



Neutral Citation Number: [2022] EWCA Civ 1620

Case No: CA-2022-000323

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(TAX AND CHANCERY CHAMBER)**  
**MR JUSTICE MELLOR AND JUDGE GUY BRANNAN**  
**[2021] UKUT 0270 (TCC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 December 2022

**Before :**

**LORD JUSTICE GREEN**  
**LORD JUSTICE NUGEE**  
and  
**LADY JUSTICE WHIPPLE**

**Between :**

<b>Mainpay Limited</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>The Commissioners for His Majesty’s Revenue and Customs</b>	<b><u>Respondent</u></b>

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**Michael Firth** (instructed by direct access) for the **Appellant**  
**Sarabjit Singh KC** and **Jennifer Newstead Taylor** (instructed by **the Solicitor for HMRC**)  
for the **Respondents**

Hearing date: 17 November 2022

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**Approved Judgment**

This judgment was handed down remotely at 10am on 9 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **LADY JUSTICE WHIPPLE:**

### **Introduction**

1. This is an appeal brought by Mainpay Ltd (“Mainpay”) from the decision of the Upper Tribunal (Mellor J and Judge Guy Brannan) ([2021] UKUT 0270 (TCC)) dismissing Mainpay’s appeal from the First Tier Tribunal (Judge Jonathan Cannan and Mr Julian Stafford) (TC/2016/03030).
2. The UT determined that Mainpay was liable to VAT at the standard rate when it provided doctors to Accident and Emergency Agency Ltd (“A&E”), an agency which in turn contracted with NHS Trusts. The doctors worked in hospitals run by the NHS Trusts. The relevant supplies were made in the period 1 November 2010 to 31 January 2014, and the amount of VAT in dispute for that period was £164,866.
3. The issue in the appeal is whether the supplies by Mainpay to A&E were exempt from VAT, as Mainpay argues, as services of medical care falling within the exemption at Article 132(1)(c) of the Principal VAT Directive (2006/112/EC) (“PVD”), implemented into domestic law by Group 7 of Schedule 9 to the Value Added Tax Act 1994 (“VATA”). HMRC disputes that analysis and seeks to uphold the UT and the FTT who concluded that the services were taxable at the standard rate, as supplies by Mainpay to A&E of staff, not of exempt medical care.
4. The UT granted Mainpay permission to appeal on all grounds.

### **Legal Framework**

#### *The Directive*

5. The PVD replaced the Sixth VAT Directive (77/388/EC) (“Sixth Directive”). Article 132(1) of the PVD (previously Article 13A(1) of the Sixth Directive) provides for exemption from VAT of certain supplies. Mainpay no longer seeks to rely on limb (b) of Article 132(1), which relates to medical services provided in a hospital setting by a body governed by public law (which it is not). Mainpay now relies only on limb (c) of Article 132(1), which relates to non-hospital medical services:

“1. Member States shall exempt the following transactions:

...

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned....”

6. Also relevant is Article 10 of the PVD (previously Article 4(4) of the Sixth Directive) which provides as follows:

“The condition in Article 9(1) that the economic activity be conducted ‘independently’ shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the

relationship of employer and employee as regards work conditions, remuneration and employer's liability.”

### *Domestic Legislation*

7. Section 4(1) VATA provides that VAT is charged on any supply made in the United Kingdom which is a taxable supply. Section 4(2) provides that a taxable supply is any supply which is not an exempt supply.
8. Effect is given to the exemptions at Article 132(1) by Group 7, Schedule 9 to VATA. Although there was discussion of Item 4 of Group 7 at earlier stages, it is now accepted that Item 4 adds nothing and that this appeal hinges on Item 1 which exempts from VAT supplies which fall within the following description:

“1. The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—

(a) the register of medical practitioners; ...”.
9. In this judgment, references to the ‘medical exemption’ are to Article 132(1)(c) read with Item 1(a) of Group 7, Schedule 9 VATA.

### **Facts**

#### *General*

10. The FTT's findings of fact are set out at [24]-[99] of its Decision. In summary, Mainpay employed, or treated as employed, various doctors. 80% of the doctors were consultants and the remaining 20% were GP specialists. All the doctors were registered and regulated as medical practitioners.
11. The sole shareholder of Mainpay was Simon Harker. He has an accountancy background and is resident in Sark in the Channel Islands. At the relevant time, he was responsible for the day to day running of Mainpay. Various matters were outsourced by Mainpay to UK-based companies, including the operation of Mainpay's payroll (including processing timesheets, invoicing and book-keeping), sales support (day to day employee matters such as maternity pay and pension payments) and sales generation (signing workers up to Mainpay's services). Consultants were generally introduced to Mainpay by a recruitment agency such as A&E, in response to direct marketing or by word of mouth. Mainpay funded its payments to employees from charges to A&E. Those charges comprised the costs of employing the consultants plus a 4% margin. Typically, an agency such as A&E would identify an assignment in an NHS Trust. The agency would introduce a consultant registered with them to that assignment. Rates of pay were generally standard. If the consultant was agreeable to the assignment, A&E would inform Mainpay about it and provide an “Assignment Schedule” to Mainpay, as part of its agreement with Mainpay. The NHS Trust and A&E together determined which consultant would fulfil the assignment, prior to the involvement of Mainpay; the FTT rejected the contrary evidence of Mr Harker who maintained that Mainpay dictated which consultant would provide medical care. The consultant's rate of pay was negotiated between A&E and the NHS Trust; the FTT rejected the contrary evidence of Mr Harker who maintained that Mainpay set the

consultant's pay. The FTT found that the only contact Mainpay had with the consultant was in relation to payroll matters. There was no contact between the consultant and Mainpay in relation to medical matters. Mainpay did not arrange professional indemnity insurance either for itself or for its consultants.

12. The consultants were provided with a Mainpay Employee Handbook. The FTT worked from the 2015 version, earlier versions not being available. That provided at paragraph 1.1:

“Mainpay specialises in providing temporary workers (contractors) to recruitment agencies and end clients ... and every year we employ thousands of temporary workers throughout the UK.

We maximise your income, save you time and effort, and provide you with full employment rights.”

13. Based on the Mainpay Employee Handbook and on two notes of interviews conducted by HMRC with individuals who had been employed by Mainpay in the relevant period, the perception of consultants would have been that Mainpay was providing a tax efficient payroll function in relation to assignments negotiated between the consultants, A&E and the NHS Trusts.

### *The Mainpay / A&E Contract*

14. A contract between A&E and Mainpay dated 13 March 2012 was in evidence before the FTT (the “A&E Agreement”). No earlier contract was provided, even though the relevant period went back to 2010. By clause 2.1 of the A&E Agreement, Mainpay was obliged to:

“(a) throughout the term of the Assignment supply the Services in accordance with Good Industry Practice at all times taking responsibility for the way in which the Services are performed;

...

(c) comply with all health and safety, site and security regulations applicable at the Locations(s) to the extent that they apply to the type of work required for the provision of the Services.

(d) comply with all the Client's reasonable requirements, regulations, policies and protocols...

(e) comply with the Client's IT security policies...

...

(h) be covered by appropriate professional indemnity insurance in connection with the Services...

(i) supply to [A&E] copies of any relevant qualifications or authorisations that the Supplier and/or the Consultant is required by the Client or by law or any professional body to have in order to provide the Services to the Client.

(j) where necessary, provide at its own cost all such equipment and training for the Consultant as is reasonable for the adequate performance of the Services...”

“Good industry practice” in clause 2.1(a) was defined as the “skill, diligence, prudence, foresight and judgment which would be expected from a suitably skilled and experienced person engaged in the same type of services”.

15. Clause 2.1(b) provided that Mainpay would provide weekly timesheets to the NHS Trust for approval and return those timesheets to A&E. Subject to that approval, Mainpay would issue invoices for the Services in accordance with the Assignment Schedule.
16. The Assignment Schedule was included in the A&E Agreement as a blank form. No completed copy was provided to the FTT. There was provision in the blank form for the following details to be entered:
  - (1) Details of each assignment including start and end date, normal working hours, payment rate and a description of the services to be provided by the consultant.
  - (2) Details of the client (ie. the NHS Trust) including name, address, contact details and the location at which the services were to be performed.
  - (3) Details of the consultant, including name, address, contact details and the experience, training and qualifications required.
17. By clause 6.2 of the A&E Agreement, the agreement could be terminated with immediate effect if the NHS Trust terminated its agreement with A&E or if the NHS Trust cancelled its requirement for the Services prior to the start date.

### ***The Mainpay / Consultant contract***

18. The FTT considered three iterations of the contract between Mainpay and its consultants, by reference to sample contracts between Mainpay and a consultant known as KK. The first contract in 2010 was a contract “for services”, under which Mainpay was not obliged to offer any assignment and the consultant was not obliged to accept any assignment. Clause 8 provided that:

“... KK will:

1. Co-operate with the Client’s reasonable instructions and accept the direction, supervision and control of any responsible person in the Client’s organisation;
2. Observe any relevant rules and regulations of the Client’s establishment...

3. ... comply with the Health and Safety policies and procedures of the Client.”
19. The FTT noted that under the 2010 contract, the Client was defined as the person who has contracted with Mainpay for the services of the relevant consultant (here, KK). That would have been A&E, not the NHS Trust. The extent to which A&E could direct, supervise and control the consultant would depend on A&E’s arrangements with the NHS Trust where the consultant was placed. But the FTT had no evidence before it as to the arrangements between A&E and any NHS Trust.
20. The 2013 contract replaced the 2010 contract. It was a contract “of service”. Clause 8 of the 2013 contract provided:

“KK agrees as follows:

...

8.1.3. to take all reasonable steps during an Assignment to safeguard his or her own health and safety and that of any other person who may be present...and to comply with the Client’s or any other applicable health and safety laws, regulations and statutory requirements relating to the type and location of work required for any Assignment;

8.1.4. to abide by the reasonable and relevant rules and regulations of the Client’s establishment (including but not limited to normal hours of work, security or operational matters, dress code, information technology practices...)...

8.1.5. to co-operate with the Client’s requests to the extent reasonably required to enable the Client to progress its work requirement, but not to the extent that the Client is acting as his/her employer or that [the consultant] considers that he/she will have a direct contractual obligation with the Client...”

The definition of the Client in the 2013 contract was the same as in the 2010 contract. Mainpay was obliged by the 2013 contract to obtain suitable assignments for the consultant and the consultant was obliged to consider them.

21. There was no reference in the 2010 contract or the 2013 contract to where the consultant would work or how many hours he or she would work. Mainpay would know the normal working hours and which NHS Trust the consultant was working at from the Assignment Schedule provided by A&E.
22. The third contract was from 2014 and fell outside the relevant period, so was not considered by the FTT.

#### ***Arrangements between A&E and the NHS Trusts***

23. There was no evidence before the FTT as to the arrangements between A&E and the NHS Trusts and the terms on which the consultants were provided to the NHS Trusts. However, the FTT recorded the NHS Terms and Conditions of Contract dated 22

November 2007 which applied to all locums working in NHS bodies, paragraph 24 of which deemed all agency workers to be under the “exclusive direction, supervision and control” of the relevant NHS body throughout the engagement (FTT [84]).

### **First Tier Tribunal**

24. The FTT noted that the key question was:

“23. ... whether the consultants come under the control, direction and supervision of the NHS Trusts. If so, that would be a supply of staff by Mainpay. If not, then it would be a supply of medical care by Mainpay. We will consider that test taking into account the objective of the exemption and the EU law principle of fiscal neutrality”.

25. The FTT held that the A&E Agreement was consistent with Mainpay supplying medical services or staff (FTT [103]). The issue of control of the consultants was at the centre of Mainpay’s submissions before the FTT (FTT [101]) and the FTT turned to that (FTT [105]). The FTT noted that consultants were at the top of their profession, and their role involved taking clinical decisions in the best interests of their patients. The FTT therefore looked to the framework within which the consultant operated which it considered to be more relevant to the analysis (FTT [106]).

26. The FTT rejected Mainpay’s argument that it retained control over the consultants:

“115. Based on the evidence as a whole, including the contractual arrangements and the circumstances in which consultants worked, we are satisfied that throughout the Relevant Period consultants were under the control, direction and supervision of the NHS Trusts and operated within the framework of the NHS Trusts. They effectively became part and parcel of the organisations of the NHS Trusts which were themselves providing medical care to patients.”

27. The FTT accepted that the effect of Article 10 PVD was that the economic activity of a consultant employed by Mainpay was treated as part of Mainpay’s economic activity for VAT purposes, and that the employee was not carrying on an independent economic activity. But the FTT held that this did not assist on the central argument about what Mainpay supplied to A&E (FTT [116]).

28. The FTT held that it was not a question about whether control over the consultant’s clinical decision-making had been transferred from Mainpay to the NHS Trust. The question related to control over the way in which the consultant worked: when, where and what work the consultant carries out. The FTT held:

“119. ... In our view the consultants engaged by Mainpay carried out their work within the framework of the NHS Trust, in the sense that they operated within the remit of local policies laid down by the NHS Trust. Mainpay’s consultants were incorporated into the organisation of the NHS Trust in the same way as a consultant who might have been employed directly by

the NHS Trust. Mr Firth described the question in terms of “what is the essence of the supply”. Based on the evidence as a whole we regard the essence of the supply as being that of staff, rather than medical services.”

29. The FTT held that this conclusion did not offend the terms of the medical exemption, construed purposively (FTT [123]). It noted Mainpay’s argument based on fiscal neutrality, comparing the services it supplied with those of a self-employed locum in the NHS, but held that it was not established that the self-employed locum’s supplies would fall within the medical exemption and there was a lack of evidence to support this argument, which it rejected (FTT [129]-[130]).
30. There was no evidence about GP specialists engaged by Mainpay and the appeal necessarily failed so far as they were concerned: FTT [131].

### **Upper Tribunal**

31. Before the UT, Mainpay advanced six grounds of appeal. The first three grounds went to the same point, namely Mainpay’s assertion that the consultants’ clinical decision-making was not under the control of the NHS Trusts. Mainpay said that the FTT had applied the wrong test in considering the framework in which the consultants made their clinical decisions (ground 1), that in any event the consultants had control over their own decisions, they were employees of Mainpay and thus their activities were part of Mainpay’s economic activity which did include clinical decision-making (ground 2), alternatively and in any event, the FTT’s conclusion that the NHS Trusts had control over the framework within which the consultants worked was wrong (ground 3). By ground 4, Mainpay argued that the FTT’s interpretation of the statute and its conclusions were inconsistent with the purpose of the medical exemption, namely to reduce the cost of medical care. Ground 5 relied on the principle of fiscal neutrality which Mainpay said compelled exemption of these services. Ground 6 challenged the FTT’s conclusions on GP Specialists. The UT dismissed the appeal on all grounds.
32. The UT remarked on the fact that much of the argument had proceeded on the basis that there was a choice to be made between a supply of staff, on the one hand, and a supply of medical services, on the other hand, with Mainpay arguing that by retaining control over its consultants and specialist GPs it was necessarily making a supply of medical services, not staff (see eg [92]). The UT noted that this was not the question it had to decide:

“93. To be clear, our task is only to determine whether Mainpay’s supplies fell within Article 132(1)(c). Contrary to the tenor of some of the submissions made to us by Mr Firth, it is not necessary for us to determine whether those supplies constituted a supply of staff – a term used in the context of the exemption for hospital and medical care neither by the domestic legislation nor by the Directive – or to define the hallmarks of such a supply.”
33. The UT dismissed the first ground, by which Mainpay argued that the FTT had applied the wrong test. The UT held that the FTT had approached the case correctly.



“96. The nature and characteristics of a supply is to be determined on the basis of the conventional approach set out, for example, in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16, [2014] STC 937 (see Lord Neuberger at [31]-[32] and *Airtours Holidays Transport Ltd v Revenue and Customs Commissioners* [2016] UKSC 21, [2016] STC 1509, *Beheersmaatschappij Van Ginkel Waddinxveen BV v Inspecteur der Omzetbelasting, Utrecht C-163/91* at [21] and *HMRC v Paul Newey* [2013] EUECJ C-653/11, viz that it is a matter of contractual interpretation viewed in the light of commercial and economic reality. An examination of the commercial and economic reality involves a consideration of all the relevant facts and circumstances in which the supply took place.

97. We are satisfied that the FTT took account of all relevant circumstances and paid close attention to the contractual obligations of the parties.

98. In particular, we do not accept that the FTT formulated the wrong test in relation to “control” or that it misapplied its own test.”

34. Turning to the issue of control over the consultants, raised by Mainpay’s second and third grounds, the UT considered *Adecco UK Ltd and Others v HMRC* [2018] EWCA Civ 1794 which it distinguished on the basis that it did not involve the provision of doctors or the scope of the medical exemption (UT [99]). But in any event, the Court in that case had looked at the entire arrangements between the parties and not simply at the question of whether control of the worker had been assigned (UT at [101]-[102]). The UT also considered *Moher v HMRC* [2012] UKUT 260 (TCC) which it concluded offered little support for Mainpay’s general proposition that the VAT classification of these supplies turned on the question of control of clinical decision-making (UT [105]).
35. The UT noted that the doctors supplied by Mainpay were highly skilled, and because of that not subject to control by anyone at least so far as clinical decision-making was concerned:

“106. The present case involves consultants and Specialist GPs. As with any highly skilled and specialised worker, the amount of control that the person engaging that worker could exercise over the day-to-day discharge of the worker’s duties was very plainly limited. Plainly, none of Mainpay, A&E and the relevant NHS Trust could have day-to-day control over the medical practitioners’ clinical decisions. However, we do not consider that to be necessary in order to establish the necessary degree of control exercised by the NHS Trusts. As Ms Newstead Taylor, appearing for HMRC, correctly observed, if control over clinical decision-making were to be the hallmark of control for these purposes, then, taken to the limits of its logic, there could never be a supply of staff where the employee had control over decision-making in relation to their area of specialist expertise.

In other words, there would rarely be a supply of staff where the employees concerned were highly skilled or had specialist expertise. That would be a strange conclusion which of itself suggests that Mr Firth's submission, that control over clinical decision-making was the touchstone of whether there was a supply of staff or the provision of medical care, could not be correct."

36. The UT considered the FTT's findings of fact and concluded that the FTT had not erred in law:

"115. In our view, the FTT did not err in its analysis and there is no basis for us to interfere with its conclusion. The FTT considered all the relevant evidence. Moreover, we consider it was correct to reject Mr Firth's submission that control over clinical decision-making was the key test to determine whether there was a supply of staff or, instead, medical care. That test is, as we have said, impractical to apply in the context of highly skilled and specialised workers. Moreover, the FTT's finding that the consultants operated within the framework of the NHS Trusts was fully supported by the evidence. Indeed, the NHS Trusts appear to have exercised the same degree of control over the consultants and Specialist GPs as it did over the consultants which it employed. In addition, in taking into account all the facts and circumstances in which the supply took place, paying particular attention to the contractual provisions, the FTT applied the correct analysis and did not take into account irrelevant considerations. The FTT's conclusion discloses no error."

37. The UT rejected Mainpay's argument based on Article 10 of the PVD:

"117. We have no hesitation in rejecting this argument. Article 10 of the Directive is intended to prevent the activities of employees constituting an independent economic activity for the purposes of Article 9 of the Directive (which supplies the basic definition of a "taxable person" for VAT purposes). Whilst it is true that the activities of the employee are treated as part of the economic activities of the employer for VAT purposes, so that supplies made by the employee in the course of the employment are treated as supplies made by the employer, that does not mean that every characteristic or attribute of the employee (such as control over clinical decision-making) is thereby deemed to belong to the employer. In this case, as a matter of economic and commercial reality, it is impossible to say that Mainpay, an entity which had no medical qualification nor any medical expertise or knowledge, exercised any degree of control over the clinical decision-making undertaken by the medical practitioners and Article 10 does not deem it to do so."

38. That dealt with Mainpay's second and third grounds. As to Mainpay's fourth ground, the UT accepted that the exemption contained in Article 132(1)(c) was designed to ensure that the benefits flowing from such care were not hindered by increased costs of VAT but stated that the purpose of the exemption was to reduce the cost of hospital and medical care in circumstances where the exemptions applied, and not otherwise (UT [117]).
39. The UT rejected Mainpay's fifth ground which relied on the principle of fiscal neutrality. Mainpay asserted that the relevant comparator was a self-employed consultant providing his or her services to the NHS Trust, which services would fall within the medical exemption. The UT held that the direct supply of a self-employed consultant was not a relevant comparator; but in any event, it was not established that such a supply would fall within the medical exemption (UT [121]).
40. Finally, the UT addressed Mainpay's sixth ground which challenged the FTT's conclusions on specialist GPs but held that the FTT had not erred in its conclusion that there was insufficient evidence (UT [128]).

## **The Appeal**

### ***Grounds of Appeal***

41. Mainpay advances four grounds of appeal in this Court. Those four grounds are essentially the same as the grounds argued before the UT, with former grounds 1-3 now consolidated into a single ground, ground (1). Mainpay argues that the UT erred in law in the following ways:
  - (1) Not applying the correct test to determine whether the supply fell within the medical exemption or was a supply of staff.
  - (2) In reaching its conclusion on the correct test, not taking proper account of the purpose of the exemption.
  - (3) In reaching its conclusion on the correct test, not applying the principle of fiscal neutrality correctly.
  - (4) Failing to correct the FTT's erroneous approach to making findings in relation to GP Specialists.

### ***Respondents' Notice***

42. By their Respondent's Notice, HMRC say that there are different or additional reasons why this appeal should be dismissed. They are:
  - (1) That the medical practitioners supplied by Mainpay were procured by the NHS Trust to facilitate the Trust's own supply of medical care to its patients in the hospitals.
  - (2) That the services of the medical practitioners supplied by Mainpay were part and parcel of the NHS Trust's supply of care.
  - (3) That for those reasons, Mainpay made no supply of care.

- (4) That Mainpay's case that its service was comparable to that of a self-employed locum was not made out evidentially.
- (5) That Mainpay was not covered by professional indemnity insurance and so its service was not similar to that of a self-employed locum.
- (6) That there would be no differential treatment between Mainpay's supply of consultants to an NHS Trust and a self-employed locum's supply of themselves to an NHS Trust in the same circumstances.

### *Submissions*

43. Mr Firth represented Mainpay in this Court and below. He argued that the medical exemption extended to a person who was facilitating medical services provided by another, relying on a number of authorities of the CJEU. The case which assumed greatest priority in his arguments was Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin*, [27] of the Judgment in particular (emphasis added):

“27. On a literal interpretation, [Article 132(1)(c)] does not require medical services to be supplied by a taxable person endowed with a particular legal form in order for them to be exempt. **Just two conditions need to be met: medical services must be involved and they must be supplied by persons who possess the necessary professional qualifications.**”

Mr Firth argued that Mainpay's supplies to A&E met these conditions: they involved medical services, namely the services of its doctors, who were qualified persons. The emphasis on *Kügler* [27] represented a shift in his case, he acknowledged, in response to HMRC's case, as it was now put. This was not an argument which he had advanced below.

44. He relied on other cases of the CJEU also, some of which had been cited below, but not for the same purpose as he was now relying on them. They were: Case C-106/05 *LuP GmbH v Finanzamt Bochum-Mitte*, Case C-700/17 *Finanzamt Kyritz v Wolf-Henning Peters* and Case C-48/19 *X-GmbH v Finanzamt Z*, which showed that the legal form (individual or company) does not matter, and the interpolation of an intermediary in the chain does not necessarily remove exemption. He cited two non-medical cases to support those same points: Case C-253/07 *Canterbury Hockey Club v Commissioners for HM Revenue and Customs* which concerns the sporting exemption and Case C-453/05 *Volker Ludwig v Finanzamt Luckenwalde* which concerns the financial exemption.
45. In support of his argument, he invoked the principle of fiscal neutrality which required Mainpay's services to be exempt because if the consultants had been self-employed, their services would have been covered by the medical exemption, and that was a comparable situation, judged from the perspective of the patients as the final consumers of those medical services (citing Case C-259/10 and 260/10 *Revenue and Customs Commissioners v Rank Group plc*); exemption would also apply if a consultant had incorporated him or herself and had contracted with the NHS Trust through the company. The particular legal form, using Mainpay and A&E to deliver the medical

services of consultants, was adopted for pragmatic reasons and as a matter of the consultants' choice; it did not affect the availability of exemption.

46. Further, the consequence of the UT's decision would be to create 'sticking' VAT in the chain of transactions, which in turn would serve to increase the costs for the NHS Trusts. This was antithetical to the purpose of the medical exemption which was to reduce costs of medical care by removing VAT. Mr Firth argued that the ramifications of this case were potentially significant.
47. Mr Singh KC, who did not appear below, with Jennifer Newstead Taylor, who did appear below, argued for HMRC that the sole issue before this Court was whether Mainpay's services came within the medical exemption; if they did, the appeal succeeded; if they did not, then the appeal failed and it was not necessary to define Mainpay's services, whether as a supply of staff or anything else, because by operation of s 4 VATA those services would be taxable at the standard rate. On that footing, much of the FTT's and the UT's analysis of what amounted to a supply of staff was, strictly speaking, unnecessary, and Mainpay's arguments that this was not a taxable supply of staff "missed the mark" (to quote [5(d)] of HMRC's skeleton).
48. Mr Singh argued that the FTT's findings of fact were fatal to this appeal. The FTT had found that the consultants worked according to terms set by the Trust, relating to where and when they worked, which patients they saw, and the practices and protocols which governed their clinical decision-making as well as other aspects of work such as IT use and data protection. The consultants' services were part and parcel of the Trust's provision of medical treatment. In essence, Mainpay provided a payroll service to consultants which was taxable. That analysis did not infringe fiscal neutrality because it ensured that Mainpay's services were subject to tax just like the services of any other person supplying staff or providing payroll services. Further, because Mainpay was not providing medical care, this analysis was consistent with the purpose of the medical exemption which was limited in scope to supplies of medical care. In any event, in response to Mainpay's suggestion that by taxing Mainpay, the costs of medical care would be increased, it was far from clear that the present arrangements did lead to a VAT cost being passed onto the NHS Trusts because there was no finding about whether Mainpay had recourse to A&E for the VAT due on its services or whether, if so, A&E had passed on any VAT which it was liable to pay to the NHS Trusts.
49. The rest of this judgment is divided into the following sections which answer the various points raised by the parties, not necessarily in the order in which they were raised:
  - i) The approach taken by the FTT.
  - ii) The meaning of medical care.
  - iii) The commercial and economic reality of the arrangements.
  - iv) The Grounds.
  - v) Conclusion.

## **Approach of the FTT and UT**

50. The focus of this appeal has undoubtedly shifted. Before turning to the cases about the scope of Article 132(1)(c), which are now centre stage on Mr Firth's argument, it is necessary to clear the decks of two preliminary points raised in challenge to the approach adopted by the FTT.

### *Supply of staff or services*

51. I accept the point made by the UT at [93] and now by Mr Singh and Ms Newstead Taylor in their skeleton argument, that the issue of law is whether Mainpay's services are exempt. Mr Firth saw that as a significant change in HMRC's case. I am not convinced that it did represent a change of anything more than emphasis. But in any event, I am quite satisfied that there is nothing wrong, conceptually, in approaching the issue in the way the FTT did, by asking whether this was a supply of staff or a supply of medical services. Those two analyses are mutually exclusive. If there is a supply of staff, that necessarily means that the supplies are taxable and not exempt.
52. The reason the FTT and the UT approached the issue in that way was because that is how HMRC framed their decision in the first place. The review letter was dated 25 June 2015 and it referred to Notice 700/34, which contains HMRC's policy on the supply of staff and staff bureaux. HMRC's statement of case in the FTT asserted that Mainpay was making a supply of staff, noting that the NHS Trusts directed and controlled the activities of the consultants (see eg paragraph 42 of the Statement of Case).
53. The distinction between a supply of staff on the one hand and a supply of the services of those staff on the other is reflected in case law and accords with ordinary principles of VAT. As examples: in *Reed Personnel Services v CCE* [1995] STC 388, Reed provided nurses to work in hospitals. The Commissioners of Customs and Excise (as they then were) argued that Reed was making exempt supplies of nursing services, equating the nurses with the services they would supply, the effect of which would have been to exempt the whole of the consideration received by Reed. Reed argued that it was merely introducing the nurses to the hospitals, acting as agent, so that it was liable to VAT only on its introduction fee and the rest of the money received was not consideration for any supply at all. The taxpayer won in the tribunal and the High Court (Laws J) rejected the Commissioners' appeal. That case stands as an illustration, on its own facts, of a distinction being drawn between a supply of staff on the one hand and a supply of the services by those staff on the other.
54. Two cases discussed at some length by the FTT and the UT raise similar issues. *Adecco* involved a dispute about the VAT treatment of an employment bureau which supplied clients with temporary staff who were not employed by it, except for certain regulatory purposes. The taxpayer argued that VAT was due only on that part of its overall fee charged which was consideration for the introduction, and not the whole amount. HMRC argued that VAT was due on the total sum paid by the client to the bureau. The Court of Appeal agreed with HMRC, holding that the taxpayer was supplying staff and not merely acting as agent in introducing the temps. There was no question of exemption, rather the issue was whether the employment bureau was acting as agent or principal. In *Moher*, the taxpayer supplied temporary staff, mainly nurses and auxiliaries, to dentists. She claimed that the fees received from her clients for the temps

were exempt, on the basis of the medical exemption. The FTT found as a fact that the temps were under the control of the dentists, not the taxpayer, and that the taxpayer was supplying taxable services of staff, not exempt supplies of medical care. The UT held that once established that the temps were under the control of the dentist, it was difficult to see how one could conclude the taxpayer was making supplies of anything other than staff, which was taxable.

55. The distinction between supplies of staff and supplies of services finds support in the case law of the CJEU. In Case C-434/05 *Horizon College v Staatssecretaris van Financiën*, the taxpayer placed its teachers with a host establishment which defined the duties of the teacher concerned and reimbursed Horizon the employment costs related to that teacher. The issue arose as to the nature of Horizon's supply to the host establishment. The Court considered the requirements of Article 13(A)(1)(i) (now Article 132(1)(l)) which provides exemption for education services and concluded that the supply of a teacher to an educational establishment for the purpose of carrying out teaching duties under the responsibility of that establishment could not be described as education. Education consisted of a combination of elements which included, along with the teacher-student relationship, the "organisational framework" of the establishment concerned ([20]); in this case, it was the host establishment which defined the role of the teacher and insured the teacher for the period of the placement ([21]) and Horizon's services did not come within exemption because at most they were aimed at facilitating the provision of education by the host establishment ([22]).
56. Advocate General Sharpston provided an Opinion in the case. She said:
- "44. ... the service which Horizon College ... provided to the intermediary establishments was not education or tuition *per se*, because it was the students, not the establishments, who received such education or tuition. The service was, rather, the making available of persons (staff ...) to enable the intermediary establishments to provide education or tuition to their students."
57. These cases make clear that there is a distinction between supplies of staff on the one hand, and supplies of services comprising what the staff actually do, on the other. HMRC based its decision on that distinction. The FTT considered Mainpay's appeal by addressing that distinction. That remains a valid distinction in determining this appeal.

### ***Framework of Control***

58. Having defined the issue in terms of whether Mainpay was supplying staff or services, the tribunals considered control over the consultants as a factor relevant to the nature of the supply and in order to meet Mainpay's argument that the NHS Trusts did not have control: see FTT [102] and UT [92]. In this Court, Mr Firth criticised the FTT and the UT for having adopted what he referred to as a "test" of the framework of control over the consultants. This criticism is, in my judgment, unfounded. The FTT recognised that the consultants were senior professionals who had a high degree of autonomy in their clinical decision-making. It was for that reason, and in that context, that the FTT looked at the *framework* within which the consultants worked, or the extent to which the NHS Trust exercised *operational control* (FTT [119]). The framework included place and hours of work and the requirement for the consultants to observe

local policies laid down by the NHS Trust. In that sense, the NHS Trusts did exercise control over the consultants.

59. The FTT was plainly entitled to consider the framework of control, as one factor relevant to the commercial and economic reality of the supplies made by Mainpay to A&E. The Court of Appeal had suggested a similar approach in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318; that was an employment case in which Buckley J gave the lead judgment with which the other two members of the Court agreed. He said this at [19] (emphasis added):

“Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, **some sufficient framework of control** must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment.”

60. Like the UT (at [106]), I can find no fault in the approach of the FTT in considering whether the consultants worked within a framework of control set by the NHS Trusts.

### Meaning of Medical Care

61. The FTT considered a number of cases relating to medical care for the purposes of Article 132(1)(b) and (c) at FTT [10]-[17]. The UT encapsulated much of that case law in a series of propositions set out at UT [89]. No challenge is raised to the content of any of those paragraphs, which accurately set out the law. Indeed, by his helpful note produced for the Court, Mr Firth echoes much of what the FTT and UT said in these paragraphs. But Mainpay’s arguments have moved on; before I turn to them, I record three basic propositions of law which are not in dispute:
- i) First, the exemptions constitute independent concepts of community law which must be placed in the general context of the common system of VAT (*Kügler* [25]).
  - ii) Secondly, the exemptions are to be interpreted strictly (but not restrictively) since they constitute exceptions to the general principle of taxation (*Kügler* [28]).
  - iii) Thirdly, the analysis of what is being supplied depends, in any given case, on economic realities of the transaction, that being a “fundamental criterion” for the application of the common system of VAT (see *Airtours Holiday Transport Ltd v HMRC* [2016] UKSC 21; [2016] 4 WLR 87 at [48], citing Case C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd and Baxi Ltd* [2010] ECR I-9187; [2010] STC 2651 at [39]-[40]); the contracts are the most useful starting point in that exercise, but not necessarily the end point: see *WHA Ltd v Revenue and Customs Commissioners* [2013] UKSC 24; [2013] 2 All ER 907. The UT recognised this approach in terms at



UT [96], see paragraph 33 above, and their encapsulation of the approach was not subject to any challenge in this appeal.

*Kügler*

62. Mr Firth’s main point arises out of *Kügler*. In that case, a company ran out-patient services. Those services included medical services, as well as general care and domestic help ([11]-[13] of the Judgment). The local tax authority in Germany denied exemption. The national court referred three questions to the CJEU, the first of which asked whether the medical exemption applied only where medical care was provided by an individual, or whether it was dependent on the legal form of the person providing the care. In answer, the Court held ([26] of the Judgment) that the medical exemption defined exempt transactions “by reference to the nature of the services supplied without mentioning the legal form of the person supplying them”. The Court explained the scope of the medical exemption at [27] of its judgment in terms I have already set out (see paragraph 43 above).

63. The Court determined the first question referred in the following way:

“31. The answer to the first question must therefore be that the exemption envisaged in Article 13(A)(1)(c) of the Sixth Directive is not dependent on the legal form of the taxable person supplying the medical or paramedical services referred to in that provision.”

64. Mr Firth relies on the Court’s conclusion that legal form does not matter for the purposes of the exemption, which he says assists his case. But he also relies on *Kügler* [27], which paragraph formed part of the Court’s answer to that first question, to submit that mere involvement in medical services by qualified personnel is sufficient to qualify for exemption. I am not with Mr Firth on this submission. I do not accept that the two conditions spelt out in the last sentence of *Kügler* [27] bear the broad meaning for which he contends, they do not permit exemption to apply to services which are “involved in” medical care. The Court’s conclusion at [27] appears to have built upon the Opinion of Advocate General Tizzano, who said at [29]:

“... the wording of subparagraph (c) does not require that the medical services be supplied by a person with a particular legal form. For these services to be exempted, two conditions must be met irrespective of the legal form of the person in question: that the services are indeed ‘medical services’ and that they are performed by persons meeting the necessary professional requirements. ...”

65. AG Tizzano included a footnote to this part of his Opinion, referring to the Opinion of AG Cosmas in the earlier case of C-216/97 *Gregg v Commissioners of Customs and Excise* who said at [26] (original emphasis):

“from the general structure of the system of tax exemptions, it appears clear that the reason for those exemptions from tax is the *type* and *conditions* of the supply of the specific activities,

factors which do not depend on the legal personality of the operator”.

66. It does not seem to me that either AG Tizzano or AG Cosmas was suggesting that mere involvement with medical services was sufficient for exemption. To the contrary, AG Tizzano said that only services which were “indeed” medical services would be sufficient, accepting AG Cosmas’ view that the medical exemption extended to particular services which by their *type* and *conditions* were medical care, regardless of the legal personality of the operator. That is wholly unsurprising. That narrow approach, permitting exemption only to apply to a supply of services which are, in and of themselves, within the definition of medical care, is consistent with the principle that exemptions are to be construed strictly as exceptions to the general rule (see paragraph 61 above), and that words of extension cannot be read in (see eg Case C-366/12 *Finanzamt Dortmund-West v Klinikum Dortmund GmbH* considered at paragraph 76 below).
67. Furthermore, I note that the Court returned to the meaning of medical care in the course of answering the second question, and at [38] recited a formula which is often seen in the CJEU case law on the medical exemption. That formula defined medical care as “diagnosing, treating and, in so far as possible, curing diseases or health disorders”, citing Case C-384/98, *D* [2000] ECR I-6795 at [18]. That is what the Court means by medical care; that is not an expansive meaning of the sort suggested by Mr Firth.
68. Given the emphasis which Mr Firth placed on *Kügler* [27], we invited the parties to investigate the different language versions of the words “medical services must be involved” which appear in the English version of the Judgment. I am grateful for the efforts of counsel in response which put the matter beyond doubt. The language of the case was German, which version takes priority. The last sentence of paragraph 27 in the German version reads:

“Es genügt, dass zwei Voraussetzungen erfüllt sind: Es muss sich um ärztliche Leistungen handeln, und diese müssen von Personen erbracht werden, die die erforderlichen beruflichen Befähigungsnachweise besitzen.”

Translated into English, this version contains no equivalent to the words “medical services must be involved” but instead we were offered the following translation (emphasis added):

“It is sufficient that two conditions are met: **the services must be medical** and they must be provided by persons who have the necessary professional qualifications.”

There were 11 official language versions of the Judgment in *Kügler*. In no other language version do words equivalent to “medical services must be involved” appear.

69. I conclude that on a proper reading, *Kügler* confirms that the supply in question must be of medical care, coming within the established meaning of that term, from *D* and other cases, which requires that the services have a therapeutic aim, that they consist of the diagnosis, treatment or cure of disease or ill-health. That is what the phrase “medical services must be involved” in the English version of *Kügler* [27] means.

*Other CJEU cases*

70. Mr Firth relies on *LuP* and *Peters* to demonstrate the possibility of exemption extending to supplies higher up in a chain of transactions which ends in the delivery of care to a patient. *LuP* concerned a private company whose sole shareholder was Dr Scharmann, a pathologist. The company carried out medical tests for companies operating laboratories which were affiliated to the general practitioners who prescribed those tests as part of the care they provided ([9] of the Judgment). The national court found that the supplies were not within the medical exemption. The Court disagreed and held that in light of the objective of reducing healthcare costs, and on the basis that the medical tests were for prophylactic purposes, they could come within the meaning of medical care (see [31] of the Judgment). The Court held that this interpretation was consistent with the principle of fiscal neutrality:

“32. ... It would be contrary to that principle to make medical tests prescribed by general practitioners subject to a different VAT scheme depending on where they are carried out when they are equivalent from a qualitative point of view in the light of the professional qualifications of the service providers in question. ...”

This was to accept the view expressed by Advocate General Maduro who gave an Opinion in that case:

“32. The rationale of the exemption laid down in subparagraph (b) and also in subparagraph (c) is the same, whether the tests are performed by a hospital or similar establishment or even by a medical practitioner in his consulting room (if he has the proper qualifications and technical facilities) or, on the other hand, they are performed in other establishments specifically intended for conducting medical tests. From the view-point of the objective of reducing the cost of medical care, a disparity of treatment there would be incomprehensible. The approach to interpretation suggested here is also the most compatible with the principle of fiscal neutrality, whereby economic operators carrying on the same activities must not be treated differently as far as the levying of VAT is concerned.”

71. Mr Firth seeks to draw an analogy between Mainpay’s services and those provided by *LuP*. He argues that in Mainpay’s case, as in *LuP*, the whole chain of transactions should come within exemption as medical care; that exemption is not lost by Mainpay’s presence in that chain; Mainpay provides doctors to hospitals so that they can treat patients and in that sense it does provide medical care.
72. The next case in the sequence is *Peters*. Mr Peters was a specialist in clinical chemistry and laboratory diagnostics ([2] of the Judgment). He provided services to a laboratory company called LADR, which supplied laboratory services for doctors working in medical practices, rehabilitation clinics, public health services and hospitals ([8] of the Judgment). He received monthly remuneration of EUR 6,000 for those services, which included providing “evaluation services aimed at specific laboratory physician diagnoses as well as medical assistance in transfusion medicine measures in specific

treatment scenarios” ([9] of the Judgment). The tax authority refused his claim for exemption on the basis that the services of clinical chemists and laboratory physicians did not involve any confidential relationship with the patient receiving treatment, as required under national law ([11] of the Judgment). The Court referred to *LuP* at [29] and *Kügler* ([32] of the Judgment). It held that Mr Peter’s services were exempt:

“33. It does not in any way follow from the wording of that provision that, in order for the provision of medical care to be exempt, it must be supplied within the framework of a confidential relationship between the person providing the care and the person being treated.

34. Moreover, to add such a condition is unwarranted in light of the objective of that provision of reducing the cost of medical care and making that care more accessible to individuals (see, to that effect, judgment of 13 March 2014, *Klinikum Dortmund*, C-366/12, EU:C:2014:143, paragraph 28 and the case-law cited), to the extent that those services are of sufficient quality (see, to that effect, judgment of 27 April 2006, *Solleveld and van den Hout-van Eijnsbergen*, C-443/04 and C-444/04, EU:C:2006:257, paragraph 37), without the existence of a confidential relationship between the patient and the person providing the care being decisive in that regard.”

73. Mr Firth seeks to draw an analogy between Mainpay’s services and the services of Mr Peters. He notes that the whole chain of transactions from Mr Peters, via LADR to the GPs, was exempt, and suggests that Mainpay’s services should come within exemption too.
74. The last CJEU case about medical care relied on by Mr Firth is *X*. That case involved a company providing telephone consultations on various topics relating to healthcare and patient support programmes, with patients who suffered from chronic or long-term illnesses, on behalf of statutory health insurance funds. Those services were carried out by nurses and medical assistants and in some cases a doctor was also involved. If callers asked for medical advice, the company’s employees would make a software-assisted assessment and from that give appropriate advice ([5] to [7] of the Judgment). The Court held that the company’s services did come within the medical exemption. Article 132(1)(c) did not specify where a service had to be provided ([19]), this service was capable of coming within the medical exemption ([21]), and it would be contrary to the principle of fiscal neutrality to make medical tests prescribed by general practitioners subject to a different VAT regime depending on where they are carried out when they are “equivalent from a qualitative point of view” in the light of the professional qualifications of the service providers in question ([22], citing *Peters*).
75. Mr Firth showed the Court two other CJEU authorities which concerned different exemptions. Neither takes matters much further. The first was *Canterbury Hockey*, a case about the sporting exemption at that time contained in Article 13(A)(1)(m) of the Sixth Directive (now Article 132(1)(m) of the PVD). *Kügler* already establishes in the context of the medical exemption that the precise form of the person or body making the supplies is immaterial, which is in essence the point Mr Firth seeks to take from this case. The second was *Ludwig*, a case about the financial exemption. *LuP* and *Peters*

already demonstrate in the context of the medical exemption that the presence of an intermediary in the chain does not necessarily remove the exemption, which was the proposition which Mr Firth drew from this case.

76. The answer given by Mr Singh to all of these cases is that the outcome in each turns on its own facts; together, these cases beg the question to be answered in this case, which is whether Mainpay's supplies were indeed of medical care so as to come within the medical exemption, or not. None of these cases provides a strong analogy on the facts. Further, Mr Singh relied on *Klinikum Dortmund* to emphasise that there are limits to the medical exemption, even where therapeutic medical supplies are involved, where fiscal neutrality is engaged and where there is a risk of increasing the cost of healthcare if exemption is not available. That case involved cytostatic drug prescriptions which were prepared in a hospital pharmacy to be used by patients undergoing cancer treatment on an outpatient basis under the care of doctors working independently at the hospital. The Court held that the drugs could not qualify under Article 132(1)(b) (medical care in hospitals) because they were used in outpatient care. The Court noted that Article 132(1)(c) does not contain any reference to activities "closely linked to the provision of medical care" (words which do appear in Article 132(1)(b)) (see [32] of the Judgment), that it was for the national court to determine whether the drugs were supplied separately from or as part of a composite supply of medical care ([37]), but that if they were supplied separately they would not come within exemption even though they were part of the treatment regime for the patient:

"36. Nevertheless, despite that therapeutic continuum, the interested parties confirmed during the hearing that the treatment at issue in the case in the main proceedings comprises a series of activities and steps, which, although interrelated, are individually distinct. ...

...

38. Subject to those determinations [by the referring court], the dispensing of cytostatic drugs in circumstances such as those at issue in the case in the main proceedings is not liable to be considered to be exempt from VAT."

77. This was to adopt the view of Advocate General Sharpston who had said in her Opinion for the Court:

"53. That principle [of fiscal neutrality] cannot extend the scope of an exemption in the absence of clear wording to that effect. It is not a rule of primary law but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions."

78. I accept Mr Singh's answer on the CJEU cases. None of them carries Mainpay home. The facts of each are important to the CJEU's confirmation that the medical exemption applied (or, in the case of *Klinikum Dortmund*, did not). It is the facts of this case, judged through the lens of commercial and economic reality, which determines whether Mainpay was making supplies of medical care, or not. It is to that issue which I now turn.

## Commercial and Economic Reality

79. Mainpay argued that it had control over the consultants in a number of different ways. I have already dealt with its argument in the FTT that it retained control over clinical decision-making, an argument that the FTT rejected by looking instead at the framework of control over the consultants, finding that was operated by the NHS Trusts (see above at paragraphs 58-60).
80. Other variants of Mainpay's case on control resurfaced during the course of argument in this Court. I shall deal with them briefly. First, Mainpay argued that clause 2.1 of the A&E Agreement provided that Mainpay retained control over the consultants, because Mainpay remained responsible for the way in which the services were provided. The FTT found that what Mainpay was taking responsibility for would depend on what services it contracted to provide; and those services were, on proper analysis, supplies of staff (FTT [104]). The UT upheld the FTT's approach (UT [115]). I shall return to these paragraphs shortly. It is only necessary here to record that the argument based on clause 2.1 did not succeed below.
81. Secondly, Mainpay argued that it was in control of the consultants' clinical decision-making by virtue of the employment relationship, relying on Article 10 PVD. This was rejected by the FTT at [117] and by the UT at [117]. I agree with the UT that the effect of Article 10 is to remove the activities of employees from the scope of the tax and that it does not operate to confer on the employer all the activities of the employee, nor does it necessarily make the employee's activities part of the employer's supplies for VAT purposes.
82. Thirdly, and for the first time in this Court, Mainpay submitted that Mainpay's services were the same as and were constituted by the services provided by the consultants. This argument runs close to the Article 10 argument which I have rejected in the preceding paragraph. It was advanced as part of the argument based on *Kügler* [27], which I have also rejected. But in any event, this argument fails in its own right. As a matter of principle, it wrongly conflates a supply of staff with a supply of the services provided by those staff; but these are conceptually distinct types of supply (see paragraphs 51-57 above). Further, this argument is not tenable on the facts as found, because the FTT has determined that the consultants provided their services to the NHS Trusts who used them as part and parcel of their own supplies to patients (FTT [115]). The consultants did not, on the FTT's findings, provide medical services to Mainpay, for onward supply to the NHS Trust.
83. I return to the findings by the FTT. The FTT concluded, based on the contractual arrangements and the circumstances in which the consultants worked, that the consultants were under the control, direction and supervision of the NHS Trusts for the duration of the assignment; they effectively became part and parcel of the NHS Trusts which themselves provided medical care to patients (FTT [115]). In consequence, and after detailed consideration of Mainpay's submissions, it found that the essence of the supply was that of staff, rather than medical services (FTT [119]). The UT held that that was a conclusion to which the FTT was entitled to come, on the evidence before it and on the facts as found; as a matter of commercial and economic reality, Mainpay provided consultants (staff) to A&E, which consultants were on-supplied by A&E to the NHS Trusts, which Trusts used the consultants to provide medical care to their patients (UT [115]). I can find no fault in the approach of either the FTT or the UT.

The short answer to Mr Firth's case is that it does not fit the facts as they have been found by the FTT. The commercial and economic reality is that Mainpay provides supplies of staff, not medical care, to A&E. It follows that this case is different from *LuP* and *Peters*, in which medical care was provided at each stage in the chain of supplies, leading to the delivery of medical care to the patient.

## **The Grounds**

### ***Ground 1***

84. For all these reasons, Ground 1 must fail. The UT did not apply the wrong test. It correctly interpreted the term "medical care", as the FTT had done before it, and applied a test of commercial and economic reality to determine whether Mainpay's services to A&E came within the meaning of that term.

### ***Grounds 2 and 3***

85. By Ground 2, Mainpay invokes the purpose of the exemption, to prevent VAT increasing the costs of healthcare, in support of its arguments. I agree with the responses given by the FTT and the UT. First, it is not at all clear that any VAT charged on Mainpay's services will have the effect of increasing VAT in the chain: there is no evidence about whether Mainpay did or can pass this VAT on to A&E, and there is no evidence about A&E's VAT status so we do not know whether A&E can recover any VAT which is passed on to it by Mainpay. Secondly, and in any event, the issue at the heart of this appeal is one of interpretation and application of the medical exemption; if particular supplies are not exempt applying the terms of Article 132(1)(c), properly construed, they cannot come within exemption simply because not to do so would increase the cost of medical care. That was made clear by the CJEU in *Klinikum Dortmund*. In this connection, and for the sake of completeness, I note that public bodies such as NHS Trusts can in many cases recover VAT charged on inputs by means of the Contracting Out Direction issued by the Treasury under s 41(3) VATA, but that solution would not be available in this case because the VAT, if it is a cost to the NHS Trust, sticks at an earlier stage between Mainpay and A&E. I am not convinced that this case does have far-reaching consequences for the medical sector, as Mr Firth suggested.
86. By Ground 3, Mainpay relies on the principle of fiscal neutrality. Here too I agree with the FTT and the UT. It is not established that the services of a self-employed doctor or the doctor who contracts via a service company would fall within exemption. Mr Singh does not accept that they would; he says that the VAT liability would turn on the facts of the individual case. We were told at the hearing that Mainpay has around 50-100 consultants on its books at any one time. We know from the FTT that Mainpay has no medical expertise beyond the skills of the doctors it employs. Its sole shareholder has a background in accounting. Its business is to fulfil the terms of the Assignment Schedules to which it is party by ensuring that its employees are paid (with tax and National Insurance obligations met) for the duration of any given assignment. It does not carry professional indemnity insurance for the consultants or itself. This is a long way from the hypothetical self-employed consultant contracting directly or via a personal services company with an NHS Trust, held up by Mr Firth as a comparator for Mainpay. Certainly, from the NHS Trust's point of view, these two situations are very different. I agree that the particular circumstances of each of these posited

arrangements would need to be considered carefully in order to determine whether the services provided were within exemption. I accept Mr Singh's submission that the services would be exempt if they constituted medical care – or if they were “qualitatively equivalent” to medical care applying fiscal neutrality – but they would be taxable if they amounted to a supply of staff or some other service falling outside the meaning of medical care.

87. Grounds 2 and 3 fail.

***Ground 4***

88. Ground 4 would only come into play if Mainpay succeeded on its appeal in relation to consultants. Mainpay has not done so. In any event, the FTT dismissed Mainpay's appeal in relation to GP specialists because there was insufficient evidence about them. The UT correctly upheld that conclusion. Either way, Ground 4 fails.

**Conclusion**

89. Mr Firth's grounds of appeal are summarised by one overarching contention that Mainpay's supplies are exempt from VAT. For reasons given above, I reject that contention.

90. It is not necessary to deal with the different or additional grounds relied on by HMRC in their Respondents' Notice. Broadly, they are all facets of HMRC's overarching contention, accepted by the FTT and the UT, that Mainpay was making taxable supplies of staff, not exempt supplies of medical services.

91. Subject to the views of my Lords, I would dismiss this appeal.

**LORD JUSTICE NUGEE**

92. I agree.

**LORD JUSTICE GREEN**

93. I also agree.