNDS

86. We have also heard argument on the remaining grounds of appeal. However, our conclusions on Ground 1 and Ground 2 are sufficient to decide this appeal in favour of HMRC. We do not need to reach a decision on the remaining grounds of appeal and we do not do so.

DISPOSITION

87. We have reached the conclusion that there are material errors of law in the Decision.

88. We must therefore decide whether or not to set the Decision aside. For the reasons that we have given, we are satisfied that the errors of law are material, and we should therefore set aside the Decision.

89. Having done so, we must determine whether or not to remake the Decision or to remit this appeal to the FTT. We have decided that we must remit this appeal to the FTT. We do so with some reluctance. We acknowledge the difficulties that this will cause for the parties and, in particular, for Mr Alcock. However, we do not feel that we are sufficiently equipped with appropriate findings of fact to remake the Decision. The tribunal has powers to call witnesses and request further evidence, and to make further findings of fact. However, in the present case, that would require a significant exercise not least because our conclusions effectively reopen the second issue before the FTT (summarized in paragraph 16 above) on which no conclusions were reached.

90. We therefore set aside the Decision and remit this appeal to the FTT. We direct that this appeal should be heard by a new panel.

[4] Not cited to us by the parties

91. We are reluctant to place unnecessary constraints on the FTT in its rehearing of the appeal. However, we make the following comments that the FTT should bear in mind when doing so.

(1) The FTT should, of course, have regard to the approach to appeals in the context of the intermediaries legislation endorsed by the Court of Appeal in *Atholl House CA* and *Kickabout CA*. In particular:

(a) the FTT must determine what the terms of the hypothetical contracts would have been if Mr Alcock and the end clients had concluded their contracts directly, from a combination of the ULCs, LLCs and all other relevant circumstances; and

(b) having determined the terms of those hypothetical contracts, the FTT must analyse whether they are contracts of employment or not. The focus should be on the terms of the hypothetical contracts.

(2) When applying the law on mutuality of obligation to the hypothetical contracts, the FTT must bear in mind the implications of the case law authorities to which we have referred in this decision and, in particular, the Court of Appeal's analysis of those authorities in *PGMOL*.

(3) The FTT should not infer from the fact that we have chosen not to address the other grounds of appeal raised by HMRC in this decision that we do not regard those grounds as being of any particular merit. We have not expressed our views upon them simply because it is unnecessary for us to do so to decide this appeal.

(4) The FTT should also not infer from our decision that we are of the view that, if the FTT had approached the construction of the hypothetical contracts correctly and had properly applied the concepts of mutuality of obligation, it would have reached the conclusion that Mr Alcock should be regarded as an employee of the end clients for income tax purposes. The FTT should determine the issue afresh by applying the approach set out above.

MR JUSTICE RICHARDS
JUDGE ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date: 15 April 2024