TC07377

Appeal number: TC/2014/03148
TC/2014/06207
TC/2016/00837

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS — whether IR 35 applies to arrangements between personal service companies owned by BBC news presenters and the BBC – whether the determinations issued by HMRC were valid – whether HMRC were in time to issue the determinations - whether the advisers acted carelessly

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAYA LIMITED **Appellant**

TIM WILLCOX LIMITED

ALLDAY MEDIA LIMITED

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER MR ANDREW PERRIN

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1LN on 30 April, 1 May to 4 May and 7 May to 11 May 2018

Mr Jonathan Peacock QC, Ms Marika Lemos and Ms Georgia Hicks, counsel, instructed by RadcliffesLeBrasseur, for the Appellants

Mr Adam Tolley QC and Mr Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellants, Paya Ltd ("**PL**"), Tim Willcox Limited ("**TWL**") and Allday Media Limited ("**AML**") are each what is commonly known as a "personal services company" ("**PSC**"). They were formed by Ms Joanna Gosling, Mr Tim Willcox and Mr David Eades (the "**Presenters**") respectively to act as the vehicle through which their presenting services were provided to the BBC for a number of years under a series of contracts each PSC made with the BBC in relation to BBC News channel ("**News**") and/or the BBC World channel ("**World**"). Each Presenter was at all relevant times the sole shareholder and a director of the PSC he or she set up.

2. Each PSC appealed against determinations and notices issued by HMRC for income tax and national insurance contributions ("**NICs**") which HMRC consider to be due under the Pay as You Earn System on income paid to the relevant PSC by the BBC under contracts for the provision of the relevant Presenter's presenting services in respect of the tax years (a) 2007/08 to 2011/12, as regards PL, (b) 2006/07 to 2012/13, as regards TWL and (c) 2007/08 to 2013/14, as regards AML (although, for AML and PL, in some years only income tax or NICs were in dispute and not both).

3. HMRC issued the determinations under regulation 80 of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682) ("**regulation 80**") and the notices under s 8 of the Social Security Contributions (Transfer of Functions) Act 1999. HMRC assert that the income tax and NICs shown as due in the determinations and notice arises under provisions commonly known as "IR35" contained in ss 48 to 62 of the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**") and regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000 SI 2000/727.

4. In outline, IR35 applies where an individual provides services to a client under arrangements involving a third party, such as a PSC, if the individual would be regarded for income tax purposes as an employee of the client if the services were provided under a contract directly between the client and the individual. In that case, the income received by the PSC for the individual's services is treated for tax purposes as though it were employment income paid to the individual and the PSC is liable to account for income tax and NICs on it under the PAYE system. The tribunal is asked only to consider whether there is in principle any such liability and not to consider the amount of the liability.

Part A - Background and overview of the dispute

Intermediary issue

Legislation

5. The conditions for IR35 to apply are set out in s 49 ITEPA as follows:

> "49(1) This Chapter applies where-
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for another person ("the client"),
>
> (b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and

(c) the circumstances are such that 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…..

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

(5) In this Chapter "engagement to which this Chapter applies" means any such provision of services as is mentioned in subsection (1)."

6. The conditions for the corresponding NICs provisions to apply are broadly the same as those in s 49 ITEPA but the provision corresponding to s 49(1)(c) is as follows:

> "the circumstances are such that, had the arrangements taken the form of a contract between the worker and the client, the worker would be regarded for the purposes of Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client".

7. There is no dispute that the conditions in s 49(1)(a) and (b) ITEPA and in the corresponding NICs provisions are satisfied. The only issue is whether the condition in s 49(1)(c), and in the corresponding NICs provision, are met. It is common ground that the burden of showing whether it is met is upon the PSCs.

Background to IR35

8. As set out in the press release issued when IR35 was first introduced in 1999 the concern, which the legislation was introduced to prevent, was that it was possible "for someone to leave work as an employee on a Friday, only to return the following Monday to do exactly the same job as an indirectly engaged 'consultant' paying substantially reduced tax and national insurance". However, as Walker LJ emphasised in *R (on the application of Professional Contractors Group Ltd) v IRC* [2002] STC 165, IR35 does not apply automatically where a person acts through a PSC. He said, at [12] of that case, that it does not apply at all unless the relevant person's "self-employed status is near the borderline and so open to question or debate"; the whole regime is "restricted to a situation in which the worker, if directly contracted by and to the client 'would be regarded for income tax purposes as an employee of the client'" as "determined on the ordinary principles established by case law…." This was referred to with approval by Henderson J in *Dragonfly Consultancy Limited v HMRC* [2008] EWHC 2113 (Ch) at [10].

9. That is not to say, however, that IR35 is restricted to applying only in cases involving artificiality. As Walker LJ put it at [51] of the *Professional Contractors Group* case, the aim of both the income tax and NICs provisions:

> "is to ensure that individuals who ought to pay tax and NIC as employees cannot, by the assumption of a corporate structure, reduce and defer the liabilities imposed on employees by the United Kingdom's system of personal taxation".

Approach to IR35

10. The parties were agreed that determining whether the legislation applies calls for a two stage exercise (see *Usetech Ltd v Young (Inspector of Taxes)* [2004] STC (SCD) 213 at [35], [36] and [47]; and *Future On-Line Limited v Foulds (Inspector of Taxes)* [2005] STC 198 at [25]):

(1) At the first stage the tribunal essentially has to determine the basis on which the BBC and the Presenters would have engaged under direct contractual arrangements between them for the provision of the Presenters' services. We refer to this as the "assumed contract" or "assumed relationship".

(2) The tribunal must then determine the nature of the assumed contract between the Presenter and the BBC, as either an employment or a self-employment relationship, by reference to the well-established legal principles applied by the courts in determining whether an employment relationship exists.

11. The parties were agreed that there is a "slight, but potentially significant" difference in the approach for income tax and NICs purposes (although in practice the outcome may be the same) as set out by Henderson J at [17] of *Dragonfly Consultancy Limited*:

(1) The NIC test requires "the arrangements themselves to be embodied in a notional contract, and then asks whether the circumstances (undefined) are such that the worker would be regarded as employed."

(2) On the other hand, the income tax test: "…directs attention in the first instance to the services provided by the worker for the client, and then asks whether the circumstances (widely defined in paragraph 1(4) in terms which include, but are not confined to, the terms of the contract forming part of the arrangements) are such that, if the services were provided under a contract directly between the client and the worker, the worker would be regarded as an employee of the client." As the Special Commissioner said in that case the income tax test appears, therefore, to require a wider enquiry into what the terms of a direct contract would have been given there is no limitation in the wording to contract terms which are encompassed in the arrangements or the circumstances.

12. We note that in *Usetech Ltd v Young* (2004) 76 TC 811, at [36], Park J envisaged that in a straightforward case where there are two contracts in place (between the PSC and the worker and between the PSC and the client), the content of the assumed or notional contracts will be "fairly obvious":

> "they will be based on the contents of the second 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."

13. He continued that deciding on the terms of the assumed contracts may be more complicated where, for example, there is an agent in the contracting chain. He noted that in *R (on the application of the Professional Contractors Group Ltd and others)* v *IRC* [2001] STC 629 (at page 651) Burton J was of the view that in such a case "all relevant circumstances would fall to be taken into account in determining the contents of the hypothetical contract between the worker and the end user, including the provisions (or the absence of particular provisions) of a contract between an agency" and the end client (see [46] and [47]).

14. However, there is no such complexity in this case. In our view, in these circumstances, the actual contractual terms between the BBC and the PSCs constitute the best available evidence of what the terms of a direct contract would have been. On that basis we consider that, for the purposes of determining whether IR35 applies,

each Presenter should be assumed to have entered into a series of contracts with the BBC based on the actual contracts between the relevant PSC and the BBC on terms as near as may be to the actual contractual terms. On that approach we do not consider there is any difference in the outcome under the slightly different formulations of income tax and NICs tests and the parties did not suggest there was.

15. As regards the classification of the hypothetical relationship, it was common ground that there are three cases of particular importance, which form the basis of the subsequent case law:

(1) In *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 MacKenna J set out the often quoted three stage test for there to be a contract of service at page 515:

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

We refer to the first test set out by MacKenna J as the mutuality test and to the second as the control test. This formulation for the existence of a contract of service has been approved in a number of subsequent cases including by the Supreme Court in *Autoclenz v Belcher Ltd* [2011] UKSC 41 at [18].

(2) In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, Cooke J approached the question of whether there was an employment contract by examining whether the individual in question was "in business on his own account".

(3) In *Hall v Lorimer* [1994] 1 WLR 209, STC 23 the court interpreted the approach in *Market Investigations Ltd* essentially as requiring a multi-factorial exercise.

Overview of submissions on IR35

16. The parties did not dispute that the majority of the terms of the actual contracts between the BBC and the PSCs are to be taken as the basis of the terms of the assumed contracts. In line with the multifactorial approach set out in the cases, the parties each pointed to a range of factors as indicating that the assumed relationship was, in HMRC's view, one of employment or, in the PSCs' view, one of self-employment. However, at the heart of the debate is whether the minimum requirements for there to be an employment relationship, under the mutuality and control tests, are met.

17. In outline, on the mutuality test:

(1) Mr Peacock submitted that on the true construction of the actual contractual terms, as then incorporated into the assumed contracts, the arrangements constituted merely a form of "elegant zero-hours contract". There was no obligation on the BBC to offer the Presenters any work at all. The Presenters merely agreed to give the BBC "call" or "first call" over or, a minimum commitment of, a given number of days on which they were available to work for the BBC. When assignments were offered, the Presenters were free

to turn them down. They were entitled to be paid only for the programmes they in fact presented on. On that basis the mutuality test was not met and there could be no question of the assumed relationship being one of employment.

(2) Mr Tolley argued that, on the contrary, on the correct contractual interpretation, the BBC was required to provide the Presenter with work (and if called on the Presenter was required to work) on a specified minimum number of days or, if it chose not to use the Presenter's services, nevertheless to pay the stipulated fee for that minimum number of days. He emphasised that the assumed contracts require the personal service of the Presenter and do not provide for (and prevent) any material right of substitution. On the basis of the caselaw, it is irrelevant that the Presenters could turn down work offered for a particular day. What matters is that there was an obligation to do some work as, in his view, there clearly was.

(3) Mr Tolley submitted, in the alternative, that each single assignment comprised an individual engagement of employment. Mr Peacock responded that HMRC should not be permitted to raise this argument as it was only raised for the first time towards the end of the hearing. In any event, in his view the arrangements could not be characterised in this way.

18. Mr Tolley submitted that the BBC had the required ultimate right of control over the Presenters necessary to demonstrate an employment relationship on the basis it controlled (a) the work which Presenters did for the BBC as regards what they did, the manner in which they did it and where and when they did it and (b) the Presenters' ability to do other non-BBC work through extensive restrictions including a prohibition on the Presenters working for other broadcasters. He considered that the extensive Editorial Guidelines and other guidelines published by the BBC, which set out the principles and practices required of all those involved in producing content for the BBC, are central to evidencing this right of control. He also argued that this conclusion is bolstered by the fact that, in his view, the Presenters were controlled by the PSCs under an implied employment contract. In his view that negates any assertion that the BBC could not control the Presenters in the required way due to the specialised nature of the work involved.

19. In Mr Peacock's view, however, any control which the BBC may have had over the content or "output" of the relevant news programmes under the guidelines and/or the contractual terms does not amount to the BBC having the required control over the Presenters *themselves* in providing their services. He emphasised that the relevant guidelines apply to all involved in producing content for the BBC (whether employees or independent production companies); they are merely part of the regulatory framework in which the BBC operates. Moreover, the cases establish that control over the manner in which a person performs his work is of little relevance in a scenario, such as this, where the person provides specialised skills of a kind which, in practice, the putative employer cannot control.

20. Mr Peacock argued that Mr Tolley placed too much emphasis on control of when and where the Presenters worked; he said that in a modern context that rarely of itself suffices for the control test to be met. Nor did he consider that the control of the Presenter's outside activities was material. He disagreed that a contract of

employment could be implied between the PSC and the Presenter and that, if it could, it had any relevance to the analysis of the assumed relationship.

Validity of determinations/notices

21. The PSCs disputed that HMRC validly issued the determinations in dispute. Mr Peacock argued that HMRC can only validly issue such a determination where they have "discovered" an insufficiency of tax within the meaning of s 29(1) of the Taxes Management Act 1970 ("**TMA**"). In his view, this is the effect of regulation 80(5) which provides that a determination made under regulation 80 is subject to various parts of the TMA, including Part 4 which includes 29 (1) TMA "as if - (a) the determination were an assessment..".

22. In Mr Peacock's view in the case of AML and TWL any discovery of an insufficiency of income made by HMRC had lost its essential newness or become "stale" by the time the determinations were issued so that they were not valid for the purposes of s 29(1) under the principles set out in recent case law. HMRC disputed that s 29(1) was in point at all but said that, in any event, there was a valid discovery which was not "stale" by the time the determinations were issued.

23. Mr Peacock also submitted that in any event some of the determinations were not issued within the applicable time limits in s 34 and s 36 TMA which, as was not disputed, also apply by virtue of regulation 80(5). The tax years in question are (a) in respect of PL, 2007/08 and 2008/09 (b) in respect of AML, 2009/10 and 2010/11 and (c) in respect of TWL, 2006/07 to 2008/09 (together the "**disputed years**").

24. It was common ground that HMRC were out of time to issue the determinations for the disputed years unless the conditions are met for the longer limit for them to do so, as provided for in s 36 TMA. The longer period applies "in a case involving a loss of income tax" which is "brought about carelessly by the person" or "by another person acting on behalf of that person" (under s 36(1B)). In HMRC's view the longer period applies on the basis that the advisers who dealt with the incorporation of the PSCs and on-going compliance requirements, were acting on behalf of the PSCs and brought about a loss of income tax carelessly in the disputed years. Mr Peacock disputed that HMRC have demonstrated to the required standard of proof (on the balance of probabilities) that the requirements for the longer time limit to apply are met.

Conclusion

25. In summary, for all the reasons set out below, the tribunal's decision is that:

(1) Except as regards certain of the arrangements made between the BBC and TWL in relation to World, as regards each tax year in question IR35 applies to the arrangements in each of these appeals such that the PSCs are in principle liable to income tax and NICs under those provisions. I note that Mr Perrin does not agree with this conclusion but as chairman of the panel I have exercised my casting vote.

(2) The provisions of s 29(1) TMA do not apply to the determinations but, if we are wrong on that, the discovery of an insufficiency of income tax made by HMRC had not lost its essential newness by the time the determinations were issued such that they were not invalidly made on that basis.

(3) The longer time limit for the issue of the determinations in the disputed years does not apply so that HMRC were out of time to issue the determinations in respect of those years.

Part B - Evidence and Facts

Evidence

26. We have found the facts set out below on the basis of:

(1) the evidence given for the PSCs by (a) the Presenters, (b) Mr Paul Riseley (who had worked with Ms Gosling and Mr Willcox in his capacity as lead studio director on News and BBC1 news bulletins), Mr Richard Bowen (who had worked with Mr Willcox as a producer and assistant editor at World), Ms Louisa Compton (who worked with Ms Gosling as an editor at the BBC) and Ms Emily Caporn, (c) Mr David Jordan of the BBC, who was the head of editorial standards and (d) Mr John Simmonds, an accountant of John Simmonds & Co ("**JSC**") who acted for AML;

(2) the evidence given for HMRC by Mr David Smith who was head of employment tax at the BBC from 2001 until May 2015 (and head of global mobility from 2005 to his departure from the BBC in 2015); and

(3) the bundle of documents produced to the tribunal.

27. Each of the witnesses attended the hearing and was cross examined except Ms Compton and Ms Caporn whose witness statements stood as their evidence. We have not cited evidence from those statements but note that overall the evidence in them is consistent with and supports the relevant evidence of the other witnesses. We found all the witnesses who attended the hearing to be credible witnesses and we have accepted their evidence as set out below except where expressly stated otherwise.

28. We note that whilst Mr Smith was familiar with the history of contracts between the BBC and PSCs from a policy perspective, he had no involvement in the negotiation of contracts or their day to day administration and no direct experience of working in live television or of how the PSCs and the Presenters dealt with the BBC on a day to day basis. He had not seen any documentation on which the PSCs rely. His evidence was largely confined, therefore, to his understanding of the BBC's relevant policies and how he thought the BBC intended to operate them. He did not have knowledge of how the policies were in fact implemented in practice in this case.

History of arrangements with the BBC and overview

Setting up the PSCs

29. Each of the Presenters worked for the BBC for a number of years before they set up the PSCs to provide their services to the BBC. PL was set up on 14 October 2003, AML on 20 October 2003 and TWL on 13 October 2004. The Presenters each said that, at that time, in effect they were forced into acting through a PSC in order to be able to continue working with the BBC in the sense explained below.

30. Mr Willcox and Ms Gosling were both previously engaged on a "freelance" basis, in Mr Willcox' case from 2001 and in Ms Gosling's case from 1999. Mr Eades was an employee of the BBC for about 16 years until he took voluntary redundancy in 2003. He wanted to change the nature of his work for family reasons; being at the beck and call of the BBC as a staff correspondent put a strain on him and his family. At that time Mr Eades started to build up a portfolio of work outside the BBC (in

providing training services to sporting organisations, writing articles for a European magazine and producing videos to highlight community sport activities). He also had a few radio presenting shifts at BBC World Service Radio on an ad hoc, freelance basis.

5 *Overview of scope of services*

31. In the period from their establishment until 2014, the PSCs entered into a series of contracts with the BBC for the provision of the relevant Presenters' services to News or World as applicable. News and World provide live coverage of news events in the UK and around the world.

10 32. During the relevant period:

(1) Ms Gosling mainly presented on News but she also presented news bulletins on BBC1 and BBC2 as well as on World and BBC London. (Since 2015, she has also been engaged as a presenter on the Victoria Derbyshire programme.)

15 (2) Mr Willcox worked primarily on News but also on World in each case as a "fill-in" presenter with no regular slot.

(3) Mr Eades presented on World. He also presented a number of programmes on BBC Radio but income received by AML in respect of his radio presenting work is not the subject of this appeal.

20 33. The Presenters all did some other non-BBC work although not as news presenters and to varying degrees. In 2014 the Presenters were all engaged directly by the BBC under continuing contracts. The BBC treat these as employment contracts for tax purposes.

Presenters' evidence on the use of the PSCs

25 34. Ms Gosling said that in 2003, when she was called in by the BBC to see Ms Mary Greenham some eight months before the expiry of a two year contract she then had with the BBC, she was told "if I wanted to carry on working for the BBC, I had to set up a company and operate through a company". She did not understand why this was needed and did not want to do it as she thought it would be complicated to run. 30 She was hoping to have a second child and wanted the security of employment with the BBC. She was told that in order to be an employee she would have to take a 30% pay cut and be a staff producer. She did not want to sign up to that.

35. Shortly after, on 10 June 2003, she received an email from Ms Greenham (it appears in error) entitled "freelance" stating: "Unless Joanna Gosling sets up a 35 company we need to offer her a 1 year fixed term contract - have just done [a colleague] and agreed £60k sal and 10k - where would you see Joanna fitting in - she may well set up a company". She gathered from this that a colleague was paid £70,000, as she later discovered from the colleague, for 130 days of work whereas she was offered £57,960 for 230 days. Ms Greenham was embarrassed at having sent the 40 email to her but said that the "staff" terms that were offered to her would not change. Ms Gosling felt that she had no option but to set up a PSC.

36. Mr Eades said that "out of the blue", around eight months after he took redundancy, the BBC advised him that there was an opportunity for him to present for World. This was attractive to him as he thought that he could do a certain number of 45 shifts at World around which he could fit his other work which he had started to build

up. When he accepted the offer, he was informed by the BBC that he had to have a PSC; his understanding was that this was the only way to be engaged for this role.

37. Mr Willcox said that using a PSC was mentioned to him in the autumn of 2004 by the managing editor at BBC News (Mr Nigel Charters) and then at a meeting with 5 the contract manager, Ms Tessa Beckett. His recollection was that she said that he would not be engaged in future as a freelance unless he set up a company; all news presenters had to set up such companies. Mr Willcox said this was presented as "a fait accompli". Whilst he did not remember the conversation with the BBC in detail, it was very clear in his mind that the only way forward was working through a PSC.

10 38. Following a further meeting in October 2004 he received an email from Ms Beckett offering him a contract. She said that, if he wanted to maintain his freelance status, he would need to satisfy the BBC that over 50% of his income was from non-BBC sources and, if that was not the case, he may want to take advice from his accountant on the options such as forming a PSC. She said it may be possible to 15 move to a fixed term staff contract but there would be additional employment costs to the BBC and his salary would be around 16% less. Mr Willcox said that none of this had been mentioned in his previous meetings but, in the circumstances, he felt he had no choice but to set up a PSC.

39. The Presenters all said they had not heard of IR35 until it was mentioned to 20 them by their accountants or when HMRC started their enquiries into their tax affairs in the relevant periods (see [676] to [686]).

BBC policy on use of PSCs

40. Mr Smith said that in 2004 the BBC adopted a policy that news presenters could either be engaged as employees or through a PSC. He said this came about following 25 HMRC's review of their tax status which was prompted by the clarification of the control the BBC had over such presenters in the Neil Report produced that year. In a letter dated 8 December 2004 HMRC advised the BBC that presenters with similar patterns to those reviewed should be put on the payroll. This was not required for presenters engaged through a PSC albeit that they may be subject to review under 30 IR35. Mr Smith said this meant that engaging with news presenters as sole traders was an unacceptable risk to the BBC.

41. We note, however, that PL was set up in 2003 and there was evidence in the bundles that BBC presenters had used PSCs long before the Neil Report (since the 1990s). Mr Smith said he was not aware of this. We also note that general control 35 was not the focus of the Neil Report. There is some doubt, therefore, over precisely when the policy Mr Smith described was put in place and how it came about.

42. Mr Smith's understanding was that at the time HMRC viewed the use of PSCs as acceptable as they could ensure tax was paid correctly through compliance reviews. They made it clear that, on that basis, the use of PSCs was absolutely fine from the 40 BBC's perspective. The BBC provided full disclosure to HMRC on an annual basis of anybody paid "off payroll" and the amounts paid to them. He said that it was clear within the organisation that the BBC regarded a presenter using a PSC as being in an employment rather than a self-employment position.

43. Mr Smith said that he advised internally that the PSC option merely moved the 45 tax risk and liability from the BBC to the individual and should not be encouraged or recommended by the BBC. However, if the presenter wanted to contract via a PSC,

having taken their own advice, that was acceptable. He said that the BBC looked at employment for presenters in the first place; it was only if employment terms could not be agreed and the person wanted to work “off payroll”, that a PSC was the alternative.

44. In emails from Mr Smith to HMRC dated 5 November 2009 and 29 January 2010 he said that (a) the BBC were not seeking to avoid tax or NICs but had “a policy in place that Presenter contracts will only be with a service company” which was “to protect the BBC from risk” and (b) the BBC strived to put those it considered employed on employment contracts but where they would not accept this “we will only contract them via a service company so that the IR35 rules will apply and any tax or NIC due” would be its responsibility. He noted that the BBC reported all “vendors” to HMRC at the end of the year via the P46 returns and explained that the BBC only looked at the specific contract with the BBC and “if we consider that we have editorial control, want to restrict what they do outside the BBC and want their services over a longer period of time, we would seek to put in place employment terms….”

45. At the hearing he was shown an email from Ms Patel, the former finance director at the BBC, from July 2012 in which she said that “freelance contractors who earn more than £10,000 a year are told that we, the BBC, prefer them to set up a [PSC] and in many cases, this will be their only option.” He said he thought that this “is a generalisation, short cutting the steps” to get to the use of PSC. He said that it certainly was not the internal approach to drive straight to use of a PSC and suggested that this is not the way contracts should have been spoken about. He had no comment when it was put to him that the Presenters were not told by the BBC that the employment status tax risk was passed to the PSCs.

46. We accept the above evidence as reflecting Mr Smith’s understanding of how the BBC policy on the use of PSCs was to be operated but, as noted, he had no direct experience of how matters were operated in practice. His evidence does not, therefore, cast doubt on the Presenters’ evidence that in their cases, the policy was not implemented entirely as Mr Smith said it should have been.

Contractual arrangements between the PSCs and the BBC

Overview - Contract renewal

47. During the relevant period, each of the PSCs entered into a series of written contracts with the BBC for the provision of the relevant Presenter’s services. Although the copies of some of the contracts or related documents in the bundles were not signed and/or dated, there was no dispute that the terms in these documents represent the contractual terms agreed between the parties and that where handwritten amendments were occasionally made by the Presenter these were accepted by the BBC. The PSCs entered into substantially similar contracts with the BBC in the periods immediately before and after the relevant period (until the Presenters contracted directly with the BBC in 2014).

48. Each contract was usually stated to commence on the expiry of the previous contract although in some cases there was a gap between expiry of one contract and the signing or agreement of the new contract. The Presenters continued to present on World or News as applicable whilst negotiations were on-going for the new contract. Mr Willcox confirmed that he carried on working in the same way during these gaps

and invoiced for the work done as usual. He said that he was anxious about these periods but not particularly more or less than he always was about obtaining a renewal given there was no guarantee. Ms Gosling also said that she worked in the same way as usual during these periods and negotiated the new contract at the same time. She described herself as being "out of contract" in such circumstances and noted that when the new contract was agreed, it was "backdated."

49. The Presenters all stressed that they never felt there was any guarantee of the obtaining a new contract at the expiry of the existing one:

(1) Mr Willcox said that throughout there was uncertainty about whether each contract would be renewed: "When a contract came to an end, I was not sure if I would sign another contract with the BBC. In fact this uncertainty never went away until 2014. There was always the feeling that each year could be my last." He described himself as being in "a permanent state of anxiety" and said that even when he managed to secure contracts with the BBC, "the number of guaranteed days was nowhere near enough and there was no obligation on the BBC to offer me work outside that".

(2) Mr Eades said that it was never certain that he would be offered a new contract each year (as he thought was demonstrated by changes made to AML's contracts with the BBC in 2009 to 2011). The uncertainty, and anxiety were very real to him and strengthened his appreciation of the need for work beyond the BBC.

(3) Ms Gosling noted that each new contract with PL involved a negotiation with the BBC which made her feel vulnerable especially as a result of changes in fees (mainly pay cuts) and periods of engagement; those negotiations were not straightforward or easy. She said that as a presenter, "if your face doesn't fit any more, you will be out". She always assumed that was why the BBC wanted to keep her as freelance in-order to be able to get rid of her whenever they wanted.

50. There was evidence in the documents in the bundles that the BBC wanted to retain flexibility. In a note of a meeting between HMRC and the BBC on 22 March 2010, the BBC representatives are recorded as stating that they did not want to enter into "a handcuff contract - exclusive to BBC or output over long period of time - would regard it as employment contract but would not want it" as "programmes may bomb, "ratings may be poor" and the individual might not "fit profile". In a note of a meeting of 21 April 2008 Mr Steve Mitchell (News Editor) is recorded as stating that the BBC reviewed its position at the end of a contract to see if the individual was appropriate to the slot and Mr Smith as stating that in the industry there is no long term guarantee of work; the BBC were always looking to refresh programmes and output. In a document dated 7 November 2012 in which the BBC reviewed its engagement model it was stated that the BBC "like the rest of the broadcast industry, needs the flexibility to engage people on a freelance basis because it gives just the ability to respond to changing audience demands, stay topical and bring in key talent and specialist expertise with a speed and at a price which employment policies and practices would not allow".

Form of the contracts and related documents

51. Other than in relation to some contracts entered into between TWL and the BBC in relation to World (being those specified at [55(1) and (2)], the contracts between the parties were generally divided into two parts:

5 (1) Part A of the contract stated that the relevant version of the general terms of trade "are deemed incorporated in and shall form part of this Contract (subject to Part B hereof)". There were four different versions of the general terms applicable during the relevant periods which we refer to as the "2004 Terms", the "2007 Terms" and, as regards the last two sets of terms of 2012 and 2013 (which are very similar), the "2012 Terms", (referred to collectively as the
10 "**Terms**").

(2) Part B set out the particular terms applicable to the relevant PSC including:

(a) the details of the Presenter;

(b) the contract period or term;

15 (c) the "call period" or "minimum commitment" of a specified number of "days" during the contract period (the "**minimum days**"). The Presenters explained that the parties regarded a "day" as corresponding to a shift or slot on a particular programme which was typically three hours. If a presenter did two slots on a day, that counted as two "days"
20 for this purpose;

(d) the "contract fee" for the minimum days, usually expressed as an annual amount (or proportionate amount where the contract period was less than one year) and fees for any additional programmes at a daily rate. The contract fee was calculated on the basis of the minimum days
25 in the contract period multiplied by the agreed fee for each day/shift;

(e) a description of the services which were generally "Presenter/Reporter" and "all reasonable ancillary services including attendance for programme promotion for [World][News] to include in particular presenting" the relevant news programme or, in some
30 contracts, such services "normally associated with such role (including attendances for programme promotion) for the output of BBC news"; and

(f) a statement that the "fee" was due in equal monthly instalments payable at the end of each calendar month with the invoice to be
35 presented at the end of the month (or a reference to corresponding provisions in the applicable Terms). It appears that this referred to the contract fee only; in the earlier periods, in practice, fees for additional days were invoiced and paid for at the end of the annual or other contract period. The 2007 and 2012 Terms contained specific
40 provisions as regards payment of those fees as set out below.

We refer to the provisions in the Terms and in Part B of the contracts together as the "contractual terms".

52. The provision regarding the invoicing arrangements was varied in the contracts with TWL to provide that it was to submit invoices regularly for work actually carried
45 out in the relevant period. Mr Willcox negotiated this as, given his irregular shifts

and that he often exceeded the minimum days, he wanted to be paid for the work actually done (as he had been when he contracted directly with the BBC). Mr Willcox said that he would normally cover 100 programmes in the first six weeks of each contractual period and would then strive to get as much work as he could. Mr Eades/AML also billed for work on that basis in practice from sometime in 2009 onwards. Ms Gosling confirmed that she initially submitted invoices at monthly intervals for the contract fee divided by twelve but at some stage (she could not remember precisely when) the BBC made the monthly payments in respect of the contract fee without the need for her to submit invoices. All of the Presenters kept a diary or ledger to keep track of the number of days they worked.

53. The signed contract or an earlier draft was usually accompanied by a covering or offer letter from the BBC in which the BBC highlighted particular terms (the "**covering letters**"). The Presenter was also asked to sign (a) an "inducement letter" or "contributor agreement", and (b) a declaration of interests form. The PSCs were also sent a number of other documents such as (a) a VAT self-billing form, (b) a "non-staff accident letter", (c) Conflicts of Interest Guidelines (the "**Conflicts Guidelines**"), (d) criteria for writing for newspapers and magazines, and (e) the Off-Air Activities Guidance Notes (the "**Off-Air Notes**"), and were referred to the Editorial Guidelines as set out below. The Conflicts Guidelines, Off-Air Notes and Editorial Guidelines are referred to together as the "Guidelines".

Contracts between TWL and the BBC

Series of contracts

54. TWL and the BBC entered into a series of contracts for the provision of Mr Willcox' services for News as follows:

(1) A contract dated 17 November 2005 for one year from 1 January 2006 for (a) a "call period" of 150 days, (b) a contract fee of £63,000, (c) £420 for each additional programme and (d) as regards expenses, "early/late shift mileage as agreed". It was stated that invoices would be submitted regularly by the Presenter for services carried out as previously discussed and agreed with a BBC representative, with each invoice to be presented at the end of a calendar month.

(2) A contract dated 10 March 2007 for two years from 1 January 2007 for (a) a "minimum commitment" of 150 days per year, (b) a contract fee of £70,500 per year and (c) £470 for each additional programme (in each case subject to a CPI increase in year 2) on the basis that, if Mr Willcox did more than one programme on a day, he would be paid £470 per programme after the first ten such double shifts. There was a handwritten amendment that TWL was to invoice monthly for all work completed in the previous calendar month.

(3) A contract dated 25 August 2008 for two years from 1 August 2008, which was stated to supersede and replace the previous contract. This was for (a) a "minimum commitment" of 180 days per year, (b) a contract fee of £91,800 and £93,960 in the first and second years respectively and (c) a fee for each additional day of £510 and £522 in the first and second year respectively (with the same provisions as above as regards double shifts in the covering letter). There was a handwritten amendment stating that the invoicing arrangements were to be as set out above. This contract was extended under a

letter dated 9 August 2010 for a period ending on 30 September 2010 on the basis that the BBC expected to call on the Presenter's services for 40 days.

(4) A contract specified to take effect from 1 November 2010 for two years from that date to 31 October 2012 for (a) a "minimum commitment" of 190 days for each year, (b) a contract fee in each year of £99,180 noting that it was calculated on the basis of £522 per day multiplied by the number of days the Presenter's services were required under the minimum commitment and (c) £522 for additional days. This contract also related to World as set out in [55] below. The contract was dated 1 November 2010 but must have been signed later as it was sent out under a covering letter dated 13 December 2010.

(5) Three further contracts: (a) dated 30 January 2013 for the period to 31 March 2013, (b) dated 18 April 2013 for the period from 1 April to 30 September 2013 and (c) dated 24 October 2013 for the period from 1 October 2013 to 31 March 2014. It was in each case provided that the BBC was "entitled to call" on the PSC to supply Mr Willcox' services for a "revised commitment" during the term of a specified number of days (80 days under the first contract and 95 days under the following two contracts). The contract fee was £41,760 under the first contract and £49,590 under the other two contracts in each case with a fee for additional days of £522.

55. The parties entered into three contracts as regards the provision of services to World:

(1) A contract dated 26 January 2009 for one year from 1 August 2008 to 31 July 2009 for a fee of £510 per day.

(2) A contract dated 9 October 2009 for one year from 1 August 2009 to 31 July 2010 and for a fee of £522 per day.

(3) A contract stated to apply with effect from 1 November 2010 for the period from that date to 31 October 2012 for (a) a "minimum commitment" of 46 days for the first year and a contract fee of £24,012 (calculated on the basis of £522 per day) but (b) with no commitment for the second year.

56. There were gaps between the expiry of one contract and the signing of a new contract as follows:

(1) As regards contracts for the provision of the services to News (a) from 1 January 2007 to 9 March 2007, (b) from 1 August to 8 August 2008, (c) from 1 October to 31 October 2010, (d) from 1 November 2010 to 13 December 2011, (e) from 1 November 2012 to 29 January 2013 and (e) from 1 to 17 April 2013.

(2) As regards contracts for the provision of services to World (a) from 1 August 2008 to 25 January 2009, (b) from 1 August 2009 to 8 October 2009 and (c) from 1 August 2010 to 13 December 2010.

Covering letters in relation to contracts with News

57. The BBC sent TWL covering letters with the various contracts (or drafts of the contracts) relating to News dated 27 October 2005, 23 February 2007, 21 July 2008 and 13 December 2010 in which the BBC flagged up certain terms.

58. *Minimum commitment/call and fees*:

(1) In all of the letters the BBC stated that the fee was calculated on the basis that Mr Willcox "shall make a "minimum contribution" or "fulfils the minimum commitment" of a specified number of days during the contract period.

(2) In the letters of 23 February 2007, 21 July 2008 and 13 December 2010 it was stated that the BBC had "first call" over Mr Willcox' services.

(3) In the letter of 13 December 2010 it was stated that:

> "all fees are calculated on the basis of a minimum commitment to provide freelance services for a number of programmes/days over the contract term multiplied by a per programme/day rate. For convenience to both parties, the total fee may sometimes be paid via equal monthly instalments throughout the term, but all payments are for specific programme/day commitments based on the agreed programme/daily rate. If additional services are provided during the contract term the BBC will make further payment at this programme/daily rate upon receipt of a valid invoice."

59. *Working for others and conflicts of interest*:

(1) It was noted in all of the letters that the PSC/Mr Willcox was required to seek the advice of a BBC representative before entering into any commitment to engage in any work for other BBC departments or to accept any outside work including both print journalism and broadcasting and that the onus was on the PSC to keep the BBC informed (the "**working restriction**").

(2) In the letter of 23 February 2007, it was also acknowledged that as a freelance contributor Mr Willcox would be pursuing other engagements and that, "generally consent is likely to be forthcoming unless there are editorial or conflict of interest issues raised thereby".

(3) In the letter of 13 December 2010 it was stated that:

> "Whilst we have first call on Mr Willcox' services during any call day, it is acknowledged that as a freelance he is free to pursue other engagements for third parties (including during any call day), subject to this not conflicting with any scheduled BBC commitments."

(4) Attention was drawn in all of the letters to (a) the provisions in the Terms on extra-contractual activities and (b) the Conflicts Guidelines, and a request was made for the Presenter to indicate conflicts of interest and to fill in the declaration form.

60. *Editorial Guidelines*: In the earlier letters attention was drawn to the Editorial Guidelines, which were not enclosed but it was stated that a copy could be sent if requested or obtained from the line manager. In the letter of 21 July 2008 it was noted that the Editorial Guidelines were available on the website, that it was "a condition of engagement" that "you read them and agree to full comply with them" and "sign a declaration (enclosed) to warrant that you have done so" (and it was noted that compliance was required with other guidelines that may be communicated by the BBC from time to time) and that "all freelance contributors for the BBC are required to complete Editorial Standards training" (the "**guidelines provision**"). There was a similar provision in the letter of 13 December 2010 but with no reference to training.

61. *Insurance*: In the letter of 13 December 2010 it was stated that as Mr Willcox is a "freelance contributor supplied by the Company" the BBC does not provide

insurance cover (save for a purely discretionary No-Staff Accident Benefit Scheme). It was noted that "the cover available is limited" and it was, therefore, "the responsibility of the Company and/or Mr Willcox to ensure that he has adequate personally arranged insurance appropriate for all his needs" (the "**insurance provision**").

Contracts relating to World

62. The first two contracts with World were sent to TWL under covering letters dated 26 January 2009 and 9 October 2009 respectively to which the terms of trade were attached (in a substantially shorter and less detailed format than the Terms applicable to the other contracts). Each of the letters/contracts contained the following terms/explanation of the terms:

(1) It was stated that the BBC would call on Mr Willcox' services as required for a fee payable per shift which "will only be payable for work actually undertaken". It was noted that the "agreement provides no guarantee of on-going work and is not an employment contract".

(2) The Fee was stated to be "deemed inclusive of all expense unless expressly agreed by the BBC. It was provided that where "there is a specific agreement payments for permitted expenditure shall be made by the BBC on presentation of invoice accompanied by appropriate evidence…" Payment of the fee was to be made on receipt of an accurate invoice and the fee was stated to be exclusive of VAT.

(3) TWL was referred to the Conflicts Guidelines and the Editorial Guidelines and it was stated to be a condition of the engagement that "you read [the Editorial Guidelines] and agree to fully comply with them at all times…. [and] to comply with any other guidelines that may be communicated to you by the BBC from time to time". The terms of trade contained a statement that "I have received a copy of and read the [Conflicts Guidelines] and agreed to abide by them".

(4) In both letters it was noted that "the primary responsibility for personal insurance remains your liability". The letter of 9 October 2009 contained a similar provision to the insurance provision.

(5) "You agree that you will not make or authorise any broadcast or use of the contributions as packaged for the BBC for any other organisation….you may make different or similar contribution made on the same or similar content for other organisations, so long as there is no substantial copying of the BBC packaged contributions."

(6) The BBC was under no obligation to broadcast or otherwise utilise the contributions and "shall not be liable to you for loss of publicity or otherwise as a result thereof".

(7) TWL assigned to the BBC copyright and other rights in the contributions made (in similar provisions to those in the Terms).

Inducement letter and declaration of interest form

63. In the inducement letters which Mr Willcox usually entered into in relation to each contract, he agreed to the execution of the contract by TWL, made a number of representations as regards TWL's ability to enter into the contract and gave

undertakings personally to render all services required of him under the contract. In the letters entered into from 25 August 2008 onwards Mr Willcox agreed to complete such editorial training as the BBC might, from time to time, require and to comply with the Editorial Guidelines. At the hearing he said that there were online courses and things like that which he was mandated to do and it would come up if this was not done.

64. In the "declaration of interests" form Mr Willcox was asked to confirm that (1) he was aware of the Guidelines and (2) he understood the need to declare (a) any personal interest in any other business or enterprise or any work for any other organisation which might affect the impartiality of the duties he was required to undertake (including as regards his partner, dependant relatives or close personal contacts) and (b) any political involvement and any membership of any voluntary, statutory or charitable bodies which could interfere with his work for the BBC and any actual or potential conflicts of interest or close or personal relationships which might or might be perceived to influence his job. It was also noted in the form that the Off-Air Notes give specific advice for news and current affair areas on writing books and other external publications, public speaking, chairing conferences and media training and that Mr Willcox should declare any interest in the above when completing the form.

65. In the form relating to the contract dated 10 March 2007 Mr Willcox confirmed that, as for previous contracts, his freelance work outside the BBC included making and presenting documentaries and writing features articles (on non-political subjects) for the national press. He commented at the hearing that, as an impartial journalist, the fact that he could not engage in the specified matters was: "an obvious thing. I mean, I wouldn't go and talk at a lobbying group ….[or] get involved in something which was politically controversial or for a particular lobby group ……I think I went through it far more carefully, as far as my own career work was concerned as opposed to as regards relatives and others".

Contracts between the BBC and PL

Series of contracts

66. The BBC and PL entered into the following contracts as regards the provision of Ms Gosling's services to News:

(1) Two contracts each for two years starting (a) from 1 August 2006 and (b) from 1 August 2008, each for a "call period" or a "minimum commitment" of 149 days in each year. The first contract was signed on 7 July 2006 and the second on 12 January 2009:

(a) Under the first contract the contract fee was £107,727 and the fee for "any mutually agreed additional days" was £723 (in each case, subject to an RPI adjustment plus 1% in the second year).

(b) Under the second contract the contract fee and additional fee was £115,808 and £644 in the first year and £118,124 and £657 in the second year respectively.

(c) In the second contract it was stated that Ms Gosling acknowledged receipt of £47,305 from 1 August 2008 to 31 December 2008.

(d) The first contract contained a term that: "In the event of the Company failing for any reason to render the services of the [Presenter]

under this Agreement the payment shall (unless the BBC otherwise decides) be reduced by an amount proportionate to the period during which the Company failed to render the [Presenter's] services".

(2) Whilst negotiations were on-going for a new contract, the BBC confirmed in a letter dated 9 August 2010 that they wished to extend the second contract from 1 August 2010 to 30 September 2010 for a minimum commitment of 35 days and for the same fee as previously. Ms Gosling signed this on 19 August 2010 as corrected manually by her to refer to 24 days (as a proportion of the annual minimum commitment of 149 days).

(3) The final contract in the relevant period was dated 5 November 2010 for (a) two years from 1 November 2010 to 31 October 2012, (b) a "minimum commitment" of 161 days in each year and (c) a contract fee of £106,311 each year which was stated "for the avoidance of doubt" to be "calculated on the basis of a daily rate of [£657] per day "multiplied by the number of days your services are required" under the minimum days and £657 for additional days.

(4) After the relevant period, the parties entered into contracts (a) for the period from 1 November 2012 to 31 October 2013 for a minimum of 161 days and (b) dated 7 November 2011 for the period from 1 November 2013 to 30 April 2014 for a minimum of 81 days (in each case for fees calculated on the same basis as in the previous contract).

67. Ms Gosling said that during the contractual period starting on 1 August 2006 the BBC asked her to work more days which she was happy to do so. However, the BBC later tried to re-negotiate the fee when she was pregnant with her child who was due in early 2008; the BBC wanted her to return after a period of leave at a reduced fee. This was resolved when, in a letter of 14 December 2007, the BBC wrote to PL confirming that there was no need for a change in terms on the basis that Ms Gosling did not work and was not paid for three months and "our mutual agreement to suspend the existing contract" dated 7 July 2006 from 1 January 2008 "until such time as the parties may mutually agree".

68. There was a prolonged delay in concluding the second contract due to Ms Gosling disputing her pay and terms. The BBC offered her increased days but at a reduced daily rate representing, as she calculated, a 25% pay cut. During this period whilst Ms Gosling carried on working the BBC stopped paying her for a time although she could not remember for how long. From the correspondence in the bundles, we conclude that payment was delayed in respect of one month. In an email to Ms Beckett on 12 December 2008 Ms Gosling said, it appears referring to the payment for November 2008, that as she had just received a payslip in the post, the fee was obviously on the way. She asked for Ms Beckett to make sure her December payment was not delayed. On 15 December 2008 Ms Beckett confirmed that the November fee had been paid but she said that she needed "a signed contract before further payments can be made" and that this why the November fee was delayed. Ms Gosling responded to the BBC on the same day that she could not sign a contract until settlement was reached and:

> "This also follows my November payment arriving a month late because of similar issues…….Since my discussion with you, I have become increasingly aware of varying rules for presenters, especially around the unwillingness of

> those who are staff to do the more antisocial shifts, like the evening. I can detail this if necessary. The fact that as a freelance presenter, my terms and conditions are dramatically worse than for staff, compounds my feelings about this."

69. On 19 December 2008 the BBC confirmed that they could agree a contract based on 149 days per annum at the rates set out above. The BBC said that at the end of second year any increase "will be based on your rate and not fee" and confirmed they had arranged payment of the fee for December. It was noted that they would "obviously need to adjust your payments from January to August" and that as to date they had paid ££9,461 per month, that "leaves £68,503 payable during the period January 2009 to July 2009 (£9,786 per month)".

70. Ms Gosling replied on 22 December 2008 that she wanted to be sure that the BBC was not suggesting that her daily rate became her contracted rate from 2010. On 29 December 2008 Ms Beckett replied that for all freelance contributors the daily rate is the contracted rate and any increase is normally applied to this and that the actual fee is based on the number of days the BBC calls on the freelance to provide their services. From a later email chain in 2010, Ms Gosling set out how at this time she tried to clarify the above wording repeatedly but "your answers became more opaque, so we did have a conversation in which I made absolutely clear that I would not agree a position where a £657 day rate would be the baseline for negotiations two years down the track".

71. Ms Gosling said that this email exchange is illustrative of how things were at the time. She had always wanted to be a staff presenter at the BBC. She was frustrated because "I was out of contract, the contract negotiations were brutal, so it was going on for a long time. And I wasn't being paid for the work until...it sort of felt like until you sign the contract, which…..felt like a fairly forceful thing to do".

72. She was working alongside presenters who were staff presenters and by comparison she felt pretty hard done by, vulnerable and unvalued. She felt that as a freelance, she was being treated differently. She did not know if the next contract would be agreed; there was no guarantee. She had pay cuts, no pension and had three children with no maternity leave. Other presenters had mobile phones and one even had a company car. She felt like a lone ranger and not like she was part of the fabric of the BBC because she was not treated like that. So it was not just the benefits "it is the whole way you feel. You feel very vulnerable". She also noted that when she was "out of contract" her security pass was suspended so that she could not get in and out of the building without being signed in.

73. There was also a prolonged negotiation in 2010 due to Ms Gosling's concerns that she was being asked again to take a pay cut. In correspondence with the BBC on 29 September 2010 she said that in her previous contract as her annual rate was £118,124 for 149 days in effect the day rate for the minimum days was £793 and not £657 which was the rate for additional days (and she said that rate was an irrelevance as she was prohibited from doing any more shifts). She said that she had received an email from Ms Beckett stating that her day rate was to be £592 meaning she would be paid £88,880 for 150 shifts. She computed this to be a 25% pay cut and expressed much dissatisfaction with the way she was being treated by the BBC as regards the proposed pay cut and lack of benefits and attitude when she had taken time off to have children despite having received praise for her work.

Covering letters

74. The offer letters sent to PL on 20 June 2006, 5 January 2009 and 27 October 2010 contained similar provisions as those set out above in relation to TWL:

(1) *Call/minimum commitment*: It was stated in (a) all of the letters that the contract fee was calculated on the basis that Ms Gosling "shall make a minimum commitment" of the specified number of days and (b) in the last two that the BBC had "first call" upon her "freelance services". The letter of 27 October 2010 also contained the statement set out in relation to TWL in respect of the calculation of fees (see [58(3)]).

(2) *Restrictions on outside activities and conflicts*: Each of the letters contained the working restriction, attention was drawn to the restrictions on outside activities in the Terms and to the provisions relating to the Conflicts Guidelines and PL was asked to fill in the declaration of interest form and return it.

(3) *Editorial Guidelines*: In the letter of 20 June 2006, attention was drawn to the Editorial Guidelines and it was stated that a copy could be supplied if requested. The other letters contained in all material respects the editorial provision but with a reference to the editorial training only in the letter of 5 January 2009.

(4) *Insurance:* The letters of 5 January 2009 and 27 October 2010 contained provisions which were substantially the same as the insurance provision.

Inducement letters and consent form

75. Ms Gosling signed inducement letters and declaration of interest forms in a similar form to those signed by Mr Willcox. In the inducement letter of 2009 and that dated 1 November 2010 Ms Gosling warranted that she would read and fully comply with the BBC's Editorial Guidelines and guidance and make herself available for editorial training and in the later letter she acknowledged that she did not have a "relationship of worker or employee in relation to the BBC".

Contracts between the BBC and AML

Series of contracts

76. AML entered into the following contracts with the BBC in respect of the provision of Mr Eades' services to News:

(1) Two undated contracts (a) each for one year from 1 November 2006 and 1 November 2007 respectively, (b) each for a "call period" or "minimum commitment" of 184 days during the contract period, (c) in the case of the first contract, for a contract fee of £80,408 stated to be calculated on the basis of a daily rate of £437 and, in the case of the second contract, for a contract fee of £82,248, and (d) in each case, for £447 for each additional day on which the BBC called upon the Presenter to provide services.

(2) Two contracts dated 6 November 2008 and 1 November 2009 (a) each for one year from 1 November 2008 and 1 November 2009 respectively (b) each for a "minimum commitment" of 184 days and (c) each for a contract fee of £84,272 and £458 for each additional day on which the BBC called upon Mr Eades' services. In the letter relating to the second contract it was stated that "for the avoidance of doubt, the fee is inclusive of any World Cup coverage,

should this be required". Mr Eades said that he had already had a conversation with Mr Andrew Roy, who was his editor at the time, about him attending the 2010 World Cup in South Africa.

(3) A contract which was undated for six months from 1 November 2010 to 30 April 2011, as sent under a covering letter dated 28 January 2011, for a minimum of 92 days and a fee of £42,136 (calculated at £458 per day).

(4) Three contracts each of which were undated, in each case for one year (from 2 May 2011 to 1 May 2014 in total) for (a) a "minimum commitment" of 150 days each year, (b) a contract fee of £68,700 and (c) a fee for each additional day on which the BBC called upon the Presenter to provide services of £458.

77. The terms of the first contract provided for AML to bill for Mr Eades' services on a monthly basis in equal instalments but in practice at some point in early 2009 (as shown in an invoice for February 2009) AML changed to invoicing for work actually done.

78. Mr Eades said that when he was offered the contract for the six month period he was informed by Mr Roy, the editor at World, that there were issues with regard to the financing and the continuation of World and that his position was in some doubt. It was not a very comfortable conversation, so he could not be sure that he bothered to sign the inducement letter and send it back. Mr Roy's comments came out of the blue, there was no room for negotiation and he had the distinct impression that his opportunity to work at World was coming to an end. He saw this as a very good reminder that he was a freelance presenter and was never guaranteed a further contract term. He emphasised that he was told categorically by Mr Roy that this might be his last contract with World. He said that this contrasts starkly with how changes in terms and conditions are dealt with now that he is on the payroll. The role he now has in coordinating the work that World presenters are prepared to carry out involves active consultation by the BBC on new potential programmes and shifts. He also noted that he has been involved in negotiations regarding the redundancy of presenters and has negotiated how he can play a role in the new programming structure, which includes broadening his base of work, for example to include some business news. He thought that this management type role is not something that he would have been asked to do or would have done as a freelance contributor.

79. Mr Eades said that when in the next contract he was offered a minimum of 150 days it was spelt out to him by Mr Roy that this was equivalent to him working about three rather than four days a week and that was as much as he could expect. He welcomed receiving another contract, albeit at reduced days, but again he felt it was a reminder of the unreliability of the arrangement with the BBC. In the years 2010 to 2013 he did not feel that he was particularly valued at World. There was no consultation ahead of theses significant changes, and they were essentially unilateral decisions. In his mind there was no question that he would have been treated differently as an employee. He took on further business roles outside the BBC at this time.

80. In the final contract the BBC had a right, to be exercised within nine months, to terminate the contract and enter into an agreement with Mr Eades directly on identical terms; to novate the contract to him directly; to make an offer of employment to him;

or to give notice of a period of further extension of three months to that option. Mr Eades said that this was part of a drive by BBC management to get presenters to accept "staff" contracts, rather than continue with freelance service contracts. He could not stress enough how both on this occasion and when the PSCs were set up "we were squeezed" to accept the BBC's terms or "be gone". In this case he received several messages urging him to get on with changing his conditions; he said each time that he was open to discussion but that was never taken up. He said that in the summer of 2013 AML's fees were not paid for two to three months whilst these discussions were going on.

Covering letters

81. Drafts of contracts were sent to AML under covering letters dated 29 September 2006, 30 October 2007, 27 October 2008, 30 October 2009, 28 January 2011 and 11 July 2011:

(1) *Call/minimum commitment*: The letters all included statements that the BBC had first call on Mr Eades' broadcasting services and that the fee was calculated on the basis that he would fulfil the minimum commitment. In the letter of 30 October 2009, it was stated that the fee was inclusive of any World Cup coverage. The letters of 28 January 2011 and 11 July 2011 set out the wording on the calculation of fees as set out at [58(3)] above.

(2) *Restriction on outside activities*: The letters all included the working restriction and usually attention was drawn to the restrictions on other activities in the Terms and to the Conflicts Guidelines and related restrictions and the need to declare relevant interests. It was acknowledged:

(a) in the letter of 30 October 2007, that "as a freelance contributor Mr Eades will be pursuing other engagements, and generally consent is likely to be forthcoming unless there are editorial or conflict of interest issues raised thereby"; and

(b) in the letter of January 2011, that whilst the BBC had first call on Mr Eades' freelance broadcasting services, Mr Eades was free to pursue other engagements for third parties (including during any call day), subject to this not conflicting with any scheduled BBC commitments. On 3 February 2011 Ms Beckett wrote to AML with essentially the same confirmation. Mr Eades did not recall this letter and could not explain why it was sent.

(3) *Editorial Guidelines*: In the letter of 29 September 2006 it was noted that a copy of the Editorial Guidelines could be obtained. In the letter of 30 October 2007 reference was made to the Guidelines being available on the website and it was noted that: "By your signature, you warrant and undertake that you have read and understood and will at all times comply" with them. The remaining letters contained provisions which were substantially the same as the editorial provision but without the reference to editorial training in the last three letters.

(4) *Insurance*: In the letter of 30 October 2007 it was noted that the primary responsibility for insurance was for the PSC/Mr Eades and that a note explaining the position was enclosed. The letters of 30 October 2009, 28 January 2011 and 11 July 2011 included provisions which were substantially the same as the insurance provision.

82. Mr Eades was generally sent inducement letters and declaration of interest forms in a similar form to those sent to the other Presenters. All the inducement letters provided in the bundles (from 2007 onwards) stated that he agreed to comply with the Editorial Guidelines (and some of them stated that he would comply with such other editorial policies as advised from time to time) and most stated that he would make himself available to complete editorial training. In the later letters (from 2010 onwards) he was required to acknowledge that he was not an employee of the BBC.

The Terms

83. Under the Terms the BBC, the relevant PSC and the Presenter had the following main entitlements and obligations.

Services, control and good faith

84. In the 2004 terms the PSC (referred to in the Terms as the Company) warranted that:

> "The Company controls the services of the [Presenter] and agrees to place the same at the service of the BBC in accordance with the terms and conditions of the Contract...
>
> … [it] shall, and it shall ensure that the [Presenter] shall, during the Contract Period, act in good faith towards the BBC and in such manner so as not to prejudice the Services or to bring the BBC into disrepute or cause a conflict of interest to arise and the BBC shall act in good faith towards the Company and the [Presenter]".

85. The 2007 Terms contained similar provisions to those in the 2004 Terms but there was no good faith obligation on the BBC. In both of these sets of Terms the "Services" were defined as the services to be provided by the Presenter as specified in Part B. In the 2004 Terms the PSC agreed to ensure that the Presenter would: "attend such programme promotion activities as the BBC may require…." and "if requested, attend BBC News Training Sessions as a specialist guest" on not more than two days per year.

86. In the 2012 Terms it was provided that the PSC (a) "controls the exclusive services of the [Presenter]" and (b) agrees to "procure and provide the [Presenter's] non-exclusive services to the BBC, as required under this Contract…". The PSC was required to provide the freelance services of the Presenter to the BBC as required in Part A and reasonably ancillary services normally associated with such role including:

> "(a) preparation and appearing in and out of vision
>
> (b) creative input for content production (such as researching, writing and editing the [Presenter's] own written contributions/blogs any other associated content and revising it as required at the Company's own cost and in the Presenter' own time)
>
> (c) travel as deemed reasonably necessary by the BBC
>
> (d) press, promotion and trails, and
>
> (e) such other services as are usually provided by a professional first class presenter
>
> as required for the Minimum Commitment and all associated output for the BBC Output Area"

Provision of services for fees

87. It was provided that the fees were consideration for the provision of the services as follows:

(1) As taken from the 2004 Terms, but the provisions in the 2007 Terms were very similar: "In consideration of the Company making the [Presenter] available during the Contract Period to provide the Services in accordance with the terms and conditions of the Contract, the BBC shall pay to the company, the Fee". That was stated to be subject to certain of the other provisions on fees.

(2) In the 2012 Terms: "In consideration for the provision of the Services of the [Presenter], for the rights granted under [the copyright provision], and all consents and waivers given pursuant to this Contract, the BBC will pay the Company the Fee subject to compliance of the Company and the [Presenter] with all obligations in this Contract."

88. As regards payment of fees and invoicing:

(1) In the 2004 Terms it was stated that: "Subject to [the provision set out at [95] the BBC shall pay to the Company the Fee which, if applicable, shall be payable in the manner specified in Part B of the Contract on presentation of an invoice."

(2) In the 2007 Terms, it was stated that (a) invoices must be provided for payment of the total Fee in equal monthly instalments in arrears, (b) the BBC was to pay promptly on presentation of an invoice and in any event within 30 days but the monthly instalments were to be paid no later than 14 days after the end of the relevant period (subject to the BBC having received a signed agreement) and (c) the PSC was not able to claim payment in respect of additional days until the Presenter "has fully completed the Minimum Commitment [in which case] the Presenter may thereafter invoice for additional days at the stipulated rate".

(3) The 2012 Terms contained provisions similar to those in the 2007 Terms but it was stated that if the BBC required the Presenter "to exceed the Minimum Commitment he/she will be entitled to invoice the BBC at the rates specified…at the end of the Term".

89. In all sets of the Terms the "Fee" was expressed to be exclusive of VAT.

90. In both the 2004 and 2007 Terms the above payment provisions were subject to the following provision entitling the BBC to withhold payment in certain circumstances with minor differences in wording, which are shown in square brackets as regards the 2004 Terms and, as regards the 2007 Terms, in italics:

> "The BBC reserves the right to ….withhold payment against any VAT invoice which is not submitted in accordance with [the above provision in [92] above] or which covers or purports to relate to any of the Services which have not been provided [in accordance with the Contract] [*as required under this Agreement*] and the BBC Representative shall notify the [Company Representative] [*the Company*] accordingly in writing. Any such action taken by the BBC under this sub-clause shall be without prejudice to any other rights which the BBC may have under [the Contract][*this Agreement*]."

91. In the 2007 and 2012 Terms there was a further provision entitling the BBC to reduce the fee for the services as follows:

> "In the event of the [Presenter] failing for any reason to render services under this Agreement the payment shall (unless the BBC otherwise decides) be reduced by an amount proportionate to the period during which the [Presenter] failed to render services" (2007 Terms)

5

> "If the Company fails for any reason to procure the delivery of the Services of the [Presenter], the BBC will be entitled in its absolute discretion to reduce the fee by any amount proportionate to the period during which the [Presenter] failed to provide the Services (or any part thereof) and/or the value of such of the Services not provided, as appropriate." (2012 Terms)

10 *Expenses*

92. In the 2004 Terms the PSC was entitled to reimbursement of the Presenter's "reasonable travel and subsistence expenditure incurred in providing the Services together with [VAT] or similar tax" and the parties were to agree in advance, the level of such expenditure.

15 93. In the 2007 Terms it was provided that the PSC was required to meet all expenses (including travel, subsistence and clothing) incurred in the provision of the services and the fee was deemed inclusive of all expenses unless (a) certain expenses were permitted under a formal expenses policy such as for very early or very late provision of services or where the Presenter was required by the BBC to travel

20 overseas or (b) where "exceptionally", specific expenses were agreed in advance of their being incurred by the BBC Representative which must be reasonably incurred directly in providing the services and of a reasonable amount.

94. In the 2012 Terms, the Fee was stated to be "inclusive of all expenses unless specific expenses have been agreed by the BBC Representative in exceptional

25 circumstances only and in advance of being incurred by the Company or the [Presenter]".

95. In the BBC's expenses policy document applicable to freelance news presenters it was stated that if the BBC required a freelance to undertake travel a significant distance away from their home or usual BBC base it may be appropriate for the BBC

30 to arrange and pay directly for suitable travel and/or accommodation or meet the cost of such travel or accommodation (in which case the BBC may also meet subsistence/meal costs).

Performance of services

96. In the 2004 Terms the PSC was required to ensure that in providing the services

35 the Presenter would:

> "(a) possess all necessary skill and experience
>
> (b) use all proper care, skill and diligence
>
> (c) execute and complete the Services in a timely, efficient and professional manner

40

> as is necessary for the proper performance of the [Presenter's] obligations under the contract."

97. There were similar provisions to those in [96] in the 2007 Terms. In the 2012 Terms the PSC agreed to procure that in providing the services the Presenter would "possess all necessary skill, ability, knowledge and experience", "use all proper care

45 and diligence" and "execute and complete the Services as a first class presenter

conscientiously and in a professional manner at all times, fully and willingly comply with such requests as may be made by the BBC in connection with the Services."

Attendance

98. In the 2004 Terms the PSC agreed to ensure that the Presenter would attend "at such places (whether in the United Kingdom or overseas) and at such times as are necessary for the Company to fulfil its obligations under the Contract." The 2007 Terms contained virtually the same wording without the express reference to the UK or overseas. In the 2012 Terms the PSC was required to procure the Presenter would "attend at such times and places as the BBC deems reasonably necessary".

Call and availability

99. In the 2007 Terms:

(1) The BBC had "first call on the services of the [Presenter] during the Term and throughout call days. For the avoidance of doubt the [Presenter] may be required to be available for a full day on any call day, and must remain contactable and available to provide Services on call days if so required. Any day of the year may be a call day (including public holidays)."

(2) The PSC was required to "use all best endeavours to procure that [the Presenter] is contactable at such times as shall be reasonably necessary to fulfil the Services required by the BBC hereunder" and, in particular, was required to procure that the Presenter:

(a) would provide the BBC with such phone numbers and email addresses as would enable access at the required times and frequencies;

(b) shall "(subject to reasonable notice) make him/herself available for such face to face meetings as are deemed necessary by the BBC to provide the Services"; and

(c) where "specific times of availability have been agreed, uses all best endeavours to be available and accessible to the BBC at those times and also undertakes to advise the BBC Representative promptly of any change to the supplied contact details during the Term".

100. In the 2012 Terms:

(1) The BBC did not require the provision of services on an exclusive basis but it had first call on the Presenter's services but "subject only to any prior professional commitments of the [Presenter] which have been confirmed in writing to the BBC Representative prior to signature hereof" and where "any Services are being contracted on a per day basis it is acknowledged that the [Presenter] could be required to be available for a full day when called upon to provide Services…."

(2) The PSC agreed to procure that in providing the Services the Presenter would "ensure the relevant producer(s) are supplied with up to date contact details ….and of any change in official representation" and "be contactable and available to provide the Services throughout any call days, if required".

Location

101. In all of the Terms there was a very similar provision as regards access to the BBC's premises (and the following is taken from the 2004 Terms):

"The [Presenter] shall be issued with a contractor's pass which he/she shall keep on his/her person at all times whilst on BBC premises…and shall be surrendered by the [Presenter] to the BBC upon expiry of the Contract…

5 The BBC Representative shall afford to the [Presenter] at all reasonable times and with prior agreement between the parties such facilities and access to BBC premises as the Company reasonably requires for the provision of the Services."

Equipment and insurance

102. In the 2004 Terms it was provided that where the contract requires the PSC to
10 provide the Services at location premises as specified in Part B the PSC was required to ensure that the Presenter was aware of and complied with health and safety requirements, was fully trained in the use of any equipment or materials required to be used under the contract and held any required licence and conformed to the terms of any contract entered into for the hire of such equipment and materials. The PSC was
15 also required to ensure that all equipment supplied by the PSC under the contract met the requirements of safety standards (and had to provide the BBC with evidence of compliance). The PSC was also responsible for insuring equipment provided to perform the services in respect of liabilities to third parties and if it sub-contracted the services to a company to ensure it held its own public and product liability insurance.

20 103. In the 2007 Terms the PSC was "responsible for insuring any equipment provided and used by…the Company or the [Presenter] to perform the Services against loss or damage and (where appropriate) this shall cover third parties" (but not where the equipment was provided by the BBC).

104. In the 2012 Terms the Company was required (amongst other things):

25 (1) to provide appropriate clothing for the [Presenter] for carrying out the services, and to comply with any particular BBC requirements, if any;

(2) to be responsible for the care, control, security, insurance and maintenance of any equipment and materials provided by the PSC or the Presenter (or any person connected with them) to perform the services;

30 (3) to procure and warrant that the Presenter would (i) take reasonable care of the health and safety of others as well as themselves, (ii) use reasonable endeavours to attain and maintain such a good state of health as would enable the provision of the services and would not without the BBC's written consent voluntarily engage in any hazardous pursuits which could jeopardise the
35 Presenter's ability to fulfil the services, and (iii) at the reasonable request of the BBC procure that the Presenter underwent full medical examination(s);

(4) "to procure such insurance cover as the Company and/or the [Presenter] will deem necessary for the [Presenter's] own personal needs (including any needs of their dependents)". It was acknowledged that the BBC had no liability
40 as an employer or otherwise in respect of any insurance cover nor loss due to illness or injury sustained in the course of providing the services unless caused directly by the negligence or wilful default of the BBC; and

(5) to keep the BBC indemnified against breach of the contract or warranties.

Liability

45 105. In the 2004 Terms:

(1) The PSC was required to indemnify the BBC against all claims and costs in respect of injury, damage or loss arising out of the negligent or reckless conduct of the PSC or its servants in consequence of the PSC's obligation or breach thereof under the Contract.

5 (2) The BBC was not liable to the PSC or the Presenter for any loss, damage or injury to the Presenter or to the Presenter's property unless caused, broadly, by the BBC's negligence or reckless conduct.

(3) It was provided that:

> "The BBC shall be entitled not to use the Services or any part
> 10 thereof and neither the Company nor the [Presenter] nor the personal representatives of the [Presenter] shall have any claim for loss of publicity or otherwise as a result thereof beyond a claim for payment of the Fee in full".

106. In the 2007 and 2012 Terms, there was a similar provision as in (2) above and to 15 that in (3) as follows:

> "The BBC shall not be obliged to call on the services of the [Presenter] hereunder or to use all or any of the [Presenter's] contributions and if it does not do so it shall not be liable to the Company or the [Presenter] for any loss or damage suffered by the Company or the [Presenter] thereby or any failure 20 to obtain publicity, or any opportunity to enhance the reputation of the [Presenter] PROVIDED HOWEVER THAT the BBC shall nonetheless, be obliged to pay the Fee in full (subject to any other provisions to the contrary)." (Taken from the 2007 Terms but the wording in the 2012 Terms is not materially different except that it refers only to the BBC being obliged 25 to pay the "Fee" as opposed to the "Fee in full")

Editorial Guidelines

107. In the 2004 Terms the PSC was required to "discharge its obligations under the Contract in such a manner as to observe the BBC's general editorial policy as notified in writing or otherwise by the BBC to the Company Representative from time to 30 time." There was a similar provision in the 2007 Terms by reference to the Editorial Guidelines and such further guidelines as may be communicated to the Presenter from time to time. In the 2012 Terms, there was a more fulsome provision as follows:

> "..the Company agrees and will procure that the [Presenter] will read the [Editorial Guidelines] and any Guidance (up to date copies of which can be 35 found on bbc.co.uk) or any revisions or replacements…will comply fully with [the Editorial Guidelines] and Editorial Guidance… the BBC's Values, any other editorial policies and other BBC guidelines and policies as may be advised to the Company and/or the [Presenter] by the BBC from time to time, and any applicable codes from the Office of Communications or any 40 regulatory body or bodies that may replace it……)"

108. In the 2007 and 2012 Terms it was "acknowledged that the BBC's editorial control [of its content] is final".

Copyright/Defamation

109. Under the 2004 Terms:

> 45 "….the Company hereby assigns to the BBC absolutely the complete copyright in the products of the Services of the [Presenter] in all languages

throughout the Universe .... and warrants that the [Presenter] has assigned the same absolutely to the Company…

The Company warrants that nothing contributed by the [Presenter] under the contract shall: ……(b) contain anything which constitutes an infringement of copyright or is defamatory or is calculated to bring the BBC into disrepute but neither the [Presenter] nor the company shall be liable in respect of any defamatory material which was included without negligence or malice by the [Presenter]….

The Company grants to the BBC the unlimited right to edit, copy, alter, add to, take from, adapt or translate the products of the Services of the [Presenter] and with regard to those products and any programme in which they may be incorporated and hereby warrants that the [Presenter] has waived irrevocably the benefits of any provisions of law known as "moral rights"…."

110. The 2007 and 2012 Terms contained similar provisions as set out in [110] but as regards defamatory material in each case without the proviso for material included without negligence or malice by the Presenter but on the basis that the relevant warranties did not apply to any material included at the instance of the BBC.

Extra-contractual Activities

111. The 2004 Terms contained the following restrictions on the Presenter's activities:

"….the Company shall ensure that the [Presenter] shall not during the Contract Period:

(a) engage in any public controversy;

(b) undertake any extra-contractual activity liable to prejudice the editorial impartiality of the BBC and the [Presenter] shall discharge his/her obligations under the Contract in such a manner as to such guidance on extra-contractual activities as may be given by the BBC to the [Presenter] from time to time whether in writing or otherwise…

…….the Company shall ensure that the [Presenter] shall not without the prior written consent of the BBC during the Contract Period:

(a) contribute to or be associated with any audio and/or visual material (other than the BBC's) generally disseminated to, available to, or accessible by the public anywhere in the World, by any existing or future means ...;

(b) write for publication or speak in public about the BBC or its affairs;

(c) undertake other than for the BBC (including the ways set out in (a) and (b) above if and where consented to by the BBC) any extra-contractual activity using the name [BBC]… or the name of any BBC programme or other BBC entity and the Company shall ensure that all other parties similarly agree to be bound by the provisions of this sub-clause…

In this regard the [Presenter] agrees to notify the BBC Representative in confidence of any commercial business or financial interests which might reasonably be considered to influence the services provided ….or which are connected to the subject matter of any programme to which the [Presenter] contributes."

112. Under the 2007 Terms, the PSC acknowledged that the BBC (under its Agreement with the Secretary for State for Culture Media and Sport) has given certain undertakings in relation to Programme Standards including in particular impartiality and:

"….the Company…agrees ….that the [Presenter] will not:

(a) engage in any public controversy;

(b) include in any contribution for the BBC hereunder remarks or interjections which the BBC has asked or may ask the [Presenter] to avoid;

5 (c) engage in any conduct which compromises or calls into question the impartiality or integrity of the BBC or its programmes or its ancillary content (such as webpages) or the [Presenter];

(d) be publicly associated with the work of any government initiative or with campaigning or lobbying or with a political party (without prior written
10 consent of the BBC Representative);

(e) write for publication or speak in public about the BBC or its affairs in a manner which could reasonably be considered disparaging of the BBC or of any of its programmes News sites contributors or staff or which would otherwise call into question the integrity of the [Presenter] or the BBC or any
15 of its programmes News sites contributors or staff;

(f) be involved in the promotion of goods or services (whether through advertising endorsements public appearances corporate videos public relations work or otherwise) without the prior written consent of the BBC Representative;

20 In this regard the Company agrees to notify the BBC Representative in confidence of any commercial business financial or charitable interests which might reasonably be considered to influence the services provided ….or which are connected to the subject matter of any BBC output to which the [Presenter] contributes.

25 During the Term the [Presenter] shall not without the prior written consent of the BBC Representative:

(a) provide services of any kind to any media outlet accessible by the public anywhere in the world;

(b) undertake other than for the BBC any extra-contractual activity using [the
30 BBC name]..or the name of any BBC programme or other BBC brand. However, generic descriptions such as "broadcaster" and "newscaster" are acceptable."

113. The 2012 Terms contained the following restrictions:

"..the [Presenter] will not without the prior written consent of the BBC
35 Representative provide services of any kind for any form of visual or audio content primarily intended for audiences in the [UK] and the Republic of Ireland (or interactive and internet-based services anywhere in the world) for any party other than the BBC. For clarity BBC consent is unlikely to be given for any services for third parties which could reasonably be considered
40 to be in direct competition with the Services, or which would otherwise conflict with the BBC's Standards, when the BBC requires the Services to be provided, and/or any scheduled communication to the public of the content to be made hereunder.

Neither the Company nor the [Presenter] will allow any form of publication
45 of written material for a party other than the BBC in certain circumstances, [broadly, including if the Services provided are either primarily for News output or otherwise primarily journalistic in nature without first obtaining copy approval from the BBC Representative (which was not to be unreasonably withheld)].

> The Company acknowledges that the BBC's reputation for impartiality, integrity, independence and decency (referred to hereinafter as the BBC's Standards) is fundamental and agrees that the Services provided by and the activities and conduct of the [Presenter] must not compromise or call into question, or be perceived to compromise or call in question, any of the BBC's Standards."

114. In the 2012 Terms there was a provision similar to that above requiring the PSC to give notice of commercial, financial or personal interests or activities (including the interests or activities of any closely connected persons) but with greater specificity, in providing that this applied where the interests:

> "(a) relate to editorial decisions with which the [Presenter] is likely to be involved;
>
> (b) relate to the subject matter of any content to which the [Presenter] is likely to be involved;
>
> (c) could otherwise be perceived to give rise to a conflict of interest on the part of the [Presenter] or the Company;
>
> (d) could otherwise be perceived to influence or otherwise affect the Contributions, editorial decisions or the BBC's Standards."

115. In the 2012 terms, the PSC agreed (a) that the Presenter "will not be involved in product placement in any BBC content where the Company or the [Presenter] have any interests in such product(s), or use, wear, or otherwise promote their goods, services or personal interests via any BBC content" and (b) neither it nor the Presenter "will make any use or reference to their association with the BBC, or any BBC content in any commercial, political or campaigning context".

116. In the 2012 Terms the PSC agreed to procure that the Presenter would "complete such editorial training as the BBC may from time to time require" and would not:

> "include in any of the Contributions remarks or interjections that the BBC has asked or may ask the [Presenter] to avoid;
>
> behave in a manner, or permit themselves to be associated in any way which does or could bring the Company or the [Presenter] into disrepute …..or which could otherwise bring the BBC or any BBC content, into disrepute or which is likely to make the BBC, the Company or the [Presenter] subject to sanction by OFCOM;
>
> engage in any conduct or interests which do or could compromise or call into question the impartiality or integrity of the BBC or any BBC content, or the [Presenter] and, in particular without limitation, neither the Company nor the [Presenter] will, without the prior written consent of the BBC Representative:
>
> have a personal, financial or business interest in any legal person…which has a trading relationship with the BBC….;
>
> provide media training (such as coaching in how to be interviewed);
>
> be publicly associated with the work of any government initiative;
>
> be publicly associated with campaigning or lobbying for any campaigning organisation (including charities or political parties);
>
> publicly express personal opinions or advocate any particular position on matters of public policy, or political, social or industrial controversy or other

controversial issues (other than professional opinions, if applicable, which must always be given with due accuracy);

publish statements about the BBC;

promote goods or services, whether through advertising, endorsements, public appearances, corporate videos, public relations work, or otherwise…….”

Right of first refusal

117. In both the 2004 and the 2007 Terms the BBC had the right of first refusal on any proposed written publication from the Presenter’s contributions under the contract for news or current affairs on terms to be agreed. This right fell away if the BBC was not able to match terms genuinely offered by a third party (provided the Presenter did not unreasonably refuse a matching offer from the BBC) subject to the right for the BBC to charge the Presenter for the use of any material which was the property of the BBC in respect of the publication the Presenter. In the 2007 Terms it was acknowledged that the BBC “will have all rights in the underlying contributions made to such BBC output and no use may be made of such copyright materials without the Agreement of the BBC”.

Progress meetings and dispute resolution

118. It was stated in the 2004 Terms that the parties were to conduct progress meetings to review progress of the services and that the parties would use their best endeavours to resolve any disputes. The 2007 Terms had a similar provision on dispute resolution.

Termination

119. *Termination for suspension*:

(1) Under all Terms the contract was to be suspended (unless the BBC decided otherwise) if the Presenter was to stand as a candidate for election to Parliament or a local authority or, under the 2012 Terms, in a broader set of circumstances (such as on election to the House of Lords). The BBC was entitled to cancel any engagement during the period of suspension without the Presenter having a claim for any fee in respect of the cancellation. If the Presenter was elected the contract was (under the BBC otherwise decided) to be determined forthwith subject only to payment for services rendered up to the date of suspension.

(2) Under the 2012 Terms the BBC could suspend a contract for a period of up to three months where it believed “the [Presenter] has behaved in a manner which could bring the BBC into disrepute, and/or could otherwise compromise or call into question the BBC’s Standards or could otherwise constitute a material breach of this Contract” and at the end of that time could terminate the Contract or continue with it. In that case the BBC could “in its absolute discretion reduce the Fee by an amount proportionate to the period during which the BBC suspends its call upon the [Presenter’s] Services hereunder”. Liability for any sums due for Services in respect of the period prior to termination or suspension was not affected.

120. *Termination for breach*:

(1) Under the 2004 Terms, either party could terminate the contract by written notice if the other party was in material breach of the contract/any warranties

other than a remediable breach remedied within 14 days of notice of such breach being given and the other had no claim for "damages compensation or otherwise beyond a claim… where such termination is by the BBC for payment by the BBC for services provided by the [Presenter] to the date of termination; or…where such termination is by the Company for the provision of services by the [Presenter] to the date of termination" but without prejudice to any claim outstanding on the part of the party terminating the contract.

(2) There was a similar provision in the 2007 and 2012 Terms except that it operated only to allow the BBC to terminate in the event of the Presenter's breach or, in the 2012 Terms, the PSCs or Presenter's breach. Under the 2012 Terms the circumstances capable of constituting "material or irremediable breach" included: if the Presenter "is unable personally to provide the Services hereunder due to on-going ill-health, injury, mental or physical disability or other on-going substantive cause or reason" or "fails to submit to a medical examination that is reasonably required..". In the 2007 Terms it was stated that liability for any sums due for services in respect of the period prior to termination was not affected. There was no such express provision in the 2012 Terms.

(3) Under the 2012 Terms if the PSC or Presenter failed to provide services in accordance with the contractual terms and was in breach of contract the BBC may in its discretion give the Presenter the option of continuing to provide the services for the rest of the term provided that if the Presenter refused the BBC was under "no obligation to provide any services or engagements to the [Presenter], to use any of the Contributions prior to such failure nor to invest in or assign any powers or duties to the [Presenter]" and could exclude the Presenter from the premises.

121. *Force majeure*: Under all of the Terms neither party was liable for any failure to fulfil its obligations under the contract by reason of exceptional events. In the event of any such failure, under the 2004 and 2007 Terms, the parties were required to consult together to determine what course of action to take and to disclose to each other all relevant information and the PSC was to use its best endeavours to comply with any reasonable request of the BBC with a view to mitigating any loss or detriment which may result to the BBC from the relevant event.

Assignment/Sub-contracting

122. In the 2004 and 2007 Terms there were similar terms on assignment but the specific wording set out below is taken from the 2004 Terms:

> "The Company shall not without the prior written consent of the BBC, assign, transfer, charge or deal in any other manner with the Contract or any of its rights thereunder ... nor subcontract any or all of its obligations under the Contract."

123. In the 2012 Terms the assignment provision was amended with a proviso that:

> "However, the Company will be entitled to nominate and provide an alternative [Presenter] in exceptional circumstances where the [Presenter] is not available for reasons beyond their reasonable control (not including suspension hereunder) subject to reasonable prior notice being given to the BBC Representative and such alternative provider being deemed suitable and being approved by the BBC Representative for this purpose…"

124. In the 2004 Terms there was an additional information note which stated that the BBC was not responsible for personal accident sickness and life insurance but that the BBC operated a Non Staff Accident Benefit Scheme details of which have been supplied to the Presenter which was designed to provide limited financial assistance in certain circumstances."

125. In the 2004 and 2007 Terms there was a statement that the agreement (being Part A and Part B) constituted the entire understanding between the parties with respect to the subject matter of the agreement and "supersedes all prior arrangements negotiations and discussions between the parties relating thereto". In the 2007 and 2012 Terms it was stated that the agreement was not intended to create an employment contract. In the 2012 Terms it was stated that the contract will prevail at all times over all other terms and conditions which may purport to apply in connection with the Services, unless amended by the prior agreement of the parties…"

Editorial and other guidelines

Overview

126. The Editorial Guidelines (and the previous Producer Guidelines) are commissioned and approved by the BBC trust which, until April 2017, acted as the guardian of the licence fee revenue and public interest as prescribed under the Royal Charter which established the BBC. In addition, like all broadcasters, the BBC is bound by the Office of Communications code (the "**Ofcom code**") although prior to April 2017 only limited areas of this applied to the BBC and, in particular, it did not apply as regards requirements of due impartiality and due accuracy.

127. During the period in question the two different versions of the Editorial Guidelines were in place, those published in June 2005 and in October 2010.

(1) In the 2005 version the Guidelines were described as "a statement of the Values and standards we have set for ourselves over the years" which "codify the good practice we expect from the creators and makers of all BBC content, whether it is made by the BBC itself or by an independent company working for the BBC …". As the Director General set out in the introduction to that version: "Many of the guidelines are advisory, but some are mandatory and have the force of instructions…So please read the guidelines and keep them by your side as you work …"

(2) The 2010 version was described by the Chairman of the BBC, as "one of the most important documents the BBC publishes" which "set out the standards required of everyone making programmes and other content for the BBC". The general comments of relevance on the scope and operation of the guidelines include that (a) the guidelines apply to "all of our content whoever creates or makes it and wherever and however it is received", (b) any proposal to step outside the guidelines must be "editorially justified" and "must be discussed and agreed in advance with a senior editorial figure or, for independents, with the commissioning editor. Director Editorial Policy and Standards must also be consulted…", (c) "Editorial responsibility in the BBC rests with the editorial chain of management from programme or content producer, whether in-house or independent, through to divisional director, and to the BBC's Director-General, who is the editor-in chief", (d) "Knowledge of the Guidelines is an essential professional skill, and everyone who makes the BBC's content is contractually

required to familiarise themselves and work within them…" and (e) The Principles are the standards that all BBC output must meet regardless of who makes it or where in the world it is broadcast….The Practices…are based on the best practice of generations of programme makers; they are a framework for the considered editorial judgements needed when making our output….Some of the Practices are obligatory to ensure the BBC meets its legal and regulatory requirements. Others are advisory…In all normal circumstances, they should be followed as well….There may be circumstances in which a decision not to follow an advisory practice might be justified and might not constitute a breach of the relevant Principle. Anyone intending not to follow an advisory Practice should seek advice in advance from Director Editorial Policy and Standards."

128. The BBC also published Conflicts Guidelines which were in place throughout the period in question. These were stated to apply "equally to freelancers or staff" and were also aimed at independent producers on the basis that it is important that they "should not have any interests which could undermine the integrity and impartiality of the programmes or websites which they produce for the BBC". They contained particular guidance for and restrictions on those "who are known to the public primarily as presenters of, or reporters on, BBC news programmes or programmes about current affairs". The Presenters accepted that this description (and the similar description in other guidelines) applied to them during the relevant period. We refer to those falling within this description and similar descriptions in other guidelines as "those known as news presenters". In outline, the main guidance of relevance in the Conflicts Guidelines is as follows:

(1) Those who work on news and current affairs programmes "should have no outside interests or commitments which could damage the BBC's reputation for impartiality, fairness and integrity".

(2) Those known as news presenters:

(a) should be seen to be impartial and it is "important that no off-air activity, including writing, the giving of interviews or the making of speeches, leads to any doubt about their objectivity on-air";

(b) in both BBC and non-BBC work (such as writing, speaking or giving interviews), should not, broadly, express political views or support for a political party, advocate any position on an issue of current public controversy or debate or exhort a change in high profile public policy; and

(c) should seek permission from the BBC before outside writing or speaking commitments are undertaken about current affairs or matters of current public controversy or debate.

(3) News and current affairs freelance presenters and reporters should not write a regular newspaper or magazine column dealing with "current affairs or matters of current public policy, debate or political or industrial controversy" broadly except where the BBC gave advance agreement that the individual did not derive his/her main external status from their work for the BBC.

(4) It was noted that in the case of those known as news presenters there is a greater possibility of conflict of interest: "Care must be taken to ensure that they remain impartial when speaking publicly…..and do not promote any political

party, campaigning organisation or lobby group which may jeopardise their status as an impartial broadcaster. The chairing of conferences may well be acceptable, but it is essential that the conference is not a promotional exercise or one-sided, on an issue of public controversy". Individuals were advised to consult the Head of Department about the suitability of such activities.

(5) It was stated that: "BBC people, freelances or presenters clearly associated with BBC programmes should not speak or write publicly about the BBC without specific, prior approval……Presenters…should not train people they are likely to interview ……Presenters involved in News, Current Affairs….should not interview anyone they have trained and it is very unlikely that it will be acceptable for producers or editorial people in these areas to undertake any outside coaching on how to appear on air."

(6) "Presenters….in news, current affairs…. should not normally associate themselves with any campaigning body, particularly if it backs one viewpoint in a controversial area of policy. It is unlikely to be appropriate for a news presenter to front a campaign for a charity or a campaigning body…"

(7) Personnel including freelances and independent production companies were required to declare any commercial interests which may impinge on their work with the BBC.

(8) "Presenters and reporters on news, current affairs and business programmes are not permitted to take part in any promotions, endorsements or advertisements for third parties."

129. The BBC also published additional Off-Air Notes in May 2006 which contained similar provisions to those in the Conflict Guidelines but with greater detail for those known as news presenters. The 2005 version of the Editorial Guidelines did not contain provisions on conflicts of interest but they were included in the 2010 version. As Mr Jordan explained, the BBC discovered that on many occasions people were misinterpreting what they could and could not and should not do, which was compatible with their status within the BBC and "we brought it back so that people would realise the seriousness of it, as part of the overall commitment to values and standards in the BBC".

130. As Mr Jordan explained, underpinning the Editorial Guidelines are the BBC's editorial values which set out, at a high level, the standards that the BBC as an organisation and those who work with it and for it are expected to embody including, trust, truth and accuracy, impartiality, editorial integrity and independence. Of particular relevance in a news context are due accuracy and impartiality. For example, the 2010 Editorial Guidelines state that:

> "News in whatever form must be treated with due impartiality, giving due weight to events, opinion and main strands of argument…Presenters…are the public face and voice of the BBC - they can have a significant impact on perceptions of whether due impartiality has been achieved… Our audiences should not be able to tell from BBC output the personal prejudices of our journalists or news and current affairs presenters on matters of public policy, political or industrial controversy or on "controversial subjects" in other areas…"

131. In the section on impartiality in those guidelines it was noted that the external activities of presenters can affect the BBC's reputation for impartiality and therefore that section should be read in conjunction with the section on conflicts of interest. It was stated in the introduction to the chapter on conflicts of interest that the principles set out "apply equally to everyone who makes our content" and that all BBC staff had to formally declare any personal interest which may affect their work with the BBC as did freelance presenters and reporters (as well as others). Again specific restrictions applied to those known as news presenters or working in news which were similar to those set out in the Conflicts Guidelines.

132. The Editorial Guidelines advise and sometimes proscribe that certain matters must be referred to others within the BBC, such as more senior editorial figures, the Editorial Policy team or experts elsewhere or to the legal team. The circumstances in which mandatory referrals had to be made include the following:

(1) As regards the reporting of serious allegations in a live unscripted "two way", that "it must be the editor's decision as to whether [live unscripted two ways] are an appropriate way to break a story". A live "two way" is a live discussion between presenters in the studio and on location.

(2) Proposals to rely on a single unnamed source making a serious allegation or to grant anonymity to a significant contributor or allegations resulting from BBC journalism without giving those concerned the right to reply.

(3) Content dealing with religion and likely to cause offence to those with religious belief.

(4) Proposals for a news presenter to front a charity or campaigning body, for on-air talent on long term contracts to take part in political activity or for those associated with the BBC to stand as a candidate in a political election.

(5) Decisions to proceed with a programme despite legal advice.

Evidence of Mr Jordan

133. Mr Jordan confirmed that the Guidelines apply to "everyone who contributes to BBC output. They apply to all the people who are employed by the BBC, be they casual, freelance, staff or indeed, to any independent producer who makes output for the BBC". He said that they go beyond the requirements of the equivalent provisions of the Ofcom code in that, for example, impartiality and due accuracy is required across all content in the BBC and not just in news and current affairs. He explained that there were a series of incidents in 2007 and 2008, which lead to concern that the importance of the guidelines had not been spelt out to everyone including on-air talent. The BBC then made a determined effort to bring them to everyone's attention by sending a copy to every programme maker inside and outside the BBC.

134. Mr Jordan explained that editorial responsibility within the BBC rests with the editorial chain of management or command (the "**editorial chain**") which runs from "programme or content producers (including in-house or independent), presenters, editors, heads of department, divisional directors, and up to the Director General, who is the editor-in-chief and therefore has ultimate editorial responsibility for the BBC's content". He said that the guidelines do not prescribe what output is made but provide a point of reference for the considerations to be borne in mind as to how the output should be produced in a way that accords with the BBC values. They are not, therefore, generally prescriptive; when applying them, individual producers or

presenters are expected to make necessary judgments in many areas. If the issue is particularly difficult, the person can contact others such the editorial policy team or particular experts within the BBC for guidance but that team's capacity is limited and decisions often have to be made instantly.

5 135. In response to the question of whether the Editorial Guidelines are also intended to influence decision-making in the first place, Mr Jordan said that "in most cases, the guidelines are advisory" and that they:

> "try to implement the BBC's values by giving expression to them in a principled and practical way, which is why [they] are more substantial than
> 10 some others, because they show people the best practices that can be adopted. That doesn't mean to say they are the only practices that can be adopted, and judgments need to be made all the time about what is the best way of realising our objective of getting output and content on air which……is the best we can possibly do, creatively and qualitatively but also, is the best that
> 15 we can do in terms of our own values."

136. He continued that they are intended to be:

> "an aid to programme makers, to help them negotiate the more difficult aspects of programme and content making in the BBC and sometimes to offer guidance. They are…rarely intended…to be outright instructions because
> 20 there are always different ways of doing things, but they offer a guide as to how to negotiate some of the more difficult ethical issues that we face in putting our content on air."

137. He said he would be concerned if presenters were to say they had never read them at all but that "clearly, in many instances, particularly with experienced
25 presenters, in effect…they are dealing with the currency of the Editorial Guidelines throughout their careers, so to some extent this is a common currency across the UK broadcasting scene". He would not expect presenters to read them as a novel but to ensure they were aware of the sections that might apply to them and to consult them if there were things that they were going to do which were outside their normal purview.

30 138. He thought that a lot of what is in the Editorial Guidelines is fundamental common sense, but it is helpful for it to be codified. That is particularly the case for younger or newer members of staff and for newer people working for the BBC who need to understand, clearly, what is expected of them in meeting the standards that the BBC requires. He noted that the three Presenters were very experienced. On being
35 questioned about the particular impartiality requirements as regards news presenters, Mr Jordan said that BBC news and current affairs presenters "obviously are held to a very high standard in relation to impartiality. The public must have complete faith in their impartiality" which requires "the strictest interpretation" or "highest requirement" of impartiality". He confirmed that is what the guidelines are designed
40 to ensure. He commented that the requirements of the job in this respect are "very onerous".

139. He said that there is an editorial responsibility even amongst those who are not part of the obvious editorial chain of command. Everybody in the editorial team has a responsibility for making sure that the values in the Editorial Guidelines are upheld in
45 relation to the bit that they are participating in as "television, in particular, is very much…a team effort, there are a lot of people involved and you have to rely and trust upon all of the people who are involved to do their bit, to make sure that they are

carrying out that responsibility, just as you are, your responsibility". This is particularly important in the context of live broadcasts, especially for the presenters. In that case, as events evolve very quickly, there is a stronger reliance on individuals making the correct choices and judgment calls. There is simply not the time to weigh matters up or seek advice to the extent there is when for example producing a programme such as Panorama (which may take months to produce). This is particularly the case for presenters; as the public face of the programmes they will necessarily be associated with any such judgment.

140. He clarified that in referring to the editorial chain he was not suggesting:

> "that people are kind of referring everything, every moment, to some higher authority because they don't. And they can't. I mean in the live studio, for example, you can't possibly be referring all the decisions that you are making. You have to - presenters, in particular, are - it is a very lonely job in many respects. Although you are surrounded by people, you have to be making countless numbers of decisions all the time, phrasing things perfectly, doing things in the right way in the context of the Editorial Guidelines, in the context of the legal framework in which journalism works and so on and so forth. You are making dozens and dozens of decisions which could, ultimately, if they are not made properly…rebound to the disadvantage of people higher up the editorial chain who will be held responsible and that is a great responsibility and that applies also, to other people who contribute to the production process."

141. He continued that "it is a much more difficult process if you are dealing with live output" which "to some extent, has to be done on the hoof", and "it relies a lot on the judgment being made at the moment that you are doing it, because clearly, you can't refer every question you are going to ask or every line you are going to utter, up to anybody in your line management chain, never mind the director general. So a lot of the responsibility rests with the people, with live output, to make those decisions themselves."

142. He thought that making such decisions is a collaborative exercise but at the end of the day, the editor is responsible and the editor will, at times, have to make a decision, just as a presenter will have to make a decision because they are confronted with the situation as to what questions they are going to ask a particular individual that they are interviewing live on-air. It is a collaborative endeavour which sometimes requires individuals to take large scale responsibility and make decisions which are quite difficult. If collaboration breaks down, the ultimate line management responsibility lies through the editor (rather than producer) and, thereafter, up through the editorial chain of command as he had described.

143. It was put to Mr Jordan that the Editorial Guidelines set the standard in terms of the BBC's output by which behaviour can be judged and he said "what we are concerned with is what appears on air or on screen or online…..the output and the content….They set the standards by which our output and our content can be judged". When it was put to him that it was important for the BBC to have the right to control the content of the output he said that "control" was a curious word in that context and that the BBC takes overall responsibility for whatever its puts on its TV, radio, online output and ultimately "it will be up to the relevant content producer and/or presenter

to assess what factors are relevant to the assessment of the audience expectations for the content they are producing".

144. Mr Jordan explained that "mandatory" referrals are an "instruction" given as a "way of making sure that for some of the more sensitive decisions that we take, that there is a consultation process, regardless of whether the programme maker, in assessing the issue at the time, thinks there ought to be some consultation". He explained that there are situations, such as regards the making of a serious allegation, which have to be put through the legal team before the broadcast to advise on what the BBC can legally do. He said that it is very important that "those particular lines are put out as legalled...they are not particularly common but they do occur and …it is critical for us to make sure that we are not defaming somebody or saying something that we can't substantiate, that we stick to the same words across all of our output".

145. Mr Jordan said that whilst the Editorial Guidelines prescribe certain things, the manner in which they are interpreted "inevitably has to be a little bit flexible otherwise we would end up…..constantly reading the output of people when we knew what they did before we hired them which would be pretty pointless for all of us". He gave an example where Mr Andrew Rawnsley, a well-known Observer columnist, was hired by the BBC to be a presenter on the Westminster Hour. He pointed out that it would have been crazy for Mr Jordan as the editor to require sight of his weekly column before it went out each week. On the other hand, with employed presenters like Huw Edwards he would want to know what other external activity he was undertaking.

Awareness of terms of the contract

Mr Willcox/TWL

146. Mr Willcox thought that when he received a contract he would have read the covering letter and looked at the contract itself as regards the number of days and the fee, expenses, and the manner in which the fee was payable and he would have read through the other paperwork. He thought he would initially have read the Terms and run the first contract with TWL through his accountant but could not remember whether he did that in later years. He thought that changes in the terms over the years were not brought to his attention. He did not pay much attention to the detail. He was focused on the number of days that he thought were guaranteed in terms of work.

147. He said that as subsequent contracts came and he asked for, "perhaps, more money or other things, it was presented as a fait accompli; you know, "You either take this contract or not", and, as such, I think, in the end…. rather than have six months of protracted discussion and then nothing at the end……I didn't want to have a long period of argument with them, so I would have signed accordingly". In fact, the only thing he thought the BBC "moved on all the way through" was his stance that he wanted to invoice monthly rather than be paid "a set figure over a 12-month period". Otherwise he did not think he had negotiated anything. It just came down to "this is what we are going to pay you this year" and that's it, basically". He said that these variations did not in practice influence the way he worked with the BBC; "the way we worked together did not in practice change from when I first started working with them until I went on staff in 2014".

148. He did not think he had read the Editorial Guidelines for several years because he had come to the BBC having worked for ITN and newspapers and so understood

Ofcom and impartial reporting and as such, “I was a professional who had been hired to do a professional job.” He was never sat down to read them “in a room and given a big book, like sort of Rumpelstiltskin and turn it all into editorial gold”.

Ms Gosling/PL

149. Ms Gosling said that she was “not a great reader of contracts”. Having read through the material for the purposes of these proceedings, she realised that there are things she did not recall ever reading but “I had actually been working at the BBC since 1999, without my job changing at all”. In effect she said that was not paying attention for any alerts of a change in terms, given her job simply carried on in the same way. With each contract that came she did not read the additional notes at all but “just assumed it’s the same year in, year out”. She recognised that she probably should paid more attention but “I would have just signed it because I would have assumed I have no choice but to sign it, in order for the contract to go ahead.” She later said that possibly some years she would have flicked through the terms; possibly some years, she would have just signed. She just wasn’t aware of things changing over the years.

150. Her main concern when negotiating a contract was getting a new contract, the length of the new contract, what the fee would be and the number of days. It never occurred to her to get any legal advice on any contracts that she was signing:

> “I was being given paperwork that I had to sign. I negotiated contracts for me, as somebody that wanted to do a job. It was not easy negotiating contracts and the thing that I was concerned about was, firstly, whether I would get another contract, how many days would be in a contract, and what the fee would be. So when the paperwork came through, it was a relief that the terms had been concluded and I would just sign whatever was there. Which I recognise is…probably pretty naive, but that is the truth.”

151. Ms Gosling said that she did not read this sort of detail as regards the BBC pointing out the Editorial Guidelines in the covering letters. It was fair to say “I just assumed nothing was changing. I was doing the same job. I am a journalist”. She did not recall ever being given a hard copy of the Guidelines (although she may have been sent parts sometimes and she acknowledged that they were referred to with a link to where they were on the website). No one had sat her down with a copy and told her to read them.

152. She said that in any event as broadcast journalist “you have an obligation to be impartial and that is always the way I have worked and my sort of core understanding of the Editorial Guidelines”. She had read them but did not do so each time a contract came. She said she was well aware of the content but did not need to read the guidelines to understand that a broadcaster (whether working for the BBC or otherwise) is required to be impartial. She considered that they reflect common sense rules that she had never had an issue adhering to; these fundamental principles were ingrained in her (and had been since the start of her career in the commercial sector).

153. She said that she had read excerpts from the Producer Guidelines which was first sent to her in 2002 and contained a revised version of the conflicts of interest section. She read this and has been familiar with them throughout her time at the BBC. They mainly related to impartiality issues which she did not regard as controversial for the reasons already given. She also at some point received rewritten

chapters on impartiality and accuracy and fairness and straight dealing but she could not remember if she read that at the time.

154. Ms Gosling said that nothing changed about the way she did her job as a presenter as a result of any changes in the terms of her contract over the period during which she provided services to the BBC whether directly or indirectly.

Mr Eades/AML

155. It was put to Mr Eades that by the start of the relevant period (in 2008) he must have been quite familiar with the Terms. He agreed that was the case "inasmuch as this is the sort of thing that I would get through the post, year in, year out". However, he did not go through each one in the same forensic way. He "would have pretty much assumed - unless I had been told something by my editor or Tessa Beckett… that there was something specific that was different, I would take it as read". He did not recall any changes being flagged up to him. He also noted that whilst there were little changes in the contracts, he had not changed fundamentally the way he worked with the BBC. He thought that it was fair to say that, at a legal level a close study of these terms was not something he engaged in, at the time that they were being provided to AML.

156. Mr Eades said that as he was a foreign correspondent with the BBC for a number of years he would like to think he was pretty familiar with the policies and Editorial Guidelines of the BBC. There was not a particular moment at which he took them out and went through them, at any rate at this period of time.

Understanding of the legal relationship

Overview

157. The presenters were asked a number of questions about their understanding of the nature of their relationship with their PSCs. They all said, in effect, that while there may be a legal distinction between them and the PSCs, in practice their own relationship with the BBC carried on as it had done before they used a PSC; they personally negotiated the contracts (to the extent there was any negotiation) and did their job as before. They used the PSCs merely because they thought they had to in order to work for the BBC.

Mr Willcox/TWL

158. Mr Willcox said: "I was accepting a contract with myself through the BBC because the BBC had insisted the only way of using me as a freelancer was through a PSC…I was being contracted on freelance terms by the BBC, through a [PSC] which they had asked me to set up". Later he agreed that, when TWL agreed the terms of contracts with the BBC, he was making that decision as director of the company. He agreed that technically when he did the work of presenting and reporting he did that on behalf of TWL "but they were two of the same thing…. I was the company, the company was me, and the only reason I entered into a company was because that was the only way I was going to be able to carry on working".

159. He answered consistently that he was told to set up the PSC as otherwise he could not carry on working for the BBC, that to all intents and purposes he carried on working in the same way and that, although he understood there was a legal distinction and that he was being contracted through a company of which he was the director, he viewed himself and the company as the same thing. He understood that

TWL had a separate legal existence from him as a human being, that it was a registered company, that it needed audited accounts and to be VAT registered. He left the running of it and these matters to his professional advisers such as accountant and his bookkeeper.

5 160. It was put to him that the legal basis on which he received the amounts shown in the accounts as remuneration was that he was an employee of TWL. He said he did not accept that because he thought of himself as the PSC. The PSC paid him but he was the PSC as the majority shareholder and the director. Clearly he needed to be paid "and this was the vehicle that the BBC said I needed to use, and that is what I
10 did, of course……so I was using this as a way of carrying on almost as a sole trader, in terms of taking revenue from it".

Ms Gosling/PL

161. Ms Gosling said that she did not think of herself as acting as an employee of PL or under its control – it was just her dealing with the BBC. She just regarded herself
15 as a freelance journalist but she had to be paid through PL. She did not analyse it in that way. It was "me making sure I would do those things. It was never me thinking I had to do it because [PL] was telling me to or ... I don't regard [PL] as controlling me, in terms of the job I do".

162. It was put to her that in the tax year 2007/08 and 2008/09 she was recorded as
20 receiving £60,532 and £40,000 from PL as income which was taxed at source as employment income and for the tax year 2007/08 reflected in the accounts as fees for director's services. She was asked if she accepted that this showed she was treated as received these amounts as fees for her services as director. She said: "I was being paid to do a job and… it had to go into a company and the company was being run by
25 accountants". If asked what her job was, she would not say director of PL but that she was a journalist.

Mr Eades/AML

163. Mr Eades said that he recognised that AML was an entity in the sense that he was obliged to have an accountant do its accounts. He did not dispute that in a
30 documentary sense AML entered into the contracts with the BBC but to him he was dealing with the BBC as an individual and not as a director or employee AML. He said that he was AML, he was the director and if he decided that he was going to do something, he did it. The "whole way in which these contracts were agreed and discussed were with me, David Eades. They weren't with me, the director of
35 [AML]". There was a clear understanding that, "we would like you, David, to come and work with us on this", and "in the simplest of terms, that was good for me. I understood that. It fitted in to my general plan of work". That is how he always perceived his relationship with the BBC.

164. He thought that AML was a useful vehicle for dealing with all the work he did
40 for quite a lot of people but he would just as happily have done all that work in his own name. The only stipulation which led him down that path was that he was told (as it seemed were most of his colleagues) that a PSC was the route that the BBC expect him to take if he wanted to do that work. That was the reason he set AML up. He clarified this route through his accountant, Mr Simmonds; he did not know about
45 PSCs or IR35 at that time but thought it was "fairly diligently, checked as a sensible

route to take". Using that route did not "in any material way, change the relations I had personally, with the people I worked with at the BBC, at any level".

165. It was a significant amount of work which was important to him not just for the work itself but as it gave him opportunities to expand on his other work within this vast BBC market and otherwise. So he was, "to all intents and purposes…. David Eades doing these things" and he had a company the money went into but beyond that he did not see it as a structure that was entirely separate to him.

166. His view on this was not affected by any description of him as an employee or of amounts he received as earnings or director's earnings in forms filed by AML or in the accounts or tax returns. These forms did not affect "the way in which I ever perceived who I was and what I was doing. I took advice from my accountant, who laid out the structure that you would expect in terms of accounting for a company for PSC, and this was, he suggested, a sensible route to take. This was money that I had brought in for me and this was the best way that it should be disbursed. That was my understanding from John Simmonds. So that is how I perceived these sums coming in".

Managing the rotas and the minimum days

Presenters' evidence

167. The Presenters confirmed that the rotas were managed by a member of the BBC staff who emailed or called the presenter to ask him or her to work on a specific day or days. The list was usually provided around one month or several weeks ahead of the relevant dates although that was not a hard and fast rule (sometimes it would be later).

168. Mr Willcox said that when he was contacted by the rota manager he would say, for example, "sorry, I can't do those two days, but I can do this, this and this". He thought that the position was different under his current direct contract with the BBC; the old arrangement gave him flexibility. He agreed that, provided he accepted enough days to fulfil the minimum days, he was free to say "no" on any particular occasion but noted that he worked extremely hard and took as many days as possible. He later said that he could say "no" to a particular programme at any time. Whilst it did not happen very often, he could say "in the first week of a contract for example: "No, I need three days off for family", or something, there's no requirement to do the [minimum] days, first of all, no."

169. Mr Eades said that while World was the main provider of work for him, he frequently pointed out that he was not available for certain days once he was given a list of the days the BBC wanted him for. Most of the time this was done by email with the rota producer. Discussions were friendly and cordial in tone and rarely involved any friction. He made it clear when he was not available usually a month in advance and, in that case, may provide the name of a colleague who could do the shift. Sometimes he only gave short notice of his unavailability, on occasions only one or two days. In those cases, both sides were as flexible as possible. He would try to help as far as possible by covering any other shortfall that arose in covering a presenting shift.

170. The Presenters' evidence is supported by a number of emails in the bundle which record that both Mr Eades and Mr Willcox emailed the rota manager turning down or cancelling a shift with little or no explanation and sometimes on short notice.

For example, this occurred when Mr Eades' mother was unwell, where he simply said he had to be somewhere on the particular day and where he had a mix up with his holidays. Sometimes he offered a replacement but on other occasions the rota manager simply agreed to replace him.

171. In response to questions on whether he had to keep an eye on fulfilling the minimum days, Mr Eades said there could be times when the rota manager would be thinking, "I'm really stuck here. I've got nobody to turn to" and "would need me to do it and I would hunt high and low for a replacement". He did not remember an occasion, however, when she said to him, "you still need to get through 78 days this year..."

172. Ms Gosling thought that the reference to the BBC having first call on her services did not mean anything in practice. She did not agree that the BBC could properly be described as having the ultimate right to call upon her on any day. By this she meant that she would not have cancelled a prior commitment in order to do a shift for the BBC and did not believe she would have been expected to. In practice, however, this was not an issue as rotas were always arranged in advance and by agreement. If she was asked to cover any extra shifts, she was always able to turn them down. She noted that she kept a running tally of all the "days" worked in her diary. She always wanted more shifts than the BBC could offer, and certainly more than the minimum she was contracted to perform.

173. Mr Willcox said that when he was told that the BBC would contract with him on the condition that it was through a PSC, he was relieved, having been a sole trader "with no ostensible guarantee" of work. At the time, he understood that he was to be given the stated minimum days as a contracted arrangement: "naively at the time, I believed that those days were guaranteed days of work, and that really was the thing I was looking for". It was only recently that he understood that "the days listed were more a statement of intent". At the time he was more focused on the number of "guaranteed" days, which as a freelance contributor, he took to be reassuring that there was an interest in him. It made him feel, albeit he now thought perhaps wrongly, more secure than had he not been offered any specific number of days; this indicated the BBC was happy with what he was doing. He suggested that, whilst at the time he thought the BBC was committed to provide the work for the minimum days, he perhaps did not read the contract in a legal form as carefully as he should. He now understood it was very much his agreement to offer the BBC the minimum days with nothing in return; it "was my commitment to the BBC, even if that wasn't reciprocated".

174. Mr Willcox said that he was in a very competitive industry at the BBC, where people fall in and out of favour. He worked out fairly early on that:

> "perhaps the one thing I could offer was to be a flexible, available at all times… and I made that clear to the BBC, that I would take a call at two hours before having to go on air…..So my USP was to be flexible and available, which meant that even though there was a certain number of days here, it didn't really apply to me because I always knew that if they thought I was the person who would respond and come in, I would."

175. He thought that this flexibility put him "into a position to be valuable to the BBC as a freelancer who would come in and work, when people, perhaps who were staff, wouldn't". He understood that at the end of the relevant contractual period, the

BBC could perhaps just say, "that's it". As he worked a lot, this point never came up to be tested in practice; he always did far more than the minimum days. He noted that he had no holiday or sick pay and no protection. He worked when he could work and as much as possible because, as noted, his intended "USP" was that he would always be available. He agreed at one point, however, that it appeared to be the case under the contract that the BBC had to pay him for the minimum days whether offered or not. He emphasised again that he was conscious that in any event once the minimum days had been used, he might not be used again:

> "The one thing that most TV editors and people in positions of power agree on is that they never agree on who is a good presenter and who is the right person to be on the screen. As such, one is constantly at the whim of any new particular programme editor or person who comes in. It might be something as simple as somebody having a double-barrelled name and somebody saying on the 10 o'clock news, "I don't want somebody with a double-barrelled name on the 10 o'clock news". It is the most whimsical, ludicrous, precarious business, where actually, a lot of journalistic integrity doesn't count for as much as what seems to be right and looks right at the time. So in terms of a number of days being offered, I was always aware that once those days, perhaps, had been used up, it might be that that would be the reason - I don't want to sound paranoid, but that might be the reason why one wouldn't be used again."

176. He said that there had been several occasions over the years where he had had calls before going on air from managing directors at the BBC, who said: "I just wanted to warn you that we have taken on this particular person and as a result, the amount of work for you will be significantly impacted". He said that this was why the minimum days, in terms of a statement of intent, at least gave him some sense of security.

177. Ms Gosling noted that when her second child was born she did not work for two months between 1 April and 31 May 2004 under her contract then in place for two years from February 2004. The BBC wrote to her stating that they agreed not to exercise their right of call during the two month period and that "any shortfall" in the days worked in the first year of the contract "will, if approved by the contracts manager of BBC News, be required to be made up during the period 1 February 2005 to 31 January 2006". She noted that the amended contract for this period (signed on 14 June 2004) contained a provision that payment from the BBC would be reduced by an amount proportionate to the period during which her services were not rendered. She thought that this meant that the BBC had made sure that they were not in a position where they would have to pay for her services without her actually performing them. Ms Gosling had a similar period when she was not paid when she had another child in 2008 as set out above.

178. Ms Gosling was asked if she understood the "minimum commitment" as being a genuine commitment on her part, through PL, to work the specified number of days for the BBC. She said "yes" and if she was offered a certain number of days she would absolutely make sure she did them because otherwise she would not get paid. Hence, when she had her children she took only eight weeks maternity leave in one case because she could not afford not to work. When asked again she said that obviously "we had agreed a certain number of days" but noted again the case when her contract was suspended when she had children and that the minimum days were

not then "honoured by either of us". She agreed that leaving that aside she would have expected to have worked at least the specified number of days and to have been paid for it. However, where she did not do them due to taking time off work when her children were born, she was not paid. She thought that there was never a scenario where she was available for work, but not called upon by the BBC.

179. It was put to Ms Gosling that in principle the BBC could have required her to be available on a particular day under the call provisions. She did not think that was the case. For example, when she had to do photography for the books she wrote, she told the BBC that she was not available for periods of time. She accepted that she and the BBC found a mutually agreeable way to fit both types of work into the working day. If she could not work at a particular point she would make up the days later or perhaps do extra days in the run up to that period and, as noted, she counted up her days as she went along so at the end of the year the shifts would tally.

180. She agreed that she could decide when she worked, provided she reached the minimum days. In terms of shifts and the rota, she said that if she was asked to do something and she could do it and she made a commitment, she would do it. On occasions when she was unable to do a shift that she had agreed to do she swapped shifts with another presenter who would be paid by the BBC directly or through a company.

181. She said that she did not always do the minimum days but she would if she possibly could and the possibility of doing more work for the BBC was an attraction to her. She said that: "I did as many shifts as I was offered….there were certainly periods of time when I was not offered more work or where I couldn't… do more work". She recalled that there was one year in particular (she could not remember exactly when) where she had done all her minimum days before the end of the contract period and she thought that, as she had done before, she would be able to do more shifts but she was told she was not going to get any more work and she did not in fact get more days in that period. She said that it would be wrong to think that it was normal that more work was available although she hoped that would be the case.

182. We note that there was correspondence in the bundle that demonstrated that in July 2009 the rota manager took Ms Gosling off the rota for a number of days so that she did not exceed the minimum days. On 23 June 2009 the rota manager wrote to Ms Gosling stating that "where it is possible I am tasked with keeping presenters to their contract days. Given that the contract days will be considerably over by the end of July, I would like you to come off the rota for the following days" (6 days in July). (In the relevant period Ms Gosling worked a total of 167 days in the period from 1 August 2008 to 31 July 2009.)

183. Mr Eades noted that when he signed up with The World Tonight on BBC radio he did not have to seek the prior approval of World. He said that to all intents and purposes these were entirely separate divisions and he negotiated arrangements with them separately. However, he made it clear that he was not likely to be available for evening bulletin shifts with World, as they would clash with his commitment to The World Tonight. In this way, and by managing different contracts with different parts of the BBC, he was able to pursue two different sources of income.

184. It was put to Mr Eades that the words "minimum commitment" meant a promise by the BBC to provide the specified number of days of work to AML in the relevant

period and that if the BBC did not offer that work it was nonetheless obliged to pay the contract fee in full. He said that the minimum days represented what was on offer in terms of the number of days on the table for which the BBC were interested in having him. He then knew that he had to think about what other work he could fit around those days. He agreed that once he reached the minimum days the BBC were not obliged to offer him any more days. He said that he did a lot of work for other BBC programmes and outside the BBC and "it was something of a juggling act with the rotas producer, to work out when they were fitting me in and when I was able to fit in". He had to be in a position to be able to say he could not do particular days because he had other commitments. So he thought that the proposition put to him by HMRC was not an absolutely clear position that was reflected in reality.

185. Mr Eades continued that, for example there were occasions, albeit it did not happen a lot, when he might be on the rota for one day in a particular week, which in his mind was not great, as he could see a backlog of days coming further down the track. If he said to the rota manager, as he had many times, that he really could not do a week, he may or may not give a reason, but there was still a sense from him of an obligation to get the right number of days done. If the BBC said to him that they were not using him that week he did not know where the line was as to whose responsibility it was for him ultimately to get to the right number of days of work.

186. It was put to him that if by the end of the year he had not done the minimum days there would have to be an enquiry as to why that was. He said that he was sure there would be some discussion at that point as the parties would be looking at the number of days for the next year. He said in effect that, had he been available all year but the full days were not offered, he would not necessarily have assumed that he would be paid for the relevant days. The position was that "if you're not going to do that number of days, and you don't get that number of days, you're not getting paid."

187. Mr Eades was later asked if he agreed with the statement in a record of a meeting between HMRC and the BBC where the BBC is recorded as stating that if they offered a minimum commitment, they would have to offer that minimum number of days unless other things got in the way such as if the programme was stopped or changed. He said:

> "I see that, but I feel like I'm coming back to the same point that I'm trying to make, which is, if the BBC offered a minimum commitment within a contract, they'd have to offer that minimum number of days, fine. But if I have been going back and forth with our rotas producer on who is offering what and when…..it's not that simple,…..It's not that clear. I still can't say to you now, I know that if Sharon only gives me one day this week, she's actually considering that that's three days, in a sense, that she could have given me and she's only given me one…..She's probably thinking, "I might give him another one down the track", or whatever, "and we will see where we get to at the end of the path". Hypothetically this is, because I think I have, every year, notched up the number of days, which has varied considerably over the years…… in the warp and weft of a year of days working, shifts working, maybe two shifts one day, none for a week, et cetera, et cetera, there isn't…it doesn't fit as clear a scenario, I think, as you paint."

188. It was put to him that he meant that there may be a factual question in relation to any particular occasion as to why an offer of work was either not made at all or, if it

was made, it wasn't accepted. He replied: "Which would lead to a discussion, which would be one which would ultimately be a negotiation, I suspect, with the BBC, as to whether they're going to pay me or not."

Documentary evidence and evidence of Mr Smith

5 189. Mr Willcox confirmed that he was basing his view that the BBC did not consider it had an obligation to offer him the minimum days solely on a comment of Mr Bakhurst which he had seen recorded in a note of a meeting between the BBC and HMRC on 26 January 2012. The note records that, when asked what would have happened if the minimum days commitment was not met, Mr Bakhurst replied: "[Mr 10 Willcox] would not have been paid for the days unfulfilled".

190. It was pointed out to Mr Willcox that Mr Bakhurst is recorded as continuing to state that:

> "The presenters worked closely with the team, managing the rotas. As such, it was highly unlikely that any presenter would have undershot the agreed 15 figure without prior arrangement. Individuals such as Mr Willcox would have worked far more than they had, if more shifts could have been offered to them."

191. It was put to Mr Willcox that, in the light of these comments, Mr Bakhurst was addressing only the case where TWL did not make him available for the minimum 20 days. Mr Willcox said that was not how he interpreted the note. He had thought that he had a guaranteed number of days, and he subsequently found out, from this note, that he did not. We consider that this is a misunderstanding of the relevant comment. Viewed in the context of the entirety of Mr Bakhurst's response, it appears that he was referring to the situation where Mr Willcox did not work the minimum days due 25 to his unavailability.

192. We note that there is a record of statements in other notes that other senior personnel at the BBC considered that the BBC did have an obligation to offer work for at least the minimum days. In a note of a meeting which took place on 13 September 2012 between various individuals at the BBC, including Ms Beckett and 30 Ms Hockerday, the head of BBC News, Mr Smith and Mr Andrew Roy, the head of World, and HMRC officers it was recorded that:

> "In line with the minimum guarantee, if the BBC offered a minimum commitment within a contract, they would have to offer that minimum number of days. However, if the programme was stopped or changed, terms 35 would be renegotiated. Mr Eades was specifically offered a minimum of 184 days."

It appears that PL was also considered at the same meeting albeit that comments on PL and Ms Gosling are separately recorded in a different note. In that note there is a similar statement.

40 193. In other instances, the views of other senior personnel are recorded on how the BBC operated in practice as follows:

(1) In the notes of meetings on 13 September 2012, it is recorded that: "There was a minimum guarantee expectation that the BBC offered and the individual accepted. At the point an individual was not able to make the minimum 45 commitment the BBC would adjust the contract". The senior BBC personnel present are recorded as agreeing "in effect that was a breach of contract

situation". This appears to be a reference, therefore, to the situation where the minimum days were not met due to a Presenter's unavailability.

(2) In the note of a meeting of 26 January 2012 Mr Bakhurst is recorded as stating the following:

5 (a) Mr Willcox had been paid for shifts not worked. For example when he was asked to cover for a staff presenter who was going on holiday but the presenter then changed their mind, as he had cancelled other commitments and there was little or no opportunity for him to replace the work at such short notice he had been paid for the shifts he
10 had expected to work. This was standard practice but would not have been unheard of either.

(b) As regards whether Mr Willcox could have time off, he would have made his outside arrangements known as a matter of courtesy but the BBC would have had no right of refusal. If arrangements clashed with
15 a shift for which he was rostered the BBC staff would have arranged a replacement who would have been paid directly for covering that shift.

(c) Mr Willcox would not have agreed to be staff as "he could always have been called in at a day's notice to cover any of the shifts on News or Worldwide".

20 (d) Mr Bakhurst was unaware of the first call provision in the contracts with World and he considered that it would have been a generic contractual term which wouldn't have been enforced if there had been any conflict between shifts for News and World.

(3) In a note of a meeting with HMRC on 21 April 2008, Mr Steve Mitchell
25 (a News editor) is recorded as stating that if "[the presenter] had not reached the quota the BBC would have re-negotiated his fee". It is then recorded that HMRC asked whether the BBC would still have paid the presenter if the BBC had been unable to provide him with the full amount of work - to which he replied "no, one way or another the fees would have been negotiated".

30 194. Mr Smith said he had not been involved directly in a case where the BBC had not called on a presenter for the minimum days but his understanding was that there would be a "rollover situation" into the following year albeit he had never seen it in practice. He thought that each case would be looked at on its own merits and would depend on why the minimum days had not been achieved. If the individual chose to
35 do other work, then possibly the BBC would not pay. But if it was down to the BBC not fulfilling the commitment, it would be a rollover situation. He confirmed that he had no personal knowledge of Ms Gosling's circumstances when she was pregnant. He said that it was his understanding of the situation generally, that there would be a discussion about rolling days over but that it would be up to the BBC to determine
40 whether it accepted that or not.

195. The parties sought to rely on different parts of the above evidence in support of their differing views as to what the parties' expectations were of each other as regards the minimum days and call provisions (as relevant to the mutuality issue) As set out below in the discussion on the correct interpretation of the contracts in this respect,
45 the parties' own perceptions of their contractual rights and obligations are of limited, if any, relevance. We have commented further on this evidence in the context of that

discussion below. We note that in any event the comments in the notes of meetings have to be treated with caution as evidence; their precise meaning and the context is not always clear and no witness was called from the BBC to give oral evidence in support (other than Mr Smith who attended some of them but was not questioned on them). It is plain, however, from the clear statements in the record of the meeting on 13 September 2012 that senior personnel at the BBC considered that the BBC was subject to a binding obligation to provide the minimum days of work (albeit they might seek to renegotiate in certain circumstances). We take Mr Mitchell's comments as set out at [193(3)] and Mr Smith's oral evidence at [194] as views on what was likely to happen in practice if the minimum days were not achieved and a recognition, in some instances, that as the party with the most bargaining power, the BBC may seek to renegotiate terms in its favour.

196. We have commented further on the Presenters' views on the minimum days in drawing our conclusions on the correct contractual interpretation.

Use of other presenters

197. The Presenters all said that if they could not do a slot for the BBC it was quite common for them to offer it to another BBC news presenter in a similar situation. Mr Wilcox agreed that the person the BBC wanted to do the work was him. However, it was a "very well-established practice among a certain group of presenters who work across output, that they can arrange for each other to cover, and where they can't, then the rotas producer would take on that charge". Mr Eades also accepted in the context of a different discussion that the BBC wanted his services (see [163]). He said there was a clear understanding as to which BBC presenters were deemed acceptable replacements and that this was a relatively limited group.

198. The Presenters agreed that they did not contract with the replacement presenter; that presenter contracted with the BBC directly, but, as Mr Willcox said, he "would have facilitated that". There was no fee payable to TWL but the other presenter might have offered Mr Willcox a bottle of wine. Mr Eades said it would be nice, for example, if he had given a shift to Mr Willcox if he then handed back one of his shifts to him to balance things out.

199. Ms Gosling said that she understood that the person whom the BBC wanted to do the work was her. They were not looking for somebody else to be provided by PL. She had arrived at the BBC as a journalist who had the sort of experience that the BBC liked. It was not a question of her or somebody else PL might send along instead. She saw her relationship with the BBC "as me and the BBC…not anything else". Ms Gosling said that, "if sometimes…one presenter would ask me to do their shift and that would obviously be a bonus to me and I would do their shift if I could, or the other way, if I couldn't do a shift, they would do it and they would get paid, yes. You get paid for the work you do".

200. The Presenters accepted that the provision of the other presenter's services was not any part of the performance of the relevant PSC's obligations to the BBC under its contracts with the BBC and would not count towards the minimum days under the contracts.

201. Mr Eades said that the change regarding substitutes in the 2012 Terms was not in his mind when he agreed the relevant contracts on behalf of AML. He did not think he was aware of this and had never exercised this right. He thought that the

practice did not change as set out above of looking for other people who could do the job under a good arrangement which generally worked. He noted again that there was a limited number of other people who could be called on.

Other work undertaken by Presenters

Work undertaken by AML/Mr Eades

202. During the time when AML contracted with World, Mr Eades both worked with a number of other BBC news outlets and worked outside the BBC:

(1) At the BBC he worked on a number of BBC radio programmes such as "The World Tonight" (until 2015), BBC Radio Five Live, a midday news programme and on the BBC World Service Radio (on Newshour, Newsday and The World This Weekend). In each case he had a separate contract with the relevant part of the BBC or, sometimes, provided services without a written contract at all. In June 2013, he agreed a contract for training within the BBC Arabic Service (TV). He said that the World Tonight was a much more structured news programme than World. In his contract for that programme there was no specified number of days but the understanding was that he would be the first choice for providing cover when the regular staff presenter was not available. In practice he had a relatively regular brief presenting on Thursday and Friday evenings but when he could not do so he simply said so.

(2) Outside the BBC he pursued a range of opportunities, but largely in the media and sports areas such as (a) video production projects for various organisations (such as a community sports project for Sports England, filming athlete profiles, interviews and features for the World Masters Games in Sydney in October 2009 and Slovenia in 2010), (b) acting as the master of ceremonies and moderator for conferences, (c) conference planning, which encompasses finding speakers and setting up the theme for the conference, (d) presentation training as regards public speaking, and (d) writing reports and articles (technical and survey reports). Mr Eades noted that he had worked annually at a number of conferences which he attended whenever they took place rather than being available for the BBC.

(3) There were schedules in the bundles which show that Mr Eades worked for a number of different parts of the BBC and a range of clients in each of the periods in question. It is in some instances not apparent whether all clients listed are separate divisions or entities. However, in each 12 months ending on 31 March in each relevant year, Mr Eades worked for (a) at least 3 different divisions of the BBC and up to as many as eight and (b) at least nine non-BBC clients and up to over 20.

203. Mr Eades said that in working for different departments within the BBC in effect he had separate engagements. He noted that when the BBC was reorganised in the 1990s with a view to preparing for digital broadcasting, programme makers were encouraged to buy services from within or outside the BBC thereby creating a form of internal market. This led on an on-going basis to programme makers competing for internal resources, including journalists and presenters, and to them, in turn, competing to offer their services to the programme makers. He said that the BBC works, in essence, "like hundreds of individual companies under the umbrella of the [BBC]". He noted that the BBC has five in-house divisions (covering matters such as

IT, finance and HR) and, within that framework, a number of wholly owned commercial divisions, including World. He said that almost every programme operates as a business entity on its own in that it chooses its own reporters, producers and presenters and often has its own budget.

204. Mr Eades said that in line with this separation he engaged separately with each different part of the BBC he worked for over the years. So far as he knew, due to this separation, none of these programmes had any communication about him with each other. It was entirely up to him, as AML, to communicate, negotiate and arrange any such work with each separate programme. He noted that at one point he worked for a programme called "Have Your Say" which is a World production but he had to negotiate a separate contract and fee even though he had a contract for World news presentation at that time.

205. He continued that, as regards non-BBC work, due to his BBC and other experience he was able to offer his journalistic skills with particular areas of expertise, from geopolitics, to sport and the environment. He had particular sports expertise and contacts; he covered the World Cup and Olympic Games whilst working for the BBC, and, accordingly, knew a lot of people in the sports and the sports broadcasting world. He speaks French and German and used his language skills to take on work overseas such as in France in the Olympics. His experience and technical skills in video and reporting allowed him to provide services in video production for a number of different organisations.

206. Mr Eades did not have an agent. He considered it was his business to decide who he worked for and who he employed (from camera crews to consultants and editors). He had his own website and his own business cards and an active twitter presence. AML also employed his wife to take care of the administration of his non-BBC work and her work was "considerable" according to his accountant, Mr Simmonds.

207. He saw the arrangement with the BBC through AML as giving him considerable freedom to pursue other interests and opportunities whereas, if he had been an employee, he would have had to put all his efforts into work for the BBC. He noted, however, that limited his opportunities for development within the BBC and that his future at the BBC was never guaranteed. As a staff member that uncertainty has now been taken away. He no longer has to worry if his contract will be renewed year by year; or even every six months; or whether the terms of his contract might be unilaterally changed in terms of hours or the number of days.

208. AML's total income for BBC work (within the scope of this appeal) and all work over the relevant period was £562,458 and £1,097,030 respectively; over the whole period, therefore, BBC work represented 51.2% of AML's total income. Income from non-BBC work grew considerably over the relevant period; of AML's total income, BBC work (within the scope of this appeal) comprised, around 75% in 2008 and 2009, between 55% and 62% in 2010, 2011 and 2012 and around 32% to 22% in 2013 and 2014. Income from his work on BBC radio which was not the subject of the current dispute comprised around 6% of AML's total income in the relevant period. The precise amounts of income AML received for BBC work (including the relatively small amounts which are not the subject of this appeal) and

non-BBC work were as follows. In each case, the first figure relates to BBC work and the second to non-BBC work:

(1) In 2008, £109,283 and £31,299.

(2) In 2009, £80,583 and £24,421.

5 (3) In 2010, £98,869 and £70,277.

(4) In 2011, £118,005 and £62,414.

(5) In 2012, £78,628 and £34,342.

(6) In 2013, £70,955 and £134,814.

(7) In 2014, £64,454 and £115,290.

10 209. Mr Eades said that he could increase his profit by using material and background research from one programme on another programme. That worked well when he was providing services to World and The World Tonight on Radio 4. He could reduce his preparation time in that way which in turn gave him more time to focus on his non-BBC work. Similarly, he found ways of making the most of some of 15 his interviews by offering a radio version of a feature or interview he had done on World or vice versa and he could expect to be paid by both outlets for that work. We note that we do not know how frequent an occurrence this was.

Work undertaken by TWL/Mr Willcox

210. Mr Willcox said that he thought that in the early years of working for the BBC, 20 before the period in question, over 50% of his income was derived from outside the BBC; at that time he was doing documentaries and corporate work. He noted that in some of the covering letters from the BBC it was stressed that he expected to pursue other freelance work. He had that option and did do some other work albeit that it never got to 50% due to the amount of work he in fact obtained from the BBC.

25 211. He said that his records showed that from 1 November 2004 to 31 October 2008 he had done presentation training on several occasions, received fees for repeats of TV dramas he appeared in, written newspaper articles, appeared on outtake TV, provided video voice overs and made TV drama appearances. He said that this work was not something he ever needed permission to do. Some TV work actively came 30 through the BBC itself and other bits and pieces he "might have run past Nigel Charters or an editor in the corridor". We note that there was no evidence on precisely how much of this work was undertaken in the relevant period.

212. Since late 2008 he had not earned much journalistic income from outside the BBC because he then earned enough from his BBC contracts and worked hard to raise 35 his profile through that work. He hoped to secure more such work through earning a reputation as a "top quality, hard-working and reliable journalist".

213. Mr Bakhurst is recorded as noting in the meeting of 26 January 2012 that the fact that Mr Willcox "had been nearly always available for any shift and had been always well-prepared meant that he would always have been one of the first people 40 called when a shift had become available". This resulted in Mr Willcox working on far more than the minimum days in the relevant period. Between November 2012 and October 2013, for example, he worked on 254 days for News, 131 days for World, 19 field days and 2 days of marketing in California.

214. From that time, he continued to pursue book projects and remained on the books of an agency for suitable assignments. He occasionally still moderated at literary conferences and debates, and helped with TV presentation work. He has always maintained an active Twitter profile (and when he wrote his witness statement had 21,600 followers). He did not consider he was merely a news presenter; he was a journalist who earned income from different kinds of journalism.

215. From the figures prepared by his accountant, in the years 2007/08 to 2011/12 BBC income comprised 98%, 99.9%, 99.8%, 96% and 99.9% of TWL's total income. He said the percentage was so high because "the more work and the more available I was for the BBC, it became easier……. as a freelancer, to do more work" for different parts of the BBC rather than to pursue other options outside the BBC. His strategy of being available generated more work. There were always projects or long-term things that "one is thinking about, but obviously…none of that came to significant financial fruition in those years".

216. He accepted that the great majority of his work in the period was for the BBC to the extent of 90 per cent or more but he said his external work would not have been so limited had he pursued other work. The point was that because he had so much work within the BBC he did not do as much outside work. He accepted that probably more so than anything else his public profile was as a BBC presenter and journalist.

217. When it was put to him that by 2006 he had become economically dependent on the BBC for income, he said that he had grown used to the fact that the BBC "even though it wasn't contracted, would probably be providing a lot of income for me because I was always available….to work there".

218. Like Mr Eades he said that there was not one single BBC but rather it was "multifaceted" such that World was separate from News and other programmes such as the breakfast news programme. He noted that each programme had their own internal budgets and the figures on which the above percentages are based do not reflect the split between the various departments within the "internal market". As a freelancer it was an easier thing to work intensively within one internal market than to look elsewhere. We note, however, that Mr Willcox did not produce any evidence that he worked on programmes other than News or World and the BBC1 bulletins he referred to which he said accounted for less than 2% of his work.

219. In response to the suggestion that he did not do presenting or reporting work for other broadcasters, Mr Willcox gave a number of examples where he thought he had done so. He said that in 2010 he worked for Irish radio and for Spanish TV and, in 2011, he thought he gave an interview and appeared as a guest on TV3 (a Spanish television channel) as regards a train crash in Spain. He also gave interviews (a) regarding the Chilean miners for Chilean television and other South American broadcasters (b) to local media in Maidan, as regards a plane crash in the Alps and (c) in Paris after the Bataclan and Charlie Hebdo shootings. He agreed that it was only sometimes that he was paid for this; he was sure he was paid for the Chile interview but could not otherwise say for sure. We note that from the descriptions given Mr Willcox was not presenting on these occasions but rather giving interviews to the relevant television channels.

Work undertaken by PL/Ms Gosling

220. Ms Gosling said that she hoped that she would obtain a higher profile through her work for the BBC which would make it possible to secure corporate work, such as hosting conferences or other events where she could use her skills as an interviewer. She hired a new agent to help her secure that work whom she used from around 2001 to 2004. Ultimately she was not successful in obtaining such work. During the relevant period she wrote a book and worked on a second one (and has published in total three books). She thought PL received around £50,000 in total for the three books. In the correspondence in the bundle her advisers attributed £13,000 of income from her book to the 2011/12 tax year.

221. Ms Gosling confirmed that in the years in question PL did not have any income from her doing any television presenting work other than that done for the BBC. She noted that she had other work from different parts of the BBC than News. She presented BBC London for a period of time, "which was a completely separate thing from my main BBC contract…..I did ad hoc reporting and presenting shifts". That was negotiated as an additional piece. She noted that from an external perspective, it is all BBC, "but it is completely different. I was approached by the editor of the programme who wanted me to work for them. It….wasn't part of, you know, the sort of same job. It was like a different job but within the same big organisation". She did not provide any figures for any income earned from this work in the relevant period.

222. Ms Gosling also recalled earning around £8,000 for a conference in October 2012 but that was outside the relevant period. She maintains her own website and her services are advertised for corporate engagement on the websites of various speaking agencies. She has had discussions on making TV shows based on her books but this did not materialise.

Impartiality and restrictions on activities

223. The Presenters were questioned about the various restrictions on them undertaking other activities outside their work for the BBC under the Terms and the various Guidelines. In summary, the main points the Presenters stressed in their evidence was that (a) these provisions did not prevent them pursuing opportunities they wished to pursue, (b) as they mostly stemmed from the requirement to be impartial, they were not things that they would have considered doing in any event, (c) they do not comply with these restrictions due to contractual obligations; the need to be impartial is simply inherent in the nature of their job as journalists and (d) the restriction on presenting for other broadcasters was really aimed at preventing them working on the same type of news programme for another broadcaster.

224. Mr Willcox thought that the important point is that journalists need to stay on the right side of the line in not expressing personal opinions. He said that generally the same type of rules applied when he was working for ITV and ITN. He thought that the Editorial Guidelines were:

> "no more than a combination of common sense, journalistic integrity and the Ofcom code and that the values are true of everyone working in the industry, whether in TV or radio. These are principles I would abide by whether working freelance with the BBC, ITN, Sky or anyone else".

225. Mr Eades said that the Editorial Guidelines acted as a background framework to the role of presenter which requires in any event "the need to be impartial and the

need to take great care with what is said in a live broadcast". He felt he "owes a responsibility, as a journalist, to get it right" and that, as a journalist, if, for example, he engaged in public controversy he would not get a lot of work off the back of that, so he would not do that under any circumstances. He thought this:

> "is all very standard broadcasting - understanding ethical practice…I wouldn't do that for any broadcaster…I wouldn't do it as a journalist. I wouldn't do it as me….This is not in my DNA…The idea that this is something the BBC insists upon or not, feels close to irrelevant to me. I would expect as a journalist to follow journalistic standards…"

226. It was put to Mr Eades that the Guidelines contained extensive restrictions on the freedoms that an individual would otherwise possess. He agreed but said that it would be the same if he were at Sky or ITN, Channel 4 News or Channel 5 News. They merely contained the restrictions he would expect to apply to any news broadcaster in the UK:

> "My point would be that they are….givens to me. I would take that as a given, that if I want to be a news journalist broadcaster in this country, those are areas that I would not be able to work in".

227. Mr Willcox said that, in practice, had he said something which was libellous he would probably have been individually called up and, if it was repeated, would not have worked again. He said that to all intents and purposes, as far as the BBC was concerned, he and TWL were the same and if he did something like that, then he would have been warned and then probably the BBC would not have used him again. He agreed that a good deal of his own behaviour involved self-regulation as to what was appropriate. He knew from his long experience what was and was not appropriate, as a BBC journalist. He agreed that he would not have done certain things as an impartial journalist who had worked for several news organisations and the national press and otherwise the work from the BBC would be likely to dry up.

228. Ms Gosling said similarly: "I am a journalist who will always do the job to the best of my ability. I would do that whatever the terms were. As a freelancer, as a member of staff. I don't do it because of what something says in a contract". The matters listed were not ones she would have got involved in in any event:

> "I think if I was interested in stuff like that, I wouldn't do the job I do, which is a job which does require you to be impartial…I actually struggle to ever kind of take a really partisan view of something because I'm just not that sort of person. So, therefore, I wouldn't have ever wanted to do something that is campaigning, or anything controversial. So… I'm not that person because I'm told not to be it by something that has been written on a bit of paper, that's just the person that I am."

229. Ms Gosling said that as a sensible journalist:

> "You sort of self-police because you would not do anything that is going to be controversial….I can't see I would ever take a different view of whether something would be controversial from – from somebody else…I think we probably all have the same view of what, potentially, could give rise to somebody not being able to fulfil a role as an impartial broadcaster."

230. Mr Willcox accepted that the BBC had the right, as a matter of contract, to withhold consent for outside activities, even though in some cases it gave an indication about the circumstances in which consent was likely to be forthcoming.

He thought that the "the thrust" of the meaning of the relevant wording was that the BBC expected him to pursue other engagements but he would have to seek consent and would not do so without consultation. He clarified that, in practice, when he talked to the BBC about doing outside work, the BBC was content for him to do this work and it was generally done on a very informal basis. He thought that the BBC acknowledged all the way through that it was a freelance commitment on his part so that he could pursue other freelance activity albeit with their consent. He noted that in fact non-BBC work was actively encouraged by some at the BBC (such as Mr Bakhurst).

231. It was put to Mr Willcox that some of his contracts stated that his work as a television presenter and journalist was to be exclusive to the BBC. He said: "Well, no, that's not true… I was allowed, and indeed did do, other work for other broadcasters, if I discussed it…..I did a documentary for Channel 5 which I wrote and presented and got permission for doing that before this period, but still working as a presenter for the BBC." He confirmed that he understood that he needed to get permission in order to do any broadcast work for anyone else.

232. In a note of a meeting between the BBC and HMRC on 21 January 2012 it is recorded that Mr Bakhurst said he would not have wanted Mr Willcox to work for "a direct competitor in a news presenting or current affairs capacity" but no "objection would have been raised had he worked for another media organisation in a different role". He also said that whilst Mr Willcox might have "asked for advice where there might have been the possibility of a clash" this "had not been mandatory" (as was the case for most if not all presenters).

233. Mr Willcox said that he understood that he had to get permission for writing and speaking commitments. This was not an issue as regards the articles he wrote as they were of a non-political nature. He would not have thought of writing something which was politically controversial because it did not fit with his role whether as a BBC presenter or when he was working at ITV or ITN.

234. As regards conference work, he said that if the topic of a conference had been something controversial, he would not have accepted it because he realised there were limits on what he was allowed to do. Again he thought that the same limit applied in any news organisation. He described the requirement not to be involved with campaigning bodies as "standard rules". He thought that as soon as a presenter was thinking of, for example, standing for Parliament, the presenter would have to come off the screen. He noted that any presenter who appears on air in a journalistic capacity will have considerable restrictions on what, if any, promotional activities they may undertake.

235. Mr Eades recalled that in 2003 he had a very informal meeting (at Charing Cross railway station) with Mr Charters, who stipulated that: "Of course, you will need to do work outside the BBC as a PSC". He said that "the idea that I would have a contract that would stop me from doing that is, frankly, nonsensical. That was the only way I could have worked". In the record of the meeting between HMRC and the BBC on 13 September 2012 it was noted that permission only had to be sought where the "other work would compromise the BBC's reputation or DE's ability to act as an impartial news presenter" in which case the BBC could "stop him doing the other work". In a meeting with HMRC on 13 June 2011 it was recorded that Mr Eades said

he would not work for another broadcasting company but that was his choice, not something imposed by the BBC. It is not clear whether Mr Eades was here referring to work as a news presenter or other broadcasting work or whether he had in fact asked the BBC about such work. Overall, given the uncertainty of the meaning of the comment, we attach little significance to it.

236. Mr Eades noted that whilst there had been small changes in the contractual terms over the years, he had not changed fundamentally, the way he worked with the BBC; he looked at the areas where he thought he could and could not do something and he tended to refer it to his editor. For example, when he was asked to provide some media training for British Olympic sports teams, in the first instance he ran through this with his editor, Mr Roy, who gave the green light but he did not do that subsequently. He explained that most of what he did in this area involved presentation training or media familiarisation (in terms of explaining how a programme is put together and how the news tends to work). He seemed to agree, however, that the restriction on media training in the Terms was not really concerned with the scenario he described. It was concerned, for example, with preventing a news presenter or a person primarily known as a news presenter teaching people how to answer the difficult questions that a news presenter might ask.

237. As regards the prohibition on hazardous activities in the 2012 Terms, Mr Eades commented that he was "a fit and healthy, not-so-young man". He engaged in lots of activities, including skiing, and he did so both before and after this clause was introduced.

238. Ms Gosling considered that she was free to write books or do commercial work provided that there was no conflict of interest that could compromise her impartiality. She said that "would apply whether I was a presenter at the BBC or anywhere else in broadcasting". She said that at one point she had conversations with the BBC about doing home making programmes (her books were on this topic). They never actually came to anything, but if they had have done, she thought she would have been able to do them: "I admit I am not a brilliant reader of contracts….my understanding was that I could do broadcasting in other things…the other aspect of my career has been the books and it is home-making and I didn't think that there was any bar". As far as she knew it was rather the case that a presenter could not do news presentation for two news companies. She gave a copy of her first book to an editor just as a matter of courtesy even though she knew there was nothing controversial in it and would probably have had a conversation had the programmes come to anything. She did not discuss her other books with the BBC.

239. Ms Gosling noted that the restrictions on conference work were wide-ranging but that "it all boils down to one thing which is you cannot have any commercial interest or a partisan view, not just working for the BBC but as a broadcaster, anywhere". She had learned this from the start of her career working in commercial radio:

> "where I became aware that if you are in news, you cannot do something that endorses a product or anything else……they appear to be quite wide ranging, but the absolute link with all of them is you cannot do something that is you putting your weight behind a commercial product or a political party or a particular view on anything".

240. Similarly she said that she had an obligation to be impartial, which was just part of being a journalist wherever she worked and that she was well aware that the fundamental thing as a broadcaster “whether it is for the BBC or any other broadcaster – is to be impartial”.

241. As regards chairing a conference she noted that as a journalist, she interviewed people who have controversial views all the time and that does not mean she agrees with those views:

> “I suppose you just need to take your judgment on whatever conference you were asked to do. If it is a conference with a particular agenda where the premise of the conference is to support a controversial view, then you would not get involved, but if it is a conference on something which is not controversial but as part of that conference, you will have, perhaps, one interviewee who does take a very strong view and on the other hand, somebody who takes a different view, then that is fine”.

Provision of services - Working pattern

242. The income in dispute was generated from the Presenters’ roles in presenting on the News channel, in the case of Ms Gosling and Mr Willcox, and on the World channel, in the case of Mr Willcox and Mr Eades. In each case, typically on a three hour shift or slot in the studio, the Presenters presented news reports and live news coverage of breaking news around the world and/or in the UK which included conducting live unscripted interviews. Mr Riseley said that interviews comprised at least half of a typical broadcast on News. Each of the Presenters also presented for News and/or World from locations outside the studio in the UK and overseas, which they described as “field” work.

243. Mr Willcox described News as a “24-hour news channel…..very much sort of a rolling structure covering news as it happens on a fluid” basis. On that channel “lead-ins” to news items were written by producers as events constantly changed, and there were usually more live interviews than on World, which could crop up with very little time or “on a second’s” notice. Mr Willcox said that the presenter had “total control” over such interviews; there was simply no time for the production team to give much in the way of direction.

244. Mr Willcox explained that World is a commercial channel funded by subscription and advertising. It is also a 24 hour channel which reports on live breaking news but unlike on News (a) there is quite a large element of structured programmes, rather like a news bulletin, which generally last for 25 to 27 minutes and (b) there are set advertising breaks. This means that presenters on World have to speak to time unless the presenter is dealing with breaking news. Both channels sometimes come together on a simulcast (on huge stories, sometimes with BBC1 and BBC 2).

245. Ms Gosling confirmed that most of her work for News as a presenter was on a regular scheduled programme slot albeit that the slots changed periodically. She thought she had probably worked “every single shift” but she tended to have “the same role on a week by week basis”.

246. She principally worked in the studio setting but did some work in the field as well which usually took place in the UK. Over the years she has done election and budget coverage and various domestic stories within and outside London. She said

that she was never told she had to do an outside broadcast. She has practical considerations as she has children and if, for instance, she could not broadcast from abroad she would not do it. When she was asked if she could act as the anchor for Olympic coverage for News, as she had little interest in sport, she did not feel she could suddenly come up with the level of expertise required for that role. She said she would not do it and that was accepted by the BBC. She honestly did not think she could be told to do something like that. It was put to her that the BBC agreed that her point was a good one as regards her lack of sports expertise. She said "possibly, but they asked me to do it, so I assume they thought I could do it, and wanted me to do it, but I didn't want to do it".

247. Ms Gosling noted that when in the studio the number of news stories and interviews she covered on News varied widely from day to day (for example, from around 5 to 15). She often did not know who she would be interviewing until the hour in which the interview took place. She said that due to the fast paced and fluid nature of presenting in this live environment, where nothing can be re-set or edited, she constantly had to use her judgement in working as part of a team to get the output right.

248. Mr Willcox worked for both News and World in the studio but, from 2010 onward, work in the field was the largest part of his work. As regards studio work, he did not have a set and regular presenting slot. Occasionally, he was offered the "graveyard" shift, Friday night and Sunday morning, just to try and give him something fixed on a weekly basis. But he never had his own programme or a regular slot, as such. It irritated him but it meant that he was able to fit into any particular programme that he was needed to fill. His day was not usually an eight-hour, structured day. He said that there were times when he was making documentaries as well as presenting on the BBC (although he was not sure if it is in this particular period) when he remembered leaving the studio and then working on the documentary until midnight or 1.00am in the morning.

249. He agreed that once he had accepted a shift everything else fell into place, in terms of when he was going to do it and where he was going to do it. He confirmed that it was not open to him through TWL to change the time or location of the work. The programme he was booked for was for a specific time and with very few exceptions he attended himself. He confirmed that as a journalist he contributed very significantly, if not entirely, to what was presented in terms of what was being said.

250. As regards field work, sometimes Mr Willcox requested to go to a particular location but obtaining this work was very competitive. On many occasions it was the producer who suggested he covered a particular overseas story on location. In the meeting note of 26 January 2012 Mr Bakhurst is recorded as saying that (a) Mr Willcox could have declined an outside broadcast and had done so when it clashed with prior arrangements, (b) he could also have requested an assignment if he felt it would have fitted with his areas of expertise and (c) there were no situations where he had no choice but to accept an assignment.

251. Mr Willcox said that his fees for these assignments were negotiated on an ad hoc basis. From his other comments as set out below and the record of Mr Bakhurst's comments it appears that in fact he agreed with the BBC that each day on these assignments would count as more than one slot as accords with the contractual terms.

252. He said that he is perhaps best known for his coverage of the rescue of the trapped Chilean miners. That involved him invoicing for three programmes over 24 hours as he was on air from 6.00am to 10.00pm. When he was asked to cover the Japanese tsunami in 2011 the BBC did not want to pay for three shifts in one day but, as he wanted to cover the story, he accepted a double payment for long days (which meant a 20 hour working day for about two weeks). A negotiation on this took place whilst he was at the airport.

253. In the meeting note of 26 January 2012 Mr Bakhurst is recorded as stating that (a) on such occasions the long hours involved would have been recognised and a larger payment would be made as well as payment for some travel time but this work "formed part of his minimum guarantee of shifts and would not have been separately negotiated outside of the existing contract", (b) as regards expenses for field work, if there was time, flights and other matters would be organised centrally but, if not, Mr Willcox would claim the expenses through his invoices, and (c) the same principle would apply to all staff and freelancers. All could make a request for cash in hand whether staff or freelancers.

254. Mr Willcox noted that sometimes News and World would share the costs of his broadcasts from the field if the story was of interest to them both. He would then simulcast to both channels. He noted that all departments have their own budgets and were constantly trying to join forces to save money and he was trying to increase his invoicing by covering as many stories as possible.

255. Mr Eades worked for World both in the studio on slots of three hours and in the field. He agreed that if he was to present from the studio he had no choice but to attend the studio to do that. He confirmed that the precise location of outside broadcasts were usually chosen by the editor. He thought that he had the choice whether to travel outside the UK or not and, if he did travel overseas, he claimed expenses. He said that usually a field producer would know the best places for him to be located when reporting in the UK, for example "after the London Bridge attacks, the best place for the BBC to put a satellite van is in X or Y street or even that the police were cordoning an area off for broadcasters…"

Working pattern - Gallery team

256. Whether working on News or World the Presenters worked as part of a team which included a director, producer and editors some of whom spoke to them from the gallery via earpieces during the live broadcast. The team in the gallery also included the operational personnel who are responsible for the right pictures going on air, the quality of the visuals and sound and the overall look of the studio.

257. Mr Riseley said that his role as director was to try to ensure the live broadcast ran smoothly which he compared to acting at the same time as a stage manager and a conductor of an orchestra. He tried to ensure that the correct footage was shown, the right interviewees were in place and the presenter was looking at the right camera. He was responsible for trying to ensure that the BBC editorial policy was not breached (for example by not showing pictures when inappropriate). He said that whilst these were matters for the entire team it could be said that he had the:

> "final gate keeping role.. for doing one's best to make sure that whatever we finally see at home is technically correct, both from a visual…and a sound

> point of view. But also doing one's best to manage the standards that we do our utmost to uphold, indeed."

258. During live broadcasts Mr Riseley gave the presenter directions in the sense of which camera or screen to look at, the timing of items/interviews (to ensure that the programme ended at the allotted time), who was next for interview and what story was coming up. During a breaking news story, he and the editor gave the presenter the latest information and provided graphics and maps so that the presenter had something to ad-lib to.

259. He noted that these directions were not orders. Very occasionally the presenter may say he/she did not wish to move to the next story or to run it. For him to direct a presenter to move on was rare. Through years of experience of working with particular presenters and understanding how they work, he thought he knew where they were going with the broadcast so he would not even have that conversation with them if he felt that they had a "certain thought process…, a certain rhythm, structure, to an interview". In practice, he would not direct a presenter to move on unless there was a significant time pressure to come off air. Realistically he was unlikely ever to put the presenter in a position where he/she would have to say more time was needed.

260. He said in his witness statement that the presenter could not, both for editorial and logistical reasons, expect the gallery to run a story that the editor had not pre-agreed to run (although in a breaking news situation that may be different). He thought it fair to say both the editor and the presenter "had a veto" over what stories to run and who to interview. Except in exceptional circumstances, such as a technical failure, the editor had a final say on the stories to run and the order they run in. At the hearing he accepted that, in principle, the editor is ultimately in charge, and is responsible for what stories to run and whom to interview but said that it is a collaborative process. If there was a dispute the editor would make the choice. He agreed that in a live broadcast, in practice, he could not control what the presenter said:

> "There are very rare occasions when due to the way that news wires are received, a presenter might decide, of their own volition, to break that story, based on their judgment. And again, that would surprise me. I probably, as a director, might not be too happy about it, because there are various other people involved in making sure that whatever is said and seen on air happens simultaneously, but there is the odd occasion where that could happen."

261. He agreed that if the editor wanted the story to be run and the presenter refused to speak about it on air it was likely that there would be strong words exchanged at the end of the broadcast. He hoped such a situation would never arise given the collaborative process and teamwork; there should be a prior discussion before going on air when the presenter could raise any concerns and agreement could be reached. He could not in fact recall an example of this happening in 14 years of directing the news at the BBC.

262. He clarified that when speaking of the "right to veto" he meant that "ultimately…we find ways to agree or to treat stories in a way that will satisfy both…the editorial team and the presenter, who is the person that has to put their face on a camera at the end of the day, and represent themselves and the BBC". He said again that it is very much a collaborative process:

> "The way we work is as a team. There is rarely situations of conflict. We aim to listen to one another and get the best from whatever story and interviewee, and that means editors relying on presenters, just as it does presenters relying on editors, producers, the individual that has the onerous task of rolling the autocue in time, perhaps when a presenter is reading a scripted link, to a presenter having to listen to me perhaps making an inappropriate comment whilst they are trying to carry out an important interview."

263. He said he had referred to technical failure as the case where the editor did not have the final say but whilst "rare perhaps….there could be other examples when that might not be every single time, the case". He agreed that the principle is that the editor should have the final say, "in an ideal world". He agreed that if time allowed it may be necessary for the editor to refer a matter to someone more senior if the story was of such gravity but noted that "more often than not, time does not allow, and editors play the role that they play because of their knowledge of the…programming ….they've spent years getting to grips, perhaps, with the guidelines within which we try to operate. So ultimately, yes".

264. Mr Bowen said that in his role as senior producer (or assistant editor) on World programmes essentially he managed the overall output of the programme which included managing the team members including the presenter. He crafted the "editorial direction" of the show, in the sense that he directed more junior members of staff in relation to their editorial judgments, made decisions on which guests to interview and what stories to run and in what order. He also approved the broad direction of interviews and timed the programme.

265. Mr Bowen said that ultimately he was the person with immediate responsibility for the output of the particular programme and deciding what stories to run, in what order and what guests to interview. In part he was dependent on the presenter for the implementation of these responsibilities. When he was programme editor on World, Mr Willcox was at least in the first instance answerable to him. He accepted that his interaction with a presenter was the same whatever that person's employment status; he was not aware of that status and "a presenter was a presenter".

266. He was asked if when making the kind of decisions he referred to he had in mind the Editorial Guidelines. He said he did but noted they are very long and he did not know them encyclopaedically. Whilst he had in mind the need to make sure that the guidelines were complied with, it was not a part of his day-to-day job to read them and know them line by line. He was aware that there was a director of editorial policy but the highest person in the editorial chain of command with whom he had contact on any given day was the head of News.

267. It was put to him that the Neil Report stated that editors and executive producers of BBC programmes have to take day-to-day responsibility for the BBC's values and principles being implemented in practice and he was asked if that was correct today. He said it was correct as at the time when he left the BBC two years ago.

268. Mr Willcox said that he often suggested at the last minute that a different lead story should be used if something relevant or dramatic broke. Mr Bowen confirmed that when he worked with Mr Willcox on World he sometimes suggested that a different story was used as the lead or a story was dropped. They would discuss it and usually decide together if the running order should be changed. Mr Bowen trusted Mr

Willcox' judgment as an experienced journalist and if he planned to make wholesale changes to the running order would discuss it with Mr Willcox first.

269. Mr Riseley said that the overall editor's main role was in preparation and research. The editor may well be in the gallery for only some of the live broadcast and took a back seat once it was underway intervening only if there is a particularly difficult interview or a legal issue. Mr Bowen said that when he was at World, the overall editor was rarely in the gallery with him; the channel and assistant editors tended not to be in the gallery unless there was a breaking news story. This accorded with the Presenters experience that as, Mr Willcox said, editors were rarely in the gallery apart from during big breaking stories and, as Mr Eades said, the editor typically sat in the newsroom during live broadcasts.

270. Mr Bowen was asked if, when the editor was not present in the gallery, the presenter was answerable to the senior producer on the scene. He said it was not quite as simple as that:

> "We have a comms system, at which point any of the editors sitting in the newsroom can squawk and ultimately make me answerable to them, should the direction of the programme not be going in the way that they would like it to be. So while they aren't physically next to me, they're certainly verbally next to me."

271. He was asked whether, when there was a breaking news story, there were more senior people present to supervise the way in which it was dealt with. He said "yes" but that "all of this is nuanced, and if the story was of a particularly large nature, then multiply the number of editors and the seniority of those editors in the gallery accordingly." He agreed that the reason for their presence is that the ultimate decision-making authority in relation to the content of the story and the way that it is broadcast, rests with the editor in charge.

272. Mr Eades said that the editor sits atop the team and has ultimate responsibility for what goes out on air. However, in his view, in the fast-moving world of breaking news, updating stories, ad libs and unexpected interviews, the presenter has control over what is said. Within the team, the presenter is often the most experienced journalist. Presenters take on a large degree of responsibility; they are expected to ad lib when they think it is necessary or appropriate and the editor cannot "control" that.

273. Mr Eades said that you could think of the gallery as "air traffic control", keeping in direct touch with the "pilot/presenter" and, if need be, speaking to the newsroom editor. Much of the minute-by-minute discussion during a bulletin was with the director about what was actually available and with the news producer. A lot of the time there was also "banter, arm-twisting, a bit of argument and a search for agreement when it comes to an editorial decision about a particular story or news item. The editor sitting in the news room may not even be aware of all this".

274. Mr Eades continued that it is wrong to have the impression that presenters have to fight to control what they do or that editorial decisions are black and white. They are grey and revolve around journalistic judgement as to the relative importance of news stories and how they should be presented. If "I feel strongly about something, I will say very clearly what we should do and the editor may not be involved in this discussion at all".

275. Mr Willcox said that most information from the gallery relates to the overall co-ordination of the broadcast rather than the content. Once on air he tried to stay in touch with the gallery so he knew who was coming up for interview and which camera to face and could react quickly.

5 276. Mr Riseley said that broadcasts from the field were much less structured. In that case he was in the studio with the editor relying on the team in the field to update the audience with something to report. His role as director was largely to do with timing, telling the presenter who he was broadcasting to (as sometimes for major events coverage was presented on more than one channel), who was coming up for 10 interview and deciding which pictures to run (as sent to the gallery in advance). The presenter had to ad lib or interview for the duration of the breaking news item. Broadcasts from London such as from the houses of Parliament were a bit more structured but the same considerations applied.

277. Mr Bowen said that in that context his relationship with Mr Willcox was 15 "hugely important" and that was why they were sent away together and worked together on programmes, "because at those times of breaking news or moving stories, you need to have somebody working alongside you that you can trust and knows what they're doing, and I certainly felt that with him".

Preparation for shows and meetings

20 278. Ms Gosling normally arrived at the studio three hours prior to going on air. She had to do her hair and make-up (although sometimes she did this at home) which took about 20 minutes and the rest of time was spent preparing for interviews and doing research. She kept her on-air clothes in a locker at work, so she could change into them just before going on air and change out of them immediately after. The clothes 25 she wore were all her own, chosen and paid for by her. No-one told her what to wear or what style to adopt.

279. She noted that there is no obligation to prepare in the BBC newsroom, and there were times when she did this at home, arriving at the studios just in time to go on air. If, for child care reasons or whatever, she could not arrive at the building far in 30 advance of her shift she did not do so. She generally prepared at home for an outside broadcast. She said that there were no fixed rules on how a presenter must prepare and there were no obligatory meetings. She was simply required to be able to perform during her slot and to be prepared to deal with anything unexpected that may be thrown at her. She said it may just be a mental shift but when she was later engaged 35 as a member of staff she felt that "my time was theirs" as opposed to when she was engaged through PL, when she just did a shift.

280. At the studio she may have a brief chat with the output editor about whether interviews were set up and whether any live events were expected. They would discuss the stories to be covered, with each of them making suggestions, including 40 ideas for stories and who would be good to interview and possibly the treatment of stories (such as in relation to the use of graphics).

281. Ms Gosling said that contact with editors and producers varied dramatically depending on the programme. When she presented in the evenings, there was very little interaction with an editor at all: for periods, there would not be a senior (strand) 45 editor attached to the output. The head of News remarked at the time that she and a colleague she presented with in the evenings were frequently the most senior people

in the building at that time of the night. In those cases there would be no editorial meeting before or after the broadcast. In her experience, such team meetings as there were tended to be about logistics in terms of what stories were to be covered and in what order, rather than the editorial focus of, for example, the interviews.

282. On an average day, when the shape of the news agenda was already known she would find and read "copy" and articles on stories that she was likely to have to talk about (which could be one or two meaty subjects or sometimes as many as 8 or 10 stories). She would read through everything and make notes on each story, including questions for interviewees. She familiarised herself with all the key stories so that she could ad-lib around them when necessary and so that she was ready to do an unexpected interview at any time. She regarded it as important to keep all her notes with her on air due to having to switch between stories.

283. Ms Gosling said that there was much more involved than this specific preparation. She is always attuned to what is going on in the news and reads newspapers and articles extensively. It is essential to do that so that she can contextualise a story when it breaks. She said that "journalism is not just a job that you walk into and do a duty, and then you walk away from it and the world that you are interested in has suddenly shut down until you are next on shift. I am sort of absorbing, obviously, what is going on in the world of news all the time….it is not direct preparation but it is part of who you are".

284. Mr Willcox typically arrived at the studio some hours in advance, having started his day with a few hours of his own research at home, listening to the radio, checking the online news and the international press. On arriving at the newsroom he attended a meeting with the team of gallery staff, the strand editor, producers and broadcasters. The team was typically small; five or six people. They discussed the stories they thought were of interest, checked the running order, sorted out whether to deploy producers to chase guests on a story and talked to editors dealing with correspondents nationally and internationally. Mr Bowen said that he expected the presenter to be at the pre-broadcast meeting unless there were extenuating circumstances.

285. After the meeting Mr Willcox spent around 1.5 hours doing more research, checking for breaking news and preparing for the broadcast using his own notebooks for his proposed questions and, when in the field, cues as he did not usually have an autocue. When in the studio he prepared in the newsroom close to the team so he could chat through stories with them and for convenience as he was to broadcast from there. If he had prior warning of an interview, he may have done the research the day before but otherwise he prepared in the studio. He said that when presenting on News he could do as many as 30 unscripted live interviews in a three-hour shift. He noted that he may receive a brief but all the questions he asked on air were his own.

286. Mr Eades said that if he was on a three-hour slot from 5.00am, he would get up between 2.30am and 3.00am. He would have an hour getting in to work, in which he would listen to the radio, prepping himself. On arrival at the studio he would still have 1.5 hours to prepare before the programme started. He did not necessarily need to prepare in the studio and or to be at the studio for pre-broadcast meetings. He could join those on the phone in some cases. It was sensible and helpful and it was expected that the presenter would be there and he would want to be there. However,

if for some reason, he could not be there (and that did not happen very often) "no-one was going to kick up and say, "you don't have a choice, you have to be here"".

287. At the end of a breaking news programme there was usually a de-brief meeting to discuss how it went and what could be done differently next time. As Mr Riseley said, however, the meetings do not always happen; there are so many programmes that there may be a meeting in the morning or the afternoon or the evening but not every strand of rolling news programme would have a meeting where everyone would sit around and discuss it.

Interviews

288. The Presenters each said they had considerable input into the choice and use of interviewees. As interviews were not scripted and they were often carried out without a great deal of prior notification of the interviewee, they considered that they had "autonomy" in how to conduct them. Mr Riseley described interviews as being entirely the presenters' own given there was no script. Mr Bowen said that Mr Willcox had "complete autonomy" in conducting interviews in terms of what was asked and how the questions were put. He thought that interviews are one of the most important features of live broadcasting given they are a large proportion of the programme and could make the headlines. In that context, Mr Willcox' role was key.

289. The Presenters sometimes received a brief before an interview, prepared by the producer who set up the interview, which principally outlined the stance that the interviewee was likely to take. Ms Gosling said the briefs were sometimes well researched but sometimes very brief and unhelpful as the experience of the person producing it varied considerably.

290. The brief sometimes included questions for the interviewer to ask but the Presenters regarded them as suggestions only. Ms Gosling said they were not an edict about what to ask. As she was one of the most experienced journalists on the channel, the aim was to help her but she was not obliged to follow the brief. She thought that it was for her judgement on these issues that she was engaged to do the job. Mr Willcox said that all the questions he raised on air were his own. Mr Eades said he may have a quick word with the News editor in London about the upcoming bulletin; but that was generally about the running order. Occasionally he might have a chat about a line of questioning but that was never dictated to him. In the vast majority of interviews, he arranged his own questions and line of discussion; he fashioned his questions with very little editorial direction, if any. He did not recall having been challenged afterwards on any line of questioning he had taken.

291. Ms Gosling said that, when preparing for interviews, she was not constantly aware that she had to comply with the Editorial Guidelines. She was thinking how she could get the best out of the interviewee and how to bring the subject to life. She researched as fully as possible, in order to understand the questions that she wanted to ask and the answers she anticipated would be given, so that she could shape the best interview she could. It was uppermost in her mind to do the best job she could as a journalist in terms of communicating with an audience, making things interesting and bringing stories to life while remaining impartial. The need to be impartial was always there as her "bedrock", but it was not her "fundamental issue in terms of thinking about questions".

292. Mr Riseley said that at the pre-meeting in the studio the editor had a list of stories to be covered and the team, in particular, the presenters often made suggestions. Experienced presenters, such as Mr Willcox and Ms Gosling, often have a feel for which stories work best which is especially valuable if the editor is more junior and inexperienced. At this meeting it was decided who to interview for a given story. He said that, as both Ms Gosling and Mr Willcox had worked in the industry for a long time and have built up contacts, they would often suggest interviewees. The Presenters agreed that the planning team or producers often decided on interviewees but they suggested people as Mr Bowen said. Mr Bowen thought that their say was important due to their expertise and as they conducted the interviews.

293. Mr Bowen said that when working with a senior and experienced presenter like Mr Willcox he expected him to make good suggestions about the way the programme should be presented and as regards potential interviewees. He noted that Mr Willcox always had a view on potential interviewees and had useful input; he found his contribution invaluable. Ultimately, however, if Mr Bowen felt that the story should be covered in a different way, it would be up to him to make that decision.

294. Mr Bowen agreed that he could not control the immediate words of a presenter in a live interview nor anything else the presenter said. He agreed that he expected experienced people such as Mr Willcox to use their expertise and skill to ask the right questions in the right way so he did not need to tell them what to do very often. He may have to provide prompts for a less experienced presenter and, if he did, he would expect his direction to be followed. He was asked whether ultimately "if push had come to shove" he would have been able to direct Mr Willcox to ask a question. He said he would be able to but that scenario rarely arose in practice.

295. Ms Gosling and Mr Willcox both said that they could not dictate or order who should be interviewed but rather, as Ms Gosling said, it was kind of a collaborative process. Mr Wilcox said he would not propose somebody unless he thought they were relevant and perhaps the best person to speak to the subject. For example, when covering the tenth anniversary of the Iraq War, he suggested a former British ambassador to the UN and Jay Garner (both of whose contact details he had). They were then integral to the coverage because they were very senior figures at the time of the decision to go to war. He accepted that the BBC was not obliged to accept his suggestions.

296. They both said that there were occasions (although it did not happen very often), where they said they did not want to interview someone and that was taken on board. That may be the case, for example, if, as Ms Gosling said, the person was not actually the kind of expert that the producer thought they were or she had interviewed them so much on so many different subjects that they did not have credibility. She said it was not about throwing her weight about; it was about what is the right thing in terms of the output.

297. Mr Willcox recounted that he had objected to interviewees when he was told of the proposal through his earpiece and, on a few occasions, those people were not put on air. He agreed that was because he had put forward good reasons for not wanting to interview them as part of the collaborative exercise.

298. Mr Eades was taken to a note of a meeting in which it was recorded that he said that the editor had the final decision on interviewees should an agreement not be reached. He said that he accepted that:

> "on any story, there may be points on which one disagrees, and you would argue your corner, they would argue theirs, and you would come to a decision, and ultimately, that may not be my decision to take, in terms of the content…..By and large, overwhelmingly, in fact, I would say, if I come up with a decent interview and can contact them and get them on, that's very well received….I will go further than just a good idea. If I see it as, editorially, the right route to take and valuable, I will push for that, and I would expect and hope to get that……..I accept I cannot control the content going out on air, but I can control some of it."

299. Ms Gosling said that mostly she was comfortable about interviewing anyone without much notice, given her experience and the preparation she did. Occasionally she did feel unable to do so without more time to prepare, for example, when there was a contentious or legal issue. She said that it is generally well-understood by the production team that a presenter has to be properly prepared for an interview. She has never been or felt forced to do something she was not comfortable doing.

300. She did not usually discuss questions with anyone before interviews. On rare occasions, for example, where there was a legal issue, or an on-site reporter had very limited knowledge of a subject, questions were agreed in advance. She could not think of a single instance between 1999 and 2018 where she had been told not to ask a question in an interview. Occasionally, a producer may raise a question via her earpiece during an interview but she regarded these merely as suggestions; it was down to her if she took it on board or not.

301. Mr Eades recalled only a handful of occasions over the years when the editor suggested a question for an interview through the earpiece. He also regarded these as suggestions or advice that he may or may not follow; in his view, they were an offer of help, not editorial commands.

302. Mr Willcox said that, as a presenter on a show like World, he had much more control than on flagship programmes such as the BBC One news in that he would "write headlines, lead-ins" and do "all my own interviews" and he probably would not discuss any of the questions or areas with producers and editors because that would be left to him. He continued that in interviews "there is total editorial freedom about what I ask" because he was "hired as a professional journalist and interviewer". He said that sometimes a producer might remind him of something but he was not obliged to follow up on it. That only happened a handful of times.

303. Ms Gosling and Mr Willcox both noted that sometimes they were told to stop an interview due to timings. Mr Willcox said that occasionally he overruled the gallery if, for example, he felt that an extra question was needed. He also sometimes departed from the autocue when he felt the comment was not sufficiently impartial or did not strike the right tone. He was often more experienced than the team in the gallery. He had never been reprimanded for doing this. He thought he was hired for his judgement on such matters as much as anything else.

304. Mr Riseley said that, through the earpiece, he might ask the presenter to bring the interview to an end but that was a matter of timing or perhaps at the editor's request. He noted that the presenter can hear everything going on in the gallery and

both Mr Willcox and Ms Gosling have been known to switch their earpieces off from time to time especially during interviews as they needed to be able to hear the answers and think of the next question without too much distraction.

305. Ms Gosling said that it was up to her what happened when she was directed to close an interview. If she thought she had an important point, she would nevertheless ask another question and make up the time elsewhere. Similarly, she may be told to keep an interview going if there was nothing else to go to but if she simply had nothing else to ask she would stop then and just ad-lib something else or provide an update on a breaking news story. She said that more often than not the team in the gallery were not listening closely anyway because they were busy preparing for the next item, so in effect she was on her own. Communication through the ear-piece was usually around matters such as timings and which camera to look at.

Live broadcast

306. The Presenters all gave similar accounts of dealing with live broadcasting in particular as regards breaking news. There was an autocue which, as Mr Riseley said, operated like a series of directions, enabling the presenter to know what was coming up (as the running order was subject to change). However, during a breaking news situation the autocue became redundant and the presenter had to ad-lib potentially over prolonged periods of time.

307. Mr Riseley said that the presenters had a bank of screens in front of them showing available live pictures being fed into the studio, which the team in the gallery could also see. The presenter was not on his/her own as the team would be working hard to give them updates and pictures as well as contacting potential interviewees. The gallery had to take the lead from them at times. For example, the presenter may indicate which pictures he/she wanted to talk over.

308. Mr Bowen said that putting together the banks of images was "to enable the visual grammar of the story for the audience to make sense, rather than for the presenter necessarily". However, where there were live pictures the presenters needed to know they were there to be able to ad-lib to them in a breaking news scenario. The selection of images was collaborative, but ultimate control for this was with the output editor.

309. Mr Bowen said that when working on World with Mr Willcox, if there was breaking news in the middle of a broadcast, he sent the information to him by an electronic messaging system and briefed him on the headline, whether there were any guests or graphics for him to talk over and roughly how long he needed to talk for. Mr Willcox could have from 30 seconds to five minutes or more to read, digest and research the story before running with the item live on air. Having briefed him he would gather together images and interviews if possible. He said that whilst:

> "we are responsible for the final product of the programme, responsibility for the delivery of the content of this segment of the show transfers to Tim….He might indicate to the gallery which screen he wants to go to or he may even say it out loud. This process remains collaborative but ultimate control for this lies with the output editor."

310. At the hearing Mr Bowen said that ultimately a decision whether to break a story was, as matter of working reality, a matter for the editor. When asked about responsibility for breaking a live unscripted two way he said that: "If, for example, as

an output editor, a presenter said to me, “we need to break this”, I would look at it and if I did agree, we’d break it; if I didn’t, I would refer up to the editor either sitting next to me on occasion or in the newsroom upstairs”. The next person up in the editorial chain would then either take the decision or pass it on but it would rarely get passed further than that.

311. Ms Gosling regarded it as important to keep up to date with the latest lines on stories and breaking news while on air using the computer monitor in front of her. She said that, whilst the editor and producer also do this, often the presenter is the first to spot a breaking story online, although whoever spots a “snap” first just depends on where each person’s attention is. A “snap” is the first news wire or copy of a breaking story.

312. She said that if there was a breaking line on something expected or a development on a story that was already being covered, sometimes she may, using her own judgment, go with it immediately without discussing it with anyone in the gallery. Generally, she did discuss with the editor or producer whether they wanted to run with the story. Mostly this was a collaborative exercise but sometimes there were disagreements; she got her way as much as the editor got his. In her discussion with the on-air team she was not told by editors what editorial line to take on anything, or what questions to ask (unless something was particularly legally sensitive).

313. Ms Gosling said that often she had to ad-lib over prolonged periods from the first “snap” where the story became a rolling item, her role being to provide the facts and context. She noted that if there was a development in a story that did not require rolling coverage (such as a court ruling or reaction from a key figure) either she or an editor would make a judgement on how quickly to break the item. Her job would then be to ad-lib around and contextualise it. It is unrealistic to think that everything that she said was fed to her through an earpiece. She had to think on her feet.

314. Mr Willcox also emphasised that there were many times when he had to ad-lib; he did not have a script and needed to fill the air with something substantial. He gave an account of what happened when there was breaking news by reference to one occasion when there were three separate terrorist attacks on the same day:

> “pictures would come through, and that running order was just thrown out, and I would be looking at pictures or in my ear, the directors would be saying, "We have now got pictures in from this". For example, there was one day in the Tunisian shootings and there was an attack on a Shia mosque, and the shooting in France, and those three stories all broke within the space of an hour and a half. So it was a question then, of whatever I could see, in terms of wires on my computer, pictures coming in to feeds into the studio, and between the director and myself, working out what we were going to go to then. Nothing was scripted for an hour and a half, and it was reliant on the presenter, me, to bring it all together and move those stories on, as and when another snap came from Reuters or AP. And if I missed it, my director or producer would say, "Snap on Reuters. Can you break that?", or if we are just rolling the whole time, I looked down and I don’t ask permission to do that, I just do it…the presenter drives it, apart from when the producer says, "we need to move back now to France because the home minister is arriving and we want to focus on that more now"”.

315. Mr Eades said that when presenting in the studio, he dealt with several pieces of breaking news on an average morning and nine out of ten times this was not scripted. It was up to him to pick out the breaking news from the monitor on his desk, which showed reports from various news agencies as well as social media and work out from his own experience whether the source was credible. This was often done in collaboration with an editor, who may also send particular news lines direct to him via the messaging system. This was "raw" material and not an edited, proofed and official BBC script. Mr Eades said that he still had to decide what to mention and what to leave out. He noted that the use of judgment and the presenter's experience is vitally important in deciding what stories to break as some news agencies may be more or less accurate than others in different environments and parts of the world. Once the story became established, a producer would be expected to help by writing some script. He added that it is the nature of breaking news that there is a lot of ad-libbing, and timing is almost impossible to predict correctly; so there is a great onus on the presenter to decide what to include or drop and when to stop talking.

Autocue/script

316. The Presenters all read from an autocue or script to some extent. The extent this was required varied from day to day depending on the extent there was breaking news and live interviews. Ms Gosling said that on a quiet news day most of the programme revolved around her presenting scripted introductions into recorded reports. If there was a major breaking news story, however, no autocue was used. She thought that the majority of programmes probably fell somewhere in between.

317. She said that given how fluid the output of the News could be, scripts were important because they provided the structure which the whole team could work to. The items that are "scripted" include headlines and introductions to any item which then lets everyone know what is going on next.

318. As regards how the presenters used the autocue:

(1) Ms Gosling said that she used scripts as a prompt. They were not intended to be read on a literal word for word recitation. She used her own judgement as to when it was appropriate to read from them. She was constantly vigilant about spotting mistakes and making sure she was keeping items up to date (by ad-libbing breaking lines). She may choose not to read a scripted link if she did not like the style of it, in which case she either tried to re-write it beforehand, or she ad-libbed.

(2) Mr Willcox also said that the autocue was not designed to be followed religiously unless there was a legal reason to do so. It was more of a framework or prompt to remind him what he was covering and the order of stories; it was designed as on-screen notes.

(3) Mr Eades noted that reading from the script while looking straight at the camera helped to create a relationship with the viewer. The scripts could be changed at relatively short notice; updates or cuts to a particular script could be made easily and the presenter could deliver those changes. However, he regarded the autocue as a tool and nothing more. He regarded it as the presenter's job to use it as best he saw fit.

319. Mr Willcox said that drafting the script for the autocue was a collaborative exercise. He tended to write headlines and sometimes pieces on a "fixed" news event

(such as the opening of a gallery). He was free to alter scripts written by others such as by tweaking the script to sound more natural or to suggest a change in the running order. He said he had to be happy with the final version as only he was responsible for the words he said live on-air and he had to ensure the content was accurate. The final words spoken were typically written by him or at least edited and approved by him and he usually had the final sign-off.

320. Mr Bowen confirmed that Mr Willcox almost always re-wrote the script pages when prepared by others and that he checked and amended the autocue (as most presenters did). Once the programme was up and running, Mr Willcox received basic directions through his earpiece (such as what camera to look at) but there "is no real control of the presenter. He can say, in reality, what he wants and we trust him to exercise his judgment at all times. If he disagreed with what was written on the autocue, I would trust him to deviate from it in an appropriate way".

321. Ms Gosling generally did not write her own scripts (although she could have done so); they tended to be written by the production team. Instead, as set out above, she spent her time preparing to go on air by reading into all the stories to be covered and researching and prepping for interviews. However, she did sometimes edit the script before going on air.

322. Mr Eades said that he often made changes to scripts and re-wrote cues and stories as he went along through a bulletin. He did not wait to be asked to do so or seek permission. It was often essential simply to correct scripts which were factually wrong or already outdated (sometimes requiring the autocue simply to be abandoned). If he thought that something needed to be changed, he simply changed it. He thought that this was something editors rather like as they cannot check every script for its accuracy. He also considered that editors like presenters to take an active role in the script in the sense of "personalising" it; the presenter's job is "to maximise words, pictures, sounds...and that means veering from script either partially or (quite often) entirely". He did not think that he could be required to use certain words unless there was a "legalled" script.

323. For a lead story, he tried to make the time to write the main introduction by personalising it and giving it his stamp. Sometimes that was not possible, in particular, if things changed very close to transmission but he thought that getting this right is a critically important part of a bulletin, and the presenter is best placed to do this. He might have discussed this with the most senior editorial figure dealing with that story or programme, so that they knew what was happening and there may be a conversation or exchange of views on it. It is not as simple as saying one person had the authority over the other; issues of experience and judgement also come into play.

324. He said that communication and coordination were important, as was the ability to move very fast when things changed. He regarded the presenter as being "at the apex of that movement". It was important to make sure the rest of the editorial team were aware of where he was going with a story so that they could make sure everything else fits. For example, if he was going to mention a particular politician specifically in the headline or his introduction, he may liaise with a picture producer to see if there was a suitable picture to match his words. The same principle applied when he was ad-libbing on air; the relevant producer needed to get the "breaking news" lines onto the caption running along the bottom of the television screen as

quickly as possible, so it was helpful if they knew what lines were about to break. Overall the presenter is much more than a "newsreader". The presenter has to have the editorial nous and experience and expertise to carry out interviews and, therefore, to make snap editorial decisions.

5 325. It was put to Mr Willcox that while the News is less structured than a news bulletin programme, in principle the editor in each case has responsibility for the script albeit that the presenter has to do quite a lot of ad-libbing. He said that:

> "we have been told, as presenters, over the years, to view the scripts as a sort of aide-memoire, as it were, rather than having to stick to it….so at times,
> 10 with perhaps junior producers who are writing lead-ins, scripts, and there are legal errors, and if it weren't for the presenter to pick up on that legal error, then the channel would be in trouble".

326. He continued that:

> "TV has an amazing sort of breadth of experience and very talented, bright
> 15 people coming through, some of whom are only 23/24, who are just learning their way, and in a rolling news channel, it's not always apparent and there isn't enough time for some rogue scripts to come through. Ultimately, the person who then delivers that has to make a split-second judgment about whether you have named somebody who shouldn't be named, you know, in
> 20 the middle of a court case, where something is prejudicial…a script which is wrong, legally wrong, prejudicial, coming through…the editorial control in that scenario rests with me, to prevent the channel getting into a legal scrape because of a mistake that's been made…having been constructed and gone through this editorial process…that editorial process ends with me if
> 25 something is wrong, because I have to correct it".

327. He agreed that there were occasions when a script was positively required "where something is so tightly legalled, you have to stick to that script, and that might be once a week, or if it is an ongoing, you know, trial or something". He said that occasions when the BBC can and does dictate exactly what should be said occur
30 probably 3% of the time. Ms Gosling said that in her experience it was rare for a script to be "legalled" but, if it was, she would not deviate from it. It was "a matter of being a journalist and not wanting to…cause a legal error on air". She noted that she may have to do interviews that are legally contentious "where you know because of your journalistic instinct and background, that you have to take care with it, but it is
35 not necessarily that someone has told you".

328. She said that the reason she does not say anything that might be legally fraught or offensive on air is not because her contract tells her that; it is because she wants to be a journalist to the best of her ability. Where a script has not been "legalled", "I wouldn't feel I have to stick to what's there and I don't't". When broadcasting in a live
40 situation "nobody knows what will come out of my mouth next and I would say that that has never changed". She agreed that in other situations she was in fact encouraged to ad-lib and add colour and interest to the words that may be on the autocue.

329. Mr Eades said it was nonsense to suggest that the BBC could require him to
45 read word for word from a script. He assessed the editorial validity of the words he was being asked to read in any circumstance. If he did not think the words were correct, fair or appropriate, he would not read them out. To claim otherwise is to

make a mockery of the realities of the job, which is nuanced, rarely black and white, and hangs on co-operative approaches to stories. He also said he followed a script only when a particularly sensitive story needed to be cleared by the BBC lawyer.

330. Mr Bowen confirmed that if there was some content in the news which was sensitive from a legal point of view, the presenter was required to follow wording as loaded on the autocue. He said it was not "100% set in stone". So, for example, if it was a case of changing a "this" to a "that", or something towards the end of the script, "we could do that, but then we would have to get it re-legalled" and "put back in again as a legalled script". He agreed that a presenter would have to stick to agreed words in such cases also when working in the field.

331. Mr Willcox was taken to a section in the Editorial Guidelines that stated that witnesses should not normally be interviewed about their evidence once proceedings are underway and until the verdict has been reached. He agreed that these are rules that he had to comply with although he noted that they are rules which other broadcasters follow as well; these are the facts of journalistic reporting life. He accepted that the provision in some of the Terms that the Presenters would not include in any contributions remarks or interjections that the BBC had asked or may ask the Presenter to avoid gave the BBC the contractual right to tell the Presenters not to say something although he said this would apply if working for any broadcaster.

332. Ms Gosling said that in a live broadcast it is not possible for those in the gallery to control what the presenter says or does. She referred to the well-known cases such as that where Andrew Gilligan alleged that the government had tried to "sex-up" a dossier on weapons of mass destruction in Iraq. She said that nothing had changed since this time. The reason why there are not loads of editorial issues is not because everything is locked down and scripted but because professional journalists are doing a good job. She considered that whilst the BBC has editorial responsibility she has editorial input and personally "carries the can" if she messed up.

Breaking allegations in live "two ways"

333. Dealing with the breaking of allegations in live "two ways" was an area of concern identified in the Neil Report produced in 2004 where the following was stated: "Live unscripted two way exchanges should normally not be used to report allegations of serious wrong-doing. The editor must decide whether a live two-way is the appropriate and safest way to break a story. The seniority and track record of the correspondent is a relevant consideration".

334. Mr Jordan said that this concerned rare and particularly sensitive situations; the relevant part of the Editorial Guidelines on this derived specifically from the well-known Gilligan report regarding allegations on the war in Iraq. He said that live unscripted "two ways" are a standard part of broadcast output but serious allegations are made in this way only on rare occasions. The guidelines on this are a "warning sign" telling the producer to be "very, very, careful because that has led to disaster in the past and we need to assess whether we want to do that very carefully".

335. We note Mr Bowen's evidence, at [309], that ultimately the decision on making such allegations was for the editor. We do not consider that the Presenters' evidence is inconsistent with this albeit that they said that this was not always followed in practice and it was a matter of interpretation what constituted "serious" enough allegations to fall within this rule. Ms Gosling said that her recollection was that after

the Neil report and the Hutton enquiry there was a discussion about whether there should be a script when dealing with allegations in live "two ways". She had read the Neil report but thought that it did not contain a rule which is universally applicable. Mr Willcox also recalled that this requirement was brought in following the Andrew Gilligan "sexing of the Iraq War" but said that in practice this was only followed for about two weeks and then "everything went back to a much freer style".

336. He said that "allegations" occurred in most "two-ways" he had done from the field but there was no script. If it was an allegation of serious wrongdoing of a criminal nature, for example, he would have reported that the person had been charged and then the reporting restrictions would have kicked in. He did not accept that in practice ultimately it was the editor's decision, at any rate when he was working in the field:

> "In practice, in the field, he [Mr Bowen] wouldn't - when we were working together, he might be standing next to me, he might not…he would have relied on me to have used my judgment on that. And, again, it comes down to an allegation: if you are accusing, you know, somebody in this country of something, it is different from, perhaps, a wider allegation abroad, when you are dealing in a civil war scenario".

Field work

337. Mr Willcox said that his field trips were invariably "a last-minute send" into a scenario such as a disaster or conflict zone or a civil war, with very little in terms of crew, often only a producer and a cameraman or sometimes just a producer with a camera. If there was time he did research before going on the assignment; in his view, he did not get paid for that. (We do not agree that was the effect of the contract as set out below.) Sometimes on landing he used his contacts to source information and set up interviews or the producer might help gather interviewees.

338. He typically had to start broadcasting very soon after arrival sometimes within minutes via satellite time from an agency or with the team's own kit. There was no autocue and no information other than what he had researched before he left and gleaned on the ground. He liked the freedom this gave him although it was much more difficult than studio work. He loved having to think on his feet, react to the situation and often source all of his own information.

339. Mr Bowen often worked with Mr Willcox as a producer on field assignments. He described this work as fast paced and unpredictable where "you have to think on your feet, be practical and creative" which required working collaboratively with the presenter. The relationship between the presenter and producer was, therefore, more fluid than when in the studio. Mr Bowen's role was varied but ultimately he had to make sure they got to air on time from the heart of or, as close as possible to, where the story was happening. This meant he was responsible for logistics on the ground but Mr Willcox was happy to help out with this if necessary.

340. Mr Willcox said that when on air the director may tell him via his earpiece what reports, packages and pictures were available at his end or the producer may contact him with such information. Sometimes he may be given a draft idea of the sort of introductions the editor was looking for but often there was not time. He was also responsible for headlines and links to reports played from London. Often the instructions he received were as simple as "headlines then talk into four packages" the

details of which were spoken into his ear as he ad-libbed on air. The interviews were all his own; he was not told what to cover or how to frame the questions.

341. Mr Willcox said that no-one in London knew what he was going to say in those situations. There was no de-briefing, checking or vetting apart from the limited direction by the earpiece. In one case he was told not to say a particular word but he decided not to accept that as he thought the word was appropriate.

342. Mr Willcox illustrated the nature of field work with some examples. When covering a typhoon in the Philippines, after a flight to Manila, he was on air within 25 minutes, and he continued to provide coverage for the next 10 days. When he went to Chile to cover the story of the trapped Chilean miners, all the kit and satellite was misdirected to Mexico rather than Buenos Aires. He and the producer took an internal flight and then started broadcasting as soon as they got there. He described it as a "very much freer way of working", because he had to gather information and present and the only contact with London was through an earpiece:

> "when the bird is up and I'm speaking to a director, who will say to me, "We want you for the top. Can you give us three headlines, can you fill, can you get an interviewee? We have a package, a report, that is being made in-house, can you talk into that four minutes in", and that is it. So you are very much left to your own devices."

343. He said the roles of presenter and journalist "merge when one is out in the field, but one is primarily there as a presenter". The roles merge in the sense that in the field "one is expected to present a programme and also, if you have time, record a few things which will give you something to speak into, especially at the start of the day". For example:

> "for the Japanese tsunami, we arrived…and I said to my cameraman as we arrived, "I want to do a quick rant"……a recording showing the number of people trying to leave Japan because of the tsunami. So the airport was filled with a lot of - especially a lot of foreign students and tourists trying to get out. So as soon as we landed I recorded that, so we could send that back as I then made my way to the live point for me to talk into something. So it's a question of, as soon as one lands, thinking, "we've got all this air time to fill, I'd better prepare something in case we can't get guests in the first hour", so that is where the two roles merge."

344. He also covered a lot of events in Greece regarding the "bailouts" and often would arrive at Athens airport with an hour to get on air, would make various calls to various contacts he had built up, "get the line about the statement that Tspiras was going to make, or something like that and as I arrived at the live point, without speaking to anyone editorially about it", he would go on air "with what he had". So it was "left very much in one's hands to come up with the lines and stories to present, because you needed something…otherwise you had a lot of air time to fill".

345. He thought that it was rather haphazard in terms of what he was insured for. He thought that if anything serious happened to him the BBC would get him back to the UK but he was not sure that he was covered by their insurance or what would have happened if he was seriously injured or killed. The BBC never said what the position was. He did, however, receive war zone and battlefield training organised and paid for by the BBC. He was also accompanied in war zones by a security detail or former

Special Forces employed by the BBC. He had not taken out his own liability insurance as no-one would take him on.

346. Mr Bowen said that Mr Willcox was responsible for the delivery of the content but was also integral to the editorial shaping of that content and making sure the item or sequence works as a whole. He confirmed that Mr Willcox prepared and researched and sought interviewees as he had set out. Mr Bowen expected him to be up to speed and to be able to ad-lib fluently on the topic for long periods of time. He confirmed that the live broadcasts operated as Mr Willcox had set out.

347. Mr Eades said that when on field work, he had a significant degree of autonomy due to the nature of presenting breaking news on location. He almost always operated without an autocue facility. It was usual to receive scripts on his mobile and whilst he may on occasion try to memorise a headline the rest was improvised.

348. The onus was very much on the presenters' skills and experience to sustain the live broadcast. He gave a recent example which he thought showed that, as was typical when working on location, the presenter had little guidance in terms of direction, preparation, assistance, working out a story and the route to take a story and the guests. The producer could help with some of this but his main emphasis was on the logistical challenge of getting a programme on air. The director was an important aid in that he usually knew what pictures and interviewees were available but the director did not have an editorial role to play. The onus was very much on the presenters' skills and experience to sustain the live broadcast.

349. The example related to a report from Paris during Bastille Day. A guest was booked for 9.00am for a four minute slot but fifteen minutes before that time London suggested "we roll for a full hour". He managed to find a second interviewee within these 15 minutes and ended up staying on air for 1.5 hours. He did not hear a single editorial voice at all in that time, apart from the director in London advising she had pictures of the parade and Bastille Day, if necessary, and suggesting when he should move on to another speaker or different images, or to say "we are taking a break shortly" and counting down to that.

350. Ms Gosling said that she often had to make editorial judgements on an outside broadcast. Examples of her field work include covering the 2010 general election that lead to the Cameron/Clegg coalition and coverage of the volcano ash cloud that disrupted travel immediately before the election. She received a letter from Mr Bakhurst following this in which he thanked her for her work and said she brought "real energy and political understanding to the coverage" and that this was reflected in the huge audiences. She regarded this as an example of praise for the editorial choices she was making.

351. She was normally on air for longer on such broadcasts, such as five or six hours a day when covering the general election (which may count as two slots for pay purposes). In her view there was no obligation to do outside work and she had turned assignments down if she had other commitments but she liked doing them and accepted them whenever she could. She said that autocue was sometimes available but it was a luxury used for big set events (such as the Budget, an election or royal event). Generally she had to think on her feet and use her own judgement. For example, when covering the 2010 election she said live on air that Gordon Brown was about to resign before any official announcement was made. No-one asked her to say

that or knew she was going to say it; she used her own judgement according to the interviews she had done. She regarded it as her responsibility to make sure she was prepared and knew enough about a situation to enable her to make that kind of call.

352. She normally had a producer with her whose main role was to liaise with the gallery back at base and deal with the logistics on the ground to ensure the broadcast went smoothly. She had an earpiece so she could be told what the timings were and otherwise her main form of communication was email (as phone was not practical due to the long periods on air). She said that it varies how well planned an outside broadcast is. On one occasion, when reporting on an attack in Finsbury, there was a team of producers to find people for her to interview but they could not communicate with her as she was on air non-stop. She had to ask guests to introduce themselves on air. On a Budget day broadcast on the other hand a team planned in advance for planned interviews.

Work on BBC news bulletins

353. Ms Gosling periodically presented BBC1 weekend bulletins in the period from 2006 to 2009 although this was only a small proportion of her work in those years. She never had a written contract to cover this work. She was asked by the person in charge of rotas (who was the same person who was in charge of rotas for the News channel) whether she was willing to do the particular bulletin. Whenever she was contacted, she tried to make sure that she could do it: it was extra work which, as it was high profile, she felt could improve her chances of getting more work from other parts of the BBC or outside the BBC.

354. The BBC1 News bulletins were more structured than the News output. A bulletin is fixed scripted program with a 20 or 30 minute slot on air; the structure is decided before the programme is aired and the running order rarely changes. To prepare for such bulletins, Ms Gosling normally arrived studio around 2 hours before going on air. She would speak to the team about the stories to be covered. Some editors liked to provide a framework around which she worked but other times she wrote the script from scratch. There was a system for signing off on a script, whereby the editor and the presenter initialled the scripts before they were "greenlighted" to go on air. Any disagreements were resolved in advance by discussion. She could not recall having been overridden by an editor, or a feeling that she wanted to override an editor. But whenever she felt strongly about the way a script should be written, to the best of her recollection, the suggestion was adopted.

355. Mr Willcox also presented some of these bulletins but he thought this did not even account for 2% of his work. He said he prepared for this in the same way as for other news presenting work. He also arrived at the studio around 2 hours before the bulletin for a meeting with the editor and producer to finalise the agenda, the stories to be covered and how they should be covered. This was collaborative but the editor was ultimately responsible for what stories were to be covered. The writing of the bulletin was also collaborative; he would write some parts and would check, amend, tweak and sign off the rest. He checked for factual accuracy and that the story was sufficiently balanced and impartial and that it was written in a sensible and natural way. Due to the more structured format the script did not change before the broadcast unless the story had changed. Even when reading the autocue, however, he would

have to think on his feet and amend it if it did not sound right or an inaccuracy had slipped through the net.

Presenters' evidence on editorial responsibility

356. Mr Willcox considered that he was in the editorial chain of command albeit perhaps not in terms of the "structured BBC editorial guideline way". He thought "in practice, most presenters, especially on breaking and rolling news channels…would think that they were part of the editorial chain...in practice, that is how it is done". He said that the whole point about presenting is it is "so subjective…presenters are expected to bring something of their own to the programme".

357. He said it was "tricky to actually formulate or impose a set of rules on a very different news production" to the more structured programmes in place when the rules were originally set up. In his view, structured bulletins and rolling breaking news and live shows are "two very different animals" and the rules do not apply in the same way in each case. Whilst he agreed, therefore, that ultimately, editorial oversight of the content of a programme is a matter for the producer of a structured programme, "if we have time and if it is a non-moving story", that is "a luxury which doesn't apply to a lot of news output". He continued that if:

> "things are moving quickly and one is in the middle of a breaking story.. a director or producer might say, "We need to go here"…..but in terms of who is presenting it and who is having to think quickly and react immediately to something which is breaking, say, on an international news wire, that is me, invariably".

358. He accepted, however, that the planning of a studio broadcast or the implementing of it is a collaborative exercise in which everybody is involved in their own way and it is a team effort to produce the end product and ultimately:

> "yes, of course, I work completely with my producers and editors. There are numerous times, though, where they are trusting, on my judgment, to actually move and break something, without them even telling me something."

359. He said that "of course, that the BBC has the right of control", but the BBC ultimately, in different types of news:

> "doesn't have the control it would like to think it does, because it is just the practical execution of breaking news and reporting from abroad with no structured script, no - and no team behind you, apart from maybe a producer"

360. He agreed that in other words in a live news broadcast, the right of control can't be exercised sensibly, on a pre-emptive basis. That only worked for certain aspects of presentation. He agreed that, ultimately, it is the producer's job to manage the overall output but said that there are numerous occasions where a producer cannot manage all the output. As regards "fast TV, though, breaking second by second, as Richard Bowen….said, ultimately, he wants to think and feel he is in control. We work together because we think alike, and that is why it was a good partnership. So he doesn't need to, and cannot physically push me in different directions. He trusts my judgment, in the way I trust him as well".

361. He agreed, therefore, that whilst no-one "pulled the plug" on live television to prevent him saying something, there would be repercussions afterwards if he said something unacceptable. He said that because of the experience that presenters are expected to have that did not usually happen. There was an incident when he was

criticised for a question and he was reported to Ofcom and also there was an internal investigation at the BBC and he was cleared. He put this down to the physical constraints and challenges that he had to deal with when carrying a whole programme (in this case an outside broadcast) with not very much to go on. He confirmed that the incident referred to occurred whilst he was an employee but the same procedures would have applied whether he was an employee of the BBC or acting through TWL.

362. It was put to him that neither he nor TWL could commission a story or feature; it was for the BBC to decide what to present. Mr Willcox said on occasions when he was in the field it was very much in his hands to come up with lines and stories to present to fill the air time (and he gave the example in relation to reporting on the bailouts in Greece as set out above). He said that essentially on such trips he was engaged on a freelance basis to go out there and present a particular programme for which he provided his own journalism.

363. He accepted that the producer and editor of the programme have the ultimate decision-making authority to decide whether or not to run a particular story in a programme. He noted, however, that he had worked with several producers, where it has been decided right at the end, before going on air, that:

> "we have got the wrong lead, and then through a collaborative process, we will change that. Now, there are some producers and editors who have that sort of flexibility and there are others who don't, and I obviously prefer working with the former rather than the latter."

364. It was put to him that if he had done a pre-recorded programme it would be up to the BBC to edit it as they wished. He said that in practice if he had done a pre-recorded interview, then he would have been responsible for that, probably, going out. There were times when he was abroad with no editor there and he would send "track and rushes" (meaning a voice track and uncut, unedited pictures) for assembly back in London. The producer might change things to make it fit or maybe to take a line out, but would always consult him before doing that. He agreed that the BBC could take parts out or could decide not to broadcast it and there were times the BBC did not run certain pieces when he wanted to and there was a row about it later. He agreed that ultimately the BBC had the right to edit such a report as they saw fit.

365. It was put to Ms Gosling that that it is ultimately up to the BBC to decide what is broadcast (under the editorial chain as Mr Jordan described). She said that she recognised this "as a paper notion……but when it comes to output, it doesn't always translate that way". She gave two examples of what happens in reality:

(1) She was on an overnight shift when Pope John Paul II died. She explained that there are rules on breaking such news; in short there has to be two sources of the information and approval has to be obtained from a senior manager in the studio. In fact the news was broken by a "strap", meaning wording that was flashed over the pre-recorded programme which was then on air. She found herself on air not entirely sure whether she could say that the Pope had died or not, with a correspondent in Rome, who was doggedly refusing to confirm that the Pope had died because he was following the procedures. It was "utter chaos…..the way it unfolded was disastrous".

(2) On a later occasion when Margaret Thatcher died a producer told her via her earpiece to break the news on the basis of a report from her former

communications director, who was a family friend. She did not feel confident and wanted to take some more time and so waited until there was further confirmation.

366. She thought that the ultimate sanction if she did something wrong was just that her contract would not be renewed:

> "I don't know…..how the editorial chain of responsibility kicks up, I just always saw it that, as I say, the sanction for me for making a mistake is just, you lose your job…obviously, there have been some very well-known examples of cases where managers higher up the level have taken the ultimate responsibility. But it doesn't mean that down the chain, people have been spared as well."

367. It was put to her that in carrying out her presenting work, she was curbed by BBC controls, albeit that she internalised them and worked out in her head the right way to do something, to make sure there was not a problem afterwards. She did not accept this in the sense that she knew the Guidelines were there:

> "but that is not what makes me behave the way I behave…. if I was going on air at the BBC and they put me in a studio and said, "You are free, whatever, tear up the guidelines, we don't care what you do", I wouldn't do the job any differently. So I don't think I'm curbed by the bits of paper."

368. It was put to Mr Eades that editorial decisions were for the editor and the producer and not for the presenter. He said "editorial control is a very unclear, grey area, frankly". He thought that in a live breaking news situation:

> "The presenter ends up having to take very direct control of what's going on, and…I at times, am controlling the output, effectively. I can't, for a moment, pretend that I'm controlling an entire bulletin, because that's - clearly, it's nonsensical, and there's someone who is in a position who would have that role, but where things are breaking around us, the presenter is - effectively, is running the show….."

369. He recognised, however, that editorial responsibility belongs with the BBC itself in the grand scheme of things. It was the role of the programme editor to decide on the direction of a programme, the choice of topics and the order of topics. That could be done in collaboration with the presenter and he noted that, particularly with World, the presenter's position is a senior position:

> "As it comes closer to a bulletin, and if things are moving around, the presenter's role, inevitably, in importance, grows, to the point that, if we are in to breaking news and rolling news, the presenter is, in many regards, actually, as I said earlier, running the show".

370. He concluded that in those cases, the element of control he had was highly significant. It was put to him that whilst in delivering the programme, a large burden fell on his shoulders, the editorial responsibility for the content remained with the BBC. He repeated that in a live rolling news scenario he may well be broadcasting and taking editorial decisions "minute by minute" throughout the course of the programme, until it ended. So, "he felt very much in control of the direction in which that was going". He said it was very important to presenters that "we do maintain an element of control over what we're doing and how we do it". He accepted, however, that although there was no formal structured supervision in place, there is an editorial chain of command, and where the presenter is positioned in that varies.

371. He agreed that it was reasonable to assume that, had he gone beyond the boundaries of what the BBC regards as acceptable, that would have been picked up with him afterwards. He added that had not in fact happened. He prided himself on the fact he had not made many inappropriate comments or errors during his time as a presenter. However, he understood that it is not impossible to do so given the unpredictability of presenting in a live broadcast environment and the amount of autonomy that presenters are given on a day to day basis. In this connection, his understanding of the Editorial Guidelines is that they act as a background framework to the roles presenters play and he reiterated what "I would understand in any event, such as the need to be impartial and the need to take great care with what is said in live broadcast. The guidelines are not however prescriptive rules".

Ancilliary services, appraisals and training

372. Ms Gosling said that she had no appraisal until October 2006 when Mr Bakhurst asked her if she would like one. She agreed as it was the only time that she got any kind of feedback about her performance. That was then repeated in 2006, 2009, 2011, 2012 and 2013. These meetings were very informal; they were really a chance to talk face to face with Mr Bakhurst as regards the sorts of things she wanted to cover. It was unstructured and she did not recall there being any paperwork, performance criteria, targets or follow up. She thought on a couple of occasions she sent a note through afterwards to Mr Bakhurst about what had been discussed (such as what shifts she was doing and if a contract was coming up for renewal). At the hearing she said the meetings were not a regular thing that had happened from the beginning; they were not a sort of fixed feature of every year of her ever having been at the BBC.

373. Mr Willcox also had progress meetings with the BBC from time to time, albeit they were very informal; a cup of tea with the then editor of the day which was in essence really a catch up. He thought he had four or five of these in all the years he worked as a freelance.

374. Ms Gosling thought the reference to editorial standards training was to certain online courses that everyone in the newsroom had to do over a period. They took about ten minutes to complete and covered matters such as health and safety and interviewing children. Mr Willcox said that the BBC paid for his hostile environment and battlefield training courses and there were online courses he had to do (on data protection and things like that). Mr Eades said that he was on rare occasions asked to complete an online training module which related to issues such as privacy in the work place or legal updates in journalism which he could do at any time he liked within a certain timeframe

375. Mr Willcox said that he was not asked to do programme promotion activities. He had always been a fill-in presenter and it was those who had their own programmes who were are expected to go and attend dinners. He had attended a news training session but not as a specialist guest. He did some marketing jobs which required him to speak to people on behalf of the BBC but those were separately paid for:

> "Whenever…I went to Las Vegas for a week to do a conference for the BBC marketing side of things, I went to California for a night to talk about reporting on the frontline but for these jobs it was always ex freelance

> contracts. So one would negotiate with marketing, for example….I don't think there was a contract – you would agree a fee."

376. Mr Eades said that programme promotion activities were never imposed upon him and he never had to attend news training sessions as a specialist guest (and he was not even sure he knew what that meant). He was asked a couple of times to front and moderate at the OECD in Paris, the ministerial forum there, and beyond that, "I was asked if I would attend a golf day, which I was happy to do…. had I said, "I can't do the golf", they would have said, "Oh, that's a shame. It would have been a nice day. Never mind". The understanding was quite clearly that if "I am available to do it, great; if I'm not available to do it, okay, "Well, we'll find someone who is". He said it was fair to say that the relationship was, in fact, organised on a collaborative basis, where the BBC and he (through AML), were doing what they could to accommodate each other. The understanding was always very clear to him that, "I was never obliged to attend any particular event, and never have been".

Insurance

377. The PSCs were each responsible for their own insurance. However they benefitted from a discretionary "Non-Staff Accident Benefit Scheme" which provided for payments to be made in the case of accidental death and disability, temporary incapacity and for medical expenses, broadly, where the relevant event arose as a direct result of an accident incurred in the course of performing services for the BBC (including as a result of acts of war of violence). The PSCs were notified of this scheme in the covering letters.

Expenses and resources

378. Mr Willcox said that he/TWL claimed travel and subsistence for work carried out abroad through his invoices. He bought a laptop when he first set TWL up and used his own phone and earpiece and paid for newspapers he used for research.

379. Ms Gosling did not claim any expenses from the BBC. She assumed that she could not and it never occurred to her to ask the BBC as she saw herself as being paid a fee as a freelancer and did not think she had any rights to claim anything. PL paid for newspapers (for Ms Gosling's research), computer, laptop, mobile phone, make-up, professional clothing, taxis, business cards, website, office materials, accountancy fees and agent fees (although we note that Ms Gosling/PL had no agent in the relevant period).

380. AML paid for its own subscriptions for research purposes, owned its own camera and computer equipment and some expensive audio visual equipment and accessories (amounting to £10,000). This equipment was used for Mr Eades non-BBC activities. AML sometimes claimed reimbursement of expenses on travel for outside broadcasts.

381. Mr Willcox confirmed that as it turned out there was no risk of late payment to TWL. As noted, Mr Eades identified an occasion on which AML was paid late in 2013 (he thought as regards two to three months) and PL was also paid late on one occasion in 2008.

Benefits

382. The Presenters received no benefits such as paid holiday, sick leave, maternity leave or a pension. Mr Eades said: "there were no benefits of any sort…. beyond

being allowed to come into the building and do my work". He said that he could not afford to be sick and took holidays when employees had returned from their own.

383. Ms Gosling described feeling "very worried" and "vulnerable" when she became pregnant as not only did she not receive maternity leave but she was concerned for her position. She said that she felt like a lone ranger, going in to do shifts. It felt like a transactional relationship. She felt there was a two-tier system whereby some people had full staff benefits and status and others had no status or security. Being the second camp did not foster any sense of belonging. Mr Willcox also indicated that he did not feel integrated into the BBC noting that Mr Bakhurst "pointed out…that when I left the building, I was my own individual. But when I was on air I was associated with the BBC".

Employment contracts

Presenters' evidence on change in contracting

384. In 2014 the Presenters were engaged by the BBC under continuing contracts and from that time have been treated by the BBC as employees for tax purposes. Ms Gosling had earlier discussions about becoming staff in 2012 but she did not take this up at that point. She was offered a position but with a 25% pay cut and was aware that the offer was about 50% less than her male colleagues earned at News on a staff salary.

385. The Presenters' understanding was that the BBC required the new arrangement to avoid a debate with HMRC on the use of PSCs following publicity over this. They were given a choice between an "On Air Talent B" contract ("**OAT B**") or an "On Air Talent Statutory" contract ("**OATS**"). Ms Gosling said that OAT B was closest to a full staff contract whereas OATS was barely different to a freelance arrangement in terms of benefits with statutory benefits only. The Presenters were required to take a pay cut of around 25% for OAT B and around 12% for OATS. Mr Willcox and Ms Gosling took OATS contracts and Mr Eades took OATS B.

386. Under these contracts, Ms Gosling, Mr Willcox and Mr Eades were engaged with effect from 1 June, 1 May and 8 September 2014 respectively as a news presenter/journalist in News and/or World as applicable (a) in Ms Gosling's cases, for 206.5 days per year comprising 184 shift days and 22.5 holidays for £106,847 per year, (b) in Mr Eades' case, for 185 days comprising 165 days of work (of which a minimum of 15 were to be at the weekend) and 20 holidays for £67,024, and (c) in Mr Willcox' case for 260 days in total of which 232 were working days and 28 were holidays for £154,397 per year. In each case the holiday entitlement was inclusive of public holidays and the annual fee was payable monthly.

387. Mr Willcox and Ms Gosling's contracts are subject to termination by either party on three months' notice although the "BBC may, at its discretion, terminate your employment at any time with immediate effect and pay you your basic salary only in lieu of all or any outstanding period of notice". Mr Eades' contract could be terminated on one month's notice if he had less than five years of service and otherwise on notice of one week per year of service up to a maximum of twelve weeks. The contracts all contained similar termination rights in respect of breach and other circumstances and restrictions on undertaking non-BBC activities as were in the contracts made with the PSCs. The contracts all provided that the remuneration package and terms on which it was offered would be reviewed by the BBC from time

to time which may be "upward or downward in line with the hours you work and the extent of your duties".

388. Ms Gosling said that she was initially happy with the contract as she had always wanted to be staff. She accepted that the job that she did was the same throughout but she felt differently to when she contracted through PL:

> "employment is about being a part of an organisation where there is a reciprocal situation ….a commitment either way…when I first signed that contract….I did think that there was more of a reciprocal relationship…I did feel much more willing…I would stay for meetings, I would give more of my time. I didn't see myself as just going into the building for a shift and leaving straight afterwards…There was no obligation for me to have a meeting either side of the shift, no obligation for me to be in the building any longer than for that shift."

389. She was, however, later disappointed when she realised that she was not on equal terms with those who had been staff for years and had a higher salary. She was particularly upset by the fact that her contract could be terminated at any time. She had "always felt vulnerable, never had any guarantee of work…of another contract. I had no rights, no benefits, I have a 20-year career with no pension to show for it. I had hoped when that contract started, things would be different and I would start accruing rights and I still haven't any. So, yes, I have done the same job and I have had no rights". She thought the contract was not a proper staff contract as she viewed it because she could just be "sacked" for no reason.

390. Mr Willcox said that he had no sick pay apart from statutory sick pay and only a minimal pension. He earned less as NICs were taken from his salary at source. He thought that he had less flexibility to refuse or turn down slots and he was aware that he was subject to the BBC's disciplinary procedure and policies. Mr Willcox accepted his OATS contract was an employment and noted that on the plus side he did get holidays and no longer had the uncertainty of whether his contract would be renewed. He noted that he is paid per day for a set number of days and is no longer compensated for extra programmes. He agreed that the way in which he worked as a journalist for the BBC was no different under this arrangement from when his services were provided through TWL and he had the same relationship with the editor or director of the programme.

391. It was put to him that the salary rate was a considerable increase on the minimum commitment figures in the previous contracts. He said that the issue was that previously he had worked much more than 232 days so the BBC had in effect put a cap on his earnings albeit by raising the rate by around £70 per hour although there is now additional tax on that. He also stressed that he now lacked the flexibility whereby he could say, "I am not doing certain days", whereas now he is told, "these are the days we need you to work".

392. It was put to him that the contract contained similar restrictions on other activities as applied to the contracts with TWL. He was pointed to a letter the BBC wrote to him in April 2014 confirming that that he could undertake third party work provided that he at all times complied with the BBC News Guidelines (and in some cases subject to consent). He seemed to agree but said the contract was nonetheless different for the reasons set out above and noting that previously he had to re-negotiate each time a contract came to an end. He confirmed that essentially there

was no difference in the way he worked as a presenter now compared with how he worked before.

393. Mr Eades did not accept that he was an employee under this contract, in particular, given the lack of material benefits other than statutory ones. He said that he made this point in an email to the BBC partly because having been "pushed and pulled around" to agree to this, he wanted to make it clear he could carry on doing other work. He said that he had noticed a difference in the way he is treated by the BBC. He now spends more time in the building and feels more integrated into the BBC. Previously, his work with the BBC was "confined entirely to my time within the office, or on location during a shift". He thought that there was less room for him to choose when he could and could not work. He felt far more able to turn down work previously. Under the new arrangement he has been advised several times that he would have to attend to present a programme although there remains a recognition from the rota organiser and the editor of World that he is something of a special case as he has worked for the BBC for so long. For example, he does not have to do "stand by" shifts where a person can be called on at short notice.

394. He noted that on the positive side, he now has some opportunities which he thought he would not have had before. For example, he has been given a brief to follow Brexit negotiations. That is the sort of brief which is given to someone who can be expected to be around during a long period. He now considers options to broaden his remit by using his time beyond a shift to help set up interviews or put together reports/features. He accepted that the framework as regards extra-contractual activities was very similar to that in the previous contracts with AML. He confirmed that essentially there was no difference in the way he worked as a presenter now compared with how he worked before including as regards the need to ask permission for external activities.

Developments leading to the change in arrangements

395. There are a number of indications that on an on-going basis HMRC themselves acknowledged that IR35 is difficult to apply in practice. Following a report on IR35 by the office of tax simplification in March 2011, the Government announced in the 2011 Budget that it was committed to improving the way that IR35 was administered and HMRC set up a forum to discuss this. In January 2012 the Chief Secretary to HM Treasury announced a review of the tax arrangements of senior public appointees and a report was published on 23 May 2012. On the basis of that review, the House of Commons Public Accounts Committee ("**PAC**") took evidence from various parties, including the BBC and HMRC, on the use of PSCs in the public sector which culminated in a report dated 17 September 2012. Mr Smith confirmed that he attended the PAC hearing along with Ms Patel.

396. As recorded in the notes of the PAC meeting, Lin Homer, who was then Chief Executive and Permanent Secretary at HMRC, acknowledged that using a PSC did not necessarily involve tax avoidance but said that a number of the 59 IR35 cases HMRC opened in 2011/12 were into PSCs engaged in the media sector which was in part because the use of PSCs was "particularly common" in this sector. She also set out that from April 2012 HMRC had piloted a number of changes and were continuing to refine and improve their administration of IR35. These included changing the risk and compliance approach to IR35 to focus on the entity and whether it is run as a business entity and providing guidance to businesses to enable them to

self-assess their IR35 risk. In a note of a meeting between HMRC and the BBC on 13 September 2012 Mr Dixon of HMRC (a senior officer) is recorded as stating that he advised those he trained on this area that they would be competent after three years and understand it after five years.

397. It was put to Mr Smith that the use of PSCs was at this time fairly commonplace at the BBC and was further demonstrated in the record of the PAC meeting where Ms Patel said: "It is custom and practice that presenters in our industry - this is not just the BBC but ITV and Channel 4 - are on long term contracts through [PSCs]". He said he thought that there was a "mixed community". He was referred to the record of his comments at the meeting that the status issue for presenters was not "a black and white situation" but rather "within the grey" and that he understood HMRC had reviewed a couple of PSCs but he was not aware of the outcome of those reviews and to his knowledge not a single one has been challenged. He confirmed at the hearing that this was his understanding at the time.

398. The BBC engaged Deloitte LLP to review freelance contracts to enable it to report back to the PAC. In their report dated 25 October 2012 they said that the BBC should investigate engagements through companies as a high priority and develop a detailed plan to transition to employment where appropriate "high priority PSC" cases, the majority of which they thought related to presenters. They noted that the potential scale of "misclassification risk is one factor driving policy on the use of PSCs" which "is effective on transferring responsibility and liability to the talent, but the burden this places on HMRC is one reason why IR35 has become ineffective". They noted that the contracts they had reviewed as regards news presenters give "the BBC significant control over what additional activities it permits the PSC to undertake in a manner not unlike an employee" and that there was little distinction in which those engaged through PSCs carried out their on air roles compared with employees.

399. Mr Smith agreed that Deloitte only had access to some of the relevant information and based their views on what they were told by the BBC. He was aware that the report was based on a sample of contracts and an imperfect review; Deloitte were not able to address all the material within the time available. Mr Smith said that he was not a party to the report; there were discussions with the talent rights team rather than him. His involvement was confined to facilitating avenues to find information within the organisation, meetings with the right people and access to the right files.

400. On 7 November 2012 the BBC published its own paper in which it stated that it would introduce a more objective and specific employment test, using unambiguous criteria to determine employment status for all on air talent and, if that test was satisfied, the person would be engaged as staff rather than through a PSC. It was stated that there were four core principles of relevance: (a) the length of the engagement, (b) the certainty of work provided by the BBC, (c) the manner of payments and the proportion of income earned elsewhere, and (d) the extent to which the BBC exercises control over the way the duties are performed. Transition to the new contracting framework would begin once the BBC and HMRC agreed a new status agreement.

401. Mr Smith said that a new test was agreed with HMRC in September 2013 but it was not rolled out until December 2013/January 2014 following a period of internal training so that the contracting teams understood the principles. In a letter to Mr Smith dated 26 September 2013, HMRC said that provided the tests were applied consistently the status of a television presenter would pose a low tax risk. They said they hoped to develop an enhanced employment status indicator tool catering specifically for presenters and journalists.

402. Certain documents in the bundle indicate that at this time there was on-going uncertainty on the correct test the BBC should apply. Mr Smith said that the framework agreed with HMRC in September 2013 covered all aspects of presenting, not just news, and at this time there were certain cases that the BBC considered fell into the self-employed category but HMRC disagreed. When it was put to him that, when he left the BBC in May 2015, the status of presenters was still not clear, he confirmed was the case as regards certain categories of presenters but not news presenters; that element of the test was not then under review by HMRC or the BBC.

403. In his witness statement Mr Smith said that the BBC entered into a new contract with PL in 2013 because the new employment test had not yet been finalised. He thought that this was no reflection on the BBC's views on the level of control it had over Ms Gosling; it was simply a matter of timing that the new arrangements were not yet being put in place. He said that in 2014 Ms Gosling was offered an employment contract under the new test applied by the BBC, as she was subject to significant editorial control and restrictions on outside activities and that the same process applied to the other Presenters.

404. He clarified at the hearing that he did not have personal knowledge of the Presenters' circumstances; he was referring in his witness statement to the BBC's general approach. He was aware of the timing of the change in Ms Gosling's contracts only from discussions with the talent rights team. He assumed that the new test was applied to Ms Gosling in 2014 as, at that time, it was intended to apply to all contract renewals. He thought the editorial team would have decided what guidelines applied to Ms Gosling.

405. It was put to him that in 2013/14 the BBC simply took a policy decision to move presenters on to OATS contracts, which was not dependent on a review of their individual circumstances. He said that the BBC applied the test that had been agreed with HMRC. He was shown a file note of a conversation he had on the relevance of the guidelines in which he is recorded as stating: "News presenters would, in future, only be offered employment contracts. This was a policy decision that had been made and was not the result of the BBC's looking at the presenters' employment status individually". He said that the agreement with HMRC on the employment framework, was the catalyst to all of the renegotiation of contracts: "It was a policy roll out in terms of the framework that had been agreed with HMRC, so it should have applied to any presenter going through contract renewal".

406. Mr Smith was taken to what he thought was an early iteration of the test agreed with HMRC in September 2013. It took the form of a flow chart with a number of questions, the first of which referred to the BBC "having significant editorial control over content and activities outside the BBC" and asked whether the work undertaken was specifically covered by specified provisions in the Editorial Guidelines relating to

those known as news presenters. He confirmed that the effect of the test was that anyone whose work was covered by those provisions was to be treated as an employee. He said that he was not aware that the Editorial Guidelines applied to independent production companies. He was not clear if and how the mutuality of obligation test was taken into account under the test.

407. He said that this approach was the position taken by HMRC since 2004. They linked their determination of presenters' status "back to the control that existed in terms of the output, as well as the outside activities from the organisation, and so this specific link into the Editorial Guidelines was significantly HMRC's view that drove the employment status since…..back in 2004". It was put to him that HMRC accepted the use of PSCs by presenters until enquiries started in 2012 or 2013 or 2014. He said that was his understanding but did not think there was any question, even then, that it was not correct.

Part C - The basis of the provision of services under the assumed contracts

Overview

408. To recap, as set out at [12] to [14], our view is that, at the first stage of the required analysis as to whether IR35 applies, we should assume that the BBC and each Presenter entered into a series of contracts corresponding to the actual contracts between the BBC and the relevant PSC on terms as near as may be to the actual contractual terms. Essentially, therefore, the assumed contracts are to regarded as comprising the actual contractual terms as though references in those terms to the relevant PSC were to the relevant Presenter (and with appropriate related modifications). We do not consider it necessary to paraphrase the contractual terms or set them out excluding references to the PSCs and inserting references to the Presenters. However, we note the following:

(1) Given the obligation in the Terms to comply with the Editorial Guidelines and the reference in the covering letters and inducement letters to them and to the other relevant Guidelines, the Guidelines in effect form part of the actual contract between the BBC and the PSCs and, accordingly, of the assumed contracts.

(2) We accept that, as in the actual contracts, the assumed contracts would not contain provision for the Presenters to receive any benefits such as holiday or maternity pay or pension rights and would include provisions in relation to VAT.

409. We note that Mr Peacock emphasised that the tribunal should have regard to all circumstances in deciding on what would have been agreed between the BBC and the Presenters and not just the actual contractual terms between the BBC and the PSCs. We accept that the wording of the legislation is broad enough to enable the tribunal to have regard to matters beyond the actual contractual terms or to depart from them in determining the basis of the assumed contracts. That may be necessary where, for example, there is more than one contract in question (such as where an agent is involved in the contractual chain).

410. However, in this case, there is no such complication. In our view, the actual contractual terms represent the best available evidence of what would have been agreed between the BBC and the Presenters. It is reasonable to suppose that the

parties would have contracted on those terms barring any terms applicable only due to the interposition and nature of the PSCs. The clear evidence was that the PSCs were inserted as the contracting party only at the instigation of the BBC (see [34] to [46]). The BBC considered that this was the only acceptable way of contracting with the Presenters (unless they agreed to a substantial pay cut to become staff) due to the risk that they could be classified as employees for tax purposes (and indeed Mr Smith's view was they the BBC considered they were in that category). The use of the PSCs, in effect, shifted the employment status tax risk to the PSCs/Presenters. The Presenters considered that their underlying relationship with the BBC was not affected by the use of the PSCs. The Presenters were the parties who agreed and negotiated the relevant contracts (to the extent there was scope for negotiation) for the provision of their own services (see [157] to [166]).

411. It follows that it is necessary to address the correct interpretation of the actual contractual terms (taking into account the surrounding circumstances to the extent permissible under the applicable principles) and to apply that interpretation to the corresponding terms assumed to apply to the assumed contracts. We note that we must of course take into account all relevant circumstances at the second stage of the analysis, in determining the nature of the assumed contracts, in accordance with and as permitted under the relevant case law.

412. As regards the analysis of the contractual terms:

(1) The parties disagreed on whether the relative bargaining position of the parties should be taken into account in construing the terms based on the decision of the Supreme Court in *Autoclenz Ltd v Belcher* [2011] ICR 1157.

(2) The parties took fundamentally different views of the meaning of the terms relating to the obligations and rights of the parties as regards the provision of and undertaking of work and pay. The correct construction of these provisions is integral to the question of whether there was mutuality under the assumed contracts.

(3) The parties took different views as to the contractual position in the "gap" periods between contracts (see [48] and [49]).

413. We have also addressed in this section HMRC's argument that in order to give business efficacy to many of the provisions in the Terms it is necessary to imply a contract of employment between each PSC and the relevant Presenter. HMRC said that this is relevant as (a) the tribunal must consider all the circumstances in deciding on the nature of the assumed relationship and (b) it follows that under such an implied contract the PSC had a right of control over the Presenter which rebuts any contention that the nature of the Presenter's work is inherently so skilled, difficult or immediate, that it is not possible for a party to have a right of control over him/her.

Approach to contractual construction

414. Mr Tolley referred to *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017] 4 All ER 615 as setting out the correct approach to contractual interpretation, as set out by Lord Hodge. Prior to this decision there was some debate about the respective importance of "textualism" and "contextualism" in interpretation. Lord Hodge said that both approaches have a role and it is not a case of one approach or the other. He set out, at [10], that the court's task is to ascertain "the objective meaning

of the language which the parties have chosen to express their agreement" and noted that it has:

> "long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…"

415. He continued that it is affirmed in the cases that "the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations" is of relevance. He noted, however, that when in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (at pages 912-913) reformulated the principles of contractual interpretation, "some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past". But Lord Bingham in an extra-judicial writing (*A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390) "persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree".

416. In the passage in the *Investors* case to which Lord Hodge referred, Lord Hoffmann gave the following guidance on the relevance of background information:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) …Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification…."

417. At [11], Lord Hodge said the following as regards interpretation as "a unitary exercise":

> "where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause….and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

418. He said, at [12], that this unitary exercise involves "an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated" and to his mind:

> "once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed

analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each".

419. He concluded at [13] that "textualism" and "contextualism" are not "conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation". Rather when interpreting any contract, they can be used "as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement". He noted that the extent to which each "tool" will assist the court will vary according to the particular circumstances:

> "Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance......The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

420. In the earlier decision in *Autoclenz Ltd v Belcher*, the question was whether individuals who provided car valeting services to Autoclenz had certain rights as "workers". This involved assessing what kind of contract the individuals worked under. In doing so the Supreme Court considered to what extent a court can disregard terms included in a written agreement and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.

421. Having referred to the tests set out in *Ready Mixed Concrete*, at [19], Lord Clarke noted that the following was not contentious:

> "(i) ….There must be an irreducible minimum of obligation of each side to create a contract of service". (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status [referring to *Express & Echo Publications v Tanton* [1999] IRLR 367 at 699H]. (iii) *If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement*: see eg the *Tanton* case, at p 687G." (emphasis added)

422. At [20] Lord Clarke said that the essential question in each case is what the terms of the agreement were and noted that the position under the ordinary law of contract is clear, as was correctly summarised by Aikens LJ in the decision in *Autoclenz* in the Court of Appeal as follows:

> "87. … Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any *additional* oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement …
>
> 88. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term

> which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.
>
> 89. Generally…..the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract.. …"

423. He continued, at [21], that nothing in this judgement was intended to affect these principles which apply to ordinary contracts and, in particular, to commercial contracts. He noted that there is, however, a body of case law in the context of employment contracts in which a different approach has been taken, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties and rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms. He noted, at [22], that there are three particular cases in which the courts have held that the employment tribunal should adopt a test that focuses on "the reality of the situation" where written documentation may not reflect the reality of the relationship: *Consistent Group Ltd v Kalwak* [2007] IRLR 560, in the EAT [2008] EWCA Civ 430 and, in the Court of Appeal [2008] IRLR 505, *Firthglow Ltd (t/a Protectacoat)* v *Szilagyi* [2009] EWCA Civ 98 and the Court of Appeal decision in *Autoclenz*.

424. He said, at [23], that those cases must be set in their historical context, which includes *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. In *Snook* Diplock LJ described the concept of a "sham" as follows at page 802:

> "….. it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…… for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

425. Lord Clarke said that this is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement. However, it is not authority for the proposition that this form of misrepresentation is the *only* circumstance in which the court may disregard a written term which is not part of the true agreement.

426. At [25], he referred to the decision of the EAT in *Kalwak*, in particular at [57] to [59], where Elias J (as he then was) cautioned that tribunals must be alive to the fact "that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship" and, at [58] and [59], that:

> "….if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

> … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…”

427. Lord Clarke said, at [26], that in his view there is “considerable force” in this approach. He noted that Elias J’s decision in *Kalwak* was reversed in the Court of Appeal and, in his view, the reasoning in the two decisions was incompatible. He noted that Rimer LJ was applying the approach in *Snook* when he said, at [28], that a finding that the contract was in part a sham required a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. In his opinion, however “that is too narrow an approach to an employment relationship of this kind”. He concluded, at [29], that he “unhesitatingly” preferred the approach of Elias J and of the Court of Appeal in *Szilagyi* and in *Autoclenz*. He concluded that the question in every case is, as Aikens LJ put it at [88] of the decision of the Court of Appeal in *Autoclenz* “what was the true agreement between the parties”.

428. At [30] he noted that in the passages referred to in *Kalwak* Elias J quoted Peter Gibson LJ’s reference in *Tanton* to the importance of looking at the reality of the obligations and to the reality of the situation. He referred to the comments of Smith LJ in the Court of Appeal decision in *Autoclenz* where, at [51], she quoted [50] of her judgment in *Szilagyi* that the court has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, “as time goes by”, by which, as she clarified at [52], she meant “at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them”. He cited the following passages from her judgment:

> “53. ……where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.…
>
> 55. ….I am satisfied that [the employment judge] directed himself correctly….that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the written contract had not in fact been exercised did not mean that they were not genuine rights.”

429. He continued, at [32], that in the Court of Appeal Aikens LJ stressed, at [90] to [92], the importance of identifying what were the actual legal obligations of the parties and “correctly warned against focusing on the “true intentions” or “true expectations” of the parties because of the risk of concentrating too much on what

were the private intentions of the parties. Lord Clarke noted that Aikens LJ added the following comment, with which he expressly agreed:

> "What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

430. We note that in the *Chartbrook* case referred to, Lord Hoffmann's comments that the parties' private intentions may be relevant evidence were made in the context of assessing whether a contract was subject to rectification on the basis that it was not in accordance with an asserted prior consensus based wholly or in part on oral exchanges or conduct. He said that, on the other hand, "where the prior consensus is expressed entirely in writing…such evidence is likely to carry very little weight" although he did not think that it is inadmissible. He referred to his previous comments in *Carmichael v National Power plc* [1999] 1 WLR 2042, at 2050 to 2051, similarly made in the context of a case where the contract was to be determined not only according to written terms but also the conduct of the parties (on the basis that the written terms did not represent the whole agreement between the parties) and:

> "The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done".

431. At [33] Lord Clarke noted that, at [103], Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

> "recognising as it does that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract."

432. Lord Clarke agreed with the above statements and concluded, at [34], that the "critical difference between this type of case and the ordinary commercial dispute" is as identified by Aikens LJ, at [92], as follows:

> "…..the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ..."

433. He took from this, at [35], that:

> "So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This

may be described as a purposive approach to the problem. If so, I am content with that description."

434. Mr Peacock took from this that, in interpreting the contracts in this case, the disparity in the bargaining power of the parties must be taken into account. He raised no specific concern, however, other than that terms in the contracts purporting to give the BBC control should be "treated with circumspection". Mr Tolley said that, on the contrary, *Autoclenz* has no role to play in this case given the Supreme Court was there concerned specifically with contracts with individuals. He noted that there is no suggestion that the corporate legal structure is a "sham" within the meaning set out in *Snook* such that it can be disregarded. He said that to apply the principles set out in that case to an assumed contract of this type would open up a much wider vista which the Supreme Court could not have had in mind. In his view there is nothing in *Autoclenz* to support the view that terms purporting to give control to the BBC should be viewed with circumspection.

435. We cannot see why, as a matter of principle, the approach advocated in *Autoclenz* should not apply to the construction of the terms of contracts of this kind in place between a client and a PSC as then adopted as the basis for the assumed relationship between the parties for IR35 purposes. It is not a question of simply ignoring the corporate structure but of acknowledging that a "one man" company, owned and operated by the individual whose personal services it provides, is likely to be in the same position as regards bargaining power as the individual would be if he contracted directly for the provision of his services. Plainly there is a substantial disparity in bargaining power between a large and prestigious body such as the BBC, which in effect is a market leader in the news broadcasting sector, and those it engages with as presenters (whether directly or through corporates). The Presenters' evidence was that, when negotiating contracts on behalf of the PSCs they felt they had little choice but to agree to the majority of the terms and the BBC appeared to assume that it could simply renegotiate terms if matters did not turn out as in its favour (see [146] to [156] and [189] to [196] above).

436. We have, therefore, concluded that it is appropriate to approach the construction of the contracts between the BBC and the PSCs bearing in mind this disparity in bargaining power in line with the guidance in *Autoclenz v Belcher* and to apply the resulting meaning to the corresponding terms assumed to apply to the assumed contracts. However, on the robust approach advocated in that case, taking into account all surrounding circumstances including the conduct of the parties, we cannot see any basis for a conclusion that the contractual terms relating to control did not represent the real legal agreement between the parties.

437. There is no evidence that viewed objectively, having regard to the reality of the situation, the relevant terms, whereby the BBC had first call on the services and control of where the services were provided, the Presenters were subject to restrictions on their outside activities and the PSCs/Presenters had to comply with the Editorial Guidelines, did not represent the true agreement between the parties. The evidence does not demonstrate that these are terms inserted as a matter of form only which do not genuinely reflect what might realistically be expected to occur. This is addressed further in the conclusions on the control issue below.

Construction of the terms on pay and work

Terms

438. To re-cap, the relevant provisions in the actual contractual terms are as follows:

(1) Under Part B of the contractual terms, the BBC was liable to pay to the PSCs (a) an amount expressed as a single "contract fee" in relation to a specified number of minimum days in a call period or for a minimum commitment in a contract period and (b) an amount expressed as a daily rate in relation to additional days above the minimum days (see [51]).

(2) Under Part B the contract fee was stated to be due in equal monthly instalments payable at the end of each calendar month with the invoice to be presented at the end of the month (subject to different invoicing arrangements in the case of TWL and AML) (see [51] and [52]). The fee for any additional days was paid at the end of the relevant contract period, in the earlier periods, it appears as a matter of practice and, later, under express provision in the Terms.

(3) Under the Terms the "Fee", as defined as the fee(s) set out in Part B, was stated to be payable by the BBC in consideration of the PSC "making the [Presenter] available during the Contract Period to provide the Services in accordance with the terms and conditions of the Contract" (under the earlier Terms) or "for the provision of the services…..subject to compliance of the [PSC] and the [Presenter] with all obligations under this Contract" (under the 2012 Terms). The provisions as to payment and invoicing referred to or corresponded with those in Part B. See [87] to [92].

(4) The BBC set out in a number of the covering letters that the contract fee was calculated on the basis that the relevant Presenter "shall make a minimum committment" of a specified number of minimum days during the contract period and/or that the BBC had "first call" over the Presenter's services albeit that in some instances the BBC acknowledged that the Presenter was free to pursue other engagements for third parties (including during any call day), subject to this not conflicting with any scheduled BBC commitment. Provisions giving the BBC the right to the first call over the Presenter's services were included in the 2007 and 2012 Terms (see [99] and [100]).

(5) Under all versions of the Terms (albeit with small differences in the precise wording) it was stated that the BBC was "entitled not to use the Services or any part thereof" or "not obliged to call on the services of the Presenter…or to use any of its Contributions" and in that case, the PSC and the Presenter had "no claim for loss of publicity or otherwise as a result thereof beyond a claim for payment of the Fee in full" or the BBC was not liable to the PSC or the Presenter "for any loss or damage or any failure to obtain publicity or an opportunity to enhance the reputation of the Presenter" provided that the BBC "shall nonetheless be obliged to pay the Fee in full (subject to any other provisions to the contrary)" (the "**liability provision**") (see [105] and [106]).

(6) The BBC was entitled:

(a) Under the 2004 and 2007 Terms, to withhold payment of the fees against any VAT invoice which was not submitted in accordance with the Terms or which "covered or purported to relate to any of the

Services which had not been provided in accordance with" the contract/agreement (see [90]).

(b) Under the 2007 and 2012 Terms, to reduce the fee in the event of the failure of the Presenter for any reason to render services under the agreement or of the PSC to procure the delivery of the services by an amount proportionate to the period during which the failure subsisted (see [91]) (together the "**withholding provisions**") .

(7) Under the 2012 Terms, the BBC was entitled to make a similar proportionate reduction in the fee otherwise due during any period in which it suspended the provision of the services (see [119]). Under all Terms if the contract was terminated for breach the PSCs had no entitlement to damages or compensation beyond a claim for payment for services provided to the date of termination (but without prejudice to any other claim) (see [120]).

Submissions

439. In outline, on the correct contractual interpretation:

(1) HMRC's stance was that the BBC was obliged (a) to provide work for the Presenter for the minimum days or (b) assuming the Presenter made himself/herself available, to pay the specified contract fee, whether or not the Presenter was actually called upon to work.

(2) The PSCs' view was that (a) there was no obligation on the BBC to offer the Presenters any work at all; the PSCs merely agreed to give the BBC "call" or "first call" over the minimum days which the BBC could take up at its discretion, (b) there was no obligation on the Presenter to accept an individual assignment when offered, and (c) the BBC only agreed to pay for the programmes the Presenters in fact presented on.

440. Mr Tolley submitted that under the contractual terms each PSC was required to make the Presenter *available* and the BBC was obliged to pay the PSC for doing so. Accordingly, the BBC was required to pay the contract fee, whether or not it called on the Presenter's services, provided that the PSC had made the Presenter available. On that basis, HMRC interpreted the liability provision as meaning that, if the BBC did not call on the services of the Presenter, the PSC had a claim for payment of the contract fee in full provided it had made the Presenter available.

441. Mr Peacock countered that the liability provision merely set a cap on the claim that the PSC could seek to make by way of damages for non-use of the Presenter's services at the full fee. He noted that, in any event, that provision has to be read as being subject to the withholding provisions (as stated expressly in the 2007 and 2012 Terms). In his view, under those provisions the BBC was not liable to pay for work which was not in fact done whatever the reason. He emphasised that the whole tenor of the Terms is that the PSC was required to provide the services of the Presenter in presenting programmes and not merely to make the Presenter available. He also noted the evidence on how the contracts worked in practice, in particular, that when it became apparent that Ms Gosling may not be able to work on the minimum days in a given year, the BBC's reaction was that she could, at its discretion, carry over days into a later contract term.

442. Mr Tolley responded that the withholding provisions applied only if the PSC failed to comply with the terms of the contract such as where, despite being offered sufficient opportunities, the Presenter was made available on less days than the stated minimum. The fact that Ms Gosling was not paid during maternity leave accords with this; PL simply failed to make Ms Gosling available for the minimum days in the relevant period.

443. Mr Tolley said that, at the time when the services were provided, the Presenters placed importance on there being a real obligation on the BBC as regards the minimum days and the documentary evidence indicates that was the BBC's understanding as well. The evidence of Mr Smith and Mr Eades was that if the minimum days were not met there would have to be an enquiry as to why that was and that unused days would be rolled over into the next year. Mr Willcox' view that the BBC accepted that they were not obliged to provide work on the minimum days was based on a misunderstanding of the note in question. The Presenters properly accepted that they were required to fulfil the minimum days albeit they could refuse to accept a particular slot.

444. Mr Tolley noted that there is a consistent pattern of requests being made by the BBC for the work to be done by the Presenter and of the work in fact being done. He said that interpreting the contracts on the basis Mr Peacock argued for is wholly out of kilter with the reality of the situation. Moreover, for the BBC not to ask the Presenters to provide any services during the contract term and to refuse to pay the fee would hardly be consistent with the obligation to act in good faith expressly provided for in the earlier contracts. The fact that the BBC managed these contracts with the presenters on a collaborative basis does not in any way detract from the existence of the contractual right to require attendance on call days. The fact that the BBC allowed individuals to refuse particular slots is simply an instance of a right not being exercised rather than evidence of there being no right in the first place.

Conclusion on terms relating to obligation to work and pay

445. In our view, for the reasons set out below, on a textual and contextual approach, a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time the contracts were entered into, would interpret the overall effect of the operation and interaction of (a) the call/minimum days and consideration/payment provisions and (b) the liability and withholding provisions as interpreted in the overall context of the contractual terms as being that:

(1) The BBC was required either (a) to call on each PSC to provide the relevant Presenter's services on sufficient days for the PSC to have the ability to provide the Presenter's services on at least the minimum days or (b) if and to the extent that the BBC chose not to do so, nevertheless to pay the full contract fee.

(2) The PSC was required to provide the services of the Presenter on sufficient days on which it was called upon to do so for the Presenter to work on at least the minimum days.

446. As the contract fee was expressed as a single sum due for the minimum "commitment" or "call period" in a contract period payable in equal monthly instalments, on the face of it, the BBC was obliged to pay each full instalment regardless of the number of days on which the Presenter actually worked in each month (or overall in the contract period). There is otherwise no express explanation

of how this provision is intended to operate and whether the "commitment" was on one or both parties. In the covering letters, however, the BBC usually highlighted that the BBC had first call over the Presenter's services and that the contract fee was calculated on the basis that the Presenter would fulfil the minimum days. The right to first call was specifically included in the 2007 and 2012 Terms.

447. As regards the background, we note that the contracts were made in the course of lengthy on-going relationships between the BBC and the Presenters. The PSCs had previously entered into contracts with the BBC on similar terms to those made in the years in question. The factual pattern throughout the relevant periods was consistently that the Presenters worked on sufficient slots for which they were called upon to meet the minimum days in each contractual period (and Mr Willcox regularly exceeded the minimum). Both parties would have been aware, therefore, when contracts were entered into, as increasingly established over time, that this was the reality of the relationship.

448. We note that it was also known to the parties that, in practice, the arrangements were operated flexibly, such that the BBC did not insist upon the PSCs/Presenters working on particular slots if inconvenient for them. However, in our view a reasonable person would conclude that the allowing of such flexibility is consistent with an intention to achieve the overall result that the Presenters would be called on and would work on sufficient slots to meet the minimum days. It was simply the case that the BBC was prepared to work collaboratively and flexibly with the PSCs/Presenters to achieve that.

449. As set out in *Autoclenz*, the fact that a right in a contract is not exercised or not enforced does not necessarily negate the existence of that right. In this case, we consider that the fact that the BBC did not insist on exercising its rights to first call on the Presenters' services strictly in accordance with the stated written terms of the contract does not affect the existence of that right. In our view, the fact that the BBC operated flexibly in this respect, with a view it seems to facilitating good working relations, does not of itself suffice to evidence that the call provision did not genuinely reflect what might realistically be expected to occur. In practice, there was no reason for the BBC to insist on the Presenter providing services on a particular day, where the overall intended result, that the Presenter would work for News or World on the minimum days, was achieved consistently through collaboration and co-operation in agreeing the days of work. However, it is reasonable to suppose that the BBC would have sought recourse to this provision had that collaborative arrangement broken down in order to ensure its business need to source sufficiently skilled presenters to present on News or World was met.

450. Moreover, in our view a reasonable person would find support for the view that the minimum days obligation is intended to operate as set out above from the terms of the covering letters. It would be disingenuous on the part of the BBC to point out in the letters that a minimum commitment was required from the PSC/Presenter if the BBC did not regard itself as obliged to provide the opportunity for that PSC/Presenter to satisfy that obligation. Whether or not the letters form part of the actual written contract, they are plainly part of the context in which the relevant contract is to be interpreted. We do not consider that any inference to the contrary can reasonably be drawn from the statement in some covering letters that whilst for convenience the fee may be paid in equal monthly instalments "all payments are for specific

programme/day commitments based on the agreed programme/daily rate" (see [58(3)]). It appears this is simply the BBC pointing out that if the Presenter was not in fact available to fulfil the BBC's call requirements, payment was not due.

451. In conclusion, the overall tenor of Part B and the call provisions in the Terms, as objectively viewed in the context of the covering letters and the factual matrix described above, is that a minimum "commitment" was intended to be imposed on both parties; the PSC was required to provide the Presenter's services on sufficient days to meet the minimum commitment, if called upon by the BBC to do so, and the BBC was obliged correspondingly to call on the PSC on sufficient days to enable it to fulfil that requirement. That is subject to the remaining relevant provisions of the Terms as set out below.

452. We do not consider that this analysis is affected by the fact that the contracts with TWL and AML were varied so that they were entitled to invoice for all work performed in a given monthly period. The underlying contractual obligations and rights remain the same notwithstanding the different invoicing arrangements.

453. Turning to the Terms, with the relevant provisions in Part B in mind, the reference in the Terms to the Fees as consideration for each PSC making the relevant Presenter available to provide the services or for the provision of the services, can be taken to mean that, breaking the Fees down into their constituent elements:

(1) the contract fee was consideration for the provision by the PSC of the Presenter's services on sufficient days on which it was called upon to do so for the minimum days requirement to be met; and

(2) the daily rate fee was consideration for the provision of services on additional days in excess of the minimum days.

454. We do not see that the reference to the PSC "making the Presenter available" indicates anything more than that, due to the interposition of the PSC, it was for it, as the contracting party, to ensure that the Presenter provided the services under the terms of the agreement. Our interpretation does not hinge on the PSC being regarded as having an obligation only to make the Presenter available.

455. Mr Peacock argued that, taken together, the effect of the liability provision and the withholding provisions is that the BBC was liable only for any portion of the fees which could be attributed to the days of work actually done by the Presenter, namely, nil if no use or call was made of or on Presenter's services at all. However, in our view, this runs counter to the plain meaning of the provisions as interpreted in the light of our conclusion above.

456. The purpose of the liability provision appears to be to establish that the BBC was entitled in effect to be released from the obligation it otherwise had to use or call on a Presenter's services provided that it nevertheless paid the "Fees" (in the 2004 and 2007 Terms "in full") and that, in that case, it had no further liability to the PSC. Given our conclusion that the BBC was otherwise obliged to call on a Presenter's services on sufficient occasions for the Presenter to work on at least the minimum days, it follows that the sum the BBC was required to pay when it did not do so, in effect, in return for being released from that obligation, was the full contract fee as the sum otherwise due for the fulfilment of that obligation.

457. Moreover, we note that the liability provision is broadly drawn to apply to cases where the BBC did not use or make any call on the Presenter's services *at all* in a

contractual period. It is not limited in its ambit to cases where the BBC had made at least some call on the Presenter's services (although it plainly encompasses that situation). It would be odd to frame the provision in this way if the intention was that the BBC's failure to use or make any call on the services would not have any financial consequences for the BBC as, in that case, necessarily no services would have been provided.

458. The liability provision has to be read subject to the withholding provisions but, in our view, they are not to be interpreted as Mr Peacock argued for. On their plain meaning, the withholding provisions entitle the BBC to withhold payment of the fees where and to the extent that the PSC failed to comply with its obligations under the contractual terms. They are not intended to operate to entitle the BBC to withhold payment where the BBC itself simply did not call on/use the Presenter's services:

(1) The trigger, which entitled the BBC not to make payment against any invoice, is that the invoice related to services that were not "*provided in accordance with*" the contract or agreement. This language clearly indicates that it is the PSC's actions (or omissions) which render this clause operational, as the party which, under the contractual terms was required to provide/procure the provision of the services and to invoice for the services accordingly.

(2) On the natural and plain meaning, therefore, the BBC was entitled to withhold payment only where there was a failure *by the PSC* to comply with the terms of the contract, such as where the Presenter did not, due to his/her unavailability, work when called upon to do so for sufficient days to meet the minimum days requirement.

(3) This is even clearer in the provisions in the 2007 and 2012 Terms which specifically reference the "failure" of the Presenter or the PSC to render or procure the delivery of the services. It is wholly out of kilter with the natural meaning of these terms to categorise a case where there is no provision of services due to the BBC not calling upon the Presenter's services as a "failure" by the Presenter/PSC.

459. The combined effect, therefore, of the liability provision and the withholding provisions is that the BBC was required to pay the full contract fee due for the minimum days even where it did not call on a Presenter's services on the full minimum days (or at all) except and to the extent that any failure to meet the minimum days was down to the PSC's failure to provide the relevant Presenter's services as required (due, for example, to the Presenter's unavailability).

460. We have reached the above conclusion on the basis of the usual approach to contractual construction as set out in *Wood v Capita*. In our view, on an *Autoclenz* approach, the same conclusion would apply. A robust "purposive" approach to determining the true agreement in light of all the circumstances can only support the conclusion that the minimum commitment was binding on both parties. It is wholly out of kilter with business reality in light of the conduct of the parties to interpret the provisions as meaning that the BBC had the right but no obligation to call on the PSC/Presenters on the minimum days or that, if it chose not to do so, it had no obligation to pay the contract fee.

461. Whilst even on an *Autoclenz* approach the parties' own understanding of the intended operation of these provisions is of limited, if any, material relevance to the

contractual analysis, we note that overall the evidence indicates that this conclusion is largely consistent with the parties' understanding of how the relationship was intended to work (as set out in detail at [167] to [196]):

(1) The Presenters all accepted that they were under an obligation to work the minimum days albeit they emphasised they could refuse particular slots and the rota was arranged flexibly. Ms Gosling's comment that the call provision had no real meaning was based on the fact that, in practice, she turned down slots when inconvenient and did not consider she would have been obliged to cancel another commitment to work for the BBC on a particular day. However, for the reasons set out above, we do not consider that the flexible arrangements adopted affect the contractual position as analysed above.

(2) Mr Willcox' clear evidence was that at the relevant time he regarded the BBC as under an obligation to provide the "guaranteed" minimum days. His later view that the BBC considered it did not have that obligation was based on a misunderstanding of the comments of Mr Bakhurst as recorded in a note of a meeting between HMRC and the BBC. In any event, the records of other meetings between HMRC and the BBC indicate that senior personnel at the BBC considered that the BBC was subject to an obligation to provide the minimum days of work albeit that they considered the BBC may seek to re-negotiate in certain circumstances.

(3) Mr Eades also appeared to accept the BBC had such an obligation although he thought that it was not plain, in practice, which party assumed responsibility for making sure the minimum days were met or that in practice he would have been paid had the BBC failed to call on his services on the minimum days. We regard that as a recognition that, as the BBC had a strong bargaining position, it may seek to re-negotiate a contract in such circumstances (as accords with what can be gleaned of the BBC's view from the meeting notes). However, the fact that both the Presenters and the BBC recognised that, in practice, down the track the BBC may seek to utilise its greater bargaining power to re-negotiate terms to its own benefit does not somehow mean that the BBC was not subject to binding contractual obligations as regards the minimum days in the first place.

(4) Ms Gosling did not expressly accept that the BBC had an obligation to call on her services on at least the minimum days. However, her comments were confined to pointing out that when she took maternity leave she was not paid (and unworked days were rolled over into the next contractual period). Whilst it is understandable that Ms Gosling was dissatisfied with the fact that she received no paid maternity leave, as a contractual matter we consider it plain that Ms Gosling was not entitled to be paid in those circumstances as she was not able to work the specified minimum days due to her own unavailability. Again that does not indicate that the minimum days requirement was not otherwise a real obligation on either party.

Contractual terms - gaps between written contracts

462. As set out above, in some instances there was a gap between the expiry of one contract between the BBC and the relevant PSC and the agreement of the terms of a new contract which in some cases were substantial (as much as five months in the

case of PL). The evidence was, however, that the PSCs continued to provide the services of the relevant Presenter during these periods and they were paid in the usual way (see [48]). That is subject to one occasion when PL was late in being paid in respect of one month in a gap period of over five months (see [68] and [69]). These periods no doubt caused the Presenters anxiety although Mr Willcox said he was no more or less anxious than he was about any renewal and Ms Gosling's anxiety appeared to be that her contract was to be renewed on a pay scale unacceptable to her rather than it was not to be renewed at all.

463. In light of the consistent pattern of the Presenters continuing to work and to receive payment for doing so, the only sensible conclusion is that the parties were acting on an agreed basis that the terms of the old contract continued to apply until new terms were put in place which, once the new contract was signed, then applied with effect from the agreed date (or which, in some cases, were stated to supersede or replace the terms under the previous contract). On that basis, correspondingly the relevant assumed contracts can be assumed to continue or to be in place in the "gap" period for the purposes of the analysis set out below.

Implied contract of employment between the PSC and the Presenter

464. Mr Tolley referred to the decisions in *Catherine Lee v Lee's Air Farming* [1960] 3 WLR 758 and S*ecretary of State for Business, Enterprise & Regulatory Reform v Neufeld & Another* [2009] EWCA Civ 280)[2009] 3 All ER 79 in support of his argument that there must be an implied contract of employment between each PSC and the relevant Presenter. In the *Lee* case it was held that the deceased sole shareholder and director of a company acted as its employee in carrying out its business of aerial top dressing using a plane he flew (thereby entitling his wife to bring a claim for compensation (under certain provisions in New Zealand)). Lord Morris concluded as follows:

(1) In view of their nature, he could not see that the operations were carried out by the deceased as governing director; they must have been performed under a contractual relationship with the company. There was no reason to challenge the validity of that relationship on the basis that "it was not nor could be suggested that the company was a sham or a mere simulacrum". It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company.

(2) It is a logical consequence of the decision in *Salomon v Salomon & Co* [1897] AC 22 that one person may function in dual capacities. On that basis there was no reason to deny the possibility of a contractual relationship or why it could not be a contract of services. He did not agree that there was a difficulty on the basis that "the deceased could not both be under the duty of giving orders and also be under the duty of obeying them". He said that control remained with the company "whoever might be the agent of the company to exercise it" and notwithstanding the deceased was the agent as the governing director:

> "If the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the company is recognised. Just as the company and the deceased were

> separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased."

465. In the *Neufeld* case it was held, with reference to the *Lee* case, that there was no reason as a matter of principle why a sole director and shareholder of an insolvent company could not be held to be an employee of the company (in which case he could claim from the Secretary of State amounts due under a statutory scheme such as unpaid wages, unpaid holiday pay and redundancy). At [28] Rimmer LJ noted that it might be thought that in such a company there could be no control of the putative employee. In practice control would be exercisable by the putative employee himself since he controls the company and so it would be "easy to conclude that that cannot be real control". However, he said, at [29], that, on the basis of the decision in *Lee,* that issue could not be regarded "as providing a threshold obstacle to the creation of a valid contract of employment".

466. He commented, at [34], that in referring to cases where "the company was a sham or a mere simulacrum" Lord Morris probably had in mind the limited cases where the courts have, for policy reasons, "pierce[d] the veil" of incorporation and treated a one-man company as "the *alter ego* of the controlling shareholder, that is to treat them as one". In that case any suggestion that the individual had a service contract with the company would not succeed but he considered that "such circumstances, at least in a case in which the company is a genuine trading company, would be exceptional".

467. Mr Tolley referred to the decision of Elias J in *James v Greenwich* that the question whether an agency worker is an employee of an end-user must be decided in accordance with common law principles of implied contract (as also adopted by the Court of Appeal (see [51] of their decision). Elias J set out, at [35], that as stated by Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213, at [224], a contract can be implied on the basis that it is:

> "necessary, that is to say in order to give business reality to a transaction and to create enforceable obligations between parties in circumstances in which one would expect that business reality and those enforceable obligations to exist."

468. Mr Tolley also noted that Elias J referred to the decision in *Mitsui and Co Ltd v Novorossiysk Shipping Co.* (The Gudermis) [10993] 1 Lloyd's Rep.311, 320 where Staughton LJ said it is not enough for a contract to be implied "to show that the parties have done something more than, or different from, what they were already bound to do under obligations owed to others". In fact: "What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract".

469. Mr Tolley submitted that it was necessary to imply a contract of employment between the PSC and the Presenter in order to give legal efficacy to many of the provisions in the Terms, such as those under which the PSC warranted it had control of the Presenter's services or whereby it had to ensure that the Presenter did a number of matters. Legal efficacy can be given to those terms, he said, only on the basis that the PSC had a right of control over the Presenter's performance of services as its employer; otherwise the PSC would not be in a position to make those representations. Similarly, the PSC would not be in a position to assign to the BBC

the copyright in the product of the Presenter's services unless there was an employment relationship in place. In that case it follows as an incident of law that copyright in the artistic or film work performed by the employee in the course of the employment belongs to the employer (see s 11 of the Copyright, Designs and Patents Act 1998). He also said that implying an employment relationship is consistent with and supported by the fact that the Presenter is shown as having received income from the PSC which was taxable as employment income and in some instances was described as remuneration.

470. Mr Peacock made the following main points:

(1) The *Lee* case is particular to its facts. There is a statement in the articles of association of the company that it would "employ [Mr Lee] as the chief pilot of the company at a salary to be arranged…" which provides a basis on which the court could decide that there was a contract of employment. The decision may well have been influenced by the fact that if Mr Lee was an employee his widow could claim compensation. *Neufeld* adds little; the court merely made clear that there can be a contract of employment between a wholly owned company and its sole shareholder but inevitably that is fact specific.

(2) In this case it is not necessary to imply an employment contract between each PSC and the Presenter for the relevant contractual provisions to operate. There are a number of possible arrangements under which the Presenters could have provided their services, such as a contract for services or an agency. The relationship between the Presenters and the PSCs is adequately explained by the Presenters' shareholdings and the articles of association. In *Jones v Associated Tunnelling Co Ltd* [1981] UKEAT 523 80 1610 it was held that if a term needs to be implied into a contract, and it is not obvious what term to apply, it is necessary to "apply a term which the parties, if reasonable, would probably have applied if they had directed their minds to the problem". There is no reason to suppose that if they had directed their minds to this, the parties would have considered the Presenters were acting as employees as opposed to acting in some other capacity (and indeed they did not consider themselves as such).

(3) The PSC could have received the right to the copyright in a number of ways; under an assignment by the Presenter in a freestanding contract, under a contract for services or a contract of employment. Whilst on HMRC's view it may be necessary to imply an assignment, it is not necessary to imply a contract of employment for such an assignment to be regarded as having taken place.

(4) In any event, if there were such an implied contract it would not impact on the analysis here. We essentially agreed with this as set out in our conclusion below.

Decision on implied employment contract and control issue

471. We cannot see that "it is necessary… in order to give business reality" to the relevant transactions to imply that the Presenters were acting as the employees of the PSCs as regards the provision of their services to the BBC. We accept that, on the basis of the case law, the fact that the Presenters were each the sole shareholder and director of their respective PSCs does not of itself preclude a finding that they also acted, in a different capacity, as the employee of the relevant PSC in providing the services to the BBC. However, as Mr Peacock submitted, their services could have

been provided by the PSCs to the BBC under a number of different arrangements between the PSCs and the Presenters and not just by virtue of an employment relationship. Similarly, for the reasons Mr Peacock set out, we cannot see that it is necessary to imply a contract of employment for the provisions regarding the assignment of copyright to be effective. In our view, the fact that the Presenters received amounts from the PSCs which were taxed as employment income is not sufficient of itself to render the implication of an employment contract necessary. It is not clear that this income was paid to them as employees rather than in their capacity as directors (although we can see a greater basis for such an assumption as regards Ms Gosling in the periods when she received substantial amounts of such income).

472. In any event, we can see no reason why, if it is found, contrary to our view, that each PSC controlled the relevant Presenter as its employee, it somehow follows that the BBC had the ability to control the Presenters under the assumed contracts (or that that conclusion bolsters that view). Whilst we must have regard to all the circumstances in determining the nature of the assumed contracts, this is not a circumstance of relevance which casts light on the nature of the deemed relationship.

473. It is inherent in the exercise we are required to undertake, as based on the hypothesis of a direct relationship between the BBC and each Presenter, that the PSC essentially drops out of the picture; the question is the nature of the relationship between the BBC and the Presenter assuming the relevant PSC was not interposed between them. That is subject to the proviso that plainly the nature of the actual relationship between the PSC and the BBC is highly relevant to determining the nature of the assumed relationship. For the reasons set out above, it is reasonable to suppose that, had the Presenter stood in the shoes of the PSC as the contracting party, he or she would have entered into the same or substantially the same contractual terms with the BBC as the PSC in fact did and that the same circumstances would apply in relation to *that relationship*.

474. In taking this stance HMRC are seeking in effect to place the BBC in the position of each PSC as regards its relationship with the relevant Presenter. We cannot see, however, that the nature of the assumed relationship between the BBC and the Presenters as regards control is informed by what is in effect an implied right of control as a purely legal construct under a different relationship between the Presenter and the PSC. As noted in the *Neufeld* case it is difficult to see that such control is "real" given the nature of a one-man company although as a legal matter that is no bar to the creation of an implied employment contract. In our view that legal construct, uninformed by any actual terms between the PSC and the Presenter, casts no meaningful light on the control the BBC may be taken to have over the Presenter.

475. On that basis we have concluded that the precise nature of the relationship between the Presenters and the PSCs is not relevant to the analysis of whether the BBC controlled the Presenters under the assumed contracts.

Part D - Application of employment/self-employment test

Case law

Ready Mixed Concrete, Market Investigations and Hall v Lorimer

476. The starting point is MacKenna J's well known summary of the principles to be applied in *Ready Mixed Concrete* (see [15]). It was held in that case that a person

who was engaged to carry concrete for a company which sold it was an independent contractor. At the outset MacKenna J noted that “whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract”. That is not affected by whether the parties have declared it to be something else except that if “it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention”.

477. As regards the mutuality test MacKenna J said that “there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind”. He said at 515E that the obligation to provide work is a personal one:

> “The servant must be obliged to provide his own work and skill. Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.”

478. He noted, at 515E, that “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 his servant. 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….”

479. He continued, at 516A, that 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 by implication.

480. He described the third condition as a “negative” one and illustrated its interaction with the other tests with a number of examples (at 516B to 517B). He said that, for instance, if a person is engaged to build for another person but provides the necessary plant and materials at his own expense, there is a contract to produce a thing (or a result) for a price. On the other hand, if a labourer has to provide some simple tools and to accept the builder’s control, the obligation to provide the tools is not a sufficiently important matter to affect the substance of the contract as one of service. As Mr Peacock emphasised he said that, in other words, an obligation to do work subject to the other party’s control is “a necessary, though not always a sufficient, condition of a contract of service” and:

> “If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge’s task is to classify the contract (a task like that distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.”

481. He continued to cite a number of authorities from which he concluded, at 522G, that the common law test as regards control is not to be restricted to the power of control over the manner of performing service but is wide enough to take account of

investment and risk. He also referred to the dictum of Denning LJ in *Bank voor Handel en Scheepvaart N.V. v Slatford* [1953] 1 QB 248 where he said that "the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation". He said that this raised more questions than he knew how to answer but he could at least "invoke the dictum to support my opinion that control is not everything".

482. In the decision the following year in *Market Investigations Ltd* Cooke J held that a lady who belonged to a panel of part-time interviewers carrying out surveys for a market research company was an insured earner for NICs purposes on the basis that each of her assignments constituted a separate contract of service. He said, at 183D to F, that it has for long been apparent that an analysis of the extent and degree of control is not in itself decisive in determining whether a person is an employee and that the inadequacy of this test was pointed out by Somervell LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343 at 352:

> "The master may be employed by the owners under what is clearly a contract of service, and yet the owners have no power to tell him how to navigate his ship. As Lord Parker CJ pointed out in *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349 at 351, when one is dealing with a professional man, or a man of some particular skill and experience, there can be no question of an employer telling him how to do the work; therefore the absence of control and direction in that sense can be of little, if any, use as a test."

483. He referred to the comments of Lord Denning as set out above and those of Lord Wright and of the US Supreme Court respectively that the question whether a person is an employee may be determined by asking "whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior" or "as a matter of economic reality" (see *Montreal Locomotive Works v Montreal and A-G for Canada* [1947] 1 DLR 161, at 169 and *US v Silk* (1946) 331 US 704). He considered, at 184G, that these observations indicated that "the fundamental test" to be applied is:

> "'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'".

484. In his view, there is no single definitive test, at 184H: "no exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant…..nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases". He thought that the most that can be said is that "control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor" and the factors which are of importance are, at 185A to B:

> "whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

485. He concluded that the company had extensive control consistent with employment in that case (through a guide on the technique of interviewing (much of which was couched in imperative language) and detailed instructions on conducting

the interviews (see 185E to 186B). HMRC pointed to the fact that Cooke J said his conclusion on control was not affected by the fact there was a practical limitation on the possibility of giving instructions to the relevant individual while actually working in the field, because her supervisor would then have no means of getting into touch with her as:

> "there must be many cases when such practical limitations exist. For example, a chauffeur in the service of a car hire company may, in the absence of radio communication, be out of reach of instructions for long periods.

486. HMRC also drew attention to the fact that, at 188A to C, Cooke J did not think it could be said the individual was in business on her own account as an interviewer on the basis that she was free to work as an interviewer for others (although there was no finding that she did so) and in her work she would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own:

> "The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work".

487. The approach of assessing whether the relevant person was in business on his own account was followed in *Fall (Inspector of Taxes) v Hitchen* (1973) 1 WLR 286 and *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374. In *Fall v Hitchen* it was held, at 292H to 293A, that a professional dancer was taxable as an employee on his earnings from a contract with a ballet company; virtually all the relevant factors pointed to there being a contract of service:

> "The taxpayer is engaged to work for a minimum period of rehearsal plus 22 weeks, and thereafter until the contract is determined by a fortnight's notice on either side; he is engaged to work full-time during specified hours for a regular salary; the company has the first call upon his services, and indeed the exclusive call subject only to this, that its consent to the taxpayer performing elsewhere should not be unreasonably withheld; and then, again, the company provides and owns the gear used by the taxpayer with one exception….."

488. It was noted, at 293F to G, that counsel for the appellant relied on *Davies (H.M . Inspector of Taxes) v Braithwaite* [1931] 2 K.B. 628 in contending that the word "employment" in the relevant taxing provision does not include engagements entered into as an "incident" to the carrying on of a profession, on the basis that "incident" means "that which formed part of the fabric of the profession". In that case the issue was whether a professional actress was taxable on her income on the basis it was generated from self-employment rather than employment. HMRC pointed to Rowlatt J's comments:

(1) At 634, that he did not think the position turned on the degree of skill at all; "the most skilful and distinguished persons, whose qualifications are very rare, in art or medicine, or any other profession where distinction is difficult to obtain, might well enter an "employment"".

(2) At 635, that a person can have both an employment and a profession at the same time:

> "A man might have the steadiest employment in the world by day, and he might do something quite different in the evening and make some more money by the exercise of a profession or vocation….and even if it were in the same sphere, I do not see why he should not have both an employment as well as a profession. For instance, a musician, who holds an office or employment under a permanent engagement can at the same time follow his profession privately."

489. He said, at 635, that he thought the legislature "had in mind employments which were something like offices", and said he thought "of the word "posts" as conveying the idea required". He continued, at 635 to 636, to draw a distinction between an employment "post" of an on-going nature (taxable as employment income) and a series of engagements undertaken in the course of a profession or trade (taxable as income from self-employment):

> "…. it seems to me that where one finds a method of earning a livelihood which does not consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other……then each of those engagements cannot be considered employment, but is a mere engagement in the course of exercising a profession…"

490. In this case he thought it clear, at 636, that the appellant fell on the self-employment side of the line as she did not contract with a producer for a "post" but rather she:

> "makes a contract with a producer for the next thing that she is going to do, and then another producer, and then a third producer, and at any time she may make a record for a gramophone company or act for a film. I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career."

491. In *Fall v Hitchen* Sir John Pennycuick V-C commented that Rowlatt J was not saying that a professional such as an actor could not be engaged on an employment basis or as he put it in a "post" (and his comments were approved in *Hall v Lorimer*). He noted, at 295H to 296A, it is implicit in the whole of his judgment that:

> "if a professional person, whether an actor or anybody else, enters into a contract involving what Rowlatt J. calls a post, then that person will be chargeable in respect of the income arising from the post [as employment income] notwithstanding that he is at the same time carrying on his profession, the income of which will be chargeable [as income from self-employment]. The instance of a musician puts that point very neatly".

492. He did not think, at 296B, that most people today would use the word "post", which does not seem very apt to cover the countless instances of employment in the sense of a contract of service. However, at 296B to C:

> "every word of that judgment is applicable as between the carrying on of a profession and an engagement in the course of carrying on that profession, on the one hand, and a contract of employment, on the other hand. The fact that an actor normally undertakes a succession of engagements in the course of carrying on that profession in no way involves the result that if an actor enters an acting employment in the nature of a post, that he is not assessable under Schedule E in respect of the income arising from that employment".

493. In the *Lee Ting Sang* case the Privy Council held that a casual worker on a building site was an employee of the subcontractor for whom he was working at the

time he suffered an accident (and was, therefore, entitled to be compensated under a Hong Kong ordinance). Lord Griffiths said, at 383F to G, that all the tests, or indicia, mentioned by Cooke J in the *Market Investigations* case pointed to the status of an employee. The applicant did not provide his own equipment; it was provided by his employer. He did not hire his own helpers; he gave priority to the sub-contractor's work and if asked to do an urgent job he would tell those he was working for that they would have to employ someone else: "if he was an independent contractor in business on his own account, one would expect that he would attempt to keep both contracts by hiring others to fulfil the contract he had to leave". It was also found, at 384A to C, that he had no responsibility for investment in, or management of, the work on the construction site. The conclusion, at 384D, was that:

> "the picture emerges of a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own account as an independent contractor with all its attendant risks. *The applicant ran no risk whatever save that of being unable to find employment which is, of course, a risk faced by casual employees who move from one job to another….*" (emphasis added)

494. In the well-known 1994 decision in *Hall v Lorimer* the Court of Appeal held that a vision mixer, who in a year entered into between 120 and 150 engagements (of between 1 and 19 days) with 20 or more production companies, was self-employed. Having reviewed the above authorities, including the decision in *Lee Ting Sang*, Nolan LJ accepted, at 216C, that "an employment properly so called is not the less an employment because it is casual rather than regular". He noted, at 216C to D, that, it was acknowledged that, unlike the work of Mr Lee Ting Sang, Mr Lorimer's work depended upon his own "rare skill and judgment". However, he agreed that the nature and degree of skill involved in the work cannot alone be decisive; for example, "[a] brain surgeon may very well be an employee. A window cleaner is commonly self-employed".

495. Nolan LJ expressed reserve about adopting the same approach as that taken by Lord Griffiths in applying the tests set out by Cooke J (at 216D). He noted that in such cases "there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another". In a passage at 216E, which both parties emphasised the significance of, he agreed with the view of Mummery J in the High Court (at 944 D of the report) where he said this is not a mechanical exercise but requires the painting of a picture from the accumulation of detail:

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may

> also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v. Sinnett (*1986) 60 T.C. 150, 164: "It is in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case."”

496. At 217A to B, notwithstanding his reservations, he examined the factors listed by Cooke J to see where that led. He noted that HMRC relied on the facts that the production company controlled the time, place and duration of each programme, Mr Lorimer did not provide any of his own equipment, he hired no staff, he ran no financial risk apart from the risk of bad financial debts and of being unable to find work, he had no responsibility for investment in or management of the work of programme making and consequently he had no opportunity of profiting from the manner in which he carried out individual assignments. He noted, at 217C, that the Special Commissioner did not fully accept the validity of these points as a matter of fact in all cases, where he said the following (as set out at 217C to D):

> “[The taxpayer] provides no equipment (i.e. he has no tools) he provides no “work place” or “workshop” where the contract is to be performed, he provides no capital for the production, he hires no staff for it. No; he does not. But that is not *his* business. He has his office, he exploits his abilities in the market place, he bears his own financial risk which is greater than that of one who is an employee, accepting the risk of bad debts and outstanding invoices and of no or an insufficient number of engagements. He has the opportunity of profiting from being good at being a vision mixer. According to his reputation so there will be a demand for his services for which he will be able to charge accordingly. The more efficient he is at running the business of providing his services the greater is his prospect of profit.”

497. It was noted, at 217E, that it was submitted that not much significance should have been attached to the risk of having no engagements because, as was pointed out in the *Lee Ting Sang* case, this is a risk faced by casual employees who move from one job to another. Nolan LJ said, at 216 B to C, that it was clear from that case that the specific mention of casual employment in the Hong Kong ordnance in question was not essential to the decision in the case. On that basis he accepted that was the case but said that “the risk of bad debts and outstanding invoices is certainly not one which is normally associated with employment”. He also noted, at 217F, that the income and expenditure accounts revealed that Mr Lorimer incurred very substantial expenditure in the course of obtaining and organising his engagements and as an incident of carrying them out; in a fourteen month period the expenses for travel and running his office amounted to £9,250 against fees received of £32,875 (though it may be that the figure for fees included some reimbursement of expenses). He noted that it was not disputed that these amounts were tax deductible if the taxpayer was taxable on the basis that he was self-employed and said “in any event they would seem to me to be quite different in nature and scale from those likely to be incurred by an employee”.

498. He continued, at 217G to H, that more generally, the features specified in HMRC's list would be found in the case of many individuals who exploit their talents in the theatrical, operatic, orchestral, sporting fields but who are nonetheless independent contractors. He rejected the submission that the fundamental distinction between a contract of employment and a contract for service is that "in the former the contracting party sells his skill or labour; in the latter he sells the product of his labour. In one case the employer buys the man; in the other he buys the job". He said, at 217H to 218A, that would have provided a short and simple answer in the earlier cases. In any event, at 218A, he found that distinction "very hard to apply in the case of a professional man":

> "Surely the self-employed barrister advising in his chambers or the doctor advising in his surgery is selling his skill and labour and not its product. If the scene shifts to the court or to the operating theatre can the client or patient really be said to be buying the product which may be disastrous in spite of the best efforts of the advocate or the surgeon in the litigation or operation?"

499. He continued, at 218C to E, that the question, whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation. For example, a "self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business". He suggested that:

> "there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular pay master for the financial exploitation of his talents may well be significant. It is, I think, in any event plain that Cooke J…..was not intending to lay down an all purpose definition of employment. For example, his test does not mention the duration of the particular engagement or the number of people by whom the individual is engaged. Cooke J. said…. that he took account of the fact that the lady concerned was free to work as an interviewer for others but added that there was no finding that she did so. This is of little assistance in the present case of which the most outstanding feature to my mind is that Mr. Lorimer customarily worked for 20 or more production companies and that the vast majority of his assignments……lasted only for a single day."

500. In rejecting the argument that the Commissioner erred in law in placing reliance on the decision in *Davies v Braithwaite*, he agreed with Sir John Pennycuick's explanation of that decision in *Fall v Hitchen* (at page 295) "as another helpful statement carrying general weight in the consideration of problems of this kind".

Later case law on mutuality of obligation

501. As set out by Briggs J in *Weight Watchers*, at, [22] and [23], MacKenna J's reference to the need for mutuality of obligation for there to be a contract of employment has been interpreted by the courts as serving "one or both of two distinct purposes"; to determine whether there is a contractual relationship at all between the parties and, if so, "whether the mutual obligations are sufficiently work-related."

502. The requirement for mutuality has been looked at extensively by the courts in assessing whether individuals, who work on a casual from time to time basis, can benefit from statutory protections for workers or employees which may depend on an employment or other contractual relationship being in place for a certain period of

time. For that purpose, an individual may seek to show that there is an "umbrella", "global" or "overarching" contract of employment which exists throughout the relevant period (referred to as an "**umbrella contract**"). In that context the courts have repeatedly referred to the need for an "irreducible minimum of obligation on each side" for there to be an employment contract although precisely what satisfies that test, in terms of obligations as to work and pay, has been put in different terms. On the other hand, it is established that where there is no such umbrella contract, it may be that each individual assignment/engagement comprises an employment contract, even if of short duration.

503. Lord Justice Stephenson set out the often-quoted irreducible minimum test in *Nethermere (St Neots) v Gardiner* [1984] ICR 612, at 623, in the context of an appeal concerning if there was an umbrella contract as regards individuals who worked at home sewing garments. Kerr LJ described this minimum, at 629, as requiring that "the alleged employees…must be subject to an *obligation* to accept and perform some minimum, or at least reasonable, amount of work, for the alleged employer". Dillon LJ said, at 634, that he accepted that "an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service".

504. In *Clark v Oxfordshire Health Authority* [1998] IRLR 125 it was held that a "bank" nurse, who had no fixed or regular hours but was offered work by the health authority from time to time, was not engaged under a single continuing umbrella contract. Sir Christopher Slade held that, on the authority of *Nethermere*, no contract of employment "can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period". He noted that the authority "was at no relevant time under any obligation to offer the applicant work nor was she under any obligation to accept it". He accepted, however, that the mutual obligations required to found a global contract need not necessarily and in every case consist of obligations to provide and perform work:

> "To take one obvious example, *an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was* <u>*not*</u> *offered would in my opinion, be likely to suffice*. In my judgment, however, as I have already indicated, the authorities require us to hold that <u>some</u> mutuality of obligation is required to found a global contract of employment. In the present case I can find no such mutuality subsisting during the periods when the applicant was not occupied in a "single engagement"." (emphasis added)

505. In *Carmichael v National Power plc* [1999] ICR 1226, the House of Lords similarly rejected the argument that there was a single global contract which subsisted during the gaps between periods of work undertaken by guides, who took members of the public around certain power stations on a "casual as required" basis as set out in a written letter to the guides and the company. Lord Irvine, who gave the leading judgment, at 1230 G-H rejected the proposition that the appeal turned exclusively on the true meaning and effect of letters to the guides but said that if it did:

> "I would hold as a matter of construction that no obligation on the [the company] to provide casual work, nor on [the guides] to undertake it, was imposed. There would therefore be an absence of that irreducible minimum of mutual obligation necessary to create a contract of service".

506. The parties both referred, in particular, to the comments of Park J in *Usetech Ltd v Young* (2004) 76 TC when considering the mutuality test in an IR35 context. At [57] and [58]:

(1) He concluded from cases such as *Clark* and *Carmichael* that if the relationship is one under which the putative employer "can offer work from time to time on a casual basis, without any obligation to offer the work and without payment for periods when no work is being done….there cannot be one continuing contract of employment over the whole period of the relationship, including periods when no work was being done. There may be an 'umbrella contract' in force throughout the whole period, but the umbrella contract is not a single continuing contract of employment".

(2) However, he noted that this "leaves open the possibility that each separate engagement within such an umbrella contract might itself be a free-standing contract of employment". This was the concept he thought the Special Commissioner had in mind as covering this case although he thought the case was not really of that nature on the particular facts (given the engagement lasted for 17 months, on the individual's own evidence he worked for an average of 58 hours a week and it was found that "he was, as a rule, expected to work the "core" hours from 8am to 5pm").

507. At [60] he accepted that it is an "over-simplification" to say that the obligation of the putative employer to remunerate the worker for services actually performed in itself always provides the required kind of mutuality. He noted that mutuality of some kind exists in every situation where someone provides a personal service for payment, "but that cannot by itself automatically mean that the relationship is a contract of employment: it could perfectly well be a contract for free-lance services". At [64] he suggested that something more is required, beyond the mere requirements for there to be a contractual relationship, for a contract of employment to exist such as:

> "*a contract which provided for payment (in the nature of a retainer) for hours not actually worked. It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment*. See especially the *Clark* and *Stevedoring & Haulage* cases…." (emphasis added)

508. The parties also both referred to the decision in the Employment Appeal Tribunal ("**EAT**") in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181. In that case Langstaff J drew together the various strands in the cases and drew a distinction between mutuality in the sense of whether there is a contract at all and, if so, if, as he put it, there is a "wage-work bargain".

509. At [23] he referred to a decision by Elias J (as he then was) in the EAT in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 where, in summary, Elias J said the following at [11] to [14]:

(1) At [11] and [12] Elias J said that the significance of mutuality is that it determines "whether there is a contract in existence at all" and of control that "it determines whether, if there is a contract in place, it can properly be classified as a contract of service". He noted that the first issue arises most frequently

where a person works for an employer, but only on a casual basis from time to time and it is often necessary to show that the contract continues to exist in the gaps between periods of employment under an umbrella contract. Without some mutuality, amounting to "what is sometimes called the "irreducible minimum of obligation", no contract exists."

(2) At [13] he said that, on the other hand, the question of mutuality poses no difficulties during the period when the individual is actually working. In that case a contract must exist and for that duration "the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done". This is so, even if the contract is terminable on either side at will unless and until the power to terminate is exercised.

(3) He concluded, at [14] that:

> "the issue of whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not."

510. Mr Peacock drew attention in particular to Langstaff J's conclusion, at [47] and [48], in effect that the mutuality test extends to examining the nature of the contract and whether there is a "wage-work bargain" (as was cited with approval in *Drake v Ipsos MORI* at [33]):

> "Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is. If it is a contract of employment, consequences will follow of the greatest significance…..*These matters are determined by the* <u>*nature*</u> *of the mutual obligations by reference to which it is to be accepted that there is a contract of some type…..*
>
> *It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must also necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wage-work bargain*"". (emphasis added)

511. At [49] Langstaff J noted that it was submitted that the obligations which identify a contract as one of employment are flexible and differ according to the context relying on the judgment of Buckley J in *Montgomery v Johnson Underwood* Ltd [2001] ICR 819 at [23] where he said:

> "Clearly as society and the nature and manner of carrying out employment continues to develop so will the Court's view of the nature and extent of "mutual obligations" concerning the work in question and "control" of the individual carrying it out…"

512. He continued that later in that case Buckley J referred to the *Ready Mixed Concrete* test as permitting a tribunal "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". In a passage which HMRC relied on, he said that although it was accepted that there is room for the obligation resting upon an

employer to vary, as between the provision of work, payment for work, retention upon the books, or the conferring of some benefit which is non-pecuniary:

> "we cannot see that such elastic as there may be in the idea of mutuality of employment obligations can be stretched so far that it avoids the necessity for the would be employee to be obliged to provide his work, personally. The old fashioned description of a contract of employment as one of service……puts "service" (ie the obligation to work, personally, for another) at the heart of the relationship"

513. At [54] Langstaff J said that as "mutuality of obligation" may be used in different senses it is important to know precisely what is being considered under that label and for what purpose. In passages HMRC relied on, he continued, at [55], that there was concern that tribunals misunderstood something further which characterises the application of mutuality in the sense of the "wage/work bargain", namely, that:

> "*it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it*. Stephenson LJ in Nethermere put it as "… an irreducible minimum of obligation …" (emphasis added)

514. He noted that Stephenson LJ made these comments in the context of a case in which a home worker refused work when she could not cope with any more. She worked in her own time. He considered that "it is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some". The tribunal had accepted evidence (see 619B-C) that home workers such as she could take time off as they liked. He noted that although Kerr LJ dissented in the result, he too expressed agreement with the above principle. He referred to the comments of Dillon LJ at 634G-H including the following:

> "..I would accept that an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service. But the mere facts that the outworker could fix their own hours of work, could take holidays and time off when they wished and could vary how many garments they were willing to take on any day or even to take none on a particular day, while undoubtedly factors…to consider in deciding whether or not there was a contract of service, do not as a matter of law negative the existence of such a contract."

515. In the later decision in the EAT in *James v Greenwich* Elias J took a very similar approach to that set out in the *Delphi Diesel Systems* case. He noted at [16], that "sometimes, the employer's duty is said to be to offer work, sometimes to provide pay" but, in a succinct statement of the applicable principles, the critical feature is that:

> "the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as *Carmichael* makes clear; *if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker*, there will be a contract in the employment field; and

> if the nature and extent of the control is sufficient, it will be a contract of employment." (emphasis added)

516. We note, however, that in the later decision of the Court of Appeal in *Stringfellow v Quashie* [2013] IRLR 99 at [13], Elias LJ (as he had then become) in referring to his similar comments in *Delphi Diesel Systems* at [11] to [14], thought that on reflection the final sentence at [14] was too sweeping and that control is not the only issue as there indicated:

> "Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement. *O'Kelly* and *Ready Mixed* provide examples."

517. HMRC pointed to *Cornwall County Council v Prater* [2006] ICR 731 as authority that each separate assignment undertaken by a person may constitute an employment notwithstanding the lack of on-going obligations to offer or accept further work under an umbrella contract. In that case the Court of Appeal upheld the tribunal's decision that (a) there was the required mutuality for there to be an employment relationship between the council and a teacher as regards each of a number of individual assignments to tech pupils out of school which were of varying duration undertaken over a ten year period and (b) the times between the assignments when the teacher undertook no work for the council could be treated as periods of employment under the relevant statutory provisions (under the Employment Right Act 1996 ("**ERA**")). This was sufficient to establish the required continuity of employment for Mrs Prater to have the relevant employment rights she claimed she had.

518. The Court of Appeal set out, at [21], that the tribunal based their conclusion that the mutuality test was satisfied on the fact that the teacher was committed to teaching a pupil for as long as was necessary under an open ended arrangement as follows (at [14] of their decision):

> "…..having agreed to take on a pupil the claimant regarded herself as committed to deliver teaching to that pupil for as long as was necessary or until the arrangement was brought to an end for particular reasons. The respondents had a similar view of the situation. The matter was subject to regular review, as might have been expected, but was not re-negotiated on a week by week or month by month basis. It simply rolled on for as long as was necessary…..."

519. The passage cited included the tribunal's comment that there was an important difference between the teacher's situation and that of the individuals in the cases of *Carmichael* and *Clark*; in those cases "the periods of work were short and known to be so from the outset" whereas in the teacher's case "the arrangement was very much more open-ended…"

520. At [39] and [40] Mummery LJ agreed with the tribunal's conclusion. He thought it clear that, had Mrs Prater been engaged to teach the pupils in a class, collectively or individually, at school under a single continuous contract to teach, she would have been employed under a contract of service. He said that it made no difference to the legal position that she was engaged to teach them out of school on an

individual basis under a number of separate contracts running concurrently or successively nor that:

> "… *after the end of each engagement, the Council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the Council was under an obligation to pay her for teaching the pupil made available to her by the Council under that contract*. That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service. Section 212 took care of the gaps between the individual contracts and secured continuity of employment for the purposes of the 1996 Act." (emphasis added)

521. At [42], Longmore LJ rejected the submission that in this context mutuality had to be understood in a special sense of "an on-going duty to provide work and an on-going duty to accept work". He said, at [44], that the absence of such obligations would no doubt mean that there was no long-term global contract but that was not the argument; Mrs Prater was saying only that the individual engagements, once entered into, constituted contracts of employment. He had concluded, at [43], that there was mutuality in each engagement, namely, that the council agreed to pay Ms Prater for the work which she, in turn, agreed to do.

522. HMRC also relied on the later decisions, made in an IR35 context, in *Revenue and Customs Commissioners v Larkstar Data Ltd* [2009] STC 1161 and *Island Consultants Limited v Revenue and Customs Commissioners* [2007] STC (SCD) 700. In those cases it was held, in each case relying on the decision in *Prater*, that the fact that there was no right to renew successive contracts did not indicate that the relevant relationship was one of self-employment:

(1) In *Larkstar* Sir Donald Rattee held, at [32], that the Commissioners were wrong to hold that the absence of an obligation to offer further work to the individual in each of five successive agreements of six months indicated that he would not have been employed by the client under the assumed contract. The relevant question was "whether [the individual] would have been employed by [the client] during the two and a half years of the hypothetical contract or contracts between them". The decision in *Prater* clearly indicated that the fact "that [the client] would have been under no obligation to offer further work outside the terms of these contracts, is irrelevant to the question in issue".

(2) In *Island Consultants Ltd* the tribunal formed a similar conclusion in relation to a series of three (or in two cases, six) months contracts for the provision of an individual's services, with no obligation on either party to continue, but which were in fact entered into continuously for the three year period under appeal (and for periods before and after). The tribunal said, at [11], that:

(a) the lack of an obligation to renew each contract "may be relevant to determine whether someone is employed during breaks in work, as in [*Carmichael*], where it was not in issue that the guides were employed while working";

(b) however, as in the *Prater* case "it is sufficient that within each contractual period there was an obligation on [the client] to provide work and pay the agreed rate… the reality was that this was a five-year project" for a new computerised billing system for the client and "there was plenty of work requiring [the individual's] continuing services. [The client] was obliged to and did provide and pay for work during each separate contract period".

523. Mr Peacock submitted that these cases have been somewhat superseded by the later decisions of the Court of Appeal in *Stringfellow v Quashie* and *Windle v Secretary of State for Justice* [2016] ICR 721. In both of those cases it was accepted essentially that the absence of an ongoing obligation to provide and accept work for pay under an umbrella agreement may in itself indicate that short-term assignments undertaken are in the nature of a contract for services rather than a contract of service:

(1) In *Stringfellow* the question was whether a lap dancer who worked intermittently over a period of 18 months had employment rights. Elias LJ acknowledged, at [10], that there "is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration" (referring to the decision in *Prater* and that of the Court of Appeal in *Meechan* v *Secretary of State for Employment* [1997] IRLR 353). At [12] he said that:

> "whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee….."

(2) In *Windle* the question was whether individuals who provided interpreter services were appointed under a contract personally to do work. Underhill LJ held, at [23], that the employment tribunal had not misdirected itself in holding that the absence of an umbrella agreement was a relevant factor in assessing the nature of short-term assignments:

> "….the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances."

524. In *Weight Watchers*, in considering the mutuality test at [30] to [32], Briggs LJ summarised the position as established in the cases as being that arrangements may, at least in theory, fall into three categories: (a) "a single over-arching or umbrella

contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work", (b) "a series of discrete contracts, one for each period of work, but no over-arching or umbrella contract" or (c) a "hybrid, class… of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work".

525. He said that in the hybrid case, depending on the nature of the dispute, it may be "sufficient if either the over-arching contract or the discrete contracts are contracts of employment". He added that "it is clearly sufficient" if there is "either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods" during which the relevant individual's work is carried out.

526. He continued, at [31], that where reliance is placed on discrete contracts for periods of work it is necessary to show that: "the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done". He thought that this clearly arose from the analysis in *Clark*. He gave an example where a discrete contract may be made for a series of separate events, such as a series of one hour, monthly or weekly meetings. The discrete contract may itself last for the whole period of the series, which may be for as long as a year. In such cases he considered that Sir Christopher Slade's "'relevant period' during which the mutuality of obligation must subsist is the whole of the period of the discrete contract" (see *Clark* at [504] above).

Right of substitution

527. As noted, it was recognised in *Ready Mixed Concrete* that the right to provide a substitute to carry out work may be inconsistent with the provisions of personal service. It was held in *Usetech* at [53], that the existence of a right to substitute is not determinative of self-employment and, correspondingly, in the *Professional Contractors Group* case, at [48v], that the absence of a right to provide a substitute may suggest employment, but it is not determinative.

528. HMRC referred to *Weight Watchers*, where Briggs J expanded on this and gave examples of two different types of substitution clauses:

(1) At [32] he noted that the right to substitute "may be so framed as to enable the person promising to provide the work to fulfil that promise wholly or substantially by arranging for another person to do it on his behalf". He considered that to be "fatal" to the requirement that the worker's obligation is one of personal service. He referred to *Express & Echo Publications v Tanton* [1999] IRLR 367 as an example of that type of case.

(2) He continued, at [33], that at the other end of the spectrum is the situation "where the worker is for some good reason unable to work", and the worker may arrange for a person approved by the employer to do it, "not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person". He cited *MacFarlane v Glasgow City Council* [2001] IRLR 7 as an example of this type. In that case a qualified gymnastic instructor was entitled, if unable to take a particular class, to arrange for a replacement from a register of coaches retained by the council, on the basis that the replacement would be paid directly by the

council. He noted that the EAT "had no difficulty in concluding, distinguishing *Tanton*, that this provision was not necessarily inconsistent with a contract of employment between the Council and the instructor".

529. He said, at [34], that the true distinction between the two types of case is that:

> "in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead."

530. At [35] he said that the second possible relevance of substitution clauses is that, even if the clause is of the second kind, the individual's "right to avoid doing any particular piece of work may be so broadly stated as to be destructive of any recognisable obligation to work". He was not persuaded, at [36], that the relevant distinction is between clauses providing for substitution only where the contractor is unable to work, and those permitting substitution wherever the contractor is unwilling to work; that is "in the real world, unrealistically rigid". He put the example of a teacher who is, otherwise, obviously an employee, but whose contract permits her to absent herself, and find a replacement where, although able to work, she would for understandable reasons rather attend a wedding, or funeral, of a close relative. He said it would be "absurd to treat that sensible provision as incompatible with a contract of employment".

531. He concluded, at [37], that in such cases:

> "the real question is in my judgment whether the ambit of the substitution clause, purposively construed in the context of the contract as a whole, is so wide as to permit, without breach of contract, the contractor to decide never personally to turn up for work at all. That was indeed held to be the true construction of the relevant clause in *Tanton*."

532. HMRC also referred to the decision in the Court of Appeal in *Pimlico Plumbers v Smith* [2017] EWCA Civ 51 on whether an individual was a "worker" as a person who has entered into or works under "any other contract [meaning other than a contract of service]…..whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". In considering the effect of the individual's ability to substitute another Pimlico Plumbers operative to perform his work, Sir Terence Etherton considered it relevant to consider the authorities on the meaning of personal performance as regards determining whether a contract is one of employment (including those set out above). He summarised the applicable principles at [84] as follows:

> "Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor

> is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

533. This decision was appealed and, since the hearing of these appeals, the Supreme Court has released their decision in *Pimlico Plumbers Ltd & Anor v Smith* [2018] UKSC 29. Lord Wilson (who gave the judgement with which the rest of the panel agreed) did not refer to the above passage but nothing in his judgement casts any doubt on the comments there set out. He held, at [34], that the tribunal was entitled to hold that the "dominant feature" of the relevant contracts was an obligation of personal performance and that to the extent that the individual's facility to appoint a substitute was the product of a contractual right (as he assumed it was), the limitation of it was significant:

> "the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done.."

534. Mr Peacock pointed to the passages at [48] of the *Professional Contractors* case where Burton J considered whether the fact that the expertise of a contractor who provided specialist computer services at a client's premises may become such that no one else would be able to replace him indicated against employment. He said that "given that the issue is not determinative, but only one of the factors, that may indeed be right and may in a particular engagement be a strong counter-indicator against employment".

Control

535. It has long been recognised that, as set out in *Ready Mixed Concrete* and *Market Investigations*, control is a necessary feature of an employment contract but not necessarily sufficient of itself to indicate that there is such a contract. It is also long established that absence of control as to the detailed way in which work is performed is not necessarily inconsistent with the employment of a skilled person (see for example *Davies v Braithwaite* and *Morren v Swinton and Pendlebury Borough Council* (at 582A-B) as referred to in *Market Investigations*).

536. A similar point was made by Vinelott J in *Walls v Sinnett* [1987] STC 236, at 246c, as regards the "modest degree of control which in practice was exercised by the governors and the principle of a college" over a professional singer who lectured in music at a technical college:

> "In some contexts the degree of control exercised may be very important in deciding whether someone is an employee or servant, but in the case of a senior lecturer at a college of further education, more particularly one who like the taxpayer came into teaching from active work as a singer, it is not surprising to find that he was given a very wide degree of latitude in the organisation of his work and time."

537. In *Montgomery v Johnson Underwood Ltd*, at [19], Buckley LJ noted that in *Ready Mixed Concrete* MacKenna J had "well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential". There are many examples "from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent". In many cases the employer may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However:

> "some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment."

538. He noted that MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which he referred to the first few lines:

> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any 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."

539. He continued, at [23], that as society and the nature and manner of carrying out employment continues to develop, so will the court's view of the nature and extent of "mutual obligations" and "control". However, he thought it desirable that a clear framework or principle is identified and kept in mind and, in his view, the quoted passage from *Ready Mixed Concrete* was still the best guide. He considered that whilst the approach in that case permits tribunals "appropriate latitude" in considering the nature and extent of mutual obligations and control it does not "permit those concepts to be dispensed with altogether" but rather 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".

540. HMRC referred to the case of *White and another v Troutbeck SA* [2013] IRLR 286 as support for their view that it is the right to overall control or a framework of control which matters rather than day to day control. In that case the EAT held that individuals who were engaged to look after a substantial estate for the largely absent owners, were employees of the owners for the purposes of ERA. Richardson J noted, at [40] that:

> "The key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work."

541. He expanded on this, at [41] and [42], as follows:

> "….in modern conditions many workers - especially the professional and skilled - have very substantial autonomy in the work they do, yet they are still employees. But this has, I think, always been the case…There would be no doubt that the owners retained the right to step in and give instructions concerning what was, after all, their property. It does not follow that, because an absentee master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them….

> …all aspects of control are relevant to this question. It was once thought that for a contract of employment to exist the master must be empowered to direct not only what is to be done but also the manner in which it is to be done. However, many kinds of employee - such as the surgeon, the captain and the footballer discussed by Somervell LJ in [*Cassidy v Ministry of Health*] at 579 – are engaged to exercise their own judgment as to how their work should be done."

542. He concluded that on the facts of the case, whilst the individuals had substantial day to day responsibility, the owners retained a sufficient right of control. Essentially the Court of Appeal agreed with the EAT on the control point in *White and another v Troutbeck SA* [2013] EWCA 1171 (see [41]).

543. HMRC also referred to (a) *Various Claimants v Catholic Child Welfare Society & Ors* [2012] UKSC 56 where it was held, at [36], that the significance of control is that the employer can direct what the employee does, not necessarily how he does it and (b) *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938 where, at [76], Ward LJ said that the question of control is not merely about the legal power to control, but that it should be viewed more in terms of accountability and supervision by a superior. That was said in the context of vicarious liability of the Church for sexual abuse by priests. In our view Ward LJ was not suggesting here that the legal power to control was less important.

544. Mr Peacock referred to *Matthews and another v HMRC* [2012] UKUT 229 (TCC) and *Datagate Services Ltd v Revenue and Customs Commissioners* [2008] STC 453 (at [20] to [28]) as support for the view that when considering whether the control exercised is "sufficient", the practical realities of a particular working context are relevant.

545. In the *Matthews* case the UT upheld the tribunal's decision that two entertainers who provided entertainment on various cruises were engaged under contracts for services with the various cruise lines they contracted with. The UT recorded that the tribunal's findings included (a) that on average the length and number of the engagements was 4 and 13 days and 38 and 16 per year respectively, (b) the cruise line expected the highest standards of behaviour, (c) the appellants complied with the directions of the cruise director (for example, as regards some aspects of content of their act, timing and taking part in additional activities), and (d) they were treated more like crew than passengers and were, for example, expected not to occupy a bar stool if a passenger was standing, and not to occupy places in the hot tub when passengers were waiting and were expected to assist passengers finding their way round the ship.

546. The UT set out that, at [12] of its decision, the tribunal held that the level of control was the determining factor on the basis that "much of this is required by the context of a cruise ship" and it was:

> "to be expected that the staff will be closely controlled so as to achieve the cruise line's objective because the staff are in the public eye at all times. This factor seems to us to have less bearing on the employment status of the staff than might be the case if the context were different. It is not the case that the self-employed have complete freedom over what they do. An actor can discuss points of interpretation with the director as an equal but in the end the director's wishes will prevail...."

547. At [13] the tribunal held that the appellants did not have a series of "posts" but earned their living under a series of separate engagements in a similar way to an actor as in *Davies v Braithwaite*. They concluded, at [14], that in this context it was right to give more weight to this point than to control. In the UT, in rejecting the argument that the tribunal gave insufficient weight to control, Mann J said, at [18], that the conclusion on control was "entirely justifiable":

> "….the requirement of a certain degree of behaviour when "off duty" and not performing is not control over the employment activities and the performer. It is a degree of control which is required because the performers are part of a community confined on a ship for days on end and in which the ship has its own standards. It is not really related to the engagement as a performer at all. The requirement to comply with the ship's regulations is probably a requirement imposed on all people on the ship; crew, passengers, entertainers and all others."

548. Mr Peacock relied on the case of *Marlen Ltd v Revenue and Customs Commissioners* [2011] UKFTT 411 (TC); [2011] STI 2439 as support for the proposition that control over an aspect of a person's performance of their services is not indicative of an employment relationship if the same control is exercised over independent contractors and employees. In that case, as noted at [46], all persons engaged had to work together to produce a specific machine within a specified timeframe which could only be achieved by a "reasonably rigorous direction and supervision by senior management". The tribunal said that, in reality, the degree of supervision and direction exercised over the relevant individual in this respect was "broadly similar to that exercised over all the other contractors and senior employees simply because the nature of the project demanded it". The tribunal concluded, at [47], that the only helpful analysis was to compare the control exercised over the individual with the control exercised over employees as regards matters such as flexibility of working hours and whether the individual was subject to induction, appraisals and disciplinary procedures.

Other cases on other factors

549. Mr Tolley referred to the *Weight Watchers* case where, at [41] to [43], Briggs J set out that the third test set out in *Ready Mixed Concrete* is in substance a negative condition "that the terms of the contract, taken as a whole, should not be inconsistent with it being a contract of service". He continued, at [42], that putting it more broadly where there is sufficient mutuality and control, there 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."

550. Mr Tolley referred to the comments of Sir Terence Etherton in *Pimlico Plumbers*, at [115], that the employment tribunal was right to hold that the degree of control exercised by Pimlico Plumbers over the relevant individual was inconsistent with it being a customer or client of a business run by him (for the purposes of the

"worker" test set out at [532]). In particular, the tribunal was "entitled and right to place weight on the onerous restrictive covenants….which, on the face of it, included a covenant….precluding Mr Smith from working as a plumber in any part of Greater London for three months after the termination of the [relevant agreement]". Mr Tolley said that in this context it must be of at least equivalent and potentially greater importance to have regard to restrictions operating during the period of the contract on other activities that the individuals would otherwise be free to do.

551. Mr Tolley also referred to *Dragonfly Consulting Limited* [2008] STC 3030 as demonstrating the limited relevance of the parties' stated intentions. At [53], Henderson J (as he then was) said that whilst "it is true that in a borderline case a statement of the parties' intention may be taken into account and may help to tip the balance one way or the other" on the basis of *Ready Mixed Concrete* at 513B and *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 (CA) "in the majority of cases, however, such statements will be of little, if any, assistance". He said, at [55], that he would not go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties (as there is no actual contract by reference to which they have intentions):

> "If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance."

552. Mr Peacock submitted that it is clear from *Clyde & Co LLP v Bates Van Winkelhof* [2014] UKSC 32 that it does not necessarily follow that, if a person is held not to be in business on his own account, he is an employee. In that case the issue was whether a member of a limited liability partnership ("**LLP**") had certain rights as a "worker" (under the definition set out at [532] above). Lady Hale (with whom the majority agreed) held that the individual was not prevented from falling within this definition by virtue of s 4(4) of the Limited Liability Partnerships Act 2000 which provides that a member of an LLP "shall not be regarded for any purpose as employed by" the LLP unless certain conditions are satisfied. She said, at [23], that "employed by" does not cover a person who falls within the definition of "worker".

553. Mr Peacock pointed to her comments, at [24] and [25], that "the law draws a clear distinction between those who are employed under a contract of service and those who are self-employed but enter into contracts to perform work or services for others" and that, as regards the latter, the law now draws a distinction between (a) "people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them" and (b) those who are "self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else". She gave an example of a case where arbitrators within the first category were held not to be "workers" and that where a doctor within the second category, who operated in a medical practice but also provided hair restoration services to a hair restoration company, was held to be a "worker". She said that if Parliament wished to include

this "worker" class of self-employed people within the meaning of section 4(4), it could have done so expressly but it did not.

554. I cannot see this adds to the debate in the present case. Lady Hale in effect acknowledged that under the applicable statutory test not all "self-employed" persons may be "workers" but that persons who are members of an LLP are not prevented from falling within that category under s 4(4). These findings do not relate to where the appropriate line is to be drawn between employment and self-employment.

555. Mr Peacock said that certain factors which might be indicative of employment in one case, might merely be the product of market forces in another and so not relevant (referring to *O'Kelly v Trusthouse Forte plc* [1984] 1 QB 90 at 121 F and *RS Dhillon v HMRC* [2017] UK FTT 17 (TC) at [35] and following). He did not, however, make any specific point on what factors might be the product of market forces in this case. Mr Peacock also referred to a number of tribunal decisions but we did not find that these were instructive in that they did not add to the principles set out above (*Lime-IT Ltd v Justin (Inland Revenue Officer)* [2003] STC (SCD) 15, *Datagate Services Ltd v HMRC* [2007] UKSPC 656 and *ECR Consulting Ltd v HMRC* [2011] UKFTT 313 at [40]).

Application of employment/self-employment test

556. The conclusions in this section apply to all of the assumed contracts except those between Mr Willcox and the BBC relating to World which are addressed separately below. Accordingly, all references to the assumed contracts in this section are to be read as excluding those between Mr Willcox and the BBC relating to World except where expressly stated otherwise.

557. On the basis of the caselaw set out above, I have concluded that in each of these cases, in each relevant tax year, there was sufficient mutuality and at least a sufficient framework of control to place the assumed relationships between the BBC and the Presenters in the employment field. On that basis and, having regard to all relevant factors, my view is that overall, throughout all relevant tax years, the assumed relationship between the BBC and each Presenter was one of employment rather than self-employment. For convenience, in these conclusions I refer to the assumed contracts as though actually in place between the BBC and the Presenters. Except where stated otherwise, references to the actual contractual terms are to those terms as they apply under the assumed contracts.

Mutuality of obligation

558. I note that, as set out in *Cotswold*, "mutuality of obligation" may be used in different senses and "it is important to know precisely what is being considered under that label and for what purpose". In this case, IR35 requires the tribunal to assess whether the income generated under the arrangements with each PSC is taxable as employment income on the basis that, if the BBC and the relevant Presenter had contracted directly, their relationship would have been one of employment. That assessment has to be made for each tax year by reference to the income generated in that year under the applicable assumed relationship. The starting point, therefore, must be to assess, as regards each tax year, the nature of the obligations and rights under the particular assumed contract(s) under which the income is assumed to be generated in that year. In my view, however, in making the ultimate overall assessment of the nature and quality of the particular assumed contracts, it is relevant

to have regard to the wider context such as the nature of the on-going arrangements between the parties over the years.

559. In this context, the main dispute between the parties was on the correct construction of the relevant contractual terms as regards work and pay (and hence, of the assumed terms under the assumed contracts) and whether the actual contracts between the BBC and the PSCs continued in the "gap" periods between the ending of one contract and the signature of the next (and hence, whether the assumed contracts continued correspondingly). To re-cap, we have concluded that:

(1) The actual contractual arrangements continued in the "gap" periods between the ending of one contract and the signature of the next (generally on the same basis as under the old contract) and the assumed contracts are to be assumed to have continued correspondingly (see [462] and [463]).

(2) It follows from our conclusion on the meaning of the relevant actual contractual terms, that under the assumed contracts (as based on those terms) (a) if called on by the BBC the Presenter was obliged to work on sufficient call days to meet the minimum days requirement and the BBC was obliged correspondingly to call on the Presenter on sufficient days to enable him or her to do so and (b) the BBC was nevertheless obliged to pay the full contract fee if and to the extent that the minimum days requirement was not met due to its failure to call on the Presenter's services on sufficient days (see [445] to [461]).

560. On that basis the mutuality test is plainly satisfied in respect of each assumed contract in both of the senses set out in *Weight Watchers*, namely, that there was a binding contract in place and that the mutual obligations created under the contract are sufficiently work-related or, as put in *Cotswold*, there was a "work/wage bargain".

561. The fact that the Presenters were able to turn down slots or shifts and that the rota was organised on a flexible and collaborative basis does not affect this conclusion. For the reasons set out above, this flexible approach does not affect the BBC's contractual entitlement to first call on the Presenters' services (see [448] and [449]). In any event, as set out in *Cotswold*, the fact that a person can refuse to work a particular day or can take holidays when the person chooses does not prevent there being mutuality; what matters is whether or not there is at least some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it (see [513] and [514]). For the reasons already set out, that is plainly the case here. The fact there was no guarantee of each assumed contract being renewed does not of itself affect the fact that there was mutuality under each applicable contract but it is a factor to be considered in the overall assessment as set out below.

562. Mr Tolley said that if, contrary to HMRC's view, there is not sufficient mutuality throughout, each assumed contract should be regarded as providing a non-binding framework agreement pursuant to which there was a freestanding contract of employment for each particular engagement when a Presenter actually worked on a programme (referring to *Larkstar, Prater* and *Usetech* at [58]). Mr Peacock responded that HMRC should not be permitted to raise this argument on the basis that it was not part of HMRC's pleaded case; it was raised for the first time at the hearing on the penultimate day. He said that had this been raised sooner the PSCs may well have produced further evidence from the BBC, such as, about whether payment would

be made if a Presenter had turned up for a programme but was turned away or was never called upon in a contract period.

563. He continued that, in any event, HMRC's argument is wrong in law:

(1) The arrangements in this case involve short-term engagements akin to those in *Carmichael* which the court in *Prater* distinguished from the open-ended engagements in that case. Moreover, as Mrs Prater needed to establish that she had the required continuity of employment to have certain rights under ERA, the focus was necessarily on the periods when she was at work as, for that purpose, certain periods away from work (for up to 26 weeks) are disregarded by statute (under s 212 ERA). The erroneous application of this employment specific case in a tax context would lead to gaps between engagements wrongly being ignored for the purposes of the mutuality test.

(2) In *Larkstar*, the court overlooked the centrality of s 212 ERA to the decision in *Prater* and failed to take the length of each engagement into account. This error was compounded in *Weight Watchers* where, at [30], Briggs J held that there is sufficient mutuality if there is a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods during which the relevant individual's work is carried out. No authority is cited for the proposition or to explain the basis on which the periods between assignments can be ignored.

(3) The most relevant authority is *Windle* where it was recognised that the absence of mutuality between each short-term assignment is a relevant factor in assessing the nature of the assignment. The length of the engagement is also relevant; ad hoc engagements of a day or a programme are materially different to engagements of indefinite duration.

(4) In any event, the individual assignments/programmes lack the requisite mutuality. On a programme by programme basis there was no obligation on the BBC to pay unless the Presenter did the programme in question. If the Presenter arrived but the programme was cancelled or their services were no longer needed, there was no obligation on the BBC to pay them. Whether they were paid or not was at the BBC's discretion. To suggest otherwise is contrary to the express contractual terms, common sense and feasibility and the evidence of Mr Bakhurst.

564. Given my conclusion on the mutuality test, we do not need to address this. We comment only that, in any event, we consider that it is not in the interests of justice and fairness for HMRC to be permitted to raise this argument at such a late stage. Whilst the evidential issues to some extent overlap with those under HMRC's primary mutuality argument, this requires a different focus and analysis such that we can see the PSCs may well have wanted to consider bringing further evidence. We appreciate that in some instances further legal arguments may present themselves to the parties as the evidence unfolds during the course of the hearing. Here, however, we can see no reason why HMRC could not have raised this argument at a much earlier stage.

Personal performance and sub-contracting

565. It is clear that the Terms (in all versions) imposed an obligation of personal performance of services by the Presenter. The Presenters all recognised that the BBC wanted each of them personally to provide their services in presenting the news. As

Ms Gosling said it was not a case of the BBC wanting her or someone else (see [197] to [201]).

566. Mr Peacock argued, however, that it is apparent from the approach in *Windle* that the fact that in practice the Presenters could refuse a slot and, if so, sometimes asked others to stand in for them, showed a flexibility which does not sit happily with an obligation to provide personal service. He said that even if it is held that this does not constitute a right of substitution properly so-called, the lack of any such right is, at best, merely one factor and not a weighty one pointing towards employment. In the context of the provision of highly specialised services of this kind, it is not surprising that the client requires the particular person to do the work (and he referred to the comments of Burton J as set out above).

567. However, in my view, as HMRC submitted, the relevant provisions and practices do not detract from the fact that the Presenters' were required to perform their services personally. As HMRC noted, in the earlier Terms as a contractual matter the Presenters were not entitled to sub-contract except with the consent of the BBC (see [122]). The right to withhold consent was unqualified; there was no requirement for such consent not to be unreasonably withheld. In the 2012 Terms there was a right to provide a replacement presenter but only in exceptional cases where the Presenter was not available due to circumstances beyond his or her reasonable control on giving prior notice and subject to the replacement being regarded as suitable by the BBC (see [123]). Both of these very limited forms of ability to subcontract or substitute fall within the parameters of the examples given in *Pimlico Plumbers* of circumstances which are not inconsistent with employment. Indeed, the requirement for the BBC to approve the replacement clearly indicates that the identity of the presenter was an important feature. I also note that this is indicated by the inclusion in the 2012 Terms of a right for the BBC to terminate the contract if the Presenter was unable, personally, to provide the services.

568. I cannot see that existence or importance of the Presenters' obligation to provide their services personally is in any way diminished by the informal arrangements whereby the Presenters arranged cover for slots they were offered or swapped slots with a limited pool of other suitable BBC news presenters (see [197] to [201]). It is clear, as the Presenters accepted, that this did not affect the PSCs' contractual rights or obligations. The other presenter did not contract with the PSC but worked on the relevant slot under his/her own contractual arrangements with the BBC (whatever they may be). Therefore, the other presenter's work on the slot did not count towards fulfilment of the PSCs' contractual commitment as regards the minimum days. The PSCs remained obliged to provide the Presenters' services and the BBC remained obliged to call on those services on the stipulated number of minimum days. In effect, therefore, the arrangement simply enabled the Presenters to fulfil their minimum days obligation within a flexible system as regards what particular days they worked. The arrangements must be assumed to operate in the same way as regards the assumed relationships.

569. Moreover, similarly to the situation in *Pimlico Plumbers*, the fact that it was clearly recognised that cover could only be provided by a limited number of BBC news presenters in similar positions to the Presenters demonstrates that the BBC was concerned with the identity of the individual who was to appear on any slot. This was

plainly not a case where the BBC was only concerned that the work was done and not with who was to do it.

Control and related issues

570. In HMRC's view, the critical factors as regards the control test are that under the assumed contracts the BBC had the *right* of control over the Presenters in all relevant respects, namely, as a result of the right to direct where and when they did a shift, the right to direct how they did their work under the editorial chain and the extensive restrictions on their outside activities. Mr Tolley emphasised that it is the right of control which is important; it does not cease to be of importance if it is not exercised on a day to day basis. It is not correct that the tribunal should be sceptical about rights in a contract merely because they have not been exercised, in the absence of any contention supported by evidence that the rights in question were never intended to form part of the contract in the first place.

571. Mr Tolley submitted that, under the contractual terms, as applicable to the assumed contracts, in effect the BBC had the right to direct, on any day, when and where the presenting and reporting was to be done (whether from the studio or an outside broadcast). Moreover, the BBC had the right to require the Presenters to do a number of matters beyond presenting the news, such as to attend promotional activities. The fact that the Presenters may have had a wide degree of latitude in the organisation of their work and time (for example, that the rota was agreed by collaboration) does not detract from these rights and is completely consistent with employment.

572. Mr Tolley submitted that, what he described as extensive and intrusive restrictions on the Presenters' other activities under the Terms and the Guidelines, are core to the concept of control in this type of work. They are designed to ensure the contract was performed by the Presenters as the BBC intended in order to enhance and protect their personal impartiality and thereby that of the BBC. Whilst some matters could be done with the BBC's consent, the right to refuse consent was unqualified. He noted, in particular, that the BBC had the contractual right to prevent the Presenters from pursuing a business as broadcast journalists and that the restrictions upon them, as news journalists were much more extensive than those upon other individuals.

573. Mr Tolley said that the cases clearly establish that it is irrelevant to the control issue that the BBC cannot in practice control what the Presenters say in many live situations in a pre-emptive sense and that, in that context, the Presenters can be said to have a degree of autonomy. That simply reflects the nature of the work environment and the professional skills of the Presenters. Whilst the Presenters had a degree of creative input into their work, the BBC was ultimately responsible for the output and had the right to reject any editorial suggestions made by the Presenters. The Presenters worked in the context of a team environment and were not producing by themselves a "thing" or an "output", but rather providing their personal service to the BBC to play their part in delivering news programmes to the public. Any decisions made by the Presenter during the live broadcast were made within a framework of control albeit that in some situations it could only be enforced retrospectively.

574. Mr Peacock noted that control over how a person does their work is not necessarily the decisive test when the person is a professional or has some particular

skill or experience. In his view, a right to dictate what is to be done and the time and place for doing of it is rarely sufficient alone to amount to the right sort of control to indicate an employment relationship. What matters is the overall *nature and degree* of the right of control said to exist over *the individual* concerned in the performance of the services. In the first place the tribunal must test whether that is a real right or an illusory right. If there is never any exercise of that right, that calls into question the meaningfulness and significance of the right itself. Even if the BBC has real rights in this case in the sense of editorial control over the end product, that does not constitute the required type of control over the individual; it is no different from the type of control exercised by any client over the services provided by a professional.

575. He emphasised that the BBC seeks to exercise a form of control over all content due to its own obligations (most notably of impartiality and integrity) under its Royal Charter and to Ofcom. Accordingly, it seeks to apply the relevant standards to all those who produce content for the BBC to ensure that all contributions to its output are aligned with its objectives. Just as a cruise ship has to impose certain rules in the public interest, as in the *Matthews* case, so the BBC has to impose certain guidelines in keeping with its own obligations. Any control which the BBC had over output, therefore, is simply part of the regulatory regime in which the BBC operates and which it applies to all whatever their status. Similarly to the situation in the *Matthews* case, any such control is not a material consideration in determining employment or self-employment status.

576. Mr Peacock noted that the Editorial Guidelines are just that; they are rarely prescriptive. Even where they are prescriptive, they simply require steps to be taken to seek a further reference to someone else for a view as to the appropriateness of a course of action. They do not require the Presenters to work in a particular way as such but provide guidance only. Moreover, in effect, the Presenters have their own editorial role because they are necessarily having to exercise editorial judgement whilst broadcasting live. Given the nature of live television, the Presenters are entrusted with a huge amount of responsibility to edit and control the content. Even where the Guidelines are prescriptive, the clear evidence is that the Presenters would have adopted the relevant standards in any event; they did not need the Guidelines to tell them what to do. He added that the Presenters could choose what work they did and could decide whether to go on outside broadcasts or not.

577. In his view the provisions as regards first call, the various requirements not to bring the BBC into disrepute and as regards impartiality and the restrictions on outside activities are not individually sufficient to amount to control of the individuals in the performance of their services. He noted that these provisions also apply to those who are manifestly not employees of the BBC to the same effect. There was no obligation, in practice, to provide ancillary services or do promotional activity. Any control over the Presenter's outside activities was not relevant to and directly referable to the performance of their duties under the contracts; it was relevant and directly referable to their integrity as journalists. The Presenters again gave clear evidence that they would not have done many of the restricted activities in any event as they were well aware of their obligation to be impartial.

Conclusion - control of the place and where the work is to be done

578. Under each set of Terms the BBC had the right to require the Presenter to attend "at such places…..and at such times as are necessary" for him/her fulfil their obligations under the contract (as taken from the 2004 Terms but the wording in the other Terms was similar) (see [98]). In outline, the Presenters' primary obligations were to present on News or World on any given slot and to perform reasonably ancillary services (see [85]) which, under the 2012 Terms only, specifically included preparation, creative input for content production, travel as deemed reasonably necessary by the BBC, press, promotion and trails and such other services as are usually provided by a professional first class presenter (see [86]). Under the 2004 Terms the Presenter was required to attend such programme promotion activities as the BBC may require and if requested, news training as a specialist guest. The Presenters were required to perform such services with proper skill, care and diligence and (a) in the earlier Terms, in a timely, efficient and professional manner as was necessary for the proper performance of their obligations or, (b) in the 2012 Terms, as a "first class presenter conscientiously and in a professional manner at all times" and with full and willing compliance with the BBC's requests (see [96] and [97]).

579. In the 2007 and 2012 assumed terms, as set out in further detail at [99] and [100] above, the BBC had the right to first call on the Presenter's services during the contract period and throughout call days (which could be any day) with detailed provisions on availability and contact in the 2007 Terms and subject to any prior professional commitments of the Presenter confirmed in writing to the BBC prior to signature of the contract in the 2012 Terms. In the 2007 Terms the Presenter was required, subject to reasonable notice, to make himself/herself available "for face to face meetings as are deemed necessary by the BBC to provide the Services".

580. It is clear, therefore, that the BBC had the contractual right to decide the time and place where the Presenters were to perform the required services. As determined by the BBC, on the day and at the designated time for the slot, the Presenter was required to attend the studio where the rest of the team was located or an outside broadcast location. The existence of this right is not affected by the fact that in practice the BBC did not insist on a Presenter undertaking field work if he/she did not wish to do it (such as in Ms Gosling's case when she did not wish to report on the Olympics (see [246]), [250] and [254]) and that the Presenters considered they could not be forced to do a particular assignment. As in relation to the BBC's call rights, that the BBC was prepared in practice to take the Presenters' wishes into account in not insisting they took on particular assignments, does not of itself suffice to evidence that the written contractual terms do not reflect the true legal agreement between the parties. It is realistic to suppose that there could be occasions when, if the BBC had a difficulty in filling a particular assignment, it would want to rely on this provision. There is no reason to suppose that these provisions were inserted as a matter of form only.

581. Outside of these provisions, there was no specific stipulation as to how and where the Presenter was to prepare for the broadcast or specific requirement that the Presenter was to attend team meetings in preparation for the broadcast or review meetings afterwards, other than the obligation to attend face to face meetings set out in the 2007 Terms. However, I consider that it is inherent in the general provisions relating to attendance, availability on call days and the use of required skill, care and diligence (and related provisions) that the Presenters were required to spend sufficient

time preparing (whether at home or in the studio) and to attend relevant meetings where necessary to enable them to present the news on World or News whilst on air as a professional presenter would. It follows that the fees due under the contracts were due for all such required services, including time spent preparing, and not just for the Presenter's actual appearance on air.

582. Moreover, that accords with the business reality of the relationship and the parties' expectations. The evidence was that the Presenters did attend team meetings relating to studio broadcasts and considered that they were expected to do so subject to cases when they could not attend for a particular reason (see [284] and [286]). Mr Bowen said that he expected the presenter to be at the pre-broadcast meeting unless there were extenuating circumstances (see [284]). In Ms Gosling's case, when working on the evening slot, there was little if any editorial input and the presenters were often the most senior personnel in the studio (see [281]). However, the fact that there were no or very few meetings appears to be simply because that was how that particular slot was run; it does not necessarily indicate that had meetings been required Ms Gosling would not have been required or expected to attend.

Conclusion - control over the thing to be done and the manner of performance

583. The BBC had overall control over deciding the thing to be done and, in a broad sense, over the manner in which it was done in that it determined the nature of the programme on which the Presenters worked, the overall running order and the format for its production and had ultimate editorial responsibility for the content of the programme.

584. The Presenters' evidence was that, within the overall framework set by the BBC, they had substantial creative input into the presentation of the relevant programme (see [256] to [336] and [356] to [371]). In outline, as experienced and respected journalists, the Presenters had input into what stories to run in what order and what interviews to conduct. I fully accept their evidence that they were engaged by the BBC for their individual skill base in journalistic presentation; it was their job, broadly, through their own presenting style to make the news stories come alive. Moreover, in view of their skill base and due to the nature of the live broadcast environment, in practice, it was largely left to them to use their own personal judgment and skill in conduct their live reporting and interviewing, in particular, in ad-libbing in a breaking news scenario and in deciding on their own line of questioning in interviews. To the extent a script was used, they either wrote it, inputted into it, used it as a guide only or, on occasions, overrode or amended it as they went along on air (except as regards legalled scripts as set out below). In one sense, using Mr Eades' words, the Presenters "were running the show".

585. However, as the Presenters themselves emphasised, they worked in a team environment on a collaborative basis in which the presenter is only one part, albeit an important part, as the immediate interface with the public. The Presenters did not, therefore, produce the "output" by themselves, but rather provided their personal services to the BBC to play their part in the teamwork required to deliver news programmes to the public. Ultimately, as for the rest of the team, they were required to operate within a framework of the BBC's editorial control albeit that there were practical constraints upon how that control could be exercised.

586. The BBC, as an organisation, had editorial responsibility for the content of the news programme produced although, as Mr Jordan explained, it was dependent on each person in the editorial chain playing an appropriate role with ultimate responsibility falling to the Director General (see [133] to [145]). The Presenters were part of that chain as, in effect, the front line or face of the BBC (see also [356] to [371]). Under the assumed contracts, in preparing for and presenting the news on air and playing their part in the editorial chain the Presenters were obliged to comply with (a) the BBC's values and principles including those relating to accuracy and impartiality as set out in the Guidelines, (b) specific requirements in the Guidelines such as those regarding the making of allegations in live "two ways" and the requirement to stick to the wording of "legalled" scripts (see [131]), and (c) specific restrictions in the 2007 and 2012 Terms as regards not using remarks when required by the BBC (see [112] and [116]) or using defamatory material (see [109] and [110]). Under their obligation to comply with the Editorial Guidelines, the Presenters were also in effect obliged to comply with the direction of those in the editorial chain above them. The circumstances do not suggest that any of these contractual obligations did not genuinely reflect what might realistically be expected to occur and the business reality of the relationship.

587. In practice, where possible within the constraints of live broadcasting, matters such as what stories to run, in what order, who to interview, when to break news and/or how to deal with allegations in a live "two way" were agreed collaboratively between the members of the team. In the event of a disagreement between the Presenter and the editor, however, whilst the Presenters stressed that their views were taken into account and sometimes prevailed, under the editorial chain, the editor/producer (or other line manager higher in the chain) had the right to decide the matter. Mr Jordan, Mr Riseley and Mr Bowen all recognised this in their evidence (see [142], [260] to [267], [271], [293] and [310]).

588. Whilst there were practical constraints in the level of editorial control the relevant BBC personnel could seek to exercise during a live broadcast, the editors and directors clearly considered it was their job to seek to do so where necessary. Mr Riseley said that during the broadcast if the editor wanted the story to be run and the presenter refused to speak about it on air it was likely that there would be strong words exchanged at the end of the broadcast (see [261]). Mr Bowen said that, whilst the senior editors were not in the gallery during the broadcast, they would contact him by the intercoms system if they did not like the direction it was going in. He said that the larger a breaking news item the greater the number of senior editors who would be present in the newsroom as ultimately the ultimate decision-making authority in relation to the content of the story and the way that it is broadcast rests with the editor in charge (see [270] and [271]).

589. The Presenters stressed their own part in inputting into these matters and focussed on their own editorial input in a live breaking news scenario and as regards live interviews. They highlighted that, in practice, in a live breaking news situation the scope for editorial consultation was limited, particularly when they were reporting from outside the studio (see [337] to [352]), and that, when events unfolded rapidly, the intended editorial process may break down (as in the example Ms Gosling gave of breaking the news of the Pope's death at [365]). They acknowledged, however, that there was an editorial chain and that, in cases of dispute and time permitting, the

editor (or other person higher in the chain) would have the ultimate say (see their general comments on editorial decisions at [356] to [371]).

590. Mr Eades recognised that the direction of the programme and the choice and order of the topics is for the editor to work out (see [369]). Mr Willcox and Ms Gosling said they could not dictate who was to be interviewed; rather the team agreed on interviewees by a collaborative exercise although the Presenters' suggestions were often taken into account and on occasions their objections to interviewees were accepted where there was a good reason (see [295] to [297]). Mr Eades accepted that ultimately the choice of interviewee (or any point on any story) may not be his decision to make but often his suggestions were well received and he pushed for them to be adopted (see [298]).

591. As highly experienced and skilled presenters, in practice, the Presenters had the freedom to conduct interviews in their own manner (see [288] to [305]). They all said they set their questions and felt free to reject the limited suggestions of questions they received from others (whether before the broadcast or on air) and that they had not later been questioned about how they had done this. The witnesses described the Presenters as having "complete autonomy" or "editorial freedom" as regards interviews. I do not accept, however, that this was the case in a contractual sense. The Presenters were subject to compliance with the Editorial Guidelines as regards the conduct of interviews no less than as regards other matters. Under the editorial chain, the BBC editorial team retained the right to seek to intervene.

592. The evidence was that the editorial team would in fact seek to intervene when necessary as demonstrated by the evidence set out at [588]. Mr Bowen said that he expected such experienced presenters to use their expertise and skill to ask the right questions of interviewees in the right way and did not need to tell them what to do very often. However, he may have to provide prompts for a less experienced presenter and, if he did, he would expect his direction to be followed. He said that ultimately "if push had come to shove" he would have been able to direct Mr Willcox to ask a question albeit that rarely happened in practice (see [294]). The fact that it was not necessary in practice for the editorial team to intervene in the Presenters' interviews due to their skill and experience does not diminish the existence of the contractual obligations.

593. The Presenters acknowledged that generally decisions on when and how to break news stories live on air (at least when in the studio) were made collaboratively although sometimes they would go with a story without consultation with the gallery team (see [306] to [315]). Whilst the Presenters often had to adlib for prolonged periods of time and generally did not follow the autocue or adapted it as they went along, they all recognised that they were required to follow a "legalled" script. That was the case albeit that they said they did not need to have rules in place to tell them to do so; they said that, as journalists, in any event they appreciated the need to follow a script in such circumstances (see [327] to [330]). They also acknowledged that there were rules on breaking allegations in live "two-ways" albeit they were not always followed in practice in a live situation (see [333] to [336]). Mr Bowen said that ultimately a decision whether to break a story was, as matter of working reality, a matter for the editor including in a live "two-way" scenario.

594. Clearly the gallery team and other senior editors involved in the production of the relevant new programmes had no means of physically controlling the Presenters' actions whilst presenting live on air. Should a Presenter act in breach of their obligations or ignore editorial direction, short of taking the drastic step of taking the broadcast off air, there was nothing the editorial team could do. Moreover in a fast moving, time pressured working environment with complex team interaction, such as that involved in producing a live news programme, realistically it is to be expected that guidance and rules such as that in the Guidelines may not always be adhered to strictly at the time decisions have to be made. As a practical matter and as the Presenters all stressed, it was simply not always possible for the Presenter to discuss matters with the editor/producer (as the person above them in the editorial chain) or for that person to refer decision making up the chain. Due to the nature of dealing with live breaking news and interviews, therefore, the Presenters were of necessity involved in making what may be termed editorial decisions, exercising their own skill and judgment, on whether and when to break a story or allegation or whether it was appropriate to pursue a line of questioning to pursue.

595. However, none of this detracts from the fact that the Presenters were contractually obliged to act in accordance with the Editorial Guidelines and other Guidelines and the relevant provisions in the Terms including whilst presenting live on air and in taking their own decisions where necessary. The practical difficulties as regards the BBC's lack of ability to interfere with the Presenters' actions during a live broadcast do not render the relevant obligations and their right to overrule the Presenters under the editorial chain any less contractually binding. That, in some situations, the BBC (acting through the editorial chain) could only impose its views or any sanctions for a failure to act in accordance with the Guidelines after the live broadcast, does not detract from the fact that the Presenter had the obligations. Had the Presenter failed to comply by, for example, repeatedly failing to adhere to the rules on reporting live "two ways" or to comply with requests from the BBC not to use certain remarks or to report in accordance with the required impartiality, the BBC was plainly entitled to terminate the relevant contract on the basis the Presenter was in material breach of the contractual terms or simply not to use the Presenter's services (although there may still be payment obligations). The Presenters recognised that the BBC would take up any such matters with them after the event (see [227], [361], [366] and [371]). Mr Willcox gave an example where the BBC had investigated a complaint about him and he said the procedure would be the same whether he was working as an employee or on a freelance basis.

596. Nor do I consider that it is relevant that the Presenters did not consider that they were mindful of the need to comply with the various Guidelines or other Terms because of any contractual requirement upon. In their view, the relevant principles were ingrained in them as journalists; it was an inherent part of their journalistic integrity to act in accordance with the principles enshrined in the various Guidelines. They said they would have acted in the same way professionally whether working for the BBC or any other news broadcaster and noted that the same or similar standards apply across the industry (see [223] to [229], [239], [240] and [367]). However, neither the Presenters' own perceptions as to their reasons for abiding by the Guidelines nor the fact that there are industry wide standards negate the existence of

the relevant contractual obligations. The fact is that, in this case, the obligation to comply with the relevant standards was made a contractual requirement.

597. Whilst the above comments relate to studio work, my view is that the position is essentially the same as regards the field work carried out by the Presenters. I note that, in that context, due to the nature of operating from outside the studio there was less scope for contact with the studio team and use of the autocue and in some cases greater scope for the Presenters to shape the nature of the report, for example, by sourcing for themselves potential interviewees. As set out in detail at [337] to [350] the Presenters all did some field work. Mr Willcox, in particular, said that he did a great deal of this from 2010 onwards (although we have no split of TWL's income between studio and field work). Both he and Mr Bowen stressed the increased nature of Mr Willcox' personal input into the production of and content of the reports he made from the field compared with studio work. Mr Willcox said that he often had to source his own angles for the story he was covering and interviewees with very little if any input from the team back in the UK and he gave a number of examples of this.

598. Although in this context the Presenters on occasions had greater responsibility for the content of the broadcast, in particular, when reporting live and/or from overseas, the Presenters were still operating as part of a team albeit within the practical constraints of more limited contact with the studio team. Within this expanded parameter of their reporting, their obligations towards the BBC remained essentially the same as regards compliance with the Guidelines and other terms. It was the BBC who decided what story was to be covered (although Mr Willcox sometimes approached the BBC with suggestions) and had the final say over the content and, where appropriate, whether it was used (see [363] and [364]).

Control over the Presenter's ability to carry out other activities

599. As set out in detail at [111] to [116] and [126] to [132] above, under the Terms and the Guidelines there were extensive restrictions on the Presenters' ability to carry out activities outside the BBC. Notably the BBC was entitled in effect to prevent the Presenters from working for any other broadcaster. Whilst the Presenters could undertake this and many of the other specified activities with the consent of the BBC there was no qualification on the BBC's right to refuse consent; there was no requirement that consent was not to be unreasonably withheld. The circumstances do not suggest that these contractual restrictions did not genuinely reflect what might realistically be expected to occur and the business reality of the relationship.

600. Mr Willcox and Ms Gosling considered that it was very much the reality that they would not be permitted to present the news for other broadcasters as seems to be the BBC's view as well (see [232] and [238]). Mr Eades is recorded as saying at a meeting with HMRC that the fact he did not work for another broadcaster was his choice and not imposed by the BBC (see [235]). However, I do not consider this undermines the other evidence given that the context of his comment is not clear. None of the Presenters did any substantive broadcasting work, including news reporting, for any other broadcaster during the relevant period. Mr Willcox referred to some engagements for overseas channels but it is not clear when these took place, they appear to be limited to one off appearances where he was asked for his own comments on particular events (as opposed to him reporting on the event) and he was not always paid (see [219]). He also referred to producing a documentary for another

channel but that was not during the relevant period and it was evidently of a different nature to his work for the BBC (see [231]).

601. As regards other restrictions, the Presenters all said that, as news journalists, they would not in any event have thought of or wanted to be involved in many of the
5 restricted activities given the restrictions were aimed at preventing any perceived compromise of their and the BBC's impartiality. These were largely areas which they were well aware it was inappropriate for them to be involved in due to the potential for compromising their journalistic impartiality. They said that it was not a question of complying with these restrictions due to contractual specification; it was inherent in
10 being journalists that they would not do so (see [223] to [241]). However, for the same reasons as set out at [596] this does not affect the existence of the contractual restrictions.

602. The evidence was that the Presenters had no problem undertaking the external projects they wished to undertake. To some extent they appear to have adhered to the
15 contractual requirements for consent to be obtained from the BBC where necessary albeit this was done relatively informally (see [211], [230], [231], [236] and [238]). In some cases where consent was not obtained it appears that there may have been no need as there was no impartiality concern. In any event, for the same reasons as set out in relation to the other provisions relevant to the control test, I do not consider that
20 the binding legal effect of these restrictions is affected by any failure on the part of the BBC to enforce these provisions strictly. It is entirely realistic to suppose that the BBC would have sought recourse to these provisions where it considered it necessary given the evident importance of the impartiality requirements as regards its news output. The PSCs noted that the BBC often offered an assurance in the covering
25 letters that consent would be forthcoming for external activities subject to conflicts issues and/or to the proposed activity not conflicting with scheduled BBC commitments. I also cannot see that this detracts in any way from the existence of the contractual restrictions, if that was the suggestion. The fact that the BBC was prepared to give an assurance as to how it would exercise its contractual discretionary
30 right to consent to outside activities does not affect the binding nature of that right.

Significance of "control"

603. It is established in the case law, as set out in detail above, that the absence of control over the precise manner in which an individual carries out his work is not usually determinative that the person is self-employed where the very nature of the
35 work and specialist skills and expertise required are not of a type which the client can control as is the case in many professions. In my view, Mr Tolley was right to say that any lack of control by the BBC over the manner in which the Presenters exercised their skills in presenting a live news programme is analogous to the situation where, for example, a football club lacks control over its players during a game or a hospital
40 lacks control over a surgeon carrying out an operation. The level of autonomy the Presenters have is, as Mr Eades accepted, "because of the nature of presenting breaking news".

604. On that basis, that the BBC lacked the ability, in an immediate sense, to control the Presenter's actions during a live broadcast, does not of itself mean that the
45 assumed relationships cannot be categorised as employment contracts. However, for a contract to be in the employment field, 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" (per Mackenna J in *Ready Mixed Concrete*). As Buckley J put it in the *Johnson Underwood Ltd* case that means that even as regards skilled workers at least "some sufficient framework of control must surely exist". As he said, the question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any 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". Similarly, in *Trout v Whitebeck* the court held that whilst many workers, especially those who are professional and skilled have substantial autonomy in the work they do, they may still be employees where the client retains "the right to step in and give instructions". It was noted that the key question is not whether in practice the worker has day-to-day control of his own work and that all aspects of control are relevant.

605. The decision in *Matthews* demonstrates that in determining whether such a sufficient framework of control exists, the practical realities of the context of the working relationship are relevant. As Buckley J noted in *Montgomery*, there is sufficient flexibility in the approach set out in the case law for the view of the courts and tribunals on what suffices as control (and mutuality) to develop over time as society and methods of working change provided that the court keeps in mind "a clear framework or principle" as to which he thought the often quoted passage from *Ready Mixed Concrete* was still the best guide.

606. With these principles in mind, in my view, having regard to the particular context in which the Presenters were working and the nature of their skilled specialist work, the BBC had a sufficient framework of control over the Presenters to place their assumed relationships with the BBC in the employment field. Having regard to all aspects of control, I form that view on the basis of the combination of the BBC's contractual ability, as set out in further detail above, (a) to direct where and when the work was carried out, (b) to an extent to control how the work was carried out, (c) to prevent the Presenters working as presenters for other broadcasters, and (d) to prevent the Presenters carrying out a number of activities with the aim of protecting their impartiality and thereby that of the BBC.

607. I do not accept that, as Mr Peacock argued, the control the BBC had is not relevant to the employment test on the basis that it was confined to control over the output rather than control over the Presenters themselves in the performance of their presenting services. The BBC's ultimate aim was no doubt to ensure the quality and standard of the output, as the end product. However, it sought to achieve that (and indeed I cannot see in what other way it could seek to do so) in effect by imposing the required standards of behaviour and appropriate procedures on those involved in producing that product, including the Presenters, as regards their particular role in the process. The fact that the BBC could not in all circumstances effectively exercise its editorial rights of control due to the inherent practical difficulties in doing so in a live reporting scenario, does not prevent those rights from being real binding rights giving it ultimate authority over the Presenters in the performance of their services.

608. Unlike in *Matthews*, the various restrictions and requirements imposed on the Presenters, whether under the editorial chain or as regards their ability to undertake activities outside the BBC, were directly related to the performance of their services for the BBC. By their nature it is clear that they were expressly aimed at ensuring the

Presenters were perceived to be impartial thereby ensuring that they were appropriate persons to present the news on the relevant BBC news channels in accordance with the BBC's requirements in that respect. In *Matthews*, on the other hand, Mann J noted that the relevant controls largely related to matters unrelated to the entertainers work on the cruise ship as entertainers.

609. I do not accept that the significance of the framework of control in determining employment status in this case is diminished because the Guidelines in some respects also applied to parties who are accepted to be independent contractors and employees. Determining whether a person is an employee or self-employed involves assessing all relevant factors as regards that person's relationship with the party which engages him. Whilst evidence on the different terms which may apply to employees as opposed to independent contractors may be relevant in building that picture, it is not a determinative criterion to identify points of similarity or difference between such terms.

610. I also do not accept that the relevance of the requirement to comply with the Editorial Guidelines is diminished on the basis that, in many instances, they do not contain prescriptive rules but set out principles and values an individual must adhere to in playing a part in producing the BBC's content with guidance as to how to achieve that. The Presenters were contractually bound to act in accordance with the specified values and principles albeit that determining whether particular actions fall within or outside the relevant parameters may involve difficult value judgments. Similarly, I cannot see that the requirement to make mandatory referrals is not relevant because this required a consultation process to take place. The point is that the Presenters were contractually bound to engage in that consultation process in the specified circumstances.

In business on their own account/other factors

611. Mr Tolley pointed to the following main additional factors as indicating that under the assumed relationship the Presenters were employed:

(1) The Presenters were each economically dependent on the BBC for their income as presenters/reporters. They were each well-known as BBC presenters and were strongly associated with the BBC. Any work they obtained outside the BBC was not that of carrying on the profession or trade of being a TV presenter/reporter. The PSCs did not market the services of the Presenters to the outside world to act as such and none of them had an agent during the relevant period.

(2) The Presenters lacked any of the normal indicia of being in business on their own account as presenters/reporters. Mr Tolley noted that in *Global Plant Ltd v Secretary of State for Social Security [1972] 1 QB 139* it was held that financial risk involves the ability to earn a profit or make a loss from how the work is performed (per Lord Widgery at 152). In this case the Presenters could not profit from the contracts with the BBC other than simply by taking on more shifts.

(3) There was no realistic possibility of the Presenters making a loss from the contracts. They incurred no expenses (other than those which were reimbursed). The risk that the contracts would not be renewed is not a relevant risk of loss. There was no real risk of late payment or bad debts. They did not provide their

own equipment in the performance of their services other than a laptop and mobile phone and an earpiece.

(4) The Presenters were known to the public as BBC presenters during the relevant period and the public would have seen them as no different to other presenters who were employees.

(5) The tribunal should have regard to both the length of the individual contracts and the overall duration of continuous engagement under the PSC arrangements in the context of the overall length of the Presenters work for the BBC.

612. Mr Peacock stressed that, on the basis of *Hall v Lorimer*, the tribunal must assess the weight and relevance of all factors. In looking at all factors additional to those set out above, he emphasised that the Presenters' relationship with the BBC was entirely transactional. In outline, they came in to work on a programme, were paid a fee and left the building. They had no guarantee of contract renewal and, in many instances, there were large "gaps" in the periods between one contract ending and the signature of the next. They largely had no fixed slots, they had significant flexibility in their working pattern as they could refuse slots and swap slots with other Presenters and refuse outside broadcasts. They essentially managed their own work schedules and activities. They were not treated as part of the BBC family or as staff and were not integrated into the BBC. They were permitted entry into the building for as long as their ID card worked, in order only to do the programmes the BBC engaged them for. They were not entitled to receive any benefits of a kind staff received, they were subject to termination rights inconsistent with employment rights and on occasions had to take pay cuts or reduced contractual periods. They were entitled to reimbursement of only very limited expenses and provided their own laptops, mobile phones and earpieces.

613. Mr Peacock stressed that the Presenters all did other work for the BBC and outside the BBC. This was evidently particularly substantial in Mr Eades' case. He submitted that vocational professions do not bear the same hallmarks of self-employment as tradesmen. The opportunity to profit comes not from the sound management of the person's task or employing help but from being good at his chosen profession. A professional can earn more by working better, being noticeably good at the required skills and always available (as in Mr Willcox's case); that may enhance the professional's reputation and allow the professional to charge more in the future. He considered that was relevant particularly in Mr Willcox case given the substantial amount of days he worked in excess of the minimum days. He noted that finding the Presenters to be self-employed would align them with other live performance talent who have been held to be self-employed (ship entertainers, stage actors and a radio presenter).

Overall conclusion

614. In conclusion, bearing in mind this is not a mechanistic exercise but one of looking at all factors in the context of the provision of the Presenters' highly skilled journalistic services in a live BBC news broadcasting environment, I consider that the overall picture is that the assumed relationships were ones of employment for the reasons set out below and on the basis of the conclusions on mutuality, control and personal service set out above.

615. Under the assumed arrangements in place during the relevant period, the Presenters were engaged by the BBC to provide their presenting services in effect continuously over five years, as regards Ms Gosling and Mr Eades, and seven years, as regards Mr Willcox, under a series of assumed contracts made on very similar terms. Under each assumed contract the BBC was obliged to call on the Presenters' services on at least the minimum days, or if it chose not to do so, was nevertheless required to pay the contract fee and, if called upon to do so, the Presenters were obliged to work on sufficient days for the minimum days requirement to be met. For the reasons set out above the mutuality test is met.

616. I note that in *Montgomery v Johnson Underwood Ltd* (as cited in *Cotswold*) Buckley J recognised that there is flexibility in how the mutuality and control test can be interpreted in the light of changing conditions in society and the nature and manner of carrying out employment. However, he said that such "elastic" as there is cannot be stretched so far that it avoids the need for work to be provided personally; "service", meaning the obligation to work, personally, for another, remains "at the heart" of the employer/employee relationship. As set out at [565] to [569], it is clear that the Presenters were contractually obliged to provide their services personally. The very limited rights to subcontract or substitute in the Terms and the practice of swapping shifts with other Presenters does not detract from the existence of this obligation but on the contrary serves to emphasise its importance.

617. In all versions of the contractual terms, the BBC had the right to require the Presenters to carry out activities beyond presenting the News (see [578]) and often had the right to require the Presenters to complete editorial training and, under the earlier Terms, to carry out progress meetings. In practice, the Presenters were required to undertake some training and Mr Willcox and Ms Gosling were subject to progress meetings or appraisals albeit that they were carried out informally (see [372] to [374]).

618. In each assumed contractual period in relation to each Presenter, there was a regular and consistent pattern of substantial amounts of work being offered and accepted such that each Presenter usually worked at least the minimum days or, in Mr Willcox' case, on substantially more than the minimum days. Ms Gosling did not meet the minimum days in one of the relevant periods but that was for the specific reason that she did not work for a period of time whilst having a child. This pattern of work continued in substantially the same way after the end of the relevant period under similar contracts entered into with the PSCs and under the direct contracting arrangements entered into in 2014.

619. I do not consider that the significance of the above factors is affected by the fact that the Presenters had no guarantee of each contract being renewed and that they were highly conscious of this uncertainty or that sometimes there were protracted delays in concluding a new contract (see [49], [174] and [175]):

(1) The fact that there were gaps between the expiry of one contract and the signing of the next does not detract from the regularity and frequency of the pattern of engagement. The Presenters carried on working in these periods in the same way as usual and the BBC paid them for doing so (subject to a delay in payment in Ms Gosling's case in November 2008 and in Mr Eades case in 2013 (see also the comments at [631])).

(2) On the basis that the contractual arrangements continued in place during these "gap" periods, the necessary mutual obligations as regards the provision of work and payment remained in place throughout. This is not a situation akin to that in *Windle* and *Stringfellow,* therefore, where there were periods during which there were no mutual obligations in place between assignments, which may evidence that periods when the individuals were actually working were casual, sporadic or occasional only and, therefore, in the nature of self-employment.

(3) In *Lee Ting Sang* (as referred to by Nolan LJ in *Hall v Lorimer*) the court noted that the risk of finding further engagements is one faced by all casual employees. I note that individuals treated as employees employed under longer terms contracts could be in a similar position if the contract is subject to termination on short notice. In this case, Ms Gosling was very disappointed to find that her long-term OATS contract was subject to such a right.

(4) I also note that it seems that this lack of "job security" is a feature of this particular industry applicable to all presenters although those engaged under short term contracts may well feel this risk more acutely. Mr Willcox gave a vivid account of how he felt vulnerable to the whim of senior BBC personnel as regards his continued engagement (see [174] and [175]). There is evidence that the BBC wanted to have the ability to end engagements with on-air talent at speed and with minimum costs and hence viewed employment as hindering that aim due to employment law protections for employees (see [50]). The comments at [641] and [642] are relevant in this context.

620. I do not consider that it weighs against employment that (to varying degrees) the Presenters did not have regular or fixed slots on News or World or that the arrangements for agreeing slots or specific outside broadcasts were operated flexibly in practice. I cannot see that it is a necessary feature of an employment relationship that a party works set or fixed hours only. For the reasons set out already, my view is that the flexible working practice adopted does not detract from the existence of the BBC's contractual call rights and rights to direct where the services were to be performed and does not detract from the fact that the obligation on the Presenters was one of personal service. Moreover, in a modern working environment it is not uncommon for employees and employers to have flexible working patterns or for them to work together on a collaborative and flexible basis.

621. As set out above, the Presenters were subject to the BBC's ultimate right of control under a framework of control as regards the thing to be done, when and where they performed their services and to some extent as regards the manner in which they did so. As regards constraints on their external activities, I consider it particularly significant that the BBC had the right to prevent the Presenters from presenting for any other broadcaster, including as regards news reporting. The reality was that the BBC would not give permission for the Presenters to work on news programmes for other broadcasters; the Presenters were in effect tied to the BBC as regards the exploitation of their main journalistic skill base of presenting the news for broadcasters. This was a substantial restriction on the Presenters' ability to earn money elsewhere without diversifying into different albeit perhaps related areas.

622. I consider that the contractual rights the BBC had to prevent the Presenters undertaking other activities also add to the employment picture albeit that the Presenters considered they were able to undertake such outside activities as they actually wished to undertake. These were matters that the Presenters would otherwise have been free to pursue. From the BBC's perspective, these rights gave it the ability to ensure that the Presenters' preserved fully their impartial status which, as is clear from the Guidelines, was regarded as essential to enable them to perform their function as news presenters for the BBC.

623. As acknowledged in *Hall v Lorimer*, it is difficult to apply the test as to whether a person is in business on his/her own account in the context of a person providing professional skilled services. For that reason Nolan LJ said that, "there is much to be said" in such cases, for bearing in mind "the traditional contrast between a servant and an independent contractor" and that the "extent to which the individual is dependent upon or independent of a particular pay master for the financial exploitation of his talents may well be significant". In that context, it is highly relevant that during the relevant periods Ms Gosling and Mr Willcox were economically dependent on the BBC for their livelihoods; through their respective PSCs, they received almost all of their income from the BBC (see [210] to [219] and [220] to [222]).

624. As set out at [202] to [209], Mr Eades had a substantial degree of economic dependence in that, through AML, overall during the relevant periods he earned more than 50% of his income from the BBC. However, his non-BBC income was substantial and increased incrementally to comprise just under 80% of AML's overall income at the end of the period. At all times, therefore, and increasingly over the period, Mr Eades' work for the BBC formed only a part, albeit a significant part, of his overall activities from which he earned his living. In my view, however, the degree of economic dependence which Mr Eades had on the BBC was sufficiently substantial to remain a significant factor throughout the period.

625. Moreover, in my view, none of the Presenters can be said to have been in business on their own account as regards the services which they provided to the BBC under the relevant assumed contracts; namely, of acting as news journalist, television reporter or broadcaster. In applying that test in the context of assessing the nature of the assumed relationships it seems that the tribunal must assume that the Presenters carried out any other activities in their own names and not through the PSCs; otherwise the test is unworkable in this context (and I did not understand the parties to suggest that any other approach should be adopted).

626. I accept that the hallmarks of self-employment as regards a professional person's activities may not accord entirely with those applicable to tradesmen. As Mr Peacock said, a professional's ability to profit may be restricted to the ability to earn more by working better or faster or enhancing his reputation. In *Hall v Lorimer*, Nolan LJ appeared to accept that factors indicating that Mr Lorimer was a self-employed vision mixer were that he had an office, he exploited his expertise in the market place and bore his own financial risk (greater than that of an employee) in accepting the risk of bad debts and outstanding invoices and had the opportunity of profiting from being good at being a vision mixer. He also noted that Mr Lorimer incurred substantial expenditure in the course of obtaining and organising his engagements which was deductible on a self-employed basis and that the most

"outstanding feature" was that he "customarily worked for 20 or more production companies and that the vast majority of his assignments…lasted only for a single day".

627. However, as noted, in this case the Presenters were severely constrained in their ability to exploit their expertise in the marketplace and profit from being good at their main occupation of live news journalism and presenting. As noted, they could not pursue their talents in this sector outside the BBC without the BBC's consent and it appears that consent would not have been forthcoming. They did not in fact undertake such activities outside the BBC or any substantial form of presenting for any other broadcaster. I have considered further the impact of the activities they did undertake at [632] to [636] below.

628. Mr Willcox obtained a great deal of additional slots at News and World, above the minimum days. I accept that he obtained the opportunity to work these additional slots due to doing a good job in his presenting work and his "USP" of making himself constantly available at times inconvenient for others. In that sense he profited from being good at his job but only as regards his sole "client" of substance, the BBC. Moreover, this was not a case where he could increase his profit by working better or faster; he simply worked, in effect, extended hours on obtaining additional slots at the same rate of pay per slot as applied to the minimum days. In all the circumstances but, in particular, given the substantial scale of his minimum days commitment and his overall economic dependence on the BBC, I consider this is akin to the situation where an employee works and is paid for "overtime" beyond normal hours but, in this case, beyond the minimum days.

629. Mr Eades said that he could increase his profit by using material and background research from one programme, such as World on another, such as The World Tonight on BBC radio or by offering a radio version of a feature he had done on World or vice versa. He also said that he could reduce his preparation time in that way which in turn gave him more time to focus on his non-BBC work. I note, however, that no evidence was presented on how frequent an occurrence this was or on any level of profit thereby achieved. Given the evidence that a great deal of Mr Eades' work for World comprised live reporting and interviewing it seems that these opportunities may have been limited. Overall, there is insufficient evidence to conclude that Mr Eades could profit in this way to any material extent.

630. The Presenters did not have any real economic risk in relation to their work for News or World. They did not have a risk of bad debts akin to that risk faced by an individual working, as in Mr Lorimer's case for multiple clients on multiple short-term assignments. The BBC paid them consistently throughout as invoiced or agreed on a monthly basis. They incurred no significant expenditure in relation to their work for the BBC and, in Mr Willcox and Mr Eades case, in accordance with the provisions in the Terms on expenses (as operated under the BBC's expenses policy), were reimbursed for travel expenses when on field work. I note that Ms Gosling did not claim any such expenses as she did not realise she was able to.

631. My conclusion in this respect is not affected by the fact that the BBC delayed payments for Ms Gosling's work for November 2008 and for Mr Eades' work for two to three months in 2013. Payment was made late to PL when Ms Gosling disputed the level of her pay which lead to a substantial delay in the signing of a new contract

(see [67] to [73]). Mr Eades attributed the delay in his case to difficulties in concluding a contract when the BBC wanted to contract with the Presenters direct under what it considered were employment contracts. The late payments arose, therefore, from particular contractual disputes over pay or terms rather than from any on-going uncertainty or difficulty in obtaining payment.

632. None of the Presenters can be viewed as carrying out their BBC work as part of a broader self-employed business, as was the case as regards the vision mixer in *Hall v Lorimer* or the professional actress and singer in *Davies v Braithwaite*. Whilst Mr Eades had substantial other activities, my view is that his work for World cannot be regarded as part of a broader self-employed business activity both having regard to (a) his other work for non-BBC clients to whom he provided (through AML) a range of services, such as video production, arranging conferences and presentation training, which comprised the vast majority of his other work, and (b) his work for various BBC radio programmes for which AML received around 6% of its overall income during the relevant period.

633. The services which Mr Eades provided to other clients, outside the BBC, are distinctly different in nature from his news presenting work (whether on television or radio) albeit his journalistic and presenting skill base and contacts obtained from that work may well have assisted him with obtaining and carrying out those activities. Whilst Mr Eades had to manage his overall activities to fit his BBC work in with his other engagements, there was otherwise no connection between the two distinct sets of BBC and non-BBC activities. I cannot see, therefore, that, assuming Mr Eades provided the relevant services to non-BBC clients as an independent contractor, he can be regarded as carrying on a single overall self-employed business of which his work for the BBC was a part. Leaving aside the radio work for the moment, in all the circumstances, it is no less the case that Mr Eades' distinct assumed engagement with World has the characteristics of employment because it is pursued alongside other, different types of assumed direct engagement, which may be categorised differently for tax purposes.

634. I cannot see that Mr Eades' work for BBC radio of itself impacts on the quality and nature of his assumed relationship with the BBC as regards World even accepting that (a) Mr Eades could be regarded as carrying out the radio work on a self-employed basis if engaged direct (which was not before the tribunal for decision) and (b) notwithstanding that the BBC is a single corporation, each of his engagements with different parts of the BBC can be regarded as though they were with different "clients". As recognised in *Davies v Braithwaite* and *Fall v Hitchen* (as approved in *Hall v Lorimer*) a person may concurrently hold an employment and be engaged in a self-employment business as regards the same type of activity. In my view, in light of the substantial and on-going nature of the relationship with World (albeit that the work reduced over time) and all other factors set out in these conclusions, the quality of the assumed relationship as one of employment is not impacted by the limited radio work (generating as it did only 6% of the relevant overall income).

635. I do not suggest that, in all circumstances, the nature and extent of an individual's other activities, even where distinctly different from the particular services in question, have no impact on the analysis of the particular engagement under which those services are provided. The pursuit of other activities may well have some knock-on effect on the quality of a particular engagement, for example,

where the scale of the other activities leads to the engagement becoming infrequent and casual. However, that was not the case here. Whilst the scale of Mr Eades' news presenting work for the BBC reduced over the period in question, he continued to perform substantial and regular work for World throughout the relevant period, in light of all the circumstances, in effect, as an employee on a part time basis.

636. The same conclusion as set out in relation to Mr Eades above applies to Ms Gosling and Mr Willcox, if anything, with greater clarity given the much more limited nature of their other activities (and essentially the same points apply as set out at [633] to [635]). I note the following:

(1) They both generated very little income from their non-BBC activities. Such activities as they did carry out were not related to and were different in nature from their BBC news presenting work.

(2) As regards other BBC work:

(a) Whilst Ms Gosling and Mr Willcox both considered their work for other parts of the BBC outside World and News should be viewed as different engagements, they provided no real evidence on scale of such activities or the amount of any such income for work on programmes other than News or World. Ms Gosling described her work on BBC1 bulletins as a small part of her work in the relevant period and, whilst referring to other programmes, gave no indication of the scale of such activities. Mr Willcox referred only to work on BBC1 bulletins which he thought accounted for less than 2% of his overall BBC work.

(b) I have concluded that Mr Willcox' first two assumed contracts with World were not ones of employment due to a lack of mutuality but that the third one was for the reasons set out below (see [55] and [646]).

(3) My view is that, overall in both cases, in light of the on-going nature of the relevant assumed relationships, the substantial and consistent amount of work performed under those relationships and all other factors set out in these conclusions, the nature of those assumed relationships as ones of employment is not impacted by this limited other work. As regards Mr Willcox, that is the case even on the basis that he undertook work for World under the first two assumed contracts on a self-employed basis. Viewed in the overall context of the entirety of Mr Willcox' assumed direct work for News, that activity is not of itself sufficiently significant or substantial to affect the nature of the relevant assumed relationship in the relevant periods.

637. I do not regard the provision in the Terms regarding equipment and insurance of equipment (see [102] to [104]) as inconsistent with an employment relationship. The Presenters did not in fact provide material equipment such that these provisions are somewhat redundant in their application to them. I cannot see that the fact that they used only their own limited equipment (laptops, earpieces and mobile phones) and funded their own clothing for wear on-air is inconsistent with an employment relationship.

638. I regard the BBC's rights to terminate and suspend the assumed contracts under the Terms (see [119] and [120]) as consistent with an employment relationship. I note that in *Market Research* Cooke J said (at 187A) that an appointment to do a specific task at a fixed fee is not inconsistent with a contract being a contract of service. He

also considered in effect that there is no material distinction between rights to terminate for breach in a contract of service and that for services except that in the first case "the master's right is spoken of as a right of dismissal - a peculiarity of words which makes no difference to the substance" (see 187D).

639. I note that the assumed contracts do not provide for the Presenters to receive any benefits, such as sick, holiday and maternity pay, a pension or company car or mobile phone and only provide limited insurance cover (as set out at [377]). I do not agree with HMRC's view that this is of no relevance on the basis that, under the actual arrangements in place, such matters would be dealt with as between the PSC and the Presenters (under an implied employment contract) and not between the BBC and the PSCs. As set out above, we do not accept that there was an implied employment contract between the PSCs and the Presenters. In any event, whether that is the case or not, I can see no reason why the BBC could not have agreed with the PSCs to provide such benefits to the Presenters; the fact that the Presenters were not a party to the actual contract is no bar.

640. However, I do not consider the absence of provision for benefits in the assumed contracts a material consideration pointing against employment. As HMRC pointed out, under a direct contractual relationship with the BBC, the Presenters would have the statutory rights applicable to workers in relation to some of these matters. I agree with their comment that this must be equivocal given that a person can be a worker whether employed or self-employed. I cannot see that, under the principles set out in caselaw, the provision of any additional enhanced benefits, in excess of the statutory minimum, is an integral part of an employment relationship. In my view, the fact that a putative employer has chosen not to provide such benefits does not of itself indicate that a relationship is not one of employment where the other substantive legal rights and obligations of the parties evidence the contrary. The parties appeared to act on the assumption that it is common for employers to provide some or all of such benefits but there was no suggestion that there can be no employment where they are not provided. I note that the OATS contracts did not provide for the provision of any benefits beyond those required by statute and the OATS B contract provided for only minimal additional benefits.

641. On a related note, it was stressed on behalf of PL that during the relevant period, as well as feeling vulnerable due to the lack of guaranteed contract renewal, Ms Gosling felt badly treated and undervalued by the BBC, in particular, as a result of the occasions on which they sought to cut her pay when contracts were renewed and did not pay her whilst she took leave to have her children (as they were entitled to do under the relevant contract) (see [68] to [73]). She felt she was treated vastly differently to others engaged by the BBC as staff. Mr Eades also went through a period of feeling undervalued when on certain contract renewals the BBC offered reduced minimum days and a shorter contractual period. Whilst I understand that Ms Gosling, in particular, found her circumstances distressing and unsatisfactory, I do not consider that these factors have any material bearing on the assessment of the nature of the assumed relationship.

642. I can see that those engaging the services of another may be less likely to act in this manner where the service provider is engaged under a longer-term contract which is accepted to be one of employment. A party which accepts it is an employer may feel constrained in its actions due to enhanced protections for employees under

applicable employment law and the cost and other consequences of acting in breach of such obligations. However, in my view the case law does not indicate that the fact that a putative employer does not act as it might if it recognised it was an employer of itself indicates that an individual is not an employee if the substantive legal rights and obligations it is subject to nevertheless demonstrate the contrary (as in my view they do here). It would be odd if the failure to act in certain respects as a "model" employer were of itself to lead to the inevitable conclusion that an individual is self-employed and thereby denied the benefit of protections applicable to employees. We are not concerned with employment rights here but the same principles apply for determining whether a contract is one of employment for tax purposes as for those purposes.

643. In their closing written submissions the PSCs presented a detailed comparison of the terms of the assumed contracts with those of the OATS and OATS B contracts which the BBC treat as contracts of employment. Whilst I am grateful for the detailed submissions, I consider that it is not appropriate for me to form conclusions on the nature of the assumed relationships by reference to a clause by clause comparison of the assumed terms with the terms in those contracts. The essential question is the nature of the assumed contracts according to their own terms and in all the circumstances of the case.

644. I note, however, that in many respects the new contracts are in substance similar to the assumed contracts. The Presenters considered there were some material differences in their position under the new on-going contracts; they lacked the previous flexibility in that they felt they were constrained in being able to turn down slots but they no longer had to re-negotiate contracts periodically and to some extent they felt more secure in their positions and more integrated into the BBC. However, for the reasons set out above, my view is that flexibility of the type the Presenters previously had in practice and the lack of contract renewal are not material factors. In my view, the Presenters' subjective feelings as to a lack of integration do not detract from the employment analysis viewed in the context of all the circumstances set out above and the overall length of the Presenters' on-going relationship with the BBC.

645. Finally, I note that Mr Peacock said that, although the PSCs were not making their case on the basis that the Presenters were in fact engaged as employees by the BBC (as opposed to being deemed to be such under IR35), it was open to the tribunal to find that was the case on the facts. I see no scope for such a finding on the evidence presented and note that the burden of proof is on the PSCs in this respect. In particular, I cannot see that such a finding is justified on the basis that, from their perspective, the Presenters saw no material difference in their relationship with the BBC due to the interposition of the PSCs (see [157] to [166]). They were evidently commenting from a non-legal standpoint.

Conclusion on Mr Willcox' assumed contracts with World

646. As regards Mr Willcox' assumed contracts with World:

(1) We have concluded that Mr Willcox' first two assumed contracts with World (as based on the actual contracts described at [55(1) and (2)]) were not employment contracts due to a lack of the minimum mutuality of obligation required. Unlike under his assumed contracts with News, under these contracts, the BBC had no obligation to call on Mr Willcox' services to present on World

or to pay him a fee should they not do so except. It is clear that Mr Willcox was to be paid only for whatever slots on World he actually worked on.

(2) We do not accept HMRC's argument that these two assumed contracts should nevertheless be regarded as ones of employment on the basis that, in effect, the mutuality test is met viewing these contracts within the umbrella of Mr Willcox' overall assumed relationship with the BBC. We cannot see a justification for taking this approach given that, at the point the relevant contracts were put in place, it is clear that the contracts with News and World were negotiated separately.

(3) However, the position is different as regards the final assumed contract with World which took effect from 1 November 2010 for a two year period and which also dealt with News (on the basis set out at [55(3)] and [54(4)]). Whilst there was no minimum days requirement as regards World for the second year of the contractual period, there was a minimum days requirement of 46 days in respect of the first year. In my view, in view of this and in the context of all the applicable Terms, the fact that there were no minimum days provided for in the second part of the contract does not of itself preclude a finding that, for the same reasons as set out in relation to News, this was also a contract of employment as regards the provision of services to World. Viewed in the round, as part of the broader engagement with News as well, there was sufficient mutuality.

Mr Perrin's conclusions

647. As noted, Mr Perrin does not agree with the conclusion that IR35 applies as set out above. His view is that, adopting the approach set out in *Hall v Lorimer* of painting a picture from the overall accumulation of detail, the balance is tipped to the conclusion that the Presenters were self-employed under all of the assumed contracts. Whilst recognising that this is not a mechanical exercise to be approached on a checklist basis, Mr Perrin considers that of particular relevance to his conclusion are the facts that:

(1) The Presenters had no guarantee of obtaining a renewed contract on the expiry of each contract and, in many cases, there was a gap between the expiry of one contract and the conclusion of the next. In PL/Ms Gosling's case it is notable that in 2008/09 PL was not paid for a period when Ms Gosling disputed her pay and that she worked "out of contract" for over five months and the BBC cut her pay on contract renewals.

(2) The Presenters had flexibility in their patterns of work in that they were able to refuse to work particular slots and could swap slots with other presenters or arrange for other presenters to work in effect in their place.

(3) The Presenters had considerable autonomy, as highly skilled journalists, in conducting live news broadcasts and, when acting in the field, on occasions they could be considered as having complete autonomy particularly in the case of Mr Willcox when reporting from abroad. The Editorial Guidelines are merely a framework in which functions have to be performed; they are rarely prescriptive and apply to all alike (whether employed or self-employed). Essentially the BBC provided the physical and technical framework to enable

the presenters to fulfil their work. That is akin to a theatrical producer providing a stage, a theatre and an audience to enable an actor/actress to perform.

(4) The Presenters had no holiday, sick or maternity pay, pension, mobile phone or company car provided by the BBC (which Ms Gosling said "staff "had) and only limited insurance cover and no offer of premium rates for any overtime/additional work performed. The Presenters' pass to access the BBC building was only valid for the duration of the contract such that the presenters had to be signed in and out when they were "out of contract".

(5) The Presenters could seek to use their journalistic talents elsewhere. Whilst there were restrictions on their ability to do so under the Terms and the Guidelines subject to the BBC's consent, the BBC often indicated that consent for other work would be forthcoming subject to there being no conflict of interest or conflict with a binding commitment to the BBC. This has to be viewed in the context that for skilled professionals such as the Presenters, the only real opportunity to maximise their earnings is to work more.

(6) The imbalance of bargaining power is a significant factor. The BBC were in a unique position and used it to force the presenters into contracting through the PSCs and to accept reductions in pay.

Part E - Validity of determinations and notices

Discovery issue

648. The dispute was whether s 29(1) TMA applied to the determinations and, if so, whether its requirements are satisfied. On the basis that s 29(1) applies Mr Peacock said that, even if HMRC in each case made a discovery of an insufficiency of tax within the meaning of that provision, in the case of AML and TWL, it had lost its essential "newness" by the time the relevant determinations were issued. On that basis the relevant determinations were invalid on the basis of recent cases such as *HMRC v Mr Raymond Tooth* [2018] UKUT 38 (TCC).

Law

649. Regulation 80(5) provides that a determination made under regulation 80 is subject to various provisions of the TMA including those in Part 4, which includes s 29(1) TMA: "as if - (a) the determination were an assessment, and (b) the amount of tax determined were income tax charged on the employer, and those Parts of that Act apply accordingly with any necessary modification."

650. Section 29(1) TMA provides a mechanism for HMRC to make an assessment where the usual time limit of 12 months for them to enquire into a self-assessment return has expired. It applies where "an officer of the Board or the Board *discover*, as regards any person (the taxpayer) and a year of assessment" that, amongst other circumstances, "any income which ought to have been assessed to income tax has not been assessed". In that case the officer or the Board "may, subject to subsections (2) and (3), make an assessment "in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax".

651. Where a taxpayer has made and delivered a self-assessment return under s 8 or 8A TMA he cannot be assessed under s 29(1) in respect of that year of assessment and in the same capacity as that in which he made the return, unless one of two conditions is satisfied (under s 29(3) TMA), namely, (a) that the insufficiency of tax was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf (under

s 29(4)) or (b) when an officer ceased to be entitled to give notice of his intention to enquire into the taxpayer's return or had informed the taxpayer that he had completed his enquiries into that return, he "could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of [the insufficiency]" (under s 29(5)).

Is s 29(1) TMA in point?

652. Mr Peacock submitted that s 29(1) applies simply because regulation 80(5) applies the provisions of Part 4 TMA to determinations in an unrestricted manner. Moreover, it follows from the fact that the time limits in Part 4 TMA apply to the determinations as though they are assessments that they must be assessments for the purposes of s 29(1) TMA. HMRC disagreed referring, in particular, to the decision in *Weight Watchers*.

653. In that case Briggs J rejected the appellant's argument that HMRC could only make a determination if one of the conditions set out in s 29(4) or (5) TMA was satisfied. As noted, those conditions apply only where the taxpayer has made a self-assessment return under s 8 or s 8A TMA. Mr Justice Briggs did not agree that it was necessary to treat the employer's PAYE return as if it were such a return, so as to make the conditions "intelligible in the parallel universe contemplated by Regulation 80".

654. He noted, at [16], that the conditions "are tailored to self-assessment returns so as to provide a qualified degree of comfort to honest taxpayers [that] their own assessment will not be disturbed after one year in circumstances where the information supplied by the taxpayer was reasonably sufficient to provide disclosure of the relevant facts to HMRC". To apply them to a determination would involve reading into s 29(1) a requirement that the employer's PAYE return should be deemed to be a return for the purposes of Part 4 TMA. He said, at [17], however, that he could see no basis for that; it would have the effect of "imposing conditions" for a determination "of a type which were not designed for that purpose, in addition to the general six year time limit which…clearly was to be applied". In his view regulation 80(5) "contains a specific, carefully drafted deeming provision…which is only that the determination itself is to be treated as if it were an assessment".

655. Mr Peacock submitted that Briggs J was dealing with a different point to the issue in this case, namely, whether the conditions applied and not whether s 29(1) applied in the first place. The decision that an employer's return is not to be deemed to be a self-assessment return for the purposes of s 29(3) (so that the further conditions operate) does not inform the question of whether a determination is to be regarded as an assessment within s 29(1).

656. Mr Tolley submitted that Briggs J in effect decided that the whole of s 29 cannot apply to a determination; there is simply no statutory fit between that provision and regulation 80. The necessary premise of the argument put to him was that s 29(1) applied in the first place; otherwise the need to consider the conditions in 29(3) to (5) did not arise. It was implicit in his decision, therefore, that s 29(1) did not apply. Moreover, on a purposive construction, it cannot have been the intention of Parliament that regulation 80(5) operates to apply, by reference to s 29(1), a test in respect of the knowledge which HMRC must have in order to issue a valid determination which is different from and more restrictive than that contained in

regulation 80 itself. Looking at the provision in context, regulation 80(5) is plainly confined to applying such parts of the TMA to determinations as are necessary to provide a mechanism for issuing and appealing them, collecting tax and enforcing debts.

657. Our view is that the decision in *Weight Watchers* is not determinative of the question of whether s 29(1) TMA applies. As Mr Peacock said, Briggs J decided the different question of whether the conditions in s 29(4) and 29(5) applied. We do not see that it follows from his conclusion on that point that s 29(1) itself necessarily does not apply. However, on a purposive construction of regulation 80(5), looked at in the overall context of that regulation, we consider that it is highly unlikely that it is intended to apply to deem a determination to be an assessment for the purposes of s 29(1) TMA. Regulation 80(1) contains its own threshold requirement for HMRC to be able to make a determination; namely, that it "appears" to an officer that there is a shortfall of tax. As Mr Tolley noted, it would be most odd for regulation 80(5) then to impose in effect a different threshold requirement by reference to whether an officer "discovers" an insufficiency of tax.

Was the discovery stale?

658. In case we are wrong in our conclusion on whether s 29(1) is in point, we have considered the position assuming it applies. We also note that Mr Peacock submitted that his "staleness" argument is relevant even if his argument that s 29(1) applies is not accepted. In his view, the wording of regulation 80(1), whereby an officer can make a determination where it "appears" that there is a shortfall in tax, imports requirements equivalent to those applicable to s 29(1). He said that the use of the word "appears" clearly suggests that something new must appear to the officer and, accordingly, that the concept of staleness is just as relevant.

659. In *HMRC v Mr Raymond Tooth* the UT set out, at [75], that a discovery of a situation set out in s 29(1) connotes "a change in a state of mind" as was held in *Charlton v Revenue and Customers Commissioners* [2012] UKUT 770 (TCC) at [28] as follows:

> "…the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed….."

660. The UT continued, at [76], that as was said in *Charlton* at [37], no "new information, of fact or law, is required for there to be a discovery". All that is required is that "it has *newly appeared* to an officer, acting honestly and reasonably, that one of the situations set out in section 29 may pertain. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

661. They said, at [77], that whether or not there is a discovery "is essentially subjective": it is the officer's (or officers') state of mind that matters. They referred to the comments in *Charlton,* at [37], that a conclusion that a discovery assessment should be issued might, depending on the circumstances, lose its "essential newness" where not acted upon within a reasonable period after that conclusion is reached. That did not include a delay merely to accommodate the final determination of another relevant appeal.

662. At [79] they said that they agreed with this statement broadly but they set out the position in greater detail:

> "(3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is "new" [and they referred to *Pattullo v Revenue and Customs Commissioners* [2016] UKUT 270 (TCC) at [46] to [56]].
>
> (4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for different reasons, discover that one of the situations set out in section 29(1)(a), (b) or (c) pertains a second time….
>
> (6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery.
>
> (7) We consider that such a construction is necessary for the protection of both the taxpayer and officers of HMRC…."

663. The UT has also accepted this concept of "newness" in *Mr Clive Beagles v HMRC* [2018] UKUT 380 (TCC) and *Mr Richard Atherton v HMRC* [2019] UKUT 41 (TCC). Since the hearing, the Court of Appeal has released a decision in the *Tooth* case (*HMRC v Tooth [2019] EWCA Civ 826*) in which, at [61], that court endorsed the concept of "newness" as set out *Charlton* stating that*:* "the requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover"". This tribunal is bound to follow the approach in those cases as regards the meaning of discovery.

664. In relation to AML and TWL Mr Peacock asserted that, under these principles, any discovery made lost its "essential newness" by the time the determinations were issued due to the lengthy period of time which elapsed between the two events. There was no good reason, in his view, why the determinations could not have been made much sooner. Mr Tolley responded that HMRC does not accept, in principle, that "staleness" should have any role at all in a case of an assessment that is issued within the applicable statutory time limits. In an appropriate case HMRC will argue that point in the higher courts. They accept, however, that as matters stand, there is case law, which is binding on the tribunal, that "staleness" operates as a ground of invalidity even if the assessment is made in time. Mr Tolley referred to the *Patullo* case which was cited in *Tooth*.

665. At [52] of the *Patullo* case the UT said that, quite apart from the "highly persuasive passages" in *Charlton* at [37] and *Corbally-Stourton v HMRC* at [44] "the requirement for the discovery to be acted upon while it remains fresh" appears to arise on the natural meaning of s 29(1) itself given it applies "if" HMRC discover certain matters:

> "The word "if", like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression "if and when" (e.g. if the sun comes out we shall go to the beach). I do not regard this as stretching the meaning of "if". The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1)."

666. The UT continued, at [53], that the word "if", as used in the "if and when" sense does not mean "immediately" and each case would turn on its particular facts:

> "Mr Gordon was right, in my view, to accept that the discovery could be kept fresh for the purposes of being acted upon later…..each case would turn on its particular facts. He gave the example of notification being given to the taxpayer of the discovery in the expectation that matters could be resolved without the need for a formal assessment to be made. No doubt there are many other examples which could be given. The UT in *Charlton* at para 37 recognise that the decision in each case will be fact sensitive. I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

667. The UT concluded, at [57], that in the circumstances of that case, a delay of some 18 months or more would have made the discovery stale.

668. Mr Tolley noted that the UT considered that an assessment may lose its "newness" only in exceptional cases. In his view, it is clear from the above passages that it is not only the lapse of time between the discovery and the issue of the assessment or determination which is relevant. The tribunal must consider all the surrounding circumstances and, in particular, the reason for any delay and activity in the period between the two events. A discovery should not be regarded as losing its "essential newness" where, in the period before the determination is issued, there are on-going active discussions/correspondence between the parties in relation to the tax issue in question such that the taxpayer cannot be in any doubt that HMRC intend to issue it. He submitted that was clearly the case as regards both AML and TWL. He said that it must also be borne in mind that this is not a situation where HMRC may be criticised for failing to deal with matters for many years.

Facts

669. We note that, in the circumstances of this case, we consider that we can determine, in respect of each of these appeals, that a relevant discovery was made and when it was made (to a sufficient degree of approximation) from the documents in the bundles. We do not consider, therefore, that HMRC has failed to discharge the burden of proof upon them in this respect as they did not produce any witnesses from HMRC to give evidence on this.

670. In relation to TWL:

(1) We accept that HMRC made a discovery as regards the tax years 2006/07 to 2009/10 when the relevant officer issued an opinion on 13 June 2012 that IR35 applied. The determinations and NICs notices for those years were issued on 8 March 2013. There was a period, therefore, of nearly nine months between the discovery and the issue of the determinations.

(2) It is less clear when the discovery was made in relation to the tax years 2010/11 and 2011/12. It appears from the correspondence set out below that it was made sometime between 6 September 2013 and 18 March 2014. The relevant determinations and NICs notices were issued on 5 December 2014. On balance it is reasonable to suppose that the discovery was made in late September or October 2013 given that it was at that point that it appears that HMRC received the contracts relating to the relevant periods. There was a period, therefore, of, at most, around 14 months between the discovery and the issue of the relevant determinations.

671. In outline, the history of the correspondence is as follows in the period leading to the issue of the initial determinations on 8 March 2013:

(1) On 22 November 2010, HMRC notified TWL they were checking its PAYE and NICs position and asked for a breakdown of income shown in its accounts to 31 October 2009 and copies of the contracts giving rise to the income. On 15 and 16 December 2010 Mr Willcox provided HMRC with a spreadsheet of TWL's transactions and copies of contracts.

(2) In early 2011, HMRC said they needed further information and requested a meeting. DTE was then appointment to act for TWL and there was a meeting between HMRC, DTE and Mr Willcox on 12 July 2011. HMRC circulated notes of the meeting on 13 February 2012 and DTE said they were broadly in agreement with them. Mr Goldie later said on 24 May 2012 that he was happy for the notes to be held out as HMRC's notes but without his client signing them.

(3) On 26 January 2012 HMRC met with, amongst others, Mr Bakhurst and Mr Smith at the BBC to discuss TWL as recorded in meeting notes which were sent to the BBC for their approval.

(4) On 13 June 2012 HMRC issued the status opinion to DTE it appears on the basis of a review of the contracts relevant to the tax years 2008/09 to 2010/11.

(5) On 30 August 2012 HMRC wrote to Mr Goldie noting that they had noticed that Mr Wilcox was engaged by the BBC through his PSC from 2006/07 to 2011/12 and that it was likely IR35 also applied to these contracts. HMRC asked for tax calculations for all years or, if DTE disagreed, for sight of the additional contracts. HMRC sent TWL a formal information notice on 23 October 2012. On 4 December 2012 Mr Goldie replied disputing that IR35 applied and that the information notice was required and requesting a meeting. HMRC responded to this on 21 December 2012 but on receiving no response issued a penalty notice on 15 January 2013.

(6) On 8 and 15 February 2013 HMRC informed DTE that they intended to protect HMRC's position by issuing determinations and notices that they were

going to issue county court proceedings. There was a dispute over whether these were received by DTE/TWL.

(7) On 26 February 2013 DTE contacted HMRC to arrange a meeting on 11 March 2013 which took place on that date. On 25 April 2013 TWL appealed against the initial determinations.

(8) On 30 August 2013, in response to a letter from DTE of 20 June 2013, HMRC informed DTE that they were having a meeting with the BBC on 4 September 2013 regarding the points raised at the meeting of 11 March 2013. DTE objected to the meeting taking place without Mr Willcox in attendance.

(9) On 6 September 2013 the BBC provided HMRC with their contracts with TWL for the other periods (and it appears that that was the first time HMRC had received these).

(10) On 10 October 2013 DTE asked for copies of the notes of the meeting with the BBC. HMRC sent their notes to the BBC on 16 October 2013 and informed DTE on 21 October 2013 that the notes would be released once agreed with the BBC. On 18 December 2013 HMRC sent a revised copy of the notes to the BBC for agreement and there was limited correspondence agreeing the notes.

(11) On 18 March 2014, HMRC wrote to DTE noting they now had permission from the BBC to release the notes and enclosing a copy. They said that they proposed a voluntary settlement and requested computations for the later years. HMRC requested a response by 25 April 2014.

(12) On 28 May 2014 HMRC recorded in a file note that the HMRC officer had sought numerous times to contact DTE but had spoken to him on that day regarding whether Mr Willcox wanted to settle matters with HMRC or not. On 21 August 2014 HMRC issued TWL with a warning letter in respect of the failure to operate PAYE. Following this TWL appointed different advisers who asked HMRC for copies of the meeting notes

672. In relation to AML:

(1) In this case it appears that the discovery was probably made sometime in March or April 2013 following the BBC signing off on the notes of a meeting with HMRC or at any rate no later than 24 June 2013 when the status opinion was then issued. As set out below, the meeting with the BBC took place on 9 September 2012 and it is not entirely clear why there was such a delay in the BBC agreeing the meeting notes. It is reasonable to suppose, however, that HMRC realised that there was an insufficiency of tax at that point, as they were then in possession of the relevant information from both AML and the BBC notwithstanding that it took them some months to issue the status opinion.

(2) Determinations were issued to AML for all relevant tax years initially on 17 March 2014. These were withdrawn on 6 May 2015 and new ones were issued on 2 October 2015. Mr Peacock noted that when the new determinations were issued two years fell out of account (those for 2007/08 and 2008/09 which were determined at zero) and a determination for 2013/14 was added. Otherwise there was no meaningful difference in the two sets of determinations.

(3) There was a delay, therefore, of as much as around 12 months between the discovery (on the basis that it took place in late March or April 2013) and the issue of the initial determinations on 17 March 2014 and of over two years from that time until the issue of the new determinations on 2 October 2015.

673. The history of the correspondence is as follows in the period leading to the issue of the initial determinations on 17 March 2014.

(1) On 4 January 2011, HMRC wrote to AML requesting a check of employer and contractor records and a breakdown of income shown in AML's accounts for the period to 31 March 2010. JSC, the adviser to AML, wrote to HMRC providing the requested information on 7 February 2011.

(2) On 13 June 2011, Mr Eades and Mr Simmonds of JSC met with HMRC. HMRC circulated notes of this meeting on 27 June 2011. There was correspondence on the notes in July and August 2011 following which HMRC issued revised notes on 17 October 2011. The officer apologised for the delay due to an extended period of sick leave. On 4 November 2011 Mr Eades responded with a further comment on the notes which he signed.

(3) On 13 September 2012, there was a meeting between HMRC and the BBC. The notes of this meeting were signed by HMRC shortly after. It appears that Ms Hockaday and Mr Roy did not sign the notes until 7 March and 26 February 2013 respectively. There is no correspondence in the bundles relating to the intervening period.

(4) On 24 June 2013, HMRC issued the status opinion to JSC.

(5) In August to October 2013 there was correspondence and telephone calls between HMRC, Mr Eades and Mr Simmonds regarding the status opinion. JSC queried why they had not heard from HMRC until June 2013. In a letter of 11 November 2013 HMRC apologised for the failure to keep JSC informed that they were taking technical advice and meeting with the BBC and of the delay in setting up that meeting and in obtaining the BBC's sign off on the notes. They acknowledged that there was a period between October 2011 and June 2013 when they had not engaged with JSC but they had been engaged with the BBC.

(6) On 27 November 2013 HMRC put JSC on notice of their intention to issue the determinations on requesting a breakdown of the information that JSC had provided. JSC provided this on 31 December 2013.

(7) On 27 January 2014 HMRC sent its formal warning letter to AML.

(8) On 7 April 2014 AML lodged its appeals against the determinations and requested a review which took place by agreement over a period of several months and was concluded in September 2014.

(9) Around that time HMRC recognised that the wording used in the NICs notices were defective and sought agreement to withdraw them and issue fresh notices.

(10) On 7 October 2014 in light of the additional information that AML then promptly provided, HMRC provided new deemed payment calculations and said that the existing determinations would need to be amended. On 14 November 2014 HMRC stated that they were going to withdraw the existing determinations and re-issue them with updated figures and that they would

correct the wording of the NICs notices. On 18 November 2014 Mr Kirk, who had then been appointed to act for AML, wrote to give his agreement to this course. Mr Peacock noted that the determinations were withdrawn although there was not said to be anything actually wrong with them.

(11) On 2 December 2014 HMRC communicated that steps were being taken to vacate the determinations. There was a delay due to personal difficulties of an officer who had been handling the case but Mr Kirk was kept up to date. As set out above, the old determinations were not formally withdrawn until 6 May 2015 and new ones were not issued until 2 October 2015.

674. Determinations were issued to PL for all relevant tax years (2007/08 to 2011/12) on 6 September 2013. We accept that the discovery was made when HMRC issued a status opinion that IR 35 applied on 23 May 2013. There was no contention that the discovery had become stale in the period of just over three months from the date of the status opinion to the issue of the determinations.

Conclusion on "staleness"

675. We have concluded that the discoveries made by HMRC as regards AML and TWL had not lost their "essential newness" by the time the relevant determinations were issued. In our view, on the basis of the case law, this is not just a question of simply how much time has elapsed between the discovery and the issue of the determinations and whether the determinations could have been made sooner. The status of discussions and awareness of the likely issue of the determinations must be a relevant factor in assessing whether the issue remains "live" or has becomes "stale".

676. We accept that, as Mr Tolley submitted, the evidence demonstrates that overall HMRC pursued their enquiries sufficiently actively that AML and TWL and their respective advisers cannot have been in any doubt, at any stage in the period from when the discovery was made until the determinations were issued (or re-issued in AML's case), that HMRC were actively engaged and intended to proceed with the imposition of income tax (and NICs) on the basis of their status opinions. We note that in TWL's case material delays were caused to some extent by a lack of engagement by DTE. Whilst in AML's case there was a substantial delay in HMRC dealing with the withdrawal of the original determinations and the issue of the new ones, AML cannot have been in any doubt but that new determinations were to be issued. In each case, in all the circumstances, although the determinations were not issued as quickly as they might have been, the delay is not sufficient for the discovery made by HMRC to have lost any quality of "newness".

Carelessness

677. The further issue is whether the longer time limit for the issue of the determinations applies to the disputed years on the basis that the loss of income tax arising in those years was "brought about carelessly" by another person acting on behalf of the relevant PSC (under s 36(1B) TMA). A loss of tax is "brought about carelessly by a person" where "the person fails to take reasonable care to avoid bringing about that loss…" (under s 118(5) TMA). If the longer time limit does not apply, HMRC were out of time to issue the determinations in respect of the disputed years. We note that there was no suggestion that the loss of tax was brought about carelessly by the PSCs or the Presenters. HMRC asserted that the advisers acted carelessly as set out below.

Evidence and facts

678. Ms Gosling said that when she set up PL she was not told by the BBC that there may be an issue around worker status or that she should take advice on that. She spoke to her accountant, Mr Nick Ridge at Bryan & Ridge, and asked him if it would be particularly complicated. He told her that she need not worry and said he would run it for her. She did not recall him or the BBC mentioning IR35. In her witness statement she said that she did not remember what documents she gave her accountant but she was sure she would have given him anything that he asked for. When asked whether her accountant saw PL's contracts with the BBC she said: "I mean, absolutely not that I recall. But I can't guarantee that's not the case…I would never have thought an accountant should see your contracts, so but I don't, I honestly don't know the answer".

679. Ms Gosling subsequently used different accountants in relation to her own and PL's position; by 2010 she was using Christopher Lunn & Co and, from 2011, HW Fisher and Company ("**HW Fisher**"). So far as she could recall she did not think she received advice from any of her accountants on IR35 until HMRC started their enquiries; that was the first time she heard of IR35 as a concept. Ms Gosling said that she just assumed that her accountants had never thought there was any question of her not being freelance because "everything that was ever coming from the BBC was describing me as a freelance. I felt like a freelance…there was never, in my mind…any reason to think I was anything other than freelance". She felt that if she had been advised sooner on IR35 the same conclusion would have been reached because "I...don't feel like I'm controlled".

680. She noted that when PL was offered a contract in 2013, the BBC were concerned with presenters' status for tax purposes. In an email of 7 December 2012 the BBC said that: "if an individual demonstrates characteristics of an employee they will be offered a staff contract when their current contract expires". Ms Gosling said that, in light of this statement, she took the offer of the further contract on 7 November 2013 to be an indicator that it had been determined that PL fell outside IR35. Her accountants advised that was a reasonable view to take.

681. In her witness statement Ms Gosling noted that she understood that Bryan & Ridge has since been dissolved and that Mr Ridge has effectively retired from practice. At the hearing she was shown an extract from a website from which it appeared Mr Ridge is still in practice. She said she was not aware of this. She did not know if there was any reason why he could not give evidence at the hearing.

682. Mr Willcox explained that as a sole trader he had used a friend who was a chartered accountant as regards his accounting and tax position. When he was told that he needed to set up a PSC, his friend said he was not equipped to do that. He rang a financial adviser who suggested Mr Goldie at DTE Business Advisory Service Ltd ("**DTE**"). He had been happy as a sole trader but Mr Goldie advised him that using a PSC made sense. He recalled that Mr Goldie said that this was an efficient and an acceptable way of doing it. He explained that money would come through the PSC as dividends and a small salary, which he said was entirely common practice. Mr Goldie pointed out that it was what a lot of people did in the business.

683. Mr Goldie knew that Mr Willcox had a pre-existing relationship with the BBC and that, at that time, he made documentaries for Channel 4 and Channel 5, he wrote

for the national press at times, he did some media consultancy and chairing of conferences and that he was intending to try and get a book deal. Mr Willcox told him, however, that he did a substantial amount of work for the BBC.

684. Mr Willcox said the decision to set up the PSC was predicated on what he was told by Ms Beckett and the advice of Mr Goldie. He did not set it up to avoid tax although his accountant did say this was a more efficient way of providing his services. However, "if it were up to me, I would most certainly have continued work as a sole trader, as I had been doing for my entire freelance career".

685. He said that he did not recall any discussions with Mr Goldie specifically on IR35. He simply asked him whether using a PSC was the right way forward. Mr Goldie said that it was and that he would handle it. He said that he had not heard of IR35 until HMRC started their enquiries. He then asked Mr Goldie about it and he said that it did not apply to TWL. Mr Goldie mentioned that he had acted for actors who had been caught up in something similar but there had been no consequences.

686. Mr Willcox confirmed that Mr Goldie is still in practice, providing accountancy and tax advice in either London or Hertfordshire and there was no reason he was aware of why Mr Goldie was unable to give evidence to the tribunal.

687. Mr Eades said that he discussed his contract with Mr Simmonds who considered IR35, explained the relevant considerations and advised it did not apply. Mr Eades had not heard of IR35 before this. He could not recall precisely which contract he had discussed with Mr Simmonds. He said that he understood that if there were any material changes to the terms between the BBC and AML that would need to be referred to JSC but that "in the churn of contract to contract" that was not uppermost in his mind.

688. He accepted that in the period from 2003 to 2014 there were a number of changes to the contractual terms but he did not think that fundamentally changed his status. He did not recall if or, what version of, the Terms were shown to Mr Simmonds. He did not think that he sought updated advice from Mr Simmonds about IR35. He relied on him for advice that "the PSC was the right way to go, that it fell outside IR35, and that was the premise on which I then worked". His understanding was that "we were complying with IR35….I certainly didn't make a point of checking….accounting journals or documentation, to find out if the terms and conditions around IR35 were changing month by month or year by year".

689. The Presenters' accountants dealt with all relevant tax paperwork in relation to their and the PSCs' tax position, such as forms P11, P14 and P35, prepared the PSCs' accounts and were responsible for submitting tax computations for the PSCs and the Presenters:

(1) Mr Willcox said that he had a bookkeeper who did his expenses, looked at his invoices and did his VAT return and he sent his "invoices and VAT and whatever to [DTE], who, at the end of the year, did my tax return". It appears from the documents in the bundle that no form P35 was submitted by TWL in any relevant tax year. Mr Willcox said that he was not aware that TWL had to submit a P35 form annually and he did not know if it was submitted. He "literally gave everything to my accountant. Whatever I had to sign, we had, I think, one meeting a year" but he did not recall ever signing a P35 form or it being mentioned to him.

(2) Ms Gosling confirmed that her accountants submitted forms P11, P14 and P35 and that she would probably have been asked to look at these prior to submission.

(3) Mr Simmonds confirmed that it was JSC who submitted the forms P35, P14 and P11D albeit that this was delegated to a staff member rather than dealt with by him personally.

690. It was noted to Ms Gosling, Mr Eades and Mr Simmonds that in certain of the forms P35 (for three of the relevant years in relation to PL) in response to the question: "Are you a service company?" the answer given was "no". Ms Gosling thought her accountant prepared this and that he would have shown it to her for approval but she had no recollection of why this box was ticked. Mr Eades did not know who was responsible for ticking that box but thought it was probably Mr Simmonds. He did not think he was asked to approve these forms before they were submitted to HMRC as he did not recall them. In relation to the tax year 2008/09, Mr Simmonds initially said that he could not comment because this would have been filled in by someone else at JSC. He later agreed that the incorrect answer was given on the form.

691. The income which Mr Willcox received from TWL, which was taxed as employment income in each year from the tax year 2007/07 to 2012/13, ranged from £4,500 to £7,500. He said in effect that his accountant set the level; there was no discussion about what was taken from TWL on a monthly basis. He gave the accountant all the figures and he suggested these amounts. He did not recall any discussion about keeping the income below the tax threshold. He trusted implicitly what his accountant suggested.

692. In PL's accounts for the early periods Ms Gosling and her ex-husband were both identified as employees and as being in receipt of the relevant sums as "directors' emoluments for services as directors". By 2010, once Christopher Lunn & Co were appointed as accountants, only abbreviated accounts were submitted which did not have such details. Ms Gosling did not recall discussing with her accountant specifically how she would be paid by PL. In the early years from 60% to nearly 100% of PL's income was paid to her in the form of income which was taxed under the PAYE system. She said she found the tax position very complicated compared with when she was a sole trader; she had tried to understand it but could not.

693. For 2009/10 and 2010/11 she received much smaller amounts as income taxed under PAYE, of £5,712 and £5,720, and by way of dividend income £34,419 and £105,000. (There was also a figure of £5,714 paid by way of profit from partnerships). She moved to Christopher Lunn & Co as she had heard from another presenter that they dealt with PSC matters in a different way which sounded simpler. Again she left matters to them. She was then shocked when there was a big differential in the tax due; it seemed she had gone from one extreme to the other but she did not really understand any of it.

694. For the 2011/12 tax year she received £7,020 as employment income and £79,444 as dividend income. Her ex-husband earned a little less than £4,000 it appears for acting as company secretary.

695. Mr Eades received £12,000 of employment income from AML each year during the relevant period. He thought that figure was what Mr Simmonds pointed out as an

appropriate sum and he was very happy to go along with that. It was noted that this was described as "employment" income in the tax calculations and as "directors' remuneration and other benefits" in the accounts. He said that he was aware what the arrangement was, "my accountant did everything on time and very effectively, I was very happy with that".

696. It was put to Mr Simmonds that JSC must have been satisfied that Mr Eades was properly to be regarded as an employee of ALM given that amounts were shown in the relevant forms, such as P14s, as taxable under PAYE as employment income. He said Mr Eades received "remuneration, director's fees, call it what you will...I don't think it is reasonable to suppose that he was employed as such by the company". He said that the primary reason for paying the amounts as taxable remuneration was because the payment of NICs "secures certain state benefits". He clarified that it would not have made any difference to how he drew up the accounts or filled in the relevant forms had he had a greater awareness of the legal distinction between an employee and a director. He used an accounting package which had a limited level of refinement such that it analysed the monies which Mr Eades extracted by way of PAYE as director's remuneration. From his perspective it was not really a concern whether it was shown as "remuneration, fees or whatever" provided that the accounts overall showed the correct position.

697. In AML's accounts for 2009 and 2010 there was an entry for "Staff costs, £3,120". As Mr Simmonds confirmed that was the amount paid to his wife for her work. Mr Simmonds considered that level of income was appropriate for the duties performed given Mrs Eades did a lot of work relating to the substantial non-BBC income AML received in addition to general secretarial duties. He agreed that he must have been satisfied that she was properly to be regarded as an employee of the company.

698. Mr Simmonds was shown an entry for trade debtors in the accounts for the period ending on 31 March 2010 of £49,693. He said that this would have been for work either invoiced but not paid for or for work done or not invoiced prior to 31 March 2010. He agreed that this did not necessarily represent a bad debt but rather is simply just pending debts as at year end. There was no suggestion that this related to monies owed by the BBC to AML.

699. Mr Simmonds confirmed that around October 2003 Mr Eades approached him for advice on setting up AML for his media work. He discussed the implications of IR35 with him and provided details of the cost of extracting monies from AML. He agreed that he was not asked to consider IR35 again by Mr Eades or AML on a formal basis.

700. He said that he attended various training courses in which IR35 was discussed including one specifically on IR35 which was given by a member of Macintyre Hudson's tax department. He was the only delegate on that course who had used the contract review service which HMRC then had in place to determine if IR35 applied. Prior to that he had used this service for two or three clients and HMRC said that IR35 did not apply. They were not clients in the television sector. From the information given at the course, however, he understood that "the received wisdom" was not to use this service. On that basis and, having regard to the various

publications produced by the Institute of Chartered Accountants and HMRC, he concluded that it was not necessary to refer AML's contracts to the review service.

701. He could not remember details of the publications he considered but thought there was one specifically on IR35. He could not remember what the received wisdom was, which lead to him deciding not to use the HMRC contract review service but said that it certainly made sense at the time. He accepted that having decided not to use the service he took it entirely upon himself to make the correct judgment on whether IR35 applied.

702. He said that he was aware of the factors to be considered when advising on whether IR35 applies. He discussed with Mr Eades the various contracts that AML had received but could not recall if he reviewed drafts or the final versions. He was shown the various Guidelines but could not recall if he had seen them before. He said he remembered "wading through some hefty tomes, but as regards whether it was this one or another one, I just cannot be sure". He said that he had in the back of his mind what is topical and that if there were any significant variations, "I would have been appraised of the fact and I would have considered the implications of such". He thought that there were no material changes as Mr Eades was aware of the need to inform him if there were any but had not. He did not recall being provided with any updated versions of contractual terms and could not remember if he ever asked Mr Eades for any update about the terms.

703. In 2003 he went through a number of factors with Mr Eades and considered, in particular, that the following indicated that IR35 did not apply.

(1) Mr Eades did not receive benefits from the BBC. He had come across the relevance of this in relation to another client in the motor industry where contractors were specifically precluded from enjoying staff discounts on motor cars. It was put to him that this was not relevant in a corporate context. There would never be provisions of that nature in a contract of this kind between two companies. He said he did not really see the distinction.

(2) Mr Eades could pick and choose when he wanted to work; he could refuse a particular slot. He was asked what view he took about the provisions relating to the BBC having first call and the minimum days. He was not sure that he considered that.

(3) If Mr Eades was unable to do a slot he could organise a colleague to cover for him. He was asked if he understood that this scenario did not count towards the fulfilment of the minimum days. He said that he appreciated that Mr Eades had to fulfil a certain number of days and that providing someone else did not count towards that.

(4) Mr Eades had a number of other fairly significant work streams outside of the BBC. He was shown the table that showed that in the first two years (2008 and 2009) the figure for BBC work was just below 75% of the total. He did not think that he considered whether Mr Eades' television presenting work should be assessed and analysed differently from the other work streams.

704. He also noted that the arrangements he reviewed appeared similar to the earlier contracts which HMRC had cleared as being outside IR35 (these clients were not in the television sector). Taking all of this into account his view was that IR35 did not apply.

705. He did not accept that in 2003 he should have referred AML's contracts with the BBC to the HMRC contract review service. He thought that the tests which he undertook at the time clearly indicated that IR35 did not apply. It was put to him that on completion of the P35 forms he/JSC should have requested updated documents from AML to determine whether IR35 applied in each year. When questioned about the various case law tests for determining employment status, he was not able to explain the mutuality test although he thought he had considered it. On the question of whether he considered the right of control the BBC had, he said that his recollections are vague but this was discussed. He was aware that Mr Eades had a lot of licence as regards emerging stories, using his initiative and ad-libbing. He thought that whilst the BBC expected certain standards of Mr Eades it is not clear cut that "everything is decided by the BBC, whether it is radio or television, and he has a lot of power over…the actual contents, particularly…with emerging news". He was not sure if he had in mind the difference between the right of control and its exercise.

706. He did not agree that he was wrong that IR35 does not apply and that he was carelessly wrong. He said that so far as he could recall "the television and the radio contracts have great similarities" and he found it "very surprising that one should fall within IR35 and one should fall….outside of IR35. And I think that being the case….it is understandable, if you like, that I have come to a different view to the Revenue. It is the view which I held throughout".

707. In his witness statement he said that a significant number of BBC presenters were engaged on this basis at the time. They would all have received advice from their accountants and, so far as he knew, HMRC did not take issue with this at the time. He was asked if he would have expected any accountant who advised on setting up a PSC in such circumstances as these to consider IR35. He said that when AML was set up IR35 was "the flavour of the month" and so "it was incumbent on me to consider that" but he could not comment about other accountants. Given that he went on various courses, it seemed that "one should have due consideration" for whether IR35 applied. As a general observation he thought that he thought accountants would have considered this. When asked if, in the context of establishing a PSC to provide substantial services to one client, the need to consider IR35 is obvious, he said "very much so, yes". He said that he was aware of the limitations of a small firm. Certainly if there was anything highly specialist, he would refer clients to other firms of accountants.

Submissions

708. Mr Peacock made the following main points.

(1) HMRC have to establish, that (a) a reasonable (small firm) accountant owed a duty to the PSCs/the Presenters to consider IR35 at the relevant time, by reference to the agent's retainer (*Mehjoo v Harden Barker (a firm) & Anor* [2014] STC 1470) and (b) that it was a breach of that duty not to do so adequately.

(2) The standard of care to which such accountants are to be held is different from that which applies to a large or specialist practice (see *Cooke v HMRC* [2017] UKFTT 844, [47]) and directly relates to resources available to the adviser (see *Hicks v HMRC* [2018] UKFTT 22).

(3) Carelessness cannot be judged with the benefit of hindsight (see *Hicks* at [195]). HMRC's own views on the applicability of IR35 have plainly developed over time; they did not conclude that IR35 applied to the PSCs until 2012/13. The question of employment status and whether IR35 applies are value judgments as to which different people may come to different conclusions (see *Christa Ackroyd Media Ltd v HMRC* [2018] UKFTT 69, at [180]).

(4) The requirement that the insufficiency of tax was *brought about* carelessly by the taxpayer or a person acting on his behalf means that HMRC have to prove a causal connection between the asserted carelessness and the loss of tax. They must establish that the advisers (a) should have considered the possible application of IR35 and (b) could not reasonably have concluded that it did not apply (see *Anderson v HMRC* [2016] UKFTT 0335 (TC), at [73]). It is common, however, for there to be more than one tenable interpretation of a provision, for an adviser to "take a view" on which interpretation to adopt and for that to be the most favourable to the taxpayer (see *Gedir v HMRC* [2016] UKFTT 0188 (TC) at [119]).

709. Mr Peacock concluded that HMRC has not discharged the burden of proof as regards these issues. It is accepted that JSC owed AML a duty of care. However, HMRC have never enquired into the extent of the scope of that duty as regards the advisers to TWL and PL or lead any evidence as to the scope of any retainer. In addition, HMRC have not led any evidence as to (a) the standard of care against which the advisers are to be judged or (b) how the advisers were "careless". He asserted that, on the evidence, Mr Simmonds was not careless.

710. Mr Peacock submitted that the advisers could not reasonably have been expected to conclude that IR35 applies to the PSCs given the on-going uncertainty and confusion as to how it applies. He noted that HMRC acknowledge this uncertainty in a consultation document on reform in this area issued in 2016 and made a number of points including the following (drawing, in particular, from the evidence at [34] to [46] and [395] to [407]):

(1) There was nothing in the material when IR35 was introduced to alert taxpayers to a risk that IR35 might be in point where he/she had previously been self-employed. In the *Professional Contractors Group Ltd* case, Burton J identified, at [650] to [652], certain errors and inflexibility in HMRC's approach to the question of employment status as reflected in its published guidance. The subsequent cases on IR35 demonstrate that this is a complex area of law where reasonable people can reasonably come to different conclusions. Over the years HMRC have felt the need to introduce various tools to assist in determining status and issued guidance.

(2) The approach of the BBC and HMRC to IR35 as regards news presenters is confused as reflected in the evidence of Mr Smith. It is clear, however, from the evidence that, at various stages, the BBC sought to minimise a perceived exposure to tax risk in light of HMRC's views on the employment status of news presenters. That risk was never communicated to the PSCs or the Presenters. It appears Mr Smith accepted HMRC's view on this without forming his own view based on any understanding of the contract terms, how they worked in practice or any analysis of the control and mutuality issues. It

was simply a policy decision that presenters were to contract through PSCs in 2004 and to move them to "employment" contracts in 2014.

(3) Mr Smith said that the policy to engage presenters via PSCs was prompted by a HMRC review following the Neil Report. That does not explain why the BBC sought to contract with presenters through PSCs prior to the Neil report and shows a misunderstanding of the context and application of the recommendations made in that report. HMRC's message seemed to be that news presenters should be treated as employees but that if they contracted through PSCs this may not be necessary. However, this risk was not communicated to the Presenters. The BBC continued to engage presenters using both direct employment contracts and PSCs for some years. The Presenters' evidence was that nothing changed through the time they contracted as freelancers or through the PSCs.

(4) Mr Peacock took from the records of the PAC hearing that the practice of using PSCs in the media industry was common place up to at least 2012; that HMRC had only just begun to work out a method for determining which PSCs might be high risk (if any) and that neither the BBC nor HMRC considered the issue to be black and white. It is clear from the comments that HMRC's view was clearly developing. Mr Peacock noted the changes to the administration of IR35 piloted by HMRC since April 2012.

711. In HMRC's view the carelessness test is essentially a passive one. The question is what action a prudent and reasonable accountant, in light of the accountant's actual circumstances, would have taken to avoid bringing about the loss of tax (referring to the *Anderson* case at [124]). Once there is a failure to take reasonable care and a loss of tax, it necessarily follows that there is a failure to avoid bringing about the loss of tax.

712. Mr Tolley submitted that the relevant wording contrasts with the positive causation test in s 29(7) TMA which provides that a loss of tax or a situation brought about deliberately by a person, "include a loss of tax or a situation *that arises as a result of* a deliberate inaccuracy in a document". Moreover there is no authority for the proposition that the general law of causation applies here. This situation is comparable to a claim of professional negligence against a barrister or a solicitor where the court usually considers it is sufficiently well-informed to form its own view on the standard of care. Similarly a specialist tax tribunal is in a good position to know what might reasonably be expected of an accountant. It is in line with the nature of the tribunal for such matters to be dealt with less formally. Applying the same approach as in a professional negligence claim would clog up the tribunal with long disputes which it is not economic for it to resolve.

713. Mr Tolley submitted that it cannot be the law that an accountant is not careless if it can be shown that there is a tenable view that there is no tax liability. The ceaseless ingenuity of tax advisers would always enable a tenable counter-argument to be identified. Moreover, PL and TWL have led no evidence as to the advice they would have received if their accountants had considered the issue. In any event the tribunal should assume that the accountants would have given the correct advice, namely, that IR35 applied.

714. Mr Tolley concluded that it is reasonable to expect that an adviser would (a) advise on such tax areas as a reasonably competent adviser exercising reasonable care and skill would advise on, when asked to advise on the incorporation of and working through a PSC, and (b) provide that advice to the standard expected of such a reasonably competent adviser. If, contrary to HMRC's view, there is a causation requirement, that is satisfied if the carelessness contributed to the loss of tax. That is the case here as, by failing to advise on the application of IR35, the advisers to the PSCs removed the possibility of the loss of tax being avoided.

715. As regards TWL and PL Mr Tolley made the following main points:

(1) The advisers were asked for advice about setting up a PSC, took on responsibility for filing returns/forms on its behalf and assisted the Presenter to structure his/her remuneration. They knew that the Presenters planned to work for the BBC through the relevant PSC. It is obvious from this that the scope of the adviser's retainer must have included considering the tax consequences of the structure. It would not be reasonable to exclude such advice without making it clear that the Presenter should obtain advice elsewhere.

(2) Ms Gosling and Mr Willcox' evidence is that they never received advice on IR35; they first heard of it when HMRC raised their enquiries. Forms P35 were not submitted or were not submitted correctly. The only legitimate inference is that the advisers did not consider IR35 at all. It is for PL and TWL to adduce evidence to rebut that inference. HMRC made it clear that they were going to take this stance since July 2016. There is no reason why the advisers could not have been called to give evidence.

(3) An accountant is clearly careless in failing to consider IR35 when incorporating a PSC to provide the personal services of an individual to his or her only or main client. IR35 is an obvious point that an accountant ought to consider or he ought to advise the client to seek the advice elsewhere. This is reinforced by (a) Mr Simmonds' view that presenters engaged through a PSC would have received such advice from their accountants and (b) the fact that the advisers, in PL's case, incorrectly filed P35 returns on the basis that it was not a PSC and, in TWL's case did not file P35 forms at all.

716. As regards AML, Mr Tolley said that Mr Simmonds may have been doing his honest best in advising on IR35 but he fell below the standard of the reasonably competent professional in this field:

(1) The issue was considered only at the very beginning of the contracting relationship before many of the relevant documents came into being. There is no evidence as to what contractual terms Mr Simmonds considered, he did not ask for updated terms or provide any further advice on IR35 or enquire whether the terms had changed.

(2) JSC incorrectly filed forms P35 on the basis that AML was not a PSC which Mr Simmonds accepted was incorrect.

(3) Mr Simmonds seems to have focused on a number of factors in deciding that IR35 did not apply which were wrong and unfounded. The absence of statutory benefits is of no relevance; there are never statutory worker-type benefits in a contract with a company. He did not appear to have considered that Mr Eades' ability "to pick and choose" when he wanted to work was

subject to the minimum days requirement or the significance of that in the context of the mutuality test. He did not appear to understand that test. He did not appreciate that the fact Mr Eades could arrange for a colleague to fill in for him did not give him a right of substitution in a relevant sense. He relied on, as he put it, the number of other fairly significant work streams which AML had. However, at the time AML's income from those work streams was, relatively small. He did not consider whether AML's income from BBC work should be analysed and assessed on a different basis from the other income.

(4) He had no good reason for failing to use HMRC's contract review service but accepted that he/his firm then assumed the responsibility to get the decision right.

717. Mr Tolley submitted that the views or approach of HMRC and/or the BBC as regards the application of IR35 are not relevant to the question of how a reasonably competent accountant would act unless it can be said that the accountant ought to have been aware of them. That is no part of the case on either side. Moreover, it cannot be a legitimate exercise for an appellant to seek to look at how difficult the IR35 issue has turned out to be over the years. If that were the test, the carelessness extension for time limits would be virtually impossible to invoke.

Conclusion

718. We have concluded that for the purposes of the relevant provisions (1) HMRC have not provided evidence that, on the balance of probabilities, the advisers to TWL and PL acted carelessly and (2) Mr Simmonds did not act carelessly for the reasons set out below.

719. As Mr Tolley argued, we consider that in tribunal proceedings of this kind it is not necessary for HMRC to provide expert or other evidence on the standard of care which may be expected of a small firm of accountants in relation to advising on the type of issue in this case. As a specialist tax tribunal, we are in a position to form a view without the need for such evidence. However, there remains the need for HMRC to demonstrate that, in "acting on behalf of" the PSCs, the advisers carelessly brought about an insufficiency of tax. On the plain meaning of the statutory provision that requires evidencing that in the disputed years (a) the advisers were engaged to act on behalf of the PSCs in relation to their status under IR35 and (b) in acting on their behalf in that capacity, they carelessly brought about the loss of tax resulting from the fact that IR35 applies.

720. Overall we consider that, as HMRC argued, there is sufficient evidence from which the tribunal can draw an inference that the advisers were engaged to act on behalf of AML and TWL in relation to determining their status for IR35 purposes given the actions which they otherwise took on behalf of those PSCs. However, we cannot see that there is sufficient basis for the tribunal to draw a further inference, as is necessary for HMRC's argument to succeed, that the advisers did not consider IR35 at all or carelessly took the view that IR35 did not apply. An inference that the advisers were acting on behalf of the relevant PSCs in relation to IR35 is not of itself sufficient to shift the burden of proof to the PSCs in relation to that further question. It is for HMRC at least to make out a prima facie case on both of these issues in order for the burden to shift. It was, therefore, for HMRC to bring further evidence on that, which they have not done.

721. We do not consider that we can draw such a further inference from the fact that Ms Gosling and Mr Willcox said they did not recall IR35 being mentioned to them in terms until HMRC began their enquiries and that forms P35 were not submitted or were not submitted correctly. We note also that Ms Gosling and Mr Willcox both emphasised that they trusted their advisers to simply deal with matters. The advisers said they would take care of dealing with the PSCs and that everything was fine or it was the right way forward. Whilst Ms Gosling said she could not recall her accountant asking for the contracts with the BBC and thought it would not have occurred to her that he should see them, she had no specific recollection and could not honestly say whether he did or not. Mr Willcox was not questioned specifically on whether his adviser saw the relevant contracts. He recalled informing his adviser of his circumstances as set out above. There is no sufficient basis for inferring, therefore, that the advisers did not see any relevant documents.

722. On the basis of such evidence as there is, it is possible that the advisers considered IR35 albeit that they did not discuss it with their clients or did not mention any issue under the label IR35. In the disputed years, Ms Gosling received substantial amounts of income from PL which were taxable as employment income, which could indicate that her adviser, who she relied on to determine how monies were extracted from PL, thought IR35 did apply. Mr Willcox said that he asked his adviser about IR35 when HMRC raised the enquiry and the adviser said "no, we're fine" and gave examples of other cases when this had come up. If anything, this indicates that the adviser did consider IR35 in relation to TWL. Overall, in the absence of any further evidence, it is simply speculation whether, when and to what extent the advisers considered IR35 and, if so, what they considered and how they approached this.

723. It was accepted that Mr Simmonds owed a duty of care to AML as regards whether IR35 applied or not. In our view, it is not sufficient for Mr Simmonds to be held to have acted carelessly, as HMRC seem to suggest, that he took a view contrary to that of HMRC or that now expressed by the tribunal. It cannot be the case that a person is necessarily careless because he took a view that is later found to be incorrect, in particular, where determining whether the relevant legislation applies depends on making a difficult value judgment.

724. We consider that, in these circumstances, the pertinent question is whether Mr Simmonds took such care as can reasonably be expected of a reasonably competent adviser in his approach to considering and forming his conclusions on IR35. We consider that Mr Simmonds did so given that he (a) undertook professional training in this area, (b) reviewed the relevant documents (albeit he could not at this stage remember precisely what he looked at other than that they were weighty tomes) and discussed the situation with his client, (c) consulted text books and other authorities, and (d) with that background, considered the circumstances including control and mutuality. Whilst HMRC disagree with the relevance of or weight attached to the factors which Mr Simmonds relied on in forming his conclusion, our view is that they are within the range of factors which an adviser, taking the care reasonably expected of a competent adviser, would rely on in forming a view on whether IR35 applied. We do not consider that the fact he did not consult HMRC's contract review service to be of relevance. It is open to professionals to rely on their own assessment of the law rather than HMRC's view of it. We consider it reasonable for Mr Simmonds to rely on Mr Eades to provide him with information on any substantive change in his

circumstances on the basis that Mr Eades was well aware of the need to do so and that Mr Simmonds had discussed the applicable test with him.

725. We note that Mr Simmonds could not fully recall further details of precisely what he considered at the time and did not seem fully attuned to the subtleties and nuances of the mutuality and other tests. However, given the passage of time and the fact that he is now retired from professional practice, we do not consider that this undermines the otherwise clear evidence he gave. He was at times very hesitant in his responses but we interpreted this as him seeking to give the tribunal as accurate evidence as he could as regards events of many years ago.

Conclusion

726. For all the reasons set out above, we have concluded that:

(1) IR35 applies to the arrangements under consideration in each of these appeals, except as regards the arrangements between the BBC and TWL in respect of World under the contracts referred to at [55(1)] and [55(2)].

(2) Subject to (3) below, all of the determinations in dispute were validly issued by HMRC.

(3) HMRC were out of time to issue the determinations in respect of the disputed years

727. Accordingly, the appeals are allowed in part to the extent set out above.

728. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 17 SEPTEMBER 2019