Neutral Citation: [2023] UKFTT 00042 (TC)

Case Number: TC08697

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/01322

INCOME TAX and NATIONAL INSURANCE – sections 48-61 ITEPA 2003 – intermediaries legislation – IR35 – rugby union commentator for Sky TV – personal service company – hypothetical contract – whether services provided under a contract of employment – Atholl House *considered – critical analysis of the approach at the third stage of* Ready Mixed Concrete *test when considering if personnel being 'in business on his own account'– the centrality of the contractual relationship in issue remains at the third stage –* ***appeal allowed***

Heard on: 27-29 July 2022
Judgment date: 20 January 2023

Before

TRIBUNAL JUDGE HEIDI POON

Between

S & L BARNES LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Collins, of counsel, instructed by Markel Tax

For the Respondents: Mr Bayo Randle, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appeal is brought by S&L Barnes Limited ('**SLB**' or 'the appellant') against the following decisions by the respondents ('HMRC'):

> (a) Determinations under Regulation 80 of the Income Tax (PAYE) Regulations 2003 in respect of income tax deductible via Pay As You Earn (the '**PAYE determinations**'); and
>
> (b) Notices under section 8(1)(c) of the Social Security Contributions (Transfer of Functions) Act 1999 in relation to the associated National Insurance Contributions payable on earnings subject to PAYE (the '**NIC notices**').

2. The determinations and notices relate to the contractual agreements entered into by SLB with Sky TV Limited ('**Sky**') for the provision of the services of Mr Stuart Barnes to Sky. The principal issue in this appeal is whether on the facts, the intermediaries legislation applies to the contractual relationship between Mr Barnes, SLB and Sky. If the legislation (commonly known as 'IR35') applies, then tax liabilities to income tax and national insurance contributions arise for SLB.

3. The overall quantum under appeal is £695,461.97 (not including interest), and relates to five tax years with the amounts of PAYE and NICs being assessed as follows:

	Tax year	Date of notice	PAYE	Class 1 NIC
1	2013-14	11 January 2018	£70,807.50	£31,418.54
2	2014-15	29 November 2018	£73,506.15	£34,338.17
3	2015-16	7 October 2019	£80,111.10	£35,941.25
4	2016-17	7 October 2019	£83,451.20	£37,321.73
5	2017-18	7 October 2019	£85,792.25	£37,502.08
6	2018-19	7 October 2019	£87,696.60	£37,576.00
		Aggregate Total	£481,364.20	£214,097.77

4. The determinations and notices under appeal were issued to the appellant and its tax agent then named 'Abbey Tax', which changed its name to 'Markel Tax' in 2019. The quantum of the assessments is taken to be not a matter of dispute, as neither party makes reference thereto in the course of the hearing.

LEGAL FRAMEWORK

5. The intermediaries legislation in relation to income tax is by reference to section 49 Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'), which provides as follows:

> **49 Engagements to which this Chapter applies**
>
> (1) This Chapter applies where —
>
> (a) an individual ("the worker") personally performs, or is under an obligation to perform, services for another person ("the client"),
>
> (aa) the client is not a public authority,
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and
>
> (c) the circumstances are such that –

> (i) if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or
>
> […]
>
> (4) The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.

6. The equivalent provision for national insurance purposes is under regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 (the '2000 Regulations'). The statutory wording of s49 and reg 6 is similar, but not identical. Neither party seeks to draw on the differences[1] in the wording between s49 and reg 6; both parties have proceeded on the basis that if s49 ITEPA applies in this instant case, then reg 6 of the 2000 Regulations also applies.

WITNESS EVIDENCE

7. For the appellant, Mr Barnes was called as a witness and was cross-examined over the duration of most of the first two days of the hearing. I find Mr Barnes a conscientious witness with a high degree of integrity, which led him to deliberate on the meanings of questions at times, and to give very full answers in line with what he regarded to be requisite. There is an open honesty about Mr Barnes' replies, not least when more than once in his evidence he referred to Sky as 'my employer', which paradoxically reflects well on the truthfulness of his answers as not being framed with the legal issue in mind. I find Mr Barnes to be a credible and reliable witness and accept his evidence as to matters of fact.

THE FACTS

Background

8. The appellant company was incorporated on 15 March 2005, and is the personal service company of Mr Stuart Barnes. Through the appellant company, Mr Barnes provides his services in relation to the sport of rugby union to a range of media organisations, including the Times Newspaper and the Sunday Times, Rugby World magazine, and other broadcasters such as Ireland's TV3, and Fox Sports in Sydney, Australia.

9. The appeal concerns the contracts covering the period between 6 April 2013 and 5 April 2019 (the '**Relevant Period**') when Mr Barnes was engaged by British Sky Broadcasting Limited, which changed its name to Sky TV Limited in February 2015. Nothing turns on its change of name; the broadcasting company is referred to as 'Sky' throughout for consistency.

10. During the relevant period, the appellant entered into two services agreements with Sky.

(1) The first agreement is dated 28 September 2012 and covered the period 1 June 2013 to 31 May 2017 (the '**First Contract**');

(2) The second agreement is dated 13 June 2017 and covered the period 1 June 2017 to 31 May 2019 (the '**Second Contract**').

11. Mr Barnes started working as a commentator on Sky Sports in 1994. Before turning to the terms that govern the contractual arrangements between Sky and the appellant for the

[1] Henderson J in *Dragonfly Consultancy Limited v Revenue and Customs Commissioners* [2008] EWHC 2113 (Ch) observed that depending on the specific circumstances, the differences in the wording between s49 and reg 6 may give rise to different conclusions as to the applicability of the IR35 legislation.

provision of services by Mr Barnes during the relevant period, it is expedient to set out Mr Barnes' profile that led to his introduction to Sky in 1994 by an agent.

Mr Barnes' profile

As a rugby union player

12. Mr Barnes was a top-level rugby union player throughout the 1980s and early 1990s. He describes himself as a 'Welsh schools' international but an Englishman by parentage and birth. He was selected for the Welsh national squad as a teenager but changed allegiance during his undergraduate years at Oxford, leaving Newport for Bristol Rugby club, and won his first English Cup in 1983, and was capped for England against Australia in 1984.

13. In 1985, Mr Barnes joined Bath Rugby club ('one of the great English teams' he said), which went on to win seven cups in nine years, and four consecutive titles, leading the club to its first league and cup double. In 1993, Mr Barnes was selected for the British and Irish Lions of New Zealand. In 1994, he was in the England's tour of South Africa, which was the first sanctioned tour after the country's apartheid blacklisting. By the time of his retirement from the sport (in 1994 after the South African tour), Mr Barnes described himself as 'one of England's most controversial rugby figures'.

Becoming a freelance writer and television presenter

14. It was during his 1993 Lions tour of New Zealand when Mr Barnes did his first TV broadcast, during a midweek Lions match for ITV. In 1994, Mr Barnes was approached by the Daily Telegraph to write a column as an England player touring South Africa. Mr Barnes was emphatic that 'from day one I was never ghosted' (as a writer). He said because he read Modern History at university, he was used to writing essays under time pressure, which stood him in good stead to deliver columns to deadlines.

15. When Mr Barnes retired as a rugby player after the South African tour in 1994, the Daily Telegraph offered him a 'guaranteed' column per week, and he resigned from his position as a building society manager 'for the risks of being a freelance writer'.

16. After the Daily Telegraph's offer, two other offers followed in 1994; the first was from a new magazine called *First XV* offered him a role as Executive Editor. The second offer in 1994 was from Sky. Mr Barnes said he was contacted 'out of the blue' by an agent (Don McPherson), who connected Mr Barnes to Sky Sports, and he was signed as Sky's first Rugby Union Presenter.

Profile as a freelance writer

17. The magazine *First XV* lasted for about a year only, during which time Mr Barnes was in their Bath office every Monday and filed one to three columns per week. The editorship ran concurrently with the Sky engagement which he commenced in the autumn of 1994.

18. When the magazine *First XV* folded, *Rugby World* (the sport's largest and most established magazine) started using Mr Barnes on a freelance basis. Between 1994 and 1997, Mr Barnes also edited a book of rugby writing, and published three titles in his own name, and was paid between £10,000 to £15,000 each.

(1) *Smelling of Roses* (1994) was his first and most successful, as a *bona fide* rugby autobiography.

(2) *The Year of Living Dangerously* (1995) was shortlisted for the William Hill Sports Book of the Year award.

(3) *Rugby's New Age Travellers* (1997).

Profile as a TV presenter/commentator

19. Mr Barnes' work relationship with Sky Sports was to last for 25 years from 1994 to 2019. He signed with Sky as its first rugby union presenter, and moved to what he referred to as 'the more controversial world of co-commentator', and as Sky's 'lead analyst'. He came to be known as 'the voice of rugby' for most of his 25 years with Sky.

20. Given his television profile and writing commitments, Mr Barnes stated that he was able to maintain 'an extremely high profile within the sport', one which was to grow globally. Mr Barnes engaged the service of the late David Welsh, the former Sports Editor of the Daily Telegraph, as his agent until Mr Welsh's death in 2011. Mr Banes has not engaged another agent since; he said he has no need to find a replacement agent, as he has never 'remotely lacked for work or contacts'.

Columnist for Sunday Times (2005) and Times (2013)

21. In 2005, Mr Barnes described his profile as 'the voice of rugby' being 'merged' with an offer from the Sunday Times to be a columnist. (Mr Barnes had been writing a column for the Daily Telegraph since 1994, and that engagement ceased in 2005.)

22. Eight years later in 2013, Mr Barnes became the first person to be contracted to both the Sunday Times and Times when a former editor of the Times signed him to strengthen the rugby section and to write two columns a week (i.e. Monday and Friday) for the Times.

23. During periods of high profile rugby matches such as the World Cup seasons, Mr Barnes would be writing for the Times on a Wednesday (as well as Monday and Friday) and a minimum of two columns for the Sunday Times, which he described as his 'most important assignment due to the long term plan to remain a profiled rugby writer'.

24. The 'Retainer Contributor Agreement' with the Times and separately with the Sunday Times were both effected in June 2015 for the duration of a year from 1 July 2015 to 30 June 2016. The contracting party in these agreements was Mr Barnes in his personal capacity, (and not the appellant SLB). HMRC's initial IR35 enquiry did cover the agreements entered into with the Times /Sunday Times, but this line of enquiry was not further pursued.

Contracting with Sky

25. It was in 1994 when Don McPherson contacted Mr Barnes in respect of working for Sky TV on live rugby. Mr Barnes had not heard of Sky at the time, but being freelance with only his guaranteed column with the Daily Telegraph, he agreed to a meeting, which led to a screen test and a contract offer with the agent doing all the negotiations and taking a fee.

26. The figure of days to work varied between 225 and 233 days through the 25 years of contracting with Sky. Mr Barnes explained that it would be 'difficult to categorise' his working hours for Sky, and the numbers are 'purely cosmetic' because Sky (and the late head of sport, Vic Wakeling would vouch for it) was not concerned with how many hours Mr Barnes worked, so long as he provided the expected quality of work.

27. In terms of how the contract with Sky worked, Mr Barnes described it as follows:

> 'It worked if I performed. It worked if I was available often enough to appear on Sky Sports News, often in reaction to a story, as often as not at home as in the studio. Flexibility was a key word as was the ability to react quickly and succinctly.'
>
> 'Over the years I did many interviews for Sky Sports News, fewer for Sky News. In the last five years, without a midweek programme to bring me to Sky, a lot less. If there was a major story they would get a camera crew to my home in [–shire].'

28. The most recent contract with Sky ended at the end of May 2019. Sky had hope of getting the rights to a new global international competition, and Mr Barnes was retained 'to do very little bar the four August warm-up matches'. Barney Francis, then Head of Sport, was prepared 'to pay a premium' to retain Barnes in the eventuality of a successful bid, which did not materialise. In a meeting with James Lewis, the Head of Rugby (of Sky Sports), to discuss the future, Mr Barnes was offered to work on an 'increasingly narrow output', which amounted to six or eight second division matches on a daily fee. Mr Barnes declined, and he explained that it was more important for him 'to concentrate on newsprint to cover a higher profile game and to maintain his exposure at the highest level as one of the sport's most articulate ex-players in print' – this, he said, 'has always been and will remain my identity'.

The Framework Agreements

29. The contractual arrangements for the provision of Mr Barnes' services to Sky were governed by the relevant 'Services Agreement' in force at a particular time. The two relevant contracts adopted the same format with three constituent parts: (a) the Key Terms to define the parties to the contract, the period covered, and the fee payable, etc., and the dates and signatures of the contracting parties; (b) the Terms and Conditions; and (c) the Schedule, being a Non-Disclosure Agreement ('NDA') between Sky and Mr Barnes.

30. The First Contract is exhibited with the Terms and Conditions and the Schedule of Non-Disclosure Agreement, while the Second Contract is exhibited only to the extent of the Key Terms. The parties confirmed at the hearing that the attachments to the Second Contract are the same as those to the First Contract. Any reference to the Terms and Conditions and NDA of the First Contract below is to be taken as applicable equally in relation to the period covered by the Second Contract, and therefore in force for the whole duration of the relevant period.

The Key Terms

31. The Key Terms of the first contract identify the contracting parties as Sky and SLB ('The Company') with the 'Personnel' as 'Stuart Barnes'. Other key terms relevant to the consideration of the contract are:

(1) *Assignment* – 'The Assignment will be from 1st June 2013 to 31st May 2017 on an ad hoc and when required basis for up to 228 days. For the purposes of this Agreement, "Year" means each consecutive 12 month period commencing 1st June each year.'

(2) *Services* – 'The Company shall provide the services of the Personnel as a commentator, presenter, interviewer, guest, or other participant in the making of any editorial, programme or video whether in vision or audio and whether in a studio or on location, live or recorded during the Assignment.' Separately, as provided under clause1.1 to the Key Terms:

> 'The Services will be provided on the terms set out in this Agreement subject to any variations agreed by the Parties in writing and to any Associated Company as may be agreed between the parties from time to time.'

(3) *Fee* – Year 1 was set at £235,000, and an increase by £10,000 every year for the consecutive three years to £265,000 in year 4, 'to be paid monthly in arrears during the Term by transfer to the designated bank account notified by the Company to Sky'.

32. In the Second Contract, the variations to the key terms include:

(1) The key term for 'Assignment' is removed (being amalgamated under 'Services').

(2) The key term for 'Services' states as follows:

> 'The Company shall provide the services of the Personnel as a commentator, interviewer and/or other participant in the making of any editorial, programme and/or video whether in vision or audio and/or whether in studio or on location, live or recorded on *an ad hoc as and when required basis* by Sky for up to two hundred and twenty eight (228) days per year during the Term.
>
> The above shall include, by way of example only, appearances on Sky Sports News (including reacting to breaking news stories), appearances on other Sky Sports programming and the provision, on request by Sky, of additional bespoke content (including but not limited to columns, blogs and interviews) for use on Sky Sports' digital services' (Italics added)

(3) Fee for the two years (from June 2017 to May 2019) is the same at £265,000, 'to be paid monthly in arrears … subject to receipt of a valid invoice and in accordance with Clause 3.1 of the attached Terms and Conditions'.

Terms and Conditions

33. Clause 1 in the First Contract sets out the terms of engagement as follows:

> '1.1 The Company shall use best endeavours to use the Personnel specified in the Key Terms to provide the Services. However, the Company has the right to propose other employees or sub-contractors of the Company to perform the Services.
>
> 1.2 If the Company makes a proposal under clause 1.1, Sky will have the right to assess the suitability of the substitute prior to the substitution. If Sky find the substitute to be suitable, they will confirm this in writing. …
>
> 1.3 The Company agrees that all Personnel performing the Services shall be engaged by the Company, <u>provided however</u>, the Company may sub-contract performance of the Services to an independent third party if Sky's prior written consent has been obtained. (Underlining original)
>
> 1.4 In the event that the Company sub-contracts the performance of the Services … , the Company shall procure that the sub-contractor shall ensure that any Personnel supplied by such sub-contractor shall, prior to entering into any such sub-contracting agreement … , sign a Non-Disclosure Agreement in the form attached as Schedule hereto …
>
> 1.5 Without prejudice to the provisions of clauses 7 and 9 below, the Company shall procure that all Personnel shall, prior to performing the Services, sign the Non-Disclosure Agreement in the form attached as a Schedule thereto.
>
> 1.6 The Company agrees to protect, defend, indemnify and hold Sky harmless from and against all claims, liabilities, demands, causes of action, losses and/or damages and all costs and expenses … arising from any failure of the Company to comply with this Agreement including Clauses 1.4 and 1.5 or any breach of a Non-Disclosure Agreement.'

34. Clause 2 stipulates the 'Company's Duties and Obligations', and the list under clause 2.1 is extended beyond television and radio to include 'print media and/or betting services' in the Second and Third Contracts.

> '2.1 The Company shall procure that the Personnel shall provide the Services to Sky during the Assignment for *exclusive exploitation* within the UK, the Republic of Ireland, the Channel Islands and Isle of Man ("Territory") and for non-exclusive exploitation outside of the Territory. The Company shall procure that neither the Personnel nor any former Personnel

shall be involved directly or indirectly in the provision of any services to any other television and/or all radio organisation and/or all media organisations during the Assignments for exploitation inside or outside the territory where such services are the same as or similar to the Services, *without the prior written consent of the Head of Sky Sports*, such consent not to be unreasonably withheld. This Clause 2.1 is not intended to limit the personnel from providing their services to any other entity that is not a provider or distributor of television and all radio services, provided that such services do not interfere with the provision of the Services, as determined by Sky.

2.2 The Company agrees that Sky would be entitled to *injunctive relief* to enforce the terms of clause 2.1 and acknowledges that damages would not be an adequate remedy. During the period of any such restrictions Sky will continue to pay the Daily Rate or Fee, as appropriate.

2.3 The Company agrees that there exists no employment agreement or relationship between the Personnel and Sky or any Associated Company …

2.4 The Company shall correct defective work in its own time and at its own expense. Sky reserves the right to offset losses sustained as a result of the Company's actions, breach or unsatisfactory performance from the Fee or Daily Rate without prejudice to any other remedies which Sky may have for such breach or unsatisfactory performance.

[2.5] …

2.6 The Company shall procure that the Personnel shall travel to and perform the Services at any destination both inside and outside the Territory and as such time in dates (including bank holidays and weekends and anti-social hours) as may be required by Sky.

2.7 Notwithstanding any other provision of this Agreement, Sky *shall have first call* on the Company's Personnel for the provision of the services. … Neither the Company nor any Personnel shall endorse or promote or otherwise grant any rights of association or provide marketing or promotional services to any competitor of Sky, its products, brands or services.

2.8 The company grants to Sky the *exclusive right* in the Territory during the Term (and thereafter in perpetuity for archive, library and programming purposes) to use an exploit and authorise others to use an exploit the image rights to advertise and promote Sky programmes and services generally for the purposes of this Clause 2.8. "Image Rights" means the exclusive right to use and exploit the voice, nickname, name, image (including any footage of performances), appearance, autograph, biography, biographical material, photograph, likeness or other representation or relevant details of the personnel in each case in whatever format or media, in whatever capacity, on *an unlimited basis*.

2.9 The Company shall not and shall procure that the Personnel does not use any social media service to discuss Sky, [and their associates] and/or any sports rights holder and/or any related matter other than in accordance with any direction or guidelines of Sky from time to time and/or without the prior written consent of Sky. *This is a material term of this Agreement*.' (All italics added)

Fees and payment terms

35. Clause 3 provides, inter alia, for the payment of the Fee, whereby:

(1) Clause 1.1: '… where a Fee has been agreed in writing for the whole Assignment, the Fee agreed for the Assignment (Fee) as specified in the Key Terms together with any expenses reasonably incurred in connection with the provision of the Services provided any such expenses are agreed in writing in advance with Sky.'

(2) Clause 3.4: 'The Company agrees that the Fee or Daily Rate payable to the Company in respect of the Services includes a sum which satisfies any obligations Sky may have under the Working Time Regulations 1998 to pay the Personnel entitled holiday entitlement and accordingly the Company agrees to indemnify' Sky.

Warranties

36. Clause 4 contains the terms of the warranties to be provided by SLB, which reflect the professional protocol compliant with broadcasting standards, such as:

> '4.1 the Services will be rendered to the best of the Company's and the Personnel's abilities and all directions and requests given by Sky or its nominees will be complied with;
>
> 4.2 neither the Company nor the Personnel … will enter into any arrangement or take any action which might inhibit or restrict the exercise by Sky of its rights or the performance by the Company of its obligations pursuant to this Agreement;
>
> 4.3 the products of the Services shall not contain anything which is defamatory, obscene, discriminatory … shall not infringe any rights of copyright, moral rights or rights of privacy of any person or legal entity;
>
> 4.4 the Fee or Daily Rate includes an amount in respect of equitable remuneration under the Copyright Designs and Patents Act 1988 and all regulations and all amendments thereto from time to time;
>
> 4.5 each of the Company and the Personnel and the former Personnel will at its own expense and at Sky's request do all further acts (including execution of documents) as Sky may reasonably required in order to protect, perfect or enforce any of the rights granted to Sky under this Agreement;
>
> […]
>
> 4.7 each of the Company and the Personnel will keep Sky informed of its or their addresses, telephone numbers and other contact details to enable Sky to contact all parties including at short notice if required; …'

Termination

37. Clause 5 sets out the circumstances for termination of the contract, which include:

> '(a) the Company is unable to provide the Services for a period in excess of 4 weeks by reason of ill health, mental or physical incapacity of the Personnel or other cause or by reason of the facial or physical appearance or voice of the Personnel becoming altered in any way so as, in Sky's reasonable opinion, to affect his performance of the services under this Agreement and the Company is unable to provide a substitute to Sky;
>
> (b) the Company becomes … insolvent …
>
> (c) the Company materially breaches this Agreement; [and fails to remedy such breach within 7 days];
>
> (d) production and/or transmission of any of the sports programmes broadcast by Sky in respect of which the Services are to be provided are prevented, interrupted or delayed for a period in excess of one month by any

cause outside Sky's control and/or Sky ceases to hold the broadcasting rights in respect of such sports; and

(e) the Personnel is guilty or is alleged in any public media to be guilty of any serious or persistent misconduct, …or is convicted of a criminal offence or brings himself, [or Sky] into disrepute.'

38. Clause 6 provides for the obligations upon termination of the Agreement, including the delivery by the Company to Sky of all papers and reports and data and so on received from Sky or any third party associated with Sky in the course of the engagement of the Personnel.

Confidential information/ and Non-solicitation

39. Clause 7 provides for the protocol governing the handling of confidential information that the Company may come into possession during the term of the contract.

40. Clause 8 for non-solicitation within the framework agreement is expanded significantly under the Schedule of NDA, and clause 8 provides as follows:

'The Company agrees it will not, and undertakes to procure that the Personnel … will not, during the continuance of this Agreement and for the period of twelve (12) calendar months thereafter, solicit, for employment or otherwise, any employees, consultants, directors or officers of Sky or any Associated Company who are of a senior level or with whom the Company or any of the Personnel … had material contact in the course of providing the Services or who are aware of Confidential Information.'

Status and tax liabilities

41. Clause 9.1 states the parties' intentions as regards the tax status of the Personnel:

'… the parties declare that, during the continuance of the Agreement, each of the Personnel shall be an employee or sub-contractor of the Company … and shall not be an employee, worker, agent, partner or joint venturer of Sky … Accordingly, the Company and/or any sub-contractor shall be solely responsible for all matters relating to the Personnel's employment /engagement …'

Intellectual property

42. Clause 10 states that 'the Company agrees and will procure that the Personnel agrees to':

(a) assign to Sky 'with the full title guarantee by way of a present assignment of future copyright, the entire copyright, related rights and all other intellectual property rights';

(b) irrevocably and unconditionally waive all moral rights throughout the world in, and to, the products of the Services;

(c) grant to Sky consent under the Copyright Designs and Patents Act 1988 to enable Sky to make the fullest use of the Services provided under the Agreement;

(d) warrant not to infringe on copyright and other intellectual property rights in the course of the provision of Services;

(e) grant to Sky 'the right to use and reproduce photographs, reproductions of the Personnel's physical likeness and recordings of their voice(s) and name, signature and biography exclusively for and in connection with the advertising, merchandising, exhibition and commercial exploitation' of Sky programmes and/or services in such manner and media for such purposes as Sky may require throughout the world'.

Schedule of Non-Disclosure Agreement

43. The Schedule of Non-Disclosure Agreement formed part of the framework agreement. The parties to the NDA were Sky and Mr Barnes, and the NDA replicates the relevant key provisions under the framework agreement such as the non-disclosure of confidential information, the consent, assignation, and grant of rights (copyright and intellectual property) to Sky for 'the commercial exploitation of the services in such manner and media and for such purposes as Sky may require throughout the world'.

44. The 'non-solicitation' clause 8 in the Contract is expanded to encompass 'non-compete' provisions under paragraph 4.2 of the NDA.

> 'I acknowledge and agree that I have a reputation in the market place as an expert and command audience share. I further acknowledge that during the Term *I will have become associated in the minds of the public with Sky Sports* and will gain knowledge of the Sky Sports methodology and unique practice and that should I cease to provide the Services during the Assignment that will damage Sky Sports' commercial interest, I therefore agree that should I cease to provide the Services (other than at Sky's request) during the Assignment, I will not until the end of the Term to be involved *directly or indirectly in the provision of any services to any other television and/or radio organisation, and/or media organisations during the period of Assignment for exploitation inside or outside the Territory where such services are the same as or similar to the Services*, *without the prior written consent of the Head of Sky Sports*, *such consent not to be unreasonably withheld*. This clause 4.2 is not intended to limit me from providing my services to any other entity that is not a provider or distributor of television and/or radio services, *provided that such services do not interfere with the provision of the Services as determined by Sky*. I agree that Sky would be entitled to injunctive relief to enforce the terms of clause 4.2 and acknowledge that damages would not be an adequate remedy.' (Italics and underlining added)

Sky's response to questionnaire

45. As part of the IR35 enquiry into the appellant company, Sky was sent a questionnaire by HMRC. No issue was raised as regards the truth and fairness of Sky's responses, of which the following are relevant to substantive issue in this appeal.

(1) *Whether editorial guidelines made available?* – No formal Editorial Guidelines document is provided by Sky Sports to commentators and the services are unscripted by Sky. Stuart Barnes is a former professional sportsman and a sports writer for a national newspaper and therefore little need for Sky Sports to provide detailed guidance on how to deliver engaging sports comment.

(2) *Whether subject to Editorial Guidelines/Sky Standards/ working practices?*

(a) Commentators are expected to have an awareness of the legal framework in which Sky and all broadcasters have to operate for live TV.

(b) Sky Sports commentators are expected to project their own individual styles whilst ensuring journalistic standards and regulatory requirements are met.

(3) *Substitution* – the production team will draw up a schedule of sports events at the beginning of and on an ongoing basis during the season and schedule from a roster of commentators in advance. Where a particular commentator was unavailable to attend a particular event Sky would typically redirect the request to an alternative commentator. Sky would always the commentator directly.

(4) *Who has the final say as to what topics will be covered?* – The producer taking into consideration the views of talent. This is a collaborative process relying on the deep expert knowledge of the commentator/pundit.

(5) *What discretion do the commentators/pundits have to deviate from this?* – In the context of a live sport event the commentator has a significant degree of latitude to respond to the live event as it unfolds, as appropriate. A pundit would respond to the flow of a conversation.

(6) *Whether a running order/ outline script provided by producer to enable commentator/presenter to put their own words?* – An example running order is provided for reference, which is very high level and provides information on timings, and some very high-level prompts to assist with the structure of a broadcast for the benefit of the production team and commentators/pundits. In cross-examination, Mr Barnes stated that the outline scripting was done by Gus Williamson, and the pre-script timing was especially important for international games; and that the 'pre-match' is scripted; but post-match is a 'free flow as to what has happened'.

(7) *How do they know when to move on to a different topic or when there is advertisement break coming up?*

(a) The content of commentary is the commentator/pundit's input. This is typically allowed to flow with minimal creative input from the Sky Sports production team.

(b) As the commentators/pundits are working in live TV situations, there has to be a sequence of events which the production teams have a requirement to be responsible for, so to ensure continuous coverage of a programme as well as informing the commentators/ pundits of timing sequence, such as for a scheduled break. (Mr Barnes confirmed that the producer will count in and count out for scheduled breaks and advertisers' time; the count-down is very important for timing control.)

(c) The commentator/pundit may be able to continue with a particular strand of content for longer than the production team had proposed if they felt that this was appropriate to the content or the natural flow of a discussion.

(d) However, this would be limited by the programme structure and timings, of which the individual would be aware of.

(e) For obvious practical reasons, a commentator/pundit could not initiate a totally new strand of content without the production team facilitating this, if visuals were required due to technical requirements of putting relevant images on the screen or ensuring other content was relevant to what the commentator was saying.

(f) In extreme circumstances of a commentator/pundit breaching an instruction, which might bring Sky Sports into disrepute, the producer could take them off air, though this is extremely unlikely. In reality, it is more likely that the producer might instruct a presenter to redirect the course of the discussion.

(8) *What happens if a commentator/pundit behaves in a manner which contradicts OFCOM regulations?*

(a) Sky's Broadcasting activities and the conduct of people who appear on Sky's channels are subject to the OFCOM regulations.

(b) There are no formal guidelines provided by Sky Sports to commentators/pundits on this but it is expected that they would understand appropriate conduct in the live TV environment.

(c) Sky reserves the right to charge any financial loss imposed by OFCOM on Sky Sports where the worker behaves in manner which contradict the regulations.

Contrasting with Miles Harrison

46. Sky was specifically asked to comment on the work arrangements of Miles Harrison in contrast to Mr Barnes. The question and response are as follows:

> '[Q]: [HMRC] understand Miles Harrison is usually Stuart Barnes' co-commentator. Please tell [HMRC] the differences between Sky's working arrangements with Stuart Barnes and Miles Harrison, in particular when they are commenting on the same live game?
>
> [A]: The working arrangements are similar but Miles and Stuart carry out different roles. Miles is a "lead commentator" who describes the action onscreen; the "who" and the "what". Stuart's role is to analyse the "how" and the "why" and provide the context of the action.'

SLB's response to HMRC's queries

47. By letter dated 23 January 2018, Mr Barns' tax agent (as Abbey Tax at the time) replied to a set of specific questions from HMRC by letter dated 19 January 2018. Abbey Tax's replies are not challenged by HMRC; ('**SB**' below stands for Stuart Barnes, '**MH**' for Miles Harrison).

(1) *Whether SLB can alter or decline any fixtures other than making suggestions when double header weekends are concerned* – On a double-header weekends, SB has the say as to which games he commentates on.

(a) For the weekend 13/14 (January 2018), SB decided to cover two games in Ireland while his regular commentary partner and Sky employee, MH stayed in England for both games.

(b) For the weekend 20/21 (January 2018), Sky's plan was for SB and MH to broadcast together from West Wales and Leicester, but due to SB's change of mind, MH remained the broadcaster as agreed in Leicester and SB switched to La Rochelle v Harlequins because SB considered it to be the more interesting game.

(2) *If a particular fixture cannot be covered, who at Sky would SLB take this issue up with* – Gus Williamson.

(3) *Whether any repercussions for SLB for not covering a particular fixture* – SB is not aware of any, although if SB were to cancel a number of fixtures, then SLB may run the risk of possibly being considered in breach of contract by Sky.

(4) *Provide details of any requests declined* – Sky Sports News might want SB as a studio guest but if he is committed elsewhere (say to newspaper work) he would refuse the request, or for personal reasons like taking a day off. An example – SB was supposed to work in Wales on 23 and Scotland on 30 December 2017; SB agreed to switch to a game in Edinburgh on 23rd when the game in Wales was cancelled, on condition that he would cover a match in Wales on 30th. Due to 'a managerial mix up', SB was asked to cover the game in Glasgow on 30 December. SB declined; and had the weekend off.

(5) *Details on how a column request is initiated* – the Monday column is entirely SB's decision, from the day of the column, through to the style and deadline. SB writes on whatever that interests him, and the column takes no more than an hour to write.

(6) *In depth overview of match days* – SB is involved in programme discussions when relevant but primarily he prepares his commentary; 'any editorial issues that emanate from [SB's] mouth are his own responsibility'; SB free to leave when he puts the microphone down.

(7) *Scope of work for Sky* – broadcasting, preparation, columns, and any studio work; hard to define the total number of days as research and preparation are part and parcel of television, newspapers and any other writings to which SB commits himself; the estimate is that about 90-110 days on work for Sky, and a little more for his newspaper columns.

Work Engagements in the Relevant Period

48. During the relevant period, Mr Barnes' main engagements were: (i) the Times, (ii) the Sunday Times, and (iii) Sky. However, if a major event occurred, such as the 2015 World Cup, Mr Barnes said he would 'reassess the priorities of the company', and this reassessment had led to engagements outside the framework agreement with Sky.

Major games fitted around core priorities

49. Mr Barnes' service was engaged by non-Sky broadcasters to cover the World Cup: (a) Ireland's TV3 in 2015, and (b) Fox Sports, Australia in 2019 (though the tournament took place after the relevant period). The 2015 World Cup tournament was in England, and the 2019 tournament was in Japan, but Mr Barnes was covering for Fox News from Australia.

50. Apart from working for non-Sky broadcasters to cover high-profile tournaments over which Sky did not have broadcasting rights, Mr Barnes' way of fitting his commitments with other media organisations can be illustrated by the following examples.

(1) While covering for the World Cup in 2015 and 2019, Mr Barnes would do some Sky Sports News work live from the stadiums, which he said was 'very much [his] fourth priority'. (Sky Sports News is part of the Sky organisation but separate from Sky Sports.)

(2) At every Six Nations game, Mr Barnes' time would be '100% on newspaper commitments', as it would include attending every game in order to write his columns. It was a long-standing understanding between Sky and SLB/Mr Barnes would be focused on the Six Nations Championship newspaper coverage, and that understanding was not just during the relevant period.

(3) Mr Barnes said that Sky understood that it is good to Sky Sports to have a lead broadcaster's face over the back pages of the sports section by attending the major match events, instead of 'commentating to a tiny audience in somewhere like Coventry' being broadcast by Sky Sports.

(4) Around the time of leading tournaments, Mr Barnes said he would more likely to be seen chairing a *Times/Sunday Times Readers Plus* night in London or Dublin, than be a TV presenter for Sky Sports on the tournaments.

Illustration of work pattern

Pre-match

51. Mr Barnes illustrates the manner he would fit in his newspaper commitments with his role as a commentator for Sky Sports using the match on Saturday 10 November 2018 in Twickenham: England v New Zealand in International Rugby Union.

(1) Preparation for coverage of the game began in the previous week of the match date.

(2) On Monday, 5 November, Barnes wrote his 'regular column' for Sky, which served to set out some of the key themes from the week just passed, and look forward to the week coming.

(3) The 'regular column' was an online post on Sky, to brief readers of the rugby union games covered in the week gone by and in the future weeks. Barnes said it was 'an avenue to maximise [his] online presence on Sky'.

(4) On Tuesday, 6 November, Barnes travelled to the England team camp, and would be in vision on a couple of occasions for Sky Sports News.

(5) Wednesday, 7 November, was the 'research / analysis day' for the game, which entailed 'endless hours scrutinising previous games' involving the upcoming weekend's participants in the scheduled game. Mr Barnes distinguished his research and analysis undertaken being different from the research material provided by Sky, which was of a factual nature, such as how many games since X has beaten Y; how many caps a certain player has won. These facts would be more central to Mr Barnes' co-commentator, Miles Harrison, who would explain the 'who' and 'what' of a game, while Mr Barnes' coverage would be on the 'how' and 'why' of a game, although he would need to be aware of factual details too. The research preparation required Mr Barnes to 'delve deeper' by spending hours 'scrutinising previous games' involving players in the upcoming game, in order 'to find something only someone who has played and performed at the highest levels for 35 years can see', which may be 'the nature of decoy runs', or 'something nefarious the referees have not picked up on'.

(6) Thursday would be the writing day, when Mr Barnes penned his Friday column for the Times. The working hours would 'inevitably weave their way' into the column material in like manner as the thinking associated with the columns writing would end up pat of match commentary.

(7) On the day of the match, Saturday, Mr Barnes would arrive in the Sky TV Compound some three hours before kick-off to allow for the following to happen.

(a) To liaise with the assistant producers in charge of the replays; having been Sky's senior co-commentator for 25 years, Barnes said he was 'invariably more experienced than most of the crew and replays have a direct correlation with [his] specific task of explaining the "why" and "how" of a rugby game'.

(b) To check commentary with Miles Harrison, and rehearse the 'only scripted section' of their respective roles from 'throwing' to the commentators to kick off. Mr Barnes' job was to speak for 30 seconds immediately after the teams emerge from the tunnel; he would rehearse once in a complete run through and then reread/write as he felt necessary nearer air-time.

(c) Another aspect of Mr Barnes' pre-match preparation was to pick a player from each side, and speak for 30 seconds or so on each of the chosen players, and what each can give to his team, and why he can do so.

(d) Mr Barnes emphasised that the contents of these parts of the programme were entirely his decision as 'the rugby expert in commentary', while the director and producer would be informed of his themes 24 hours before the match.

(e) Occasionally, the producer might inform Barnes that one or both of his choice players had been heavily discussed earlier in the show. Barnes would then come up with a different choice, but it had to be his choice because it was part of the process of him 'editorialising the match'.

During the match

52. The kick off time for a game fixture is normally at 3pm and finishes at 5pm. In relation to the live commentary during the match itself, Mr Barnes stated that:

(1) 'There are no limits other than the professional ones all of people within broadcasting understand. I converse predominantly with an audience but will talk to assistant producers and directors to discuss the quality of our output. The producer might have a few "pointers". I can use them but again, predominantly, they are taken up by Miles who gets the viewer from start to finish.'

(2) His role (unlike Mr Harrison) was to 'have the words and opinions' to explain what was happening 'along the way' during the match.

(3) The choice of 'Man of the Match' was always been Mr Barnes' as senior co-commentator/analyst.

Post-match

53. The match on 10 November 2018 finished with England (15) to New Zealand (16). The minute the whistle was blown, Mr Barnes would switch to turn his mind totally to writing his column for the Sunday Times, to be published post-match the next day. Mr Barnes would be writing his column article post-match while the production team 'de-rig all around' him. On the rare occasions if a match kicked off early enough from the perspective of newspaper deadlines, Mr Barnes would make himself available for Sky Sports in a final TV interview. Otherwise, it was unlikely that Mr Barnes would appear on air again after the whistle blow, and Sky understood his post-match priority was The Sunday Times column, which is about 800 to 1,000 words in length.

The Sunday Times column

54. Mr Barnes' article for the Sunday Times on 11 November 2018 is appended to his statement, along with two other columnists commenting on the match, and the headline for each column is as follows:

(1) Stephen Jones: *England were subject to 'Total Injustice'*, referring to the decision 'not to allow what would have been the winning try by Sam Underhill' as a 'travesty'.

(2) Stuart Barnes: *'Two masters of fly-half's art'*; sub-title 'Compelling tussle shows Farrell and Barrett have great deal in common', and the photograph inserted in the column has the caption: 'Flying start: Chris Ashton eludes Damian McKenzie to touch down after two minutes'. The first two paragraphs read as follows:

> 'Two of the finest fly-halves in the world produced an outstanding pair of performances as England were edged out by New Zealand nous.
>
> We came to Twickenham preparing to debate the contrasting qualities of the England co-captain, Owen Farrell, and the world's magical realist of a fly-half, Beauden Barrett. We left with an understanding that the two men had so much more in common than elements of the game that divide them.

(3) Owen Slot: *Rely on the boot' was a good call by Barrett*, with a photograph of Barret (New Zealand team) and a caption 'rare dropped goal proved crucial'.

55. Stephen Jones' column also contains 6 choice photographs (set to the left side of the page), and includes the match statistics and player ratings of New Zealand (set below the three columns). Mr Barnes's column occupies the top right-hand corner of the page, and is about 800 words in length, and appears above Owen Slot's article. Both Barnes and Owen have their photographs against their names in their columns, with 'Twickenham' printed under the photographs to denote their presence at the match Own Slot's column is signed off as 'chief rugby correspondent of The Times'.

56. Speaking of the interaction between the content of his column in the Times, which had appeared on Friday, and the post-match column for the Sunday Times, Mr Barnes said that when he visited the England team camp on Tuesday, he was essentially 'finding out all that [he] can which is relevant to [him] as a writer, journalist, rugby expert'. Much of what he heard during the visit to the England team would make its way to the match commentary; his Friday newspaper column would have already 'mined' what he regarded as 'the day's key themes'. What the England's manager wanted from the game would be the conclusion of his live commentary during the match, and an element of his Sunday Times column.

The Times/Sunday Times Columns

57. In all, 31 column articles were published by Mr Barnes to cover for the 2015 World Cup tournament, hosted by England. Mr Barnes did no Saturday fixtures at all for Sky Sports during the World Cup season. The tournament took place from 18 September to 31 October 2015 in which 20 countries competed.

(1) The Times, Friday 11 September 2015, headline *Anything other than place in the final is a failure for England*, as 'Commentary' on the 'possible paths to glory' for England in the 2015 World Cup.

(2) The Times column noted above appears in the top half of the newspaper page under the column heading of *Rugby union Sport*, with the bottom half being taken up by an advertisement by Sky Sports, as *The Home of the Barclays Premier League*.

(3) The Times Monday 14 September 2015, Mr Barnes' 'Commentary' with the headline *'Instinct, not brains, sets New Zealand apart from the rest*' appears alongside two other articles by Owen Slot and Alex Lowe respectively.

(4) The Times, Thursday 17 September 2015, featured an analytical coverage under the headline '*Stuart Barnes picks ten games you must not miss*'.

(5) The Times, Friday 18 September 2015, the Commentary has as its headline '*Bouns-point chase must defer to the pursuit of excellence tonight*', and appears alongside an article by Alex Lowe on the upcoming game England v Fiji.

(6) The Sunday Times, 20 September 2015, Mr Barnes column features on a double page cover with two other columnists (Stephen Jones and Tom Shanklin), and its column's headline is: '*Lancaster must resist wholesale changes*' with the subtitle, 'His replacements made a compelling case but evolution, not revolution, is required'. (Stuart Lancaster was the head coach of England team at the 2015 World Cup.)

(7) The Times, Monday 21 September 2015, Mr Barnes' column appears on a double page along the main article on the game New Zealand v Argentina (26-16) with the column headline as '*Argentina's breakdown gamble fails in the execution not strategy*'.

(8) The Times, Wednesday 23 September 2015, Mr Barnes' commentary focuses on a player (Japan) in the forthcoming match Scotland v Japan, with the headline '*Pocket rocket Tanaka prepares to launch another fast show*'.

(9) The Times, Thursday 24 September 2015, Mr Barnes' commentary analyses the outcome of the Scotland v Japan (45-10) match with the headline '*Defeat does not mean the sun has set on Japan*'.

(10) The Sunday Times, 27 September 2015, Barnes at Twickenham writing on England v Wales (25-28) with the headline '*Farrell could have guaranteed draw but naïve decision-making proved costly*'.

(11) The Times, Monday 28 September 2015, the column focuses on England, headline '*Robshaw has reached end of the line with England*', and the caption against Mr Barnes' photograph: 'Stuart Barnes says that errant captain must be offered no hiding place after decision that will live long in the memory for its crass ineptitude.'

(12) The Times, Wednesday 30 September 2015, the column focuses on two players (Australia) with the headline '*"Pooper" will expose England's abject weakness at breakdown*' – 'Pooper' being a reference to the players Hooper and David Pocock, who together provided the breakdown expertise behind Australia's recent improvement.

58. Towards the end of the tournament, the Times on Saturday 31 October 2015 charted the highlights by asking 7 commentators to give their views on the World Cup under several headings: (a) 'Describe the World Cup in five words' (Barnes' '*Rugby's long-awaited quantum leap*'); (b) 'The player of the tournament' (David Pocock of Australia got Mr Barnes' vote, as well as four other columnists': Ben Kay, Gareth Thomas, Eddie O'Sullivan, Own Slot); (c) the breakthrough star; (d) the best match; (e) the outstanding try; (f) best tactical innovation; (g) Was the refereeing up to scratch? (h) favourite memory; (i) what would you change for 2019?

59. The Final Match at Twickenham Stadium saw New Zealand winning the cup by beating Australia (34-17). The last article on the 2015 World Cup was published in the Times, Monday 2 November 2015. The sub-heading gives the essence of the content: 'As the dust settles on a dramatic World Cup, Stuart Barnes gives his verdict on how each side shaped up'. The 20 national teams that had competed in the tournament are ranked in order and categorised into: (a) *The achievers*, (b) *In between success and failure*, and (c) *The Underachievers*, with the headline to the article being: 'And the worst team of all was – France'.

The Sunday Times column

60. Five articles in the Sunday Times between 4 June 2017 to 9 July 2017, when the British & Irish Lions toured New Zealand, are exhibited as Appendix 4 to Mr Barnes' statement.

(1) The first exhibit (date not discernible) contains two articles by Mr Barnes and takes the whole page of the broad sheet, (apart from an advertisement of the insurance company which sponsored the British & Irish Lions 2017). One article was written from Toll stadium in Whangarei after a match in which England won, but the headline 'Panic Stations' was contrary to the winning result, and the sub-heading carries the assessment: 'Lions need to wake up after sleepwalking to victory against a side of semi-professionals'. The other article is a prognosis of the Lions' prospect: 'All the talk of this being the best Lions side since the 1971 Lions seems like the same old blind faith. The possibility of a 2005 repeat looms.'

(2) The second exhibit, 11 June 2017, features three columns, wherein Barnes opined that 'Scrum-half's brilliant kicking and all-around intelligence give Lions cause for optimism'; the other two columns are by Stephen Jones and Lawrence Dallaglio.

(3) The third exhibit, 18 June 2017, features Barnes along with 5 other pundits to 'pick their Lions Test Squad', and Barnes' column focuses on a player as 'the unlikely Lion now crucial to Gatland's team' (Warren Gatland was head coach of the Lions 2017).

(4) The fourth exhibit, 25 June 2017, on the match New Zealand v British & Irish Lions (30-15) with Barnes' column focusing on the New Zealand player with the headline: 'Barret reins in attacking instinct and shows why he will be an All Blacks great'.

(5) The fifth exhibit. 9 July 2017, another match between New Zealand and the Lions (15-15) with Barnes' column commenting on Barret's performance as 'Misfiring Barrett let Lions off the book by failing to land kicks'.

Proportion of income from Sky

61. In terms of his income profile on a yearly basis, Mr Barnes provided a summary of income received by S&L Barnes Ltd for the services he rendered to different contractors for the 12 years from the year 2009-2010 to 2020-21.

62. During the relevant period, the income received by SLB from Sky as a percentage of its overall income in the year ranged from 57.3% to 61.5%, and then dropped in 2019-20 to 33.4% when Sky Sports significantly reduced its coverage of rugby union matches.

63. A similar pattern obtains for the years before the relevant period.

(1) In 2009-2010, income from Sky was £195,000, representing 54.34% of the total income of £358,846, the balance of 45.66% income all related to written work, being: (i) £155,000 from The Times/Sunday Times, (ii) £2,500 from Rugby World magazine columns, (iii) £1,615 from Programme Publication Limited ('**PPL**') for commissioned work for England International match programmes, and Lions programme and Sky magazines.

(2) From 2010-11 to 2012-13, the income from Sky was £205,000, £215,000, and £225,000, and represented 54%, 56% and 58% of the annual total income respective to the three years.

64. For the transition year 2019-2020 when Mr Barnes (via SLB) was on a 3-month contract with Sky, the income from Sky represented 33.4% as the last column in the tabulated figures. In 2020-21, the total income received by SLB was £104,800, with £100,000 from the Times/Sunday Times, £3,000 for written work for travel and hospitality businesses and £1,800 for Rugby World columns. There was no income from Sky after the termination of contract.

65. The breakdown of the total turnover in the relevant period and the year of termination of the contract with Sky is summarised as follows.

Description	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
PPL Programmes / others[2]		350				500	143
Rugby World Columns	3,600	2,500	2,600	3,500		3,130	3,520
Voiceover Video Games		5,500	6,000	1,511	3,027		

[2] PPL commissioned works were in 2014-15 and 2018-19 in relation to programmes for international tournaments, and others include a South African publisher in 2019-20.

Rugby World Cup (non-Sky global broadcaster)			20,990				4,661
Public Appearance			2,500				
European Rugby ('Player of the Season' selection)	2,000		3,000				
Advance for 'Sketches from Memory' by Barnes						2,550	
Written work for travel and hospitality businesses							8,000
Sky Contract	235,000	245,000	255,000	265,000	265,000	265,000	88,334
Times/Sunday Times	145,000	145,000	155,000	165,000	165,000	165,000	160,000
Year Total	£385,600	£398,350	£445,090	£435,011	£433,027	£436,180	£264,658
Percentage from Sky	60.9%	61.5%	57.3%	60.9%	61.2%	60.7%	33.4%

Mr Barnes' oral evidence

Sky's production team

66. Sky had long been a major provider of rugby league events, and when Sky extended its coverage to rugby union, Mr Barnes became Sky's first presenter on rugby union in 1994. The personnel in Sky Sports for rugby union included:

(1) Barney Francis: Head of Sports, responsible for the negotiation of Mr Barnes' contract with Sky, but otherwise little interaction with Mr Barnes' work.

(2) Gus Williamson, Head of Rugby Union of Sky Sports, was the executive producer of the internal team and made all decisions in relation to Sky's coverage of rugby union.

(3) James Lewis was one of the producers in charge of stadium fixtures and later became the executive producer around 2019 when Mr Williamson left, and was in charge of putting together fixtures.

(4) George Griffiths, production manager of Sky, was in charge of matters such as equipment, catering, transport, in relation to the programme production.

(5) Any matters arising in relation to Mr Barnes' work would be directed to Williamson, Lewis, or Griffiths, but predominantly Williamson.

Nuanced distinctions in roles

67. The nuanced distinctions in the various roles fulfilled by Mr Barnes in relation to the services rendered to Sky are discernible from his oral evidence and summarised as follows.

(1) Between 2013 and 2019, Mr Barnes' role in Sky Sports was that of a co-commentator, which is to be distinguished from that of the main commentator. In Sky Sports, Miles Harrison was the main commentator often teamed with Mr Barnes as the co-commentator.

(2) The commentary work of the main presenter is different from the 'punditry service' of the co-commentator, the latter being that of an 'expert analyst', a 'second voice'.

(3) The lead presenter/commentator would take the audience through the live play of a match, while the co-commentator would focus on the 'finest moments' of the match in between the live play.

(4) As such, Mr Barnes would need to liaise with the technical team to co-ordinate any replays to align with his commentary of the finest moments.

(5) As a journalist, Mr Barnes is an 'interviewer' of the players/coaches as part of his research, while with Sky Sports News, he was being 'interviewed' for his opinion or a response, whether it was post-match in a stadium, or when the TV crew came to his home to film him for comment on a news event in relation to rugby union.

68. For any game he was to comment on air, he would need to send in an editorial note to Sky of the areas he would be commenting on 24 hours before the match. For the 30 seconds of pre-match commentary, it would be about 90 words, and he would 'chisel' 45 words on one person and 45 words on another; and 45 words assessing what might 'technically happen'. If Mr Barnes' choice of players to comment on clashed with another commentator's, then he would choose a different player.

Interweaving Sky and non-Sky work

69. The 'ad hoc' contractual basis as and when required up to 228 days per annum was to include all works undertaken for Sky.

(1) During the relevant period, apart from being the co-commentator at game fixtures, Mr Barnes also did the following for Sky:

(a) A 'Monday Column' for 'Sky Magazine' in relation to forthcoming rugby games, which took Mr Barnes normally an hour to write, and the column appeared digitally on Sky Sports Online;

(b) A mid-week programme called 'The Rugby Club' for Sky Sports, which was to give his expert analysis of upcoming matches;

(c) As a podcaster, he had only done a couple for Sky Podcast.

(2) Mr Barnes stated that the number of days working for Sky would be difficult to categorise, as his preparation, broadcasting, column writing, and studio work all rolled into one; what he was doing at the stadium for Sky may become part of the newspaper column. There was no way to demarcate the exact number of days when Mr Barnes was working exclusively on Sky-related productions.

(3) In terms of the number of days working in front of a camera for Sky Sports or News, Mr Barnes said it would be about 90 to 120 days, and nowhere near the 228 days.

(4) When Sky did not have the broadcasting rights for major game events in rugby union, such as the Six Nations tournament for the northern hemisphere, Mr Barnes would be focussing on his newspaper columns to cover the Six Nations tournament, and not be appearing in any Sky Sports game fixtures.

(5) Sky Sports News might still call on Mr Barnes to comment on games not covered by Sky Sports. Pre-match interviews by Sky would be offered wherever the match was.

The rugby season work pattern

70. Mr Barnes' work pattern through the rugby season is not clearly set out, in part because Sky's broadcasting rights of rugby union games during the relevant period are not clearly set out. From written and oral evidence, and obtainable primary facts, my inferences are as follows:

(1) The Saturday club fixtures run from September to end of June the year following, which Sky has covered since 1994 and continued beyond 2019.

(2) The Saturday fixtures of club rugby have been the main element of Sky's coverage ever since 1994, when Mr Barnes became its first presenter for Sky Sports. These are the six or eight second division matches offered by Mr Lewis in 2019 on a daily fee, which Mr Barnes declined.

(3) The 'International throughout November' as stated by Mr Barnes would include the match England v New Zealand match on 10 November 2018 used as an illustration by Mr Barnes. During the International, the audience was around 80,000 strong.

(4) Mr Barnes also referred to the 'European Cup' as the 'biggest cup tournament' Sky had the rights to broadcast from 2015-16 but lost the rights to BT Sports in 2019. It was at times confusing for me whether the 'International' and the 'European Cup' were two different tournaments. From the circumstantial facts surrounding the change of broadcasting rights, I infer that the 'International' and the 'European Cup' being referred to in evidence meant the same tournament, viz. the 'Rugby European International Championship', which has undergone several changes in the structure of the tournament, along with changes in the title of the tournament.

(5) The broadcasting rights for the International would seem to be secured by Sky to begin in July 2015, and for 5 years to end in June 2019. It was in part the expiry of these broadcasting rights that brought an end to Mr Barnes' association with Sky. The five-year deal gave Sky broadcasting rights to cover rugby union in England at all levels, including England's autumn Internationals from Twickenham, Internationals before the Rugby World Cup in 2015 and 2019, and the annual England spring fixture.

71. It would be in relation to these game events that the production team would be drawing up a schedule from a roster of commentators in advance. Mr Barnes said if he declined an offer to comment on a game for Sky, a different commentator would be asked; 'Sky always had enough commentators to cover the matches', he said. It is clear from Mr Barnes' evidence that his priority was to be at the major games (including those not covered by Sky) for his newspaper columns, and the main events Mr Barnes would surely cover even though Sky had no broadcasting rights were the Six Nations, the World Cup, and possibly also the British & Irish Lions (such as the 2017 Lions in New Zealand related earlier).

The Six-Nations Championship

72. The Six Nations (England, Wales, Ireland, Scotland, France and Italy) and the season runs for 6 to 8 weeks from February to end of March (BBC and ITV for a period time were the broadcasters), and primarily a Saturday (sometimes Sunday) event. Mr Barnes would attend each match from the Press Box wherever the game took place, and would not normally appear for Sky Sports during the Six-Nations championship, with the exceptions being:

(1) If Sky wanted him to cover a match in England was on a Friday, and the venue was near to where he could get to on the Friday.

(2) On one occasion, Sky wanted Mr Barnes to cover a Friday match during the Six-Nations season, but Mr Barnes wanted to travel to Paris on the Friday to cover the match in Paris on Saturday. Sky found a different commentator for the Friday match.

(3) If England v Italy took place in England on a Sunday, then it would be possible to appear for Sky on a Friday, but if the match was in Rome, then no appearance for Sky.

73. During the Six Nations season, Mr Barnes would broadcast for Sky Sports News pre-match if required as long as it did not impinge on his writing priorities.

The World Cup

74. The World Cup takes place once every four years over 6 to 8 weeks in September and October. ITV has been the broadcaster in the UK and Northern Ireland. Sky did not have rights, and ever since he started with Sky in 1994, Mr Barnes' priority during the World Cup season had always been to cover for his newspaper columns.

75. Concurrent with the time he worked on Sky Sports, Mr Barnes had also covered the Rugby Union World Cup for different broadcasting corporations, as marked by an asterisk.

(1) 1995 – in South Africa, working for the Daily Telegraph;

(2) 1999 – in England & Wales, worked for the Daily Telegraph, and commentary work for Sky Sports as long as match days did not clash;

(3) 2003 – in Australia, worked exclusively for the Daily Telegraph;

(4) *2007 – in France, worked for ITV as the lead commentator, commenting on all the big games, including the final; ITV paid £40,000 for six weeks of work; and Mr Barnes did interviews for Sky Sports when he could.

(5) *2011 – in New Zealand, covered for Sky New Zealand ('**Sky NZ**') in the Studio primarily as an expert/pundit from the Northern Hemisphere and was asked all the questions about the European teams; he was on air only for two matches for Sky NZ as a commentator (Fee received £20,990). Mr Barnes emphasised that the primary reason for his presence in New Zealand was to cover for the Times/ Sunday Times.

(6) *2015 – in England, covered for Ireland's TV3 as a co-commentator, for all the big games including the final; if Sky Sports wanted an interview of a match in the tournament, it was 'completely at my control', said Mr Barnes.

(7) *2019 – in Japan, where the tournament was, although Mr Barnes was in Australia (where he has family) covering for Fox Sports as the lead pundit.

76. As the 2015 World Cup was the only tournament that fell within the relevant period, Mr Barnes was questioned more extensively on his work pattern in 2015. He said that TV3 Ireland had its own main local Irish commentator, but Mr Barnes was engaged to be 'the expert voice in Ireland' to cover the broadcast of the World Cup because of his expert knowledge of the players from the northern hemisphere, from England primarily.

77. Apart from covering for TV3 Ireland, Mr Barnes was writing his columns for the Times (2 occasionally 4 articles a week), and the Sunday Times (2 articles per week). The writing schedule was Monday, Tuesday /or Wednesday, followed by Friday, Saturday /or Sunday.

Independence/Control vis-à-vis Sky

78. Mr Barnes' various replies to questions put to him, not necessarily directly related to whether he was dependent on Sky, but relevant to my consideration, are as follows:

(1) Regarding 'exclusive exploitation' (clause 2.1) – 'From Day One, when I joined Sky, I guaranteed myself I would have the capacity to be free to quit Sky', and Mr Barnes said that he did not really look at the clause in detail.

(2) Regarding 'without the prior written consent of the Head of Sky Sports' (c 2.1) who was Barney Francis during the relevant period, Mr Barnes stated that the understanding with Mr Francis was at all times that Mr Barnes would not broadcast for another TV channel with the same game. In other words, if it was just about TV, then it was only Sky, and only one game. Mr Francis saw newspaper columns as something quite different from TV and no request for consent required from Mr Barnes.

(3) Mr Barnes rarely did PR events for Sky, perhaps once a year, if at all.

(4) Email exchanges between Gus Williamson with the production team including Mr Barnes on 2 December 2016 were subjected to scrutiny during cross-examination. Williamson gave directions for the match England v Australia with an opening banter that finished with: 'Our final Test match of the year has a whiff of cordite about it and I could not be more excited', followed by:

> '**Timings**
> On Air 13.30
> KO 14.30 [i.e. Kick Off]
> Off Air 17.00
> Suited and booted please as normal, but please factor in the mercury has dropper a fair bit since start of the series.
>
> Attached is a Team Sheet and here is the rough plan.'

(5) The Team Sheet (for England v Australia) is a bullet point document that sets out the running order of the constituent components, and allocation of responsibility of each component to members of the production team. Mr Barnes was cross-examined on the control being exercised by the executive producer in relation to the Team Sheet.

(6) An email form Ms Charles (Production and Travel Coordinator – Rugby Union) dated 7 December 2016 was addressed to Mr Barnes only and asked:

> 'Will you be making your won way to and from Heathrow or will you need cars booked? Do let me know your travel preference for this game.
>
> You will be overnighting at the Radisson.'

(7) In relation to the 'dress code' as being a 'suited and booted operation', Mr Barnes said that simply reflects the sartorial standards for bigger games. In relation to the Team Sheet, that was simply how production of a programme needs to be run.

(8) The email was sent also to Miles Harrison, Alex Payne (main presenter for that game), both engaged by Sky Sports, and Mr Barnes pointed out that the recipients of the email included others, none of whom could be described as 'an employee' of Sky: *Michael Lynagh* (Australia), *Sir Clive Woodward* (in charge of England 2003 World Cup victory), *Jonny Wilkinson* (most famous name for winning World Cup for England with a very late score), *James Haskell* (former rugby player for England), and *Will Greenwood* (another winning player for England).

79. In relation to 'Editorial Broadcast Priorities', Mr Barnes said the executive producer Gus Williamson would talk to his team, and then it would be 'free-fall' after that, with a few voices having the final say – the experienced guiding the inexperienced, that it was a 'tight knit group' for a couple of days; the 'truck' where the production team could sit down over coffee or breakfast was the 'fulcrum to get everyone together', where Mr Barnes would talk to people doing the re-play, and sit quietly himself there to go through what he was going to say; and the team would be asked to 'listen to the commentators' or else 'the words and pictures don't meet'; Miles Harrison would say more, and Mr Barnes would 'come in on re-play'.

80. Mr Barnes stated in evidence that July was normally the month he took off, given the run of the rugby season. He was cross-examined in relation to an email 15 December 2016 from Kathryn Lundy, Senior Planner Sky Sports News on the subject of '*Sky Sports News HQ review of the year*' to Barnes (and Will Greenwood):

> 'Last year, Stuart [Barnes] came on set for us on 29 December to help us review the big rugby stories and moments of 2015.

> We'd like to do something similar again this year during the week commencing 26 December.
>
> Would one of you be available one day that week?'

81. Mr Barnes replied to Lundy that he was unavailable from 24th to 31st due to family visiting from Australia, and that was that. On another occasion, Mr Barnes was asked to cover a match on 30 December 2017 in Glasgow, and he told the team that 'I should not have been on the Roster', that he wanted some time off and should not be doing this game as he had worked on 24 December in Edinburgh; that workload was shared out between commentators and staff during the holiday period, and 'always very reasonable'.

82. SLB's response to HMRC's questionnaire gave examples of refusing Sky's requests:

(1) To attend a pre Guinness Pro 12 PR event with press and radio on 1 September (year unstated) because of a prior engagement;

(2) To broadcast Friday night matches during the week of Cheltenham Racing festival in March (year unstated);

(3) Frequently declined appearances if the event was not in the London region.

On Miles Harrison's coverage for other TV channels

83. HMRC rely on what Mr Barnes stated in evidence in relation to what Mr Barnes understood to be Miles Harrison's coverage for other TV channels during the relevant period:

(1) MH may well have covered the Rugby World Cup for ITV in 2015 and 2019;

(2) MH may well have covered the Six Nations for ITV;

(3) MH may well have covered European Cup Rugby Champions on Channel 4 from 2018 (after Sky lost the contract);

(4) MH's columns or blogs for Sky Magazine under his name (though Mr Barnes asserted that they would have been ghost written).

Mr Barnes as a brand

84. The questionnaire response refers to Mr Barnes' working week comprises watching games from the previous weekend for a day on either Tuesday and/or Wednesday. In evidence, Mr Barnes explained that he watches as many games as he can, with the sound dimmed to block out the commentary; that he will analyse 'one person' as part of the team, study the game with his background as an ex-player; that he will 'watch the bad bits that no one has talked about'; most of the time, he will try to find the weaknesses. As a commentator, he would ask himself: 'Who do I spot light? How do I say it?'

85. As regards the next World Cup in 2023, Mr Barnes' witness statement says:

> 'In two years' time, I am sure I will be a high profile media presence during the British and Lions tour of South Africa. The strategy for maintain this level of work and continued success has been primarily extremely hard work. I am sometimes known as someone who watches more rugby than any other journalist. This has always been essential to maintaining a career as an expert.'

86. In relation to SLB's income from sources other than Sky or the Times/Sunday Times:

(1) Mr Barnes has written regularly for the 'Rugby World', which is 'the biggest Rugby Magazine in the world' and the longest standing. Mr Barnes would be contacted by the editor of the Rugby World to contribute a column of 1,600 words (the limit) on a certain subject.

(2) Programme Publication Limited (PPL) commissioned Mr Barnes to write on the England team for international match programmes, the Lions programme and Sky magazines.

(3) The voice-over for video games was done at a studio in Soho, and the developer of the games is based in Canada. Mr Barnes' voice-over consists in calling out remarks along the play of the video game like: 'What a tackle!' 'A great projection/ throw-in!'

(4) In 2009-10, Mr Barnes appeared as an expert witness in the court case involving the player Andy Farrell, for which he was paid £4,731.

(5) Mr Barnes has been a high-profile representative to select the 'European Player of the Season' for the European Rugby for which he was paid £2,000 to £3,000 in 2010-11, 2013-14, and 2015-16.

87. Due to his long-standing profile in rugby, Mr Barnes has no need for an agent since David Welsh passed away in 2011. Nor does he maintain a website or Instagram to promote his work, but he has a Twitter account for followers.

88. In cross-examination, Mr Barnes was asked if he would agree that in terms of viewership, he was most associated with Sky Sports by the general public, given the longest engagement he has had was with Sky for 25 years. He disagreed, and said: 'the older viewers still remember me as a player', and that he has merged 'the jocular voice of Rugby from [his] days in Sky' with his 17 years as a columnist with Sunday Times, and that when he left Sky in 2019, it was by his own volition.

APPELLANT'S CASE

89. The appellant's case is that having regard to the facts set out in Mr Barnes' witness statement, it is clear that Mr Barnes was in business on his own account providing his expert opinion on national and international rugby as a freelance rugby commentator, expert pundit, journalist and author. It is submitted that:

(1) The fact that Mr Barnes was in business on his own account with several clients over a period of more than 25 years is clearly inconsistent with his being an employee of Sky, the Times Newspapers or anyone else.

(2) None of Mr Barnes' print or television engagements were contracts of employment, and the engagement with Sky was substantially similar to Mr Barnes' engagement with the Times Newspapers (which HMRC accept was not within IR35).

(3) After Mr Barnes' contract with Sky ended in 2019, he continued his business as a world-leading expert through engagements with the Times Newspapers and other broadcast media.

(4) Neither Sky nor the Times Newspapers 'controlled' what Mr Barnes said or wrote. Both Sky and Times Newspapers engaged Mr Barnes to be 'Stuart Barnes, the voice of rugby' and to provide his unique expertise and insight into the game, not to control what he said or wrote.

(5) Clause 4 of the contract with Sky which required Mr Barnes 'to comply with all directions and requests given by [Sky]' must be construed in light of the commercial purpose of the contract: *ICS Ltd v West Bromwich* [1998] 1 WLR 896.

(6) Mr Barnes built and managed his business in the same way and took the same financial risks as any freelancer. His success or failure depended on his 'profile' as explained in his witness statement:

> 'The global demands [for my services] are based on my extensive knowledge and professional ability to both write and articulate under periods of pressure. The key to continued success is profile. I established that with both Sky and the Times/Sunday Times. 'Profile' means being at the right games, being in print and having an active and growing social media presence (for example I have more than 19,000 followers on twitter).'

(7) Mr Barnes was not professionally or financially dependent on Sky. He worked for several television broadcasters other than Sky and for newspapers and magazines.

90. Mr Collins submits that the Court of Appeal decision in *HMRC v Atholl House Publications Ltd* [2022] EWCA Civ 501('*Atholl House*') is the authority that the first two conditions in the three-stage test set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ('*RMC*') are 'threshold conditions', and that meeting the first two conditions does not set up a presumption of employment.

91. Whether the hypothetical contract is a contract of employment depends on all circumstances of the case, and the appellant relies on two 'compelling indicators' that Mr Barnes is on business on his own account as one of the world's leading experts on rugby.

(1) The most compelling indicator is that the appellant's contract with Sky was but one part of the brand, and contributed on average 60% of the appellant's income, while over £150,000 on average would also be earned from other clients. Sky knew Barnes was in business on his own account and worked for other broadcasters; Sky welcomed that fact and wanted the world's best commentator for the coverage.

(2) The second compelling indicator is the degree of autonomy Mr Barnes had in relation to how he fulfilled his role as a commentator for Sky Sports coverage.

HMRC'S CASE

92. The respondents submit that a hypothetical between Sky and Mr Barnes during the relevant period would have been practically identical to the terms of the contract between Sky and the appellant, with some minimal variation. The hypothetical contract would have contained the following:

(1) Mr Barnes would be contractually obliged to provide his services as a commentator, presenter, interviewer, guest, or other participant, on Sky Sports, Sky Sports News, or other Sky Sports platforms.

(2) Sky would be obliged to pay Mr Barnes an agreed fee for those services (along with reasonable expense), on the basis that Mr Barnes was available to provide the services in accordance with the contract, whether or not it required Mr Barnes' services for up to 228 days per year.

(3) Mr Barnes would be personally obliged to perform the services. A substitute was always subject to Sky's approval, and already under contract with and be paid by Sky.

(4) Sky would have the contractual right to determine when and where Mr Barnes would work, what he would do (when providing his services) and how he would do it (taking into account his considerable expertise in the field).

(5) Sky would have final editorial control over the programme(s) on which Mr Barnes worked.

(6) The place of work would either be the Sky studios at Osterley or live at the grounds of any rugby match and would be determined by Sky.

(7) Sky would retain all intellectual property rights used and/or created during the provision of Mr Barnes' services.

(8) Mr Barnes' activities and interests outside the performance of his duties would be restricted to the extent that they:

(a) were the same and similar to the services provided by Sky (unless permission was given); or

(b) conflicted with the interests of Sky (including use of social media or promotion of third-party products and services), and he would have to seek permission from the Head of Sky Sports to provide similar services elsewhere.

93. HMRC's Statement of Case and Skeleton Argument follow very closely the structure and flow of argument in *Little Piece of Paradise v HMRC* [2021] UKTT 369 ('*LPP*'), which is a decision by me on the personal service company of Mr Dave Clark as a TV presenter for Sky Sports. The framework agreements examined in *LPPL* adopted the same format and contained substantive terms practically identical to the contracts entered into between SLB and Sky in the present appeal. It is perhaps due to the fact that SLB's contracts are also with Sky that HMRC have made their case on similar facts and reasoning as set out in *LPPL*.

94. A summary of evidence was produced for closing submissions, which is a 17-page comparison of Mr Barnes' evidence as contrast with Sky's questionnaire responses and correspondence between Sky and Mr Barnes under the headings of payment structure, requirement for services, substitution, roles performed, working for other broadcasters, content of commentary, rehearsals/testing, TV feeds, graphics and replays, talkback (discussion with Sky via headphones), arrival times, equipment and expenses, and Miles Harrison.

95. The detailed analysis of the production process to the extent as tabulated is not related here, as I do not consider it a determinative facet in the factual matrix relevant to the substantive issue, especially in the light of the appellant's acceptance that the second condition pertaining to 'control' is met. HMRC's lengthy submissions on the first two conditions as concerns mutuality of obligation and control are not related here given the appellant's concession.

96. As to the argument that Mr Barnes is in business on his own account, Mr Randle submits that Mr Barnes cannot be considered to be in business on his own account because:

(1) Sky has first call to Mr Barnes' services; Mr Barnes was required to provide them on an exclusive basis and required Sky's permission before providing his services to any competitor. This severely restricted his ability to exploit his talents in the wider market place as a commentator/pundit.

(2) A significant proportion of all of the live match coverage was for Sky, and accounted for 57% to 62% of the overall income for services provided by Mr Barnes in the relevant period, and 54% to 56% in the three years prior to the relevant period.

(3) All equipment was provided by Sky and not Mr Barnes. No real opportunity to make a profit, since Mr Barnes' fees were akin to a salary paid monthly. His engagement was for long periods, and not for specific tasks or short-term projects, which is significantly more consistent with employment.

(4) No additional paid workers were engaged by Mr Barnes to help him perform his duties, and all necessary support was provided by Sky. There was no significant risk of any financial loss; payment of the fee was in a manner akin to the payment of a salary; no risk of late payment or bad/aged debt and expenses were reimbursed.

(5) There was a possibility of defective work from Mr Barnes resulting in a cost to the appellant, particularly through Ofcom fines following any breaches from Mr Barnes. There is no evidence that this possibility does not equally apply to employees.

(6) Mr Barnes' working arrangements were materially similar to those of his co-commentator, Miles Harrison, who was an employee of Sky at all material times.

DISCUSSION

The issue and the burden

97. For the purposes of s49(1) ITEPA, there is no dispute between the parties that sub-paras (a) and (b) of s49(1) are satisfied on the facts. Mr Barnes is 'the worker', and Sky is 'the client', and SLB is 'the intermediary'. The dispute between the parties is whether the services provided by Mr Barnes to Sky via SLB were under a contract for services (i.e. self-employment as maintained by the appellant) or a contract of service (i.e. employment as HMRC contend). The issue between the parties is therefore whether s49(1)(c) is satisfied.

98. In *Usetech Limited v Young* [2004] EWHC 2248 (Ch) ('*Usetech*'), Park J identified at [9] what is required in relation to s49(1) ITEPA:

> '… The conditions of sub-paras (a) and (b) involve an analysis of the actual facts and legal relationships, but when that analysis shows that those two sub-paras are satisfied sub-para (c) involves an exercise of constructing a hypothetical contract which did not in fact exist, and then enquiring what the consequences would have been if it had existed. …'

99. To determine whether the condition under s49(1)(c) is satisfied, the Tribunal is required to construct a hypothetical contract, and in the context of the hypothetical contract, to assess:

> If the services provided by Mr Barnes were provided under a contract directly between Sky and Mr Barnes, would Mr Barnes be regarded for income tax purposes as an employee of Sky?

100. In relation to the substantive issue, the parties do not dispute that the appellant bears the burden of establishing that Mr Barnes would not be regarded as an employee of Sky pursuant to the hypothetical contract that would have existed between Sky and Mr Barnes.

Construction of the hypothetical contract

101. In *Usetech* Park J gave guidance on the construction of the notional contract is at [36]:

> '… the contents of the notional contract between the worker and the end user will be … based on the contents of the … contract between the service company and the end user, but with the worker himself agreeing that he will provide his services to the end user on, as near as may be, whatever terms are agreed between the service company and the end user'.

102. The guidance in *Usetech* is followed in *Paya Ltd & Others v HMRC* [2019] UKFTT 583 (TC) ('*Paya*'), wherein the Tribunal observed at [408] that the hypothetical contract should be regarded as comprising the actual contractual terms between the parties, as though references in those terms to the relevant personal service company were to the relevant individual.

103. The parties are agreed that there are no material differences in the terms between the First and Second Contracts to differentiate the two contractual periods. For this reason, it is unnecessary to construct two separate hypothetical contracts, and the hypothetical contract so constructed is to be taken as applicable to the entire relevant period.

104. HMRC's submission on the terms of the hypothetical contract is closely tied to the actual contractual terms, as summarised above. The appellant has not sought to set out a

hypothetical contract in its submission, and nothing turns on its absence, which is noted here simply for the sake of completeness. The construction of a hypothetical contract remains an indispensable task for the tribunal as part and parcel of its fact-finding remit.

105. Although not explicitly ventilated in the parties' submissions, I discern that it is the respondents' position that the hypothetical contract should map closely to the terms of the actual contract, while the appellant's position would seem to suggest that the Tribunal should bring in circumstantial factors outwith the terms of the actual contract in the process of constructing the hypothetical contract.

106. The question therefore arises as to the limit of the factors to be taken into account in the construction of the hypothetical contract. This is an issue expressly addressed in *Atholl House* by the Court of Appeal, and Sir David Richards' observed in the lead judgment:

> '[123] … The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties" (*Arnold v Britton* [2015] UKSC 36; [2015] AC 169 at [21]).'

107. Arnold LJ in *Atholl House* further remarked on the limit of the factors to be taken into account in the construction of the hypothetical contract being supplied by 'basic principles of contract law', whereby:

> '[170] … [The hypothetical contract], like any other agreement in writing, should not be construed in vacuum, but in the light of the admissible factual matrix. It follows that a factual circumstance known to both parties at the date of the contract (such as, for example, the fact that the person providing the work has an established career as a freelance) should be taken into account. It also follows that a factual circumstance not known or reasonably available to one party (such as, for example, the precise terms on which the person doing the work has performed work for other parties if those terms have not been disclosed to the alleged employer) cannot be taken into account.'

108. What I glean from the above pronouncements in *Atholl House* in relation to the construction of the hypothetical contract is two-fold. First, and without detracting from the validity of the guidance in *Usetech* or the soundness of approach in *Paya*, the terms of the hypothetical contract which would have existed between Mr Barnes and Sky for the performance of his services for s49(1)(c) purposes must also be derived from all the circumstances in which the services were provided, taking as a starting point the terms of the actual contracts. In this respect, I agree with Judge Greenbank in *Canal Street Productions Ltd v HMRC* [2019] UKFTT 647 (TC) at [119], with 'all the circumstances' being operative.

109. Secondly, there is limit to the factors admissible into the factual matrix in constructing the hypothetical contract. For example, the substance of the agreements entered into by Mr Barnes in his personal capacity with the Times and Sunday Times is not admissible. Notwithstanding the appellant's suggestion that there were similarities in the actual outworking of the terms between the Sky contracts and the Times/Sunday Times agreements, Sky was unlikely to be privy to the actual terms of the Times/Sunday Times agreements.

110. There are further reasons as set out below why the Times/Sunday Times agreements should not intrude into the consideration of the Sky contracts, which are the subject matter of this appeal. What is admissible in the factual matrix in constructing the hypothetical contract is limited to Sky's awareness of Mr Barnes' engagements with the Times and the Sunday Times, and with other broadcasters for high-profile games not broadcast by Sky.

The Hypothetical Contract

111. Having regard to all relevant circumstances, and taking the actual contracts as the starting point, the material terms of the hypothetical contract between Sky and Mr Barnes during the relevant period would be as follows.

(1) The contract would be for a fixed term of 4 years, extendable by another 2 years to coincide with the expiry of Sky's rights to broadcast the European International Championship, and subject to further renewal by mutual agreement.

(2) Mr Barnes would be contractually obliged to *personally* perform the 'Services' as the named Personnel under the Key Terms.

(3) Mr Barnes had no right to provide a substitute when he was unable to provide the required services personally. Sky would choose and arrange for any substitute and would pay the substitute directly.

(4) The Services to be provided by Mr Barnes would comprise:

(a) Principally, 'punditry service' as a co-commentator and expert analyst in rugby union sport events being broadcast by Sky Sports; as the 'second voice' along with the lead commentator;

(b) For live sport events, Mr Barnes' attendance pre-match for rehearsal, and during the match would be mandatory, (but not post-match);

(c) For all preparatory work, Mr Barnes would carry out the research and script drafting in his own time to ensure that he would provide an engaging commentary on the day on certain themes as agreed with the executive producer prior to a match;

(d) In addition to punditry service, Mr Barnes would provide such other services as approved by the Head of Rugby Union, such as the weekly Monday Column for Sky Magazine online, and the mid-week programme 'The Rugby Club';

(e) Interview requests from Sky Sports News (and to a lesser extent Sky News) on high-profile games, including but not restricted to those broadcast by Sky (such as the European International Championship), and games not broadcast by Sky (such as the World Cup and the Six Nations) for which Mr Barnes would be present from the press box throughout the games, and for any short-notice responses to news-worthy items in the world of rugby which Sky Sports News decided to cover.

(f) Ad hoc requests for special programmes as planned by Sky Sports, or Sky Sports News, such as the 'Sky Sports News HQ review of the year'.

(g) Ad hoc requests for any promotional or publicity events (such as the pre Guinness Pro 12 PR event with press and radio).

(5) Sky 'shall have first call' on Mr Barnes' Services up to 228 days per annum, which would be inclusive of days being on air of around 90 to 120 days per annum.

(6) The exercise of the 'first call' right by Sky would be subject to Mr Barnes' availability in conjunction with his standing commitments to the newspaper columns, and in co-ordination with Mr Barnes' coverage of high-profile matches of which Sky had no broadcasting rights, (such as the coverage of the Six-Nations, British & Irish Lions, and World Cup matches would take priority over Sky's fixtures).

(7) Such variations to the provision on 'first call' were expressly provided by clause 1.1 under the Key Terms in the First Contract:

> 'The Services will be provided on the terms set out in this Agreement subject to any variations agreed by the Parties in writing and to any Associated Company as may be agreed between the parties from time to time.'

(8) Sky would have exclusive right of Mr Barnes' services as a broadcaster within the UK. Mr Barnes would not be permitted to render his services to another broadcaster, or radio, and/or all media organisations without the prior written consent of the Head of Sky Sports. Such consent would not be unreasonably withheld, such as consent for Mr Barnes to broadcast during the World Cup season for a broadcaster outside the UK. In the event of any breach of Sky's exclusive right to Mr Barnes' services in this respect, Sky would be entitled to injunctive relief.

(9) Sky would have the right to allocate Mr Barnes from the roster of commentators to cover a specific game to be broadcast by Sky Sports. To that extent, Sky had control over the location, the date, and which match Mr Barnes would cover, subject to any reasonable alternatives being suggested by Mr Barnes, whether it be location (such as not covering matches in Scotland in two consecutive weekends) or the interest of the match (such as switching to cover La Rochelle v Harlequins on Mr Barnes' suggestion).

(10) The contract would be terminable pursuant to clause 5, which would give Sky the right to terminate the contract 'with immediate effect at any time' if in Sky's 'reasonable opinion' any of the stipulated conditions had obtained.

(11) Sky would pay Mr Barnes the annual fee of £235,000 in 2013-14 with an increment of £10,000 per annum to £265,000 in 2016-17 as stated in the Key Terms, and thereafter the annual fee would remain at £265,000 for the two years to 31 May 2019. The fee would be payable in equal monthly instalments in arrears upon the rendering of an invoice by Mr Barnes.

(12) The annual fee payable by Sky would be fixed in advance, and would not be calibrated to the actual number of days Mr Barnes would be on air for Sky.

(13) In relation to programme content, Sky would expect Mr Barnes to adhere to the running order of the live match, and to work to the direction and instructions of the executive producer, whether it be for Sky Sports, Sky News, or for Sky Sports News. The content of the pre-match broadcast, and of the live commentary would be Mr Barnes' sole responsibility, subject to prior clearance with the executive producer in relation to the themes to be covered.

(14) As with the commentary for live matches, the content of any interviews given to Sky News, and Sky Sports News, or in relation to the Monday Column, and the Rugby Club, would be content solely created by Mr Barnes.

(15) Mr Barnes would be subject to restrictions in relation to the handling of confidential information (clause 6) and non-solicitation (clause 7) and restrictions as to the provision of his Services outwith Sky as set out under the 'non-compete' undertakings at paragraph 4.2 of the NDA Schedule.

(16) Mr Barnes would carry out his research, write his own script, and adhere to the Ofcom Guidelines in relation to the Services he would perform in presenting a Sky programme. In other aspects of the delivery of his Services, Mr Barnes was expected to work under the direction of Sky's production manager in charge of the programme. Sky would have full editorial control over any programme and Mr Barnes would have to follow the reasonable requests of the executive producer, such as who to interview.

(17) Sky would provide all necessary studio equipment during the live streaming of a sport event in which Mr Barnes provided his Services, including microphone and earpieces, and the necessary travel and accommodation bookings to enable location performance of the Services to take place. Sky would reimburse any reasonable expenses claimed by Mr Barnes, upon submission of receipts and if approved by Sky.

(18) Mr Barnes would agree to assign to Sky all rights (intellectual property, copyright, etc) to enable Sky to have the exclusive rights in the commercial exploitation of his output emanating from presenting for Sky Sports.

(19) Mr Barnes would have to seek permission from Sky before engaging in any new commercial activities. He would agree not to exploit his image rights in any manner, or to undertake any assignments from other broadcasters, or media outlets, that would cause a breach of the 'non-compete' restrictions pursuant to the Non-Disclosure Agreement.

(20) Pursuant to clause 3.4, the Fixed Fee per annum would be agreed on the basis as to include a sum to satisfy Mr Barnes' 'paid holiday entitlement' under the Working time Regulations 1998. Mr Barnes would have no contractual rights (over and above those rights granted by statute), to be paid for absences caused by sickness.

***Ready Mixed Concrete* three-stage test**

112. The parties are agreed on the relevant test to be applied to the hypothetical contract to determine whether it was a contract of employment or a contract for services as the three-stage test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ('*RMC*') at p515:

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

113. MacKenna J's explication of each of the three conditions can be summarised as follows.

(1) The first condition pertains to *mutuality of obligation*, whereby there 'must be consideration' (a wage or other remuneration), and the servant 'must be obliged to provide his own work and skill'.

(2) The second condition relates to the *exercise of control* by one party on the other to create the master-servant relationship.

(3) The third condition is to assess *other provisions of the contract* as a 'negative condition'; that is to say, if the first two conditions are satisfied, a contract is a contract of employment unless there are other relevant factors to the contrary.

114. In *Usetech*, Park J cited with approval at [32] Hart J's observation in *Synaptek Ltd v Young* [2003] EWHC 645 (Ch), [2003] STC 543 ('*Synaptek*') at p553:

> 'Deciding in borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult. … In general the question is regarded as one of fact, or as it is sometimes put, a question of mixed fact and law, the evaluation and determination of which is a matter for the fact-finding tribunal.'

115. While each Contract served as the framework agreement for the relevant period between the parties, I find that the parties did not intend the Contracts to be the exclusive record of the terms of their agreement. There was tacit understanding between the parties as to the practical aspects of the outworking of the contractual terms. For instance, the Contracts did not provide for the basis of the 228 days when Mr Barnes' services would be required, nor for the protocol whereby Mr Barnes would be allowed to give priority to high-profile tournaments such as the World Cup and the Six Nations over Sky's right to call on his services.

116. In *Carmichael v National Power Plc* [1999] UKHL 47, [1999] 1 WLR 2042, Lord Hoffmann's guidance is that 'when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct', then the terms of the contract are a question of fact. In line with this guidance, the terms of the Contracts in the present case are a question of fact, based on my finding that the terms of agreement between the parties are to be gathered partly from documents, and partly from their conduct.

117. The appellant has conceded that the first two conditions in the *RMC* test are met, and has focussed its case on the third stage of the test. However, in my judgment, the expediency of bypassing the first two stages of *RMC* test on account of the appellant's concession must be resisted. In this respect, I have special regard to what Buckley J in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 said at [23]:

> '… I regard the quoted passage from *Ready Mixed Concrete* as still the best guide and as containing the irreducible minimum by way of legal requirement for a contract of employment to exist. It permits tribunals appropriate latitude in considering the nature and extent of "mutual obligations" in respect of the work in question and the "control" an employer has over the individual. It does not permit those concepts to be dispensed with altogether. As several recent cases have illustrated, it directs tribunals to consider the whole picture to see whether a contract of employment emerges. It is though important that "mutual obligation" and "control" to a sufficient extent are first identified before looking at the whole.'

118. The reason for resisting such expediency is that the first two stages of consideration on mutuality of obligation and framework of control help to anchor the *RMC* test on the relevant contractual relationship. The appellate history of *Atholl House* illustrates the potential pitfalls in inverting the order of consideration of the three-stage *RMC* test by frontloading the third-stage factors. The Court of Appeal found the Upper Tribunal's approach in *Atholl House* to be 'misguided', because:

> '[126] Having accepted the FTT's findings that Ms [Kaye] Adams had tended over her professional career generally to carry on her profession as an independent contractor and that her activities as an independent contractor included activities similar to those she performed for the BBC, the test which

> the UT set itself at [112]-[116] was whether there was "some relevant difference between the activities undertaken for the BBC and those performed as an independent contractor". Unless there was some such difference, Ms Adams would be performing her services under the hypothetical contract with the BBC as an independent contractor.'

119. On one interpretation, the appellant's submission is to suggest that there were no relevant differences between Mr Barnes' engagement with the Times/Sunday Times and that with Sky, and HMRC have accepted that the Times/Sunday Times engagement was outwith IR35, ergo the engagement with Sky was in like manner Mr Barnes being in business on his own account. This line of reasoning is to be rejected, for being flawed as the UT's approach in *Atholl House*.

(1) Mutuality of Obligation

120. MacKenna J's explication on mutuality of obligation is that there must be the irreducible minimum of the obligation to pay a wage or remuneration by one party for the obligation to work or perform services by the other party. In *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735 ('*Quashie*'), Elias LJ referred to 'an irreducible minimum of obligation', either express or implied, as necessary for a contract to remain in force, and that:

> '[10] … Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. …'

121. In relation to the interpretation of the contractual terms in this case, each Contract was for a fixed term of four (and two) years. During each contractual period, for the Contract to remain in force, Sky was obliged to pay the monthly instalments of the fixed annual fee upon the rendering of invoices by Mr Barnes. The monthly instalments of the annual fee represented the consideration from Sky. In return, there was the obligation for Mr Barnes to perform the Services personally. The appellant does not dispute that the first condition is satisfied.

(2) Control to a Sufficient Degree

122. MacKenna J's explication on the second condition is at p515 of *Ready Mixed Concrete*:

> 'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other the servant. The right need not be unrestricted.
>
> > "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." *Zuijs v Wirth Brothers Proprietary Ltd* [(1955) 93 CLR 561, at 571]
>
> To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.'

123. At p518, MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, of which the first few lines stated as follows:

> 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but *whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions*.' (Italics original in *RMC*)

124. MacKenna J's guidance on 'control' was followed by the Employment Appeal Tribunal ('**EAT**') in *White v Troutbeck* [2013] IRLR 286 at [40]-[43] per Richardson J, which was upheld by the Court of Appeal (at [2013] EWCA Civ 1171; [2013] IRLR 949), and cited by the Upper Tribunal in *Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TC):

> '[47] … The approach taken in [*White v Troutbeck*], with which we respectfully agree, was to interpret MacKenna J's guidance as requiring not a formal analysis as to an implied term in the contract but an exercise of contractual construction. The court or tribunal must address "the cumulative effect of the totality of the provisions in the agreement and all the circumstances of the relationship created by it" (per the Court of Appeal at [38]) and decide whether as a matter of construction ultimate control by the recipient of the services exists, notwithstanding the absence of an express provision in the contract.'

125. What is important is control exercisable as a result of the contractual relationship between the parties, which is derived from the contract either expressly or by implication. Having regard to the cumulative effect of the totality of the contractual terms, and all the circumstances of the contractual relationship, I find there was a sufficient framework of control over Mr Barnes in the performance of his services.

(1) While the services agreements made no express provisions as to *what* programmes Mr Barnes would be required to perform his services, there was clear understanding between the contracting parties that the core services would be live commentary of match events, and ancillary services on an ad hoc basis to be interviewed by Sky Sports News, together with media outputs in the form of Monday column and Rugby Club.

(2) The express provision that Sky would have 'first call' on Mr Barnes' services would enable Sky to have control over the timing when Mr Barnes' services would be called upon, notwithstanding the fact that Mr Barnes would have some latitude in negotiating his availability in specific instances pursuant to clause 1.1 under the Key Terms which provided for the provision of services 'subject to any variations agreed by the Parties in writing' and 'from time to time'.

(3) The core services being provided by Mr Barnes was live commentary as and when a match was being broadcast in real time, which meant Sky had control over the location and the exact date and timing for Mr Barnes' services.

(4) While Mr Barnes had autonomy as an expert over the content of his commentary, that delineated area of autonomy was contextualised within the compass of wider controls, such as the Ofcome rules, the Sky's Editorial guidelines, the directions of the executing producer for the Sky Sports programmes.

(5) The Contracts contain extensive provisions (in warranties and non-solicitation clauses) to assign a host of rights to Sky to ensure that Sky would retain the absolute control over the exploitation of the output from the games broadcast. Such terms were fortified by similar and further terms in the accompanying Schedule of Non-Disclosure Agreement between Sky and Mr Barnes.

126. With these observations, I conclude that there is a sufficient framework of control by Sky on Mr Barnes as a provider of services to satisfy the second condition of the *RMC* test.

(3) Other Provisions and Factors

127. In a case where the person providing the service through a PSC is arguably in business on his own account, certain questions arise in the third stage of *RMC* test which are pertinent to the present case. These questions include: (i) whether there is a prima facie conclusion in favour of a contract of employment upon the first two conditions of the *RMC* test being met; (ii) whether the factors to be taken into account at stage three are to be confined to the terms of the contracts in issue; (iii) whether the time period to be taken into account at stage three is restricted to the relevant period only.

128. The interpretation that upon the first two conditions in the *RMC* test being met that there is a prima facie contract of employment, and that the factors to be considered at the third stage of the *RMC* test should exclude factors other than the terms of the contract, would seem to have been derived in part from *Weight Watchers (UK) Ltd v HMRC* [2011] UKUT 433 (TC):

> '[42] … where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related obligation and the requisite degree of control, then it will prima facie be a contract of employment unless, viewed as a whole, there is something about its terms which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms for the purpose of ensuring that there is nothing which points away from the prima facie affirmative conclusion reached as the result of satisfaction of the first two conditions.'

129. The Court of Appeal in *Atholl House* rejected Briggs J's approach in *Weight Watchers*, with Sir David stating at [113]: 'I am unable to accept the approach in these respects adopted by Briggs J' and went on to cite with approval what Kerr J in *Augustine v Econnect Cars Ltd* [2019] UKEAT 0231/18 said at [61]:

> 'I don't think the judgment of Briggs J … in the *Weight Watchers* case should be treated as creating something like a legal presumption of an employment relationship in cases where the first two stages of the *RMC* test are met.'

130. In *Atholl House*, the Court of Appeal reviewed the relevant case law applying the *RMC* test, and the legal principles emanating from the review in *Atholl House* on the third stage of the *RMC* test are summarised as follows.

(1) The court or tribunal is required to weigh any terms, which are contrary to a conclusion of employment against those terms, including mutuality of obligation and control, which favour a conclusion of employment; it is a multi-factorial process addressing all the relevant factors: at [76].

(2) The court or tribunal is not restricted in its analysis to the terms of the contract; this is clear from *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 ('*Market Investigations*') and many subsequent cases, including *Hall v Lorimer* [1994] ICR 216: at [113].

(3) It is wrong to treat *RMC* and the line of cases including *Hall v Lorimer* as representing two separate tests. Both are 'multifactorial' approaches which recognise

mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment: at [122].

(4) A strict reading of the third condition in the *RMC* test might exclude consideration of any factor beyond the express and implied terms of the contract as in some authorities. In many other authorities, however, a wider range of factors was taken into consideration, such as *Matthews v HMRC* [2012] UKUT 229 (TCC) ('*Matthews*'): at [122].

(5) The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties: at [123].

131. In *Matthews*, the taxpayers in their capacity as entertainers on a cruise ship, contended that they were employees to the cruise operators while HMRC argued that they were self-employed, and successfully invited the Upper Tribunal to take in a wider range of factors in the third stage of *RMC* test. Mann J observed at [16] that the 'third element of MacKenna J's formulation leaves room for a lot of other factors'.

132. Similarly, in *Quashie* at [6] Elias LJ described that 'the approach adumbrated by MacKenna J in the *Ready Mixed Concrete* case' as a 'multiple or multi-factorial test … involving an analysis of many features of the relationship'. He continued at [8] by stating:

> 'This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court and tribunal is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract'.

133. The case law principles are all reminders of the centrality of the contractual relationship in issue, even at the third stage of the *RMC* test. The focus at the third stage remains anchored on the contract in issue, but the angle of the focus widens out to take in the context and circumstances in which the contractual relationship is created; the direction of the perspective is to zoom out from the contract in issue. The flaw in the tribunals' approach in *Atholl House*, as I understand it, is to approach the third stage from the peripherals, focusing on Ms Adams' career *outside* the relevant contract, and zoom in from the circumstantial factors to construe the relevant contract in the light of Ms Adams having been in business on her own account. The flaw of the UT's approach in *Atholl House* is analysed by the Court of Appeal at [125] to [139].

134. With these precepts in mind, the factors in the present case relevant to my consideration at the third stage of the *RMC* test are as follows.

(1) There is a distinction between a presenter and a commentator in the broadcast of a live match. Mr Barnes started as a presenter with Sky, but moved to become a commentator. During the relevant period, the principal services provided by Mr Barnes to Sky as a co-commentator in live matches were punditry in nature, which I find to be qualitatively different from those provided by Miles Harrison as a presenter.

(2) Mr Harrison was the 'first voice' and provided the running commentary of a match, while Mr Barnes was the 'second voice' giving the analytical insights on the good and bad moments of a game, from team strategy to the execution of moves by individual players. Mr Harrison would be on air most of the time, while Mr Barnes'

commentary would come in at the appropriate moments and would often be accompanied by co-ordinated replays.

(3) Without Mr Barnes' analytical input, the live commentary of a match with only the first voice would be all the duller, and unlikely to attract as many viewers as a live match with punditry input. In fixing the annual fee payable to Mr Barnes, Sky did not stipulate the minimum days of services, only the maximum. In real terms, the number of days Mr Barnes would appear on air for Sky varied from 90 to 120 days. Taking 120 days as the benchmark, it means Mr Barnes could be working 25% less than the benchmark maximum without any issue being raised by Sky. I do not consider the annual fee resemble a 'salary' in nature as submitted for the respondents. I find the annual fee to be a block fee, for the exclusive right to have first call of Mr Barnes' services for a period of time. To ensure that Mr Barnes' services would not be made available to another UK broadcaster, Sky was content to pay a premium for the assurance of exclusive right, in full knowledge that Mr Barnes' availability on air could vary up to 25%, as reduced by the duration of 6-8 weeks the World Cup tournament.

(4) The provisions for intellectual property rights under clause 10 would place no embargo on Mr Barnes' right to reproduce his opinions elsewhere that had been given during a live broadcast for Sky. The work pattern for the match on Saturday 10 November 2018 (at §§51-56) illustrates the intensity of preparation in the run-up to cover for a live match, and immediately after the match, Mr Barnes would be putting pen to paper to produce his Sunday Times column. In his journalistic output, Mr Barnes would most likely be reproducing aspects of his commentary given in the Sky broadcast on the same match. The phrasing and the emphasis might differ for the column, but it would be the same match from which Mr Barnes had gleaned insights as a live commentator while broadcasting for Sky, and he was not debarred by Sky in reusing any material so gleaned in other domains or avenues. One such avenue would be when Mr Barnes participated as an expert representative to select the 'Player of the Season' for the European Cup. The material that Mr Barnes had used to provide his services for Sky remained his intellectual property, essentially because he is the master and the creator of his opinions as a pundit.

(5) Sky would not consider it to be a conflict of interest when Mr Barnes reproduced in newspapers material which had been gleaned in the course of providing his services to Sky. On the contrary, Sky would be attuned to the publicity benefits conferred on its broadcast when Mr Barnes' column on the match broadcast by Sky would cover the back page of the Sunday Times the next day. Mr Barnes' Times/Sunday Times columns would take some of Sky's games to the newspaper readers, and Sky in turn benefitted from the reputation of Mr Barnes as a renowned columnist on its roster of commentators.

(6) Mr Barnes had much latitude in stating his availability to cover live matches for Sky. The conduct between the parties in drawing up booking schedules of Mr Barnes' time would appear to be by gentlemanly consensus, with Sky being reasonable in its requests, and Mr Barnes exercising his leeway of refusal pursuant to the express term under Key Terms (c1.1) on 'variations' agreed between the parties from time to time. There was the long-standing understanding between the parties that Mr Barnes would be unavailable to Sky during the Six Nations season, and the World Cup tournament, although he could be requested for interviews by Sky Sports News. What Sky lost in terms of Mr Barnes' availability was gained in return through the publicity of having one of its regular commentators as a columnist of these high-profile games, which in

turn reflected well on Sky as the broadcaster with the exclusive right to Mr Barnes' services.

(7) Depending on his availability, Mr Barnes would agree to be interviewed for Sky Sports News during pre-match on request, especially for matches not broadcast by Sky such as the Six Nations and the World Cup. The news interviewer of Mr Barnes might have been an employee for Sky, but it would be most unusual for an employer to interview its employee regularly on request (if Mr Barnes were Sky's employee). The context in which Mr Barnes became a regular candidate to be interviewed by Sky Sports News was his reputation as a rugby union expert, well-known and well-regarded outside Sky TV. It was Mr Barnes' personal reputation in this respect that Sky contracted with SLB to ensure it could have regular access and first call. The fact that Sky Sports News sought to interview Mr Barnes is a strong indicator that the contractual relationship in real terms was not that of a master-servant relationship in a contract of employment.

(8) Outside his Sky commitments, Mr Barnes was in business on his own account. The 31 articles published during the 2015 World Cup illustrate the competitiveness of the field to maintain parity as a sought-after sport pundit. Other expert voices were called on to give coverage of the tournament, each jostling for a unique angle to sum up a match, for insightful comments on a player or a team that would prove to be prophetic.

(9) To maintain his profile as a pundit, Mr Barnes' experience as a professional ex-player has stood him in good stead. It is in part his experience as a former player that he can profit from dedicating hours and days to watching replays of matches dimming out the sound, in order to find that unique angle for his commentary, to gain fresh insights so that his opinions do not become stale. There was no demarcation in the research, the thinking, the scripting he did for Sky broadcast and the newspaper columns, or indeed in any other ancillary engagements he undertook, (such as being an expert witness to the court on Farrell; or as representative to select the 'Player of the Season' for the European Cup). It was the one and the same enterprise of being 'Stuart Barnes, the voice of rugby'.

(10) The profit Mr Barnes can make from the sound management of his business is through the efficient use of his time, and he did so with his engagements with Sky – writing the Sky online column on a Monday, doing the Rugby Club mid-week, fitting his broadcasting engagements round his newspaper commitments.

(11) In *Basic Broadcasting Ltd v HMRC* [2022] UKFTT 00048 (TC)('*BBL*') in relation to the services provided by Adrian Chiles to ITV and the BBC, it is found that '[e]very time [Mr Chiles] presented a programme his reputation was at risk'. In common with this finding in *BBL*, there was a reputational risk for Mr Barnes every time he appeared on air for Sky, whether it was for a live commentary or for an interview by Sky Sports News. As stated in the questionnaire response, which I accept, 'any editorial issues that emanate from [Mr Barnes'] mouth are his own responsibility' (§47 (6)). The reputational risk is real, and requires vigilance to mitigate, and is part and parcel for being in business on his own account which is staked largely on Mr Barnes' profile as a world expert on rugby.

(12) Mr Barnes was not financially dependent on Sky during the relevant period, notwithstanding the fact that the income from Sky accounted for some 60% of his overall turnover. In absolute terms, his income from the Times/Sunday Times was by no means modest. His refusal to enter into a new contract with Sky after 2019 to cover

second division matches was another indicator that Mr Barnes was not financially dependent on Sky. There was no lack of contacts asking for Mr Barnes' services and he had no need for an agent. If Sky had not procured exclusive right for Mr Barnes' services as a broadcaster during the relevant period, through sound management of his time, Mr Barnes would most probably have found another outlet for his talent, owing to his personal reputation as a world-renowned expert on rugby. The reputation is personal to Mr Barnes, which was not, and is not, dependent on Sky.

135. Having regard to the cumulative totality of the provisions in the hypothetical contract in the context of the parties' conduct and intention, I conclude that the relevant Contracts would not have been contracts of employment for the duration of the relevant period. In reaching my conclusion I have not given any weight to the express provision in the Contracts in relation to the parties' intention that Mr Barnes as the Personnel shall not be an employee of Sky.

136. Separately, my conclusion is reached with the factor that Mr Barnes being in business on his own account as one of the many factors to be considered in the round. I also have regard to the fact that contractually Mr Barnes has been an employee of SLB since its incorporation in 2005, and technically would not have been in business on his own account. However, for present purposes, I have considered whether work done by Mr Barnes through SLB would, if it had been done by Mr Barnes on his own account, give rise to the conclusion that he was in business on his account during the relevant period. In so finding, I have regard to Sir David Richards' observation in *Atholl House* at [124]*:*

> 'If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. … The weight to be attached to it is a matter for the decision-making court or tribunal. ..'

137. In considering the factors at the third stage of the *RMC* test, I have rejected the suggestion from the appellant that the similarities in the actual outworking of the contractual arrangements pertaining to Sky and those to the Times/Sunday Times should inform the substantive issue to any extent. The fact that HMRC have accepted the contractual arrangements with the Times/Sunday Times to fall outside the IR35 regime does not preclude the arrangements with Sky to fall within IR35.

138. For similar reasons, I have rejected HMRC's submission that Mr Barnes' contractual relationship with Sky was of employment based on the parallels drawn between Mr Miles Harrison and Mr Barnes, including reliance on Mr Barnes' oral evidence of Mr Harrison's coverage for other broadcasters (see §83). While not doubting the reliability of Mr Barnes' evidence, I do not find it appropriate to make any findings of fact in relation to what Mr Harrison did for other broadcasters, or under what terms Sky and Mr Harrison would have contracted in relation to his other broadcasting engagements. Nor do I find it at all a sound or relevant basis to found Mr Barnes' contractual relationship with Sky by mapping onto how Mr Harrison had been contracted by Sky; each case turns on its own facts.

CONCLUSION

139. For the reasons stated, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

140. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HEIDI POON
TRIBUNAL JUDGE

Release date: 20 January 2023