



Neutral Citation Number: [2023] EWCA Civ 1073

Case No: CA-2023-000984

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY
COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)

Mr Justice Richards
[2023] EWHC 749 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 October 2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

Between :

**MERCY GLOBAL CONSULT LIMITED (IN
LIQUIDATION)**

**Claimant/
Respondent**

- and -

(1) ABAYOMI ADEGBUYI-JACKSON
(3) MICHAEL OSEMWEGIE
(6) FUNMILAYO OJUOLAPE ADEGBUYI- JACKSON
(7) CORNERSTONE GLOBAL SYSTEM UK LIMITED
**(8) MERCY GLOBAL PROPERTIES SOLUTIONS
LIMITED**
(9) DOMINION PAYROLL SOLUTIONS LIMITED
(10) OLUGBENGA TITUS JONES SOMADE
(11) OJUOLAPE ARCADE LIMITED
**(13) DMO CONSULTANCY & ACCOUNTING
SERVICES LIMITED**
(14) PURPOSE IP CONSULT LIMITED
(15) HANSTAL CONSULTING LIMITED

**Defendants/
Appellants**

**Richard Venables KC and Juliette Levy (instructed by Estate & Corporate Solicitors) for
the Appellants**

**Rupert Baldry KC, Clara Johnson and Quinlan Windle (instructed by Wedlake Bell LLP)
for the Respondent**

Hearing date : 20 September 2023

Approved Judgment

Lord Justice Arnold:

Introduction

1. On 9 October 2022 the First, Third, Sixth to Eleventh and Thirteenth to Fifteenth Defendants (“the Appellants”) applied: (i) for permission to amend their Defences to advance a defence (“the VAT Defence”) that the Claimant (“MGC”) made supplies that were exempt from VAT by virtue of Items 1 and/or 4 of Group 7 of Schedule 9 to the Value Added Tax Act 1994 (“VATA”); and (ii) for an order that the VAT Defence be tried as a preliminary issue. By order dated 5 May 2023 Richards J dismissed both applications for the reasons given in his judgment dated 31 March 2023 [2023] EWHC 749 (Ch). In short, the judge held that the VAT Defence was precluded by the decision of this Court in *Mainpay Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 1620, [2023] 3 All ER 912. The Appellants appealed with permission granted by Newey LJ. At the conclusion of the oral argument with respect to the Appellants’ challenge to the judge’s decision on the application for permission to amend their Defences, the Court announced that the appeal would be dismissed for reasons to be given subsequently. My reasons for agreeing to that disposition of the appeal are as follows.

The background to the applications

2. MGC was incorporated in 2011. It employed a number of employees who the judge described for convenience as “healthcare professionals”, recognising that this is both a broad, and therefore somewhat imprecise, term, and also that it is something of a simplification since not all of MGC’s employees were healthcare professionals.
3. The Appellants allege (and for present purposes it must be assumed that these allegations are factually correct) that, until it went into liquidation, MGC’s business operated in the following manner:
 - i) MGC employed healthcare professionals such as doctors and nurses and entered into contracts of service with those employees.
 - ii) MGC seconded the services of its employees to recruitment agencies (“Secondees”) and had contractual relationships with those Secondees.
 - iii) The Secondees in turn sub-seconded the services of MGC’s employees to “End Users”, in most cases an NHS Trust. The Secondees had contractual relationships with these End Users.
 - iv) When sub-seconded to End Users, MGC’s employees provided services consisting of “medical care” or “care or medical or surgical treatment” within the meaning of Items 1 and 4 of VATA Schedule 9 Group 7.
 - v) MGC did not control the services provided by healthcare professionals that it employed. Thus, when providing “medical care” or “care or medical or surgical treatment”, MGC’s employees discharged their professional duties within the framework set by the End Users.

- vi) MGC's secondment of employees to Secondees and the Secondees' sub-secondments to End Users were on a "back-to-back" basis, so that, in particular:
 - a) MGC would not second an employee to a Secondee unless the Secondee would in turn sub-second the employee to an End User.
 - b) MGC seconded its employees to Secondees as healthcare professionals. The Secondees in turn sub-seconded the employees to End Users as healthcare professionals. End Users did not require MGC's employees to perform duties other than those of a healthcare professional.
 - vii) MGC charged Secondees a fee for the provision of a particular employee. MGC also charged its employees a "commission" consisting of a flat-rate weekly amount which MGC justified by the fact that it provided certain administrative and payroll services.
 - viii) On receipt of a fee from a Secondee, Mercy would deduct PAYE and employees' national insurance contributions ("NICs") and its commission, and then pay the balance over to the employee concerned.
4. At the time it was carrying out this business, MGC thought (the Appellants say mistakenly) that at least some of the supplies that it made described in paragraph 3 above were standard-rated for VAT purposes, except to the extent that a particular concession (the details of which it is unnecessary to go into for present purposes) applied.
 5. HMRC carried out an investigation into MGC's activities which culminated in it making assessments on MGC for under-declared VAT totalling some £21 million ("the Assessments"). This led to MGC becoming insolvent and entering liquidation.
 6. In these proceedings MGC alleges that this under-declared VAT was the result of a significant VAT fraud perpetrated between at least 2015 and 2020. The VAT fraud is said to consist of MGC charging Secondees VAT and, save for small sums, not accounting to HMRC for that VAT, hence the under-declaration resulting in the Assessments.
 7. MGC alleges that the VAT was misappropriated by the First Defendant, Mr Adegbuyi-Jackson, who was at all material times MGC's sole shareholder, with the assistance of the Sixth Defendant (Mr Adegbuyi-Jackson's wife), the Tenth Defendant (Mr Adegbuyi-Jackson's half-brother) and various corporate Defendants. MGC seeks equitable compensation from Mr Adegbuyi-Jackson for fraudulent breach of duty and proprietary remedies in respect of sums he has received. It makes proprietary claims against Mrs Adegbuyi-Jackson and the corporate defendants, as well as claims for equitable compensation for dishonest assistance. MGC also makes a claim for unlawful means conspiracy against Mr and Mrs Adegbuyi-Jackson.
 8. By the VAT Defence, the Appellants seek to establish that MGC's supplies were exempt from VAT by virtue of Items 1 and/or 4 of VATA Schedule 9 Group 7, and hence that MGC does not owe HMRC the £21 million claimed by the Assessments. In

the absence of any obligation to pay VAT to HMRC, the Appellants contend that there can have been no VAT fraud as MGC claims.

The legislative framework

9. Article 132(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (“the Principal VAT Directive”) provides, so far as relevant:

“Member States shall exempt the following transactions:

...

- (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
- (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

...”

10. These provisions are implemented by section 31 of VATA together with Items 4 and 1 respectively of Group 7 of Schedule 9 of VATA (as amended), which provide:

“GROUP 7— HEALTH AND WELFARE

Item No.

- 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;
 - (b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians;
 - (c) the register kept under the Health Professions Order 2001;
 - (ca) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1993;

- (cb) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994
- (d) the register of qualified nurses, midwives and nursing associates maintained under article 5 of the Nursing and Midwifery Order 2001.

...

- 4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state-regulated institution.

...

Notes:

...

- (2) Paragraphs (a) to (d) of item 1 and paragraphs (a) and (b) of item 2 include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled.”

The VAT Defence

11. In summary, the VAT Defence runs as follows:

- i) The Appellants argue that there is no distinction for VAT purposes between a supply of staff and a supply of the services performed by those staff. Rather, a supply of staff where the staff are to perform services of a given description is a supply of services of that description.
- ii) Accordingly, for the purposes of Items 1 and 4 of Schedule 9 Group 7 VATA, the character of the supplies that MGC made was the same as the character of the services that the relevant employees provided.
- iii) Therefore, to fall within Item 1, read together with Note 2, all that was required was that MGC should have seconded the services of employees falling within paragraphs (a) to (d) of Item 1, in order that those employees should provide “medical care”.
- iv) Similarly, MGC’s services fell within Item 4 to the extent that it was seconding healthcare professionals. Those healthcare professionals would all be providing “care”, even if they were not necessarily providing “medical or surgical treatment”, and would be doing so on behalf of their employer, MGC. Item 4 does not impose any condition as regards the person to whom MGC made its supplies. Therefore, the requirements of Item 4 are satisfied in circumstances where MGC made its supplies to a Seconded, just as much as if MGC made its supplies to an NHS Trust.

Mainpay

12. Mainpay was a company with a similar business model to that of MGC. Mainpay was an “umbrella” company which employed consultants and GP specialists. There was no evidence about the GP specialists, and so attention focussed on the consultants. Mainpay provided the consultants to recruitment agencies, such as one called A&E, who in turn provided them to NHS Trusts. Mainpay charged the agencies a fee which comprised the costs of the employing the consultants and a percentage margin. Mainpay was responsible for paying the consultants their salary and for accounting for their pensions, sick pay, PAYE and NICs. The relevant NHS Trust and the agency in question determined which consultant would fulfil a particular assignment prior to the involvement of Mainpay. HRMC decided that Mainpay’s supplies were taxable at the standard VAT rate. Mainpay contended that its supplies were exempt by virtue of Items 1 and/or 4 of VATA Schedule 9 Group 7. Successive appeals by Mainpay to the First-Tier Tribunal, the Upper Tribunal and the Court of Appeal were dismissed. By the time the case reached the Court of Appeal, Mainpay accepted that Item 4 added nothing to Item 1, and so attention was confined to Item 1. The judgment was given by Whipple LJ, with whom Green and Nugee LJ agreed.
13. Having set out the legal framework and summarised the facts, Whipple LJ summarised the FTT’s decision and the UT’s decision. As she explained, the FTT stated in its decision at [23] that the key question was:

“... 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.”

The FTT answered that question at [119] as follows:

“... 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.”

14. On appeal to 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. As Whipple LJ noted, 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. The UT stated at [93] that this was not the question it had to decide:

“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 [counsel for Mainpay], 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.”

The UT went on to conclude that the FTT had not erred in law on any of the grounds alleged, and dismissed the appeal.

15. Whipple LJ went on to summarise Mainpay’s grounds of appeal, various contentions advanced by HMRC by way of a respondents’ notice and the parties’ main submissions. In that context, she noted that counsel for Mainpay had placed most reliance upon the judgment of the Court of Justice of the European Union in Case C-141/00 *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* [2002] ECR I-6833, in which the CJEU said at [27] that “just two conditions need to be met” in order for Article 132(1)(c) of the Principal VAT Directive to apply: “medical services must be involved and they must be supplied by persons who possess the necessary professional qualifications”. Counsel for Mainpay argued that Mainpay’s supplies satisfied those conditions. He acknowledged that the emphasis on *Kügler* at [27] represented a shift in his case, but said that this was in response to the way in which HMRC’s case was now put. As Whipple LJ went on to explain at [47]:

“[Counsel for HMRC] argued ... 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).”

16. Whipple LJ began her analysis of the issues by saying at [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 [counsel for Mainpay]’s argument, it is necessary to clear the decks of two preliminary points raised in challenge to the approach adopted by the FTT.”

17. Whipple LJ dealt with the first point under the heading “Supply of staff or services”, saying:

- “51. I accept the point made by the UT at [93] and now by [counsel for HMRC] in their skeleton argument, that the issue of law is whether Mainpay’s services are exempt. [Counsel for Mainpay] 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
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. ...”
18. Having discussed *Reed Personnel Services v CCE* [1995] STC 588, *Adecco UK Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 1794, [2018] STC 1722, *Moher v Revenue and Customs Commissioners* [2012] UKUT 260 (TCC), [2012] STC 1356 and Case C-434/05 *Stichting Regionaal Opleidingen Centrum Noor-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* [EU:C:2007:343], Whipple LJ concluded at [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.”
19. Having dealt with the second “preliminary point” under the heading “Framework of control” at [58]-[60], Whipple LJ turned to consider *Kügler* and a number of other CJEU decisions relied upon by Mainpay. She concluded at [78]:
- “I accept [counsel for HMRC]’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.”

20. Under the heading “Commercial and economic reality”, Whipple LJ said:

- “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. ...
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. ...”

21. For these reasons, Whipple LJ rejected Mainpay's first and principal ground of appeal. She also rejected its other three grounds. She added at [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.”

The judge's reasoning

22. The judge held that the Appellants should be refused permission to amend their Defences to introduce the VAT Defence because that defence had no real prospect since it was precluded by *Mainpay*. In reaching this conclusion, he rejected the Appellants' argument that the conclusion set out by Whipple LJ at [57] was not binding because it was a mere assumption on her part which was not the subject of argument or consideration. Given his conclusion that permission to amend should be refused, it necessarily followed that the application for the trial of a preliminary issue also had to be refused (although the judge said that he would have refused that application in the exercise of his discretion in any event).

The appeal

23. On the appeal the Appellants accepted that the proposition of law stated by Whipple LJ in *Mainpay* at [51], [57], [82] and [90], namely that there is a distinction for VAT purposes between supplies of staff on the one hand and supplies of the services provided by those staff on the other, formed part of the *ratio decidendi* of *Mainpay*. The Appellants also accepted that, if that *ratio* was binding upon this Court, it precluded the VAT Defence. The Appellants argued that it was not binding on this Court for two alternative reasons. First, because it was a mere assumption. Secondly, because it was manifestly wrong. The second argument was not one advanced by the Appellants before the judge. Nor was it advanced in the Appellants' skeleton argument for the appeal.

Mere assumption?

24. In *Regina (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 the Court of Appeal held that a subsequent court is not bound by a proposition of law which, although part of the *ratio* of an earlier decision, had been assumed to be correct by the earlier court and had not been the subject of argument before, or consideration by, that court. Although the Court considered that this exception to the strict rule of precedent was justified, and applied it in the case before it, Buxton LJ delivering the judgment of the Court cautioned at [38]:

“Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised

before the court and there has been no argument upon it And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."

25. Counsel for the Appellants accepted that the proposition of law stated by Whipple LJ in *Mainpay* had been the subject of consideration and decision by her, and had not been merely assumed. He nevertheless submitted that it was based upon a prior assumption which had been shared by the parties and by the Court, and had not been the subject of any argument, consideration or decision, namely that the exemptions contained in Items 1 and 4 of VATA Schedule 9 Group 7 had the same scope as Article 132(1)(b) and (c) of the Principal VAT Directive. The Appellants' case, however, was that the domestic exemptions were broader in scope than the exemptions required by EU law. It followed, counsel for the Appellants argued, that the proposition of law stated by Whipple LJ is not binding.
26. I accept the premise of this argument. It appears from Whipple LJ's judgment that it was taken for granted that Item 1 should be interpreted consistently with Article 132(1)(c) and that they were of materially the same scope, and it was also taken for granted that the same would be true of Item 4 and Article 132(1)(b). No argument was advanced that the domestic exemptions were broader than the EU exemptions, nor was that possibility contemplated by the Court.
27. I do not accept that it follows that the proposition of law stated by Whipple LJ is not binding. Before explaining my reasons, I should record that I have considerable difficulty in seeing how the domestic exemptions can be materially broader than the EU exemptions. Although the wording is slightly different, their substance appears to be much the same. This is particularly so given the broad interpretation placed upon Article 132(1)(c) by the CJEU in *Kügler* and other cases. Moreover, as is well established, the domestic provisions should if possible be construed consistently with the EU provisions as interpreted by the CJEU. I also doubt that it would have been open to the United Kingdom under EU law to provide for broader exemptions than those required by Article 132(1)(b) and (c). I shall nevertheless assume, without deciding, that the Appellants have an arguable case that the domestic exemptions are broader in scope than the EU ones.
28. In my judgment this does not detract from the binding effect of Whipple LJ's statement of the law. The issue before the Court of Appeal in *Mainpay* was as to the proper interpretation of Item 1 and its application to the facts. It is true that it was assumed that the scope of Item 1 was the same as that of Article 132(1)(c), but nevertheless the Court interpreted Item 1 and held that it did not apply. In interpreting Item 1, Whipple LJ applied the proposition of law she stated, which she considered to be supported by domestic case law, EU case law and ordinary principles of VAT. Even if the domestic exemptions are in some way broader than the EU exemptions, it would remain necessary, on Whipple LJ's analysis of the law, to distinguish between a supply of staff and a supply of the services provided by those staff. That distinction is not about the precise breadth of the exemptions, it is a more fundamental point

about the character of the supplies in question. That explains why, as counsel for the Appellants himself pointed out, one of the cases she relied upon, *Horizon College*, was a case about the exemption for education services now contained in Article 132(1)(i), and not about the healthcare exemptions.

29. Even if, contrary to my view, the breadth of the exemptions is relevant to the character of the supplies, the Appellants' argument is at best one which could have been advanced in *Mainpay* to counter the proposition upon which Whipple LJ relied, at least in the context of the healthcare exemptions. The fact that a particular argument against a proposition of law has not been advanced or considered does not mean that the proposition is not binding if it is considered by the court and accepted to be correct. In those circumstances the proper remedy is to appeal to a higher court (or, if the prior decision is one by the Supreme Court, to invite that court to depart from its precedent).
30. Counsel for the Appellants also submitted that it was assumed in *Mainpay* that Item 4 was no wider than Item 1, whereas the Appellants would if necessary argue that it was. Again, I accept that it was assumed in *Mainpay* that Item 4 was not relevantly broader than Item 1. Again, I have considerable difficulty in seeing how Item 4 can be broader than Item 1 in any respect which assists the Appellants, but I will assume without deciding that the Appellants have an arguable case that it is. Again, I do not accept that this detracts from the binding effect of Whipple LJ's statement of the law. My reasons are the same: the comparative breadth of Items 1 and 4 is not relevant to the distinction Whipple LJ drew, and at best this is an argument which could have been advanced to counter that proposition, at least in the context of cases involving umbrella companies such as *Mainpay* (and *MGC*).

Manifestly wrong?

31. In *Morelle Ltd v Wakeling* [1955] 2 QB 379 Sir Raymond Evershed MR delivering the judgment of a Court of Appeal consisting of five judges said at 406-407:

“As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the

judgments were based and to say of it: ‘Here was a manifest slip or error.’ In our judgment, acceptance of the Attorney-General’s argument would necessarily involve the proposition that it is open to this court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide. Such a proposition would, as it seems to us, open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided. Although, as was pointed out in *Young v. Bristol Aeroplane Co. Ltd.*, a ‘full court’ of five judges of the Court of Appeal has no greater jurisdiction or higher authority than a normal division of the court consisting of three judges, we cannot help thinking that, if the Attorney-General’s argument were accepted, there would be a strong tendency in cases of public interest and importance, to invite a ‘full court’ in effect to usurp the function of the House of Lords and to reverse a previous decision of the Court of Appeal. Such a result would plainly be inconsistent with the maintenance of the principle of stare decisis in our courts.”

32. Counsel for the Appellants submitted that this passage established that a prior decision could be held to have been given *per incuriam* not only where it was given “in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned”, but also in other “rare and exceptional cases” where the decision, or the reasoning upon which it was based, involved a “manifest slip or error”. I accept this, but I would add that it is plain from what Evershed MR said that this can only apply where the slip or error is truly manifest.
33. Counsel for the Appellants argued that Whipple LJ’s statement of the law in *Mainpay* was manifestly wrong. I do not accept this. Although he advanced a series of criticisms of Whipple LJ’s reasoning at [51]-[57], none of them begin to demonstrate manifest error. It is sufficient to concentrate upon counsel’s principal criticism. This is that Whipple LJ confused or conflated two different distinctions. The first distinction is one between (a) merely effecting an introduction of staff without contractually participating in the chain of supply and (b) supplying the services of workers by taking part in the chain of supply. The second distinction is between (a) a supply of staff by taking part in the chain of supply whilst controlling them and (b) a supply of staff by taking part in the chain of supply without controlling them. The first distinction is said to be the correct distinction, and supported in particular by the *Reed* case discussed by Whipple LJ. The second distinction is said to be a wrong distinction.
34. Even without getting into the details of the *Reed* case, this argument does not demonstrate manifest error on the part of Whipple LJ. The distinction she drew is on its face a perfectly coherent one, and it appears to be supported by her discussion of the case law. By contrast, the first distinction drawn by counsel for Appellants is elusive. Even if it is a possible distinction, it is not obvious that the second one is

wrong. Nor it is obvious that Whipple LJ confused or conflated these distinctions as opposed to drawing a different one.

35. Furthermore, *Reed* does not demonstrate any manifest error by Whipple LJ. *Reed* is a curious case, and not easy fully to understand. *Reed* was a recruitment agency which provided temporary nurses to hospitals. Most of the nurses were employed by the hospitals in question, and wanted to get extra work on top of their normal hours. The dispute was about input tax, and it is unclear what the position with regard to output tax was. The Commissioners contended that the supplies which *Reed* made to the hospitals were supplies of nursing services and thus exempt under the predecessor provisions to Items 1 and 4 of VATA Schedule 9 Group 7. This would mean that *Reed* could not deduct input tax. *Reed* contended that the supplies it made to the hospitals were of introducing the nurses and associated obligations, but not of nursing services. This would mean that *Reed* could deduct input tax. Thus the parties were the reverse way round to what one might expect. The VAT Tribunal found that what *Reed* supplied was not nursing services, but nurses. *Reed* supplied its administrative services as agent, the consideration for those supplies being the commission it received. It followed that *Reed* could deduct input tax (albeit, it would appear, only on the commission).
36. The Commissioners appealed, arguing that the correct characterisation of *Reed*'s supplies depended on the correct interpretation of the contractual documents, and that the latter showed that the situation was one of "vicarious performance" in which A is contractually obliged to provide services to B, but does so by the acts of a third party C. Laws J dismissed the appeal for the reasons he gave at 595-596:

"... the concept of VAT supply is not coterminous with the concept of contractual duty, contracts which fully distribute the latter may be silent about the former. So it is here. In fact I would incline to accept [counsel for *Reed*]'s argument that taken as a whole the documents indicate that *Reed* was supplying nurses, not nursing services. However for the reasons I have given the case is not resolved in [counsel for *Reed*]'s favour, any more than in [counsel for the Commissioners'], simply upon the correct construction of [the] contracts. Although the contracts fully distribute [the] parties' private law duties and rights, they do not put beyond question the nature of the supplies made by *Reed*, nor was it their function to do so. What those supplies were was accordingly a matter of fact for the Tribunal. That being the case, there is no proper basis on which this court should interfere with the Tribunal's conclusions. On one reading of those conclusions ... it may be thought that the Tribunal determined the case as a matter of construction of the documents, and I have held that their true construction is not determinative of the issue falling for decision. But I do not believe that that is the correct interpretation of the decision. Certainly they relied on the contracts; but in the end their decision rested on their overall view of the facts, which was that *Reed* supplied the nurses, who

in turn supplied their services to the hospitals. That is a conclusion which cannot be faulted on *Wednesbury* grounds.”

37. Thus the Tribunal found that Reed supplied nurses, not nursing services, and Laws J held that that was a finding of fact which was open to it. That being so, I am inclined to agree with Whipple LJ’s comment in *Mainpay* at [53] that *Reed* “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”. But at all events it is far from manifest that she was wrong to read it in that way.

Conclusion

38. For the reasons given above, I consider that the proposition of law stated by Whipple LJ in *Mainpay*, that there is a distinction for VAT purposes between supplies of staff and supplies of services provided by those staff, is binding upon this Court. It follows that the judge was correct to hold that the VAT Defence is precluded by *Mainpay*, and therefore to refuse the Appellants permission to amend their Defences. It further follows that he was correct not to order the trial of the VAT Defence as a preliminary issue.

Lord Justice Phillips:

39. I agree.

Lord Justice Underhill:

40. I also agree.