IN THE HIGH COURT OF JUSTICE APP/317/2004

CHANCERY DIVISION

[2004] EWHC 2597 (Ch)

Royal Courts of Justice

Friday, 22nd October 2004

Before:
SIR DONALD RATTEE
(Sitting as a Judge of the High Court)

B E T W E E N:

FUTURE ON-LINE LIMITED
(A Firm) Appellant

- and -

S K FOULDS Respondent
(H.M. INSPECTOR OF TAXES)

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MR. J. ANTELL (instructed by Messrs. Druitts of Bournemouth) appeared on behalf of the Appellant.

MR. A. NAWBATT (instructed by the Solicitor for the Inland Revenue) appeared on behalf of the Respondent.

JUDGMENT
(As approved by the Judge)

SIR DONALD RATTEE:

1 This is an appeal against a decision dated 31st March 2004 of a Special Commissioner, Mr. Stephen Oliver Q.C. It concerns the application of what is commonly called the "IR35" legislation relating to liability for income tax under Schedule E, and National Insurance contributions of an individual who provides services to a client through the medium of a service company owned by the individual, in circumstances in which, had the individual provided these services under a direct contract with the client, he would have been regarded as an employee of the client. The effect of the legislation in such circumstances is to treat fees paid by the client to the service company, not as income of that company, but as earnings of the individual subject to income tax under Schedule E and National Insurance contributions.

2 The IR35 legislation is contained in the Finance Act 2000 so far as concerns income tax and the Social Security Contributions (Intermediaries) Regulations 2000 so far as concerns National Insurance contributions. I must read some of the relevant provisions. Income Tax: The material provisions applicable at the time relevant to this appeal are in Schedule 12 to the Finance Act 2000. Paragraph 1 of Schedule 12 provides:

> "1-(1) This Schedule applies where:
>
> (a) an individual ("the worker") personally performs, or is under an obligation personally to perform, services for the purpose of a business carried on by 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.
>
> "(2) In sub-paragraph (1)(a) "business" includes any activity carried on –
>
> (a) by a government or public or local authority (in the United Kingdom or elsewhere), or

(b) by a body corporate, unincorporated body or partnership.

" (3) The reference in sub-paragraph (1)(b) to a "third party" includes a partnership or unincorporated body of which the worker is a member.

"(4) The circumstances referred to in sub-paragraph (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) The fact that the worker holds an office with the client does not affect the application of this Schedule."

3 Paragraph 2 provides as follows:

"(1) If, in the case of an engagement to which this Schedule applies in any tax year –

(a) the conditions specified in paragraph 3, 4 or 5 are met in relation to the intermediary, and

(b) the worker, or an associate of the worker –

(i) receives from the intermediary directly or indirectly, a payment or other benefit that is not chargeable to tax under Schedule E; or

(ii) has rights entitling him, or which in any circumstances would entitle him, to receive from the intermediary, directly or indirectly, any such payment or other benefit,

the intermediary is treated as making to the worker in that year, and the worker is treated as receiving in that year, a payment chargeable to income tax under Schedule E ("the deemed Schedule E payment").

"(2) The deemed Schedule E payment is treated as made at the end of the tax year, unless paragraph 12 applies, (earlier date of deemed payment in certain cases).

"(3) A single payment is treated as made in respect of all engagements in relation to which the intermediary is treated as making a payment to the worker in the tax year.

"These are referred to in this Schedule as the relevant engagements in relation to a deemed Schedule E payment."

4 In the present case the relevant conditions for the purposes of para.2(1)(a) are those set out in para. 3, since the relevant intermediary is a company. I need not read those provisions. It is sufficient for present purposes to say that the conditions are satisfied with certain exceptions if the individual providing the services concerned has the beneficial ownership of more than 5 per cent. of the ordinary share capital of the company intermediary.

5 It is common ground in this case that the relevant conditions are satisfied in relation to the intermediary service company concerned. Part 2 of Schedule 12 sets out the process to be adopted in computing the amount of the Schedule E payment deemed to be received by the individual where para.1 applies. Their detail is not relevant for present purposes.

National Insurance Contributions

6 The equivalent provisions relating to National Insurance contributions applicable at the time relevant to this appeal are in the Social Security Contributions (Intermediaries) Regulations 2000, Statutory Instrument 2000 No.727, Regulation 6. These are in similar but not identical terms to the income tax provisions, which I have read, but it is common ground between the parties to this appeal that the effect of the two sets of provisions is the same, and that nothing turns on the differences in drafting, so I need not read the National Insurance provisions.

The Facts

7 The basic relevant facts are very simple. One Shane Roberts ("Mr. Roberts") is an information technology ("IT") specialist with a particular expertise in testing computer systems. From 1997 he has been employed as a consultant by the appellant which was, at all material times, a company whose issued shares were owned equally between Mr. Roberts and his wife. The appellant provided services under contract with persons within the IT industry. From 1st July 2000 until 30th May 2003 Mr. Roberts worked with a company called Electronic Data Systems Ltd ("EDS") pursuant to two contracts.

8 One was a contract between the appellant and a computer services agency company called Elan Computing Ltd ("Elan"). Under that contract the appellant undertook to provide the services of Mr. Roberts, or such other consultant as the appellant and EDS might agree to EDS at one or other of two specified locations. The other contract was between Elan and EDS and by it Elan undertook to supply the services of various contractors to EDS on submission by EDS to Elan of "a purchase order" in respect of the contractor EDS required. EDS submitted a series of such purchase orders to Elan for the "professional services" of Mr. Roberts. Mr. Roberts provided his services as required by EDS pursuant to the two contracts and purchase orders. In fact, the work he did was in relation to the installation of a computer system referred to as the Child Support Reform Programme pursuant to a contract between EDS and the Department of Work and Pensions.

9 The Inland Revenue determined that by virtue of the IR35 legislation the appellant was accountable to the Inland Revenue for tax under PAYE and Class 1 National Insurance contributions on the footing that both were payable in respect of the amounts received by the appellant for Mr. Roberts's services for EDS as though those amounts were salary paid by the appellant to Mr. Roberts. It is against those determinations by the Inland Revenue that the appellant appealed to the Special Commissioner. The Special Commissioner upheld the Revenue's determinations on the basis that they represented proper applications of the IR35 legislation to which I have referred. I will explain the Special Commissioner's decision and the argument before me by reference to the income tax provisions of Schedule 12 and not also the National Insurance contributions provisions of the Social Security Contributions (Intermediaries) Regulations 2000 because, as I have said, the parties are agreed that the effect of both sets of provisions is, for present purposes, the same.

10 The Special Commissioner upheld the Revenue's determinations on the basis that in the terms of para.1(1) of Schedule 12:

(a) Mr. Roberts (the worker) personally performed services for the purpose of a business carried on by EDS (the client).

(b) The services were provided not under a contract directly between the client (EDS) and the worker (Mr. Roberts) but under arrangements involving an intermediary (the appellant); and

(c) The circumstances were such that, if the services had been provided under a contract directly between the client (EDS) and the worker (Mr.Roberts) Mr. Roberts would have been regarded for income tax purposes as the employee of the client (EDS).

In reaching his conclusion that condition (c) was satisfied, the learned Special Commissioner made a very detailed and comprehensive analysis of the terms of the actual contractual arrangements under which Mr. Roberts's services were provided to EDS and the manner in which Mr. Roberts performed those services.

11 The appellant now makes two lines of attack on the Special Commissioner's decision. The first line of attack is based on a new argument not canvassed before the Special Commissioner, but one which I allowed counsel for the appellant to put without objection from counsel for the Inland Revenue. The new argument is that it is wrong to regard EDS as the client for the purposes of the conditions in para. 1(1) of Schedule 12. The client for that purpose is Elan and not EDS. It is clear that the reason the appellant makes this submission, albeit at this late stage, is that it would clearly be impossible on the facts found by the Special Commissioner to find that condition (c) of para.1(1) of Schedule 12 was satisfied, if the relevant client were the agency company Elan rather than EDS.

12 Mr. Antell, for the appellant, submitted that in the circumstances of this case the proper construction of para.1 of Schedule 12 was clearly to the effect that Elan is the relevant client, because all one is directed by the paragraph to ignore for the para.1(1)(c) test is the contract between the worker (Mr. Roberts) and the intermediary (the appellant). This means that the hypothetical contract for the purpose of para.1(1)(c) is one between Mr. Roberts and Elan. Elan can properly said to be a client because Mr. Roberts provided his services for the purposes of Elan's agency business.

13 Alternatively, Mr. Antell submitted that, if such construction of para 1(1) was not clear then the provisions are ambiguous and under the doctrine in Pepper v Hart [1993] A.C. 593 I should look at reports of Parliamentary proceedings in Hansard to ascertain the true intent of the legislature. Counsel took me to various passages in Hansard which he submitted made clear that the legislative intention was to give para.1 of Schedule 12 the effect for which he contends. I reject both these submissions. In my view it is clear that it was EDS who required the services of an IT specialist for the purposes of its business of supplying computer systems to its customers. I do not think it can sensibly be said that Mr. Roberts performed those services for the purposes of the business of Elan, which appears to have been the business of a recruitment agency.

14 As appears from the Special Commissioner's findings of fact to which I have referred, the contract entered into between the appellant and Elan was for the provision of the services of Mr. Roberts to EDS specifically. In my judgment the only person for the purposes of whose business it can realistically be said that Mr. Roberts was performing services was EDS. However, even if I am wrong in this view, and it can be said that Mr. Roberts also provided his services for the

purpose of the business of Elan, which business consisted of making such services available to its client, EDS, this in my judgment is immaterial for the purposes of the application of para.1 of Schedule 12 in the circumstances of the present case. On this basis there would be two clients within the meaning of the paragraph, Elan and EDS. One would then have to see whether the para.1(1)(c) test was met in respect of either of them.

15 On the Special Commissioner's findings of fact that test was met in respect of EDS. I accept Mr. Antell's submission that it is not met in relation to Elan. Therefore, the Revenue would still have been correct to apply para.1 in the way in which they have done. Mr. Antell submitted that to construe para.1 of Schedule 12 in a way which would allow the possibility of there being more than one client for the purposes of the paragraph would be objectionable, because it would enable the Revenue to choose which of the two or more it should treat as the relevant client, with possibly different tax results depending on which they chose. The identity of the notional employer may be material to the process of determining what deductions are allowed in computing the amount of the workers deemed receipt under the process set out in Part 2 of Schedule 12.

16 In this context, Mr. Antell relied on a dictum in the case of Vestey v Inland Revenue Commissioners [1980] A.C. 1148 in which, at p.1172 E of the report, Lord Wilberforce said this:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined. A proposition that whether a subject is to be taxed or not or, if he is, the amount of his liability, is to be decided even though within a limit by an administrative body represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it. But unless it has done so, the courts acting on constitutional principles not only should not, but cannot validate it."

17 I accept the submissions of Mr. Nawbatt for the Inland Revenue that the principle there expressed by Lord Wilberforce has no relevance to the present argument. To construe para.1 of Schedule 12 in a manner which could produce two different persons as clients within the meaning of the Schedule would not give the Revenue any such unconstitutional discretion as that referred to by Lord Wilberforce. For on such a construction the Revenue can only treat as the relevant client a person as to whom the test in para. 1(1)(c) of Schedule 12 can be said to be satisfied. In the present case, even if either of Elan or EDS can be said

to be the client, the test in para.1(1)(c) is clearly satisfied only in relation to EDS. On the facts as found by the Special Commissioner it cannot be said that, if the services provided by Mr. Roberts were provided under a contract directly between Mr. Roberts and Elan, Mr. Roberts would be regarded for income tax purposes as an employee of Elan as opposed to an employee of EDS. This is rightly accepted by the Revenue.

18 Thus, even on the basis, which I do not think is the correct one, that Elan can be treated as a client within the meaning of para.1(1)(a) of Schedule 12, as well as EDS, the Revenue has no discretion as to which client to choose for the application of Schedule 12. It can only be EDS because that is the only client in respect of whom the para.1(1)(c) test is satisfied.

19 Despite Mr. Antell's submission to the contrary it seems to me highly unlikely that there could be circumstances in which, even if there can be more than one client within para.1(1)(a) of Schedule 12, there could be more than one in respect of which the para 1(1)(c) test is satisfied. However, whether or not in other circumstances it might be possible to find more than one client within the meaning of para.1(1)(a) of Schedule 12 as I have said, in my judgment, this is not such a case. On the facts of this case EDS is the only person of whom it can be said with any sense of reality that Mr. Roberts performed services for the purposes of its business.

20 Before leaving the appellant's first line of attack on the Special Commissioner's decision, I should say that in his submissions Mr. Nawbatt referred me to a recent unreported decision dated 8th October 2004 of Park J. on the application of the IR35 legislation in Usetech Ltd. v. Young (Inspector of Taxes) 2004 EWHC 2248 Chancery. That, like this, was a case in which the relevant worker's services were provided to a client, not only through an intermediary within para. 1(1)(b) of Schedule 12, but also through another company (the equivalent of Elan) acting as agent for the end user client. Park J. saw no difficulty in applying Schedule 12 on the footing that the end user of the worker's services was the relevant client, despite the position of its agent.

21 However, as Mr. Nawbatt accepted Mr. Antell's new point in this case was not argued in Park J's case, so that his decision cannot be said to be any authority on the point. On the other hand Park J's decision is authority against the further objection made by Mr. Antell for treating EDS as the client for the purposes of para.1 of Schedule 12, and that was that it would mean that the appellant's liability to the Revenue would depend on facts relating to the contractual arrangements between Elan and EDS not within the knowledge of the appellant. A similar argument was considered by Park J. in paras 43 to 47 of his Judgment.

I reject Mr. Antell's submission for the same reasons as those given by Park J. for rejecting the argument in his case.

22 I also reject Mr. Antell's Pepper v Hart argument, because I am not satisfied that there is any ambiguity or obscurity in the meaning of the provisions of Schedule 12 which would justify looking at Hansard, or any other Parliamentary material as an aid to construction. Thus, in my judgment, the appellant's first line of attack on the Special Commissioner's decision fails and I must turn to the second, which is that the Special Commissioner misdirected himself as to the law in considering whether the employment test in para. 1(1)(c) of Schedule 12 would be satisfied by the hypothetical contract between Mr. Roberts and EDS required to be assumed for the purposes of that test. I accept the Revenue's submissions that the question whether, had there been such a contact directly between Mr. Roberts and EDS, Mr. Roberts would have been properly regarded for income tax purposes as an employee of the client, must be determined in the light of the current common law test of employment explained in Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance [1968] 2Q.B. 497. That case was an appeal against the decision of the Minister of Pensions and National Insurance that an individual ("L") was, for the purposes of the National Insurance Act, 1965 an "employed person" under a contract of service to the appellant company.

23 At p.512H to 513B of the report in the case, MacKenna J. held that:

> "Whether the relation between the parties to the contract is that of master and servant or otherwise is a conclusion of law dependent on the rights conferred and the duties imposed by the contract."

At p.515A the learned Judge said:

> "…it is the right of control that matters, not its exercise."

Then at p.515C to H he said this:

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

"I need say little about (i) and (ii).

"As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation my not be: (See Atiyah's Vicarious Liability in the Law of Torts (1967) pp.59 to 61 and the cases cited by him).

"As to (ii). Control includes the power of deciding a 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. The right need not be unrestricted.

> 'What matters is lawful authority to command as long there is scope for it. And there must always be some room for it, if only in incidental or collateral matters – see Zuijs v Wirth Brothers Proprietary, Ltd [1955] 93 C. L. R. 561 (p.571).'"

24 The appellant's first complaint about the way in which the Special Commissioner applied the test under para.1(1)(c) of Schedule 12 is that he wrongly accepted a submission of the Revenue to the effect that in applying the employment test, it is the right of control of the worker by the client and not whether such control was actually exercised that is significant. This submission of the Revenue before the Special Commissioner is clearly supported by the dicta of MacKenna J. in the Ready Mixed Concrete case which I have quoted earlier. However, the question before the court in that case was whether the worker was to be regarded as employed under an actual contract of service. In other words, was the actual contract between him and his "employer" one of service. The question to be answered in applying the test in para.1(1)(c) of Schedule 12 is not the same question. Here the question is whether: "The circumstances are such that if the services were provided under a contract directly between the client and the worker" the worker would be regarded as an employee of the client. Thus the relevant contract concerned is not an actual contract but a notional one to be assumed in the context of all the other actual circumstances of the case.

25 This point was adverted to by Burton J. in a case in which the court had to consider whether the IR35 legislation conflicted with the European Convention on Human Rights and European Community Law. At para.48 of his Judgment in

R (On the Application of Professional Contractors Group Ltd and Others) v Inland Revenue Commissioners [2001] Simon's Tax cases 629 at p.651 Burton J. said this:

> "It appears to me clear that the Revenue must bear in mind that under IR35 they are *not* considering an actual contract between the service company and the client, but imagining or constructing a notional contract which does not in fact exist. In those circumstances, of course the terms of the contract between the agency and the client as a result of which the service contractor will be present at the site are important, as would be the terms of any contract between the service contractor and the agency. But, particularly given the fact that, at any rate at present, a contract on standard terms may or may not be imposed by an agency, or may be applicable not by reference to a particular assignment, but on an ongoing basis and may actually bear no relationship to the (non-contractual) interface between the client and the service contractor, such documents can only form a part, albeit obviously an important part of the picture."

25 In my view it is necessary to take account not only of the terms of the actual contractual arrangements between the appellant and Elan and Elan and EDS, but of all the other circumstances in which Mr. Roberts performed his services for the purposes of EDS's business in order to test whether, had those circumstances been different only to the extent that the services were provided pursuant to a contract directly between Mr. Roberts and EDS, Mr. Roberts could properly be regarded as employed by EDS. In my judgment this is precisely what the Special Commissioners did. He did not restrict his consideration to the terms of the actual contractual arrangements between the appellant and Elan and Elan and EDS. He did also consider the actual way in which Mr. Roberts performed his services for EDS. He made a very full and careful analysis of both the contractual arrangements and the actual manner and circumstances in which Mr. Roberts's services were performed. He rightly regarded the actual contractual arrangements as an important but not exclusive element in the test to be applied under s.1(1)(c) of Schedule 12. I consider this criticism of the appellants quite unfounded.

26 The appellant's second criticism under this head is that the Special Commissioner, and I quote from the appellant's grounds of appeal:

> "…placed too much emphasis on the part and parcel of the organisation test and when applying that test failed to distinguish between part and parcel of EDS team who was assembled to carry out the CSR [Child Support Review] Project and being part and parcel of EDS itself."

In this context Mr. Antell relied on a dictum of Mummery J. (as he then was) in Hall (Inspector of Taxes) v Lorimer [1992] Simon's Tax cases 599 in which case the court heard an appeal from a decision of a Special Commissioner that a tax payer was not employed under a contract of service but carried on business on his own account for the purchase of an assessment of income tax. At p.612 of the report Mummery J. said:

> "The decided cases give clear guidance in identifying the detailed elements or aspects of a person's work which should be examined for this purpose. There is no complete exhaustive list of relevant elements. The list includes the express or implied rights and duties of the parties; the degree of control exercised over the person doing the work, whether the person doing the work provides his own equipment and the nature of the equipment involved in the work, whether the person doing the work hires any staff to help him; the degree of financial risk that he takes, for example as result of delays in the performance of the services agreed; a degree of responsibility for investment and management and how far the person providing the service has had an opportunity to profit from sound management in the performance of his task. It may be relevant to consider the understanding or intentions of the parties; whether the person performing the services has set up a business-like organisation of his own; the degree of continuity and the relationship between the person performing the services and the person for whom he performs them; how many engagements he performs and whether they are performed mainly for one person or for a number of different people. It may also be relevant to ask whether the person performing the services is accessory to the business of the person to whom the services are provided or is 'part and parcel' of the latter's organisation."

27 In the present case Mr. Antell submitted that Mummery J. made it clear that the "part and parcel of the organisation test" (as Mr. Antell called it) was only one factor that in some cases might be relevant, whereas in this case he submitted the Special Commissioner placed far more significance upon it and used it as an overall test to determine whether Mr. Roberts could be said to be employed by EDS. I do not accept this submission. The Special Commissioner dealt with the point in para.31 of his decision:

> "Finally, I am satisfied that Mr. Roberts throughout the time he worked for EDS, was part and parcel of the organisation. In the particular circumstances of the present arrangements Mr. Roberts was well integrated into EDS's structure assembled to carry through the CSR project. He had a manager to whom he was accountable. Mr. Roberts in turn worked as part of a team managing other people. He was involved in

> discussions as to work allocation with EDS's project line manager. He was expected to be available to advise and assist other members of the team. He attended meetings with interested parties alongside other EDS managers. Although Mr. Roberts's role in the organisation will not necessarily be determinative, it is clear that in the present circumstances he was an integral part of the EDS organisation dedicated to the CSR project. This feature is in line with the conclusions I have reached based on the control over Mr. Roberts's work in the presence of mutual obligations of an employer/employee nature existing between EDS and Mr. Roberts."

28 It is, in my judgment, clear from this that the Special Commissioner was not treating the part and parcel of the organisation feature of the circumstances of the present case as a test of employment in its own right, or as anything other than one of the features of all the circumstances he was properly considering under para. 1(1)(c) of Schedule 12. He regarded it only as confirming the conclusion which he had reached on the other factors of the case. (See the last sentence of para.31 of his decision that I have just quoted). This he was perfectly entitled to do.

29 The second part of this ground of appeal is that in considering the part and parcel of the organisation factor, the Special Commissioner fell into error in that he failed to distinguish between being part and parcel of EDS's team working on the CSR project and being part and parcel of EDS itself. In support of this submission Mr. Antell relied on a distinction drawn by the Special Commissioner in the decision under appeal in Hall v Lorimer in which the Special Commissioner said this:

> "Being one of a team to produce a programme does not in my view lead to the conclusion that in the taxpayer's case he is part and parcel of the organisation... A violinist in an orchestra may be part and parcel of the orchestra for the performance being given but it does not follow that he is part and parcel of the organisation which runs or manages the orchestra."

I do not consider this criticism of the Special Commissioner in the present case is justified. It is clear from what he said in para. 31 of his decision (which I have already quoted) that he found that Mr. Roberts:

> "…was an integral part of the EDS organisation dedicated to the CSR project. This feature is in line with the conclusions I have reached based on the control over Mr. Roberts's work and the presence of the mutual obligations of an employer/employee nature existing between EDS and Mr. Roberts."

30 I consider that on the facts that he found and set out in his decision the Special Commissioner was well entitled to reach the conclusion that Mr. Roberts was part and parcel of the organisation of EDS's business and that that fact was consistent with the Special Commissioner's view based on all the other circumstances of the case, that the relationship between EDS and Mr. Roberts was such that had it existed under a contract between them it would have been one of employer and employee.

31 Thus, in my judgment, the appellant has failed to make good any of its criticisms of the Special Commissioner's decision and I shall dismiss this appeal.

MR. NAWBATT: My Lord, you should have a costs' schedule, but I have another copy in case you have not.

SIR DONALD RATTEE: I have it here.

MR. NAWBATT: There is just one addition, that is today's costs. It is £80 for my attendance today plus £14 VAT, so the total will be £3481.

SIR DONALD RATTEE: So you are asking me to dismiss the appeal with costs in that sum?

MR. NAWBATT: My Lord, yes.

SIR DONALD RATTEE: Any objection to that, Mr. Antell?

MR. ANTELL: My Lord, I cannot object in principle, but I would query one particular item on the schedule of costs and that is the attendances by solicitors on documents which amounts to over six hours. It is not clear what was involved in that since the skeleton argument was drafted by counsel.

SIR DONALD RATTEE: Well what is the answer?

MR. NAWBATT: My Lord, I believe the answer is this, it is that if one looks at the appellant's cost schedule you will see that my learned friend's brief fee ----

SIR DONALD RATTEE: Well I have not seen one of those, I do not have one. Anyway, just tell me what it says.

MR. NAWBATT: Well he will correct me if I am wrong. The fees put in by my learned friend exceed mine by some distance, and so if you added my learned friend's and his solicitor's fees, and then you compared them to my instructing solicitors and my fees the appellant's costs far outweigh the respondent's, and

that I think is the explanation for the difference in costs. Those instructing me have spent more time on this case than my learned friend's instructing solicitors and that is reflected in my reduced brief fee. You have seen Mr. Antell's skeleton argument ----

SIR DONALD RATTEE: It is quite difficult to see how you spend six hours on them, there are very few documents, what do you with them for six hours?

MR. NAWBATT: My Lord, I think the answer is this. You will see Mr. Antell's skeleton argument; it is quite a weighty document.

SIR DONALD RATTEE: Yes.

MR. NAWBATT: So even before instructing me that was received, so they would have to go through the Special Commissioner's decision and then go through my learned friend's skeleton argument, and then there is the preparation of the brief, and then also you have seen the authorities and the statutory material as well.

SIR DONALD RATTEE: Yes. Yes, thank you. Do you want to say anything else, Mr. Antell?

MR. ANTELL: My Lord, only that it would normally be counsel who would go through the appellant's skeleton argument when drafting the skeleton argument in response.

SIR DONALD RATTEE: No. I think the costs are reasonable. I shall dismiss the appeal, order that the appellant pay the respondent's costs in the sum of £3,481. Anything else?

MR. ANTELL: No, my Lord.

SIR DONALD RATTEE: Thank you both for your help.

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