Case No: CH/2002/APP/0777

Neutral Citation No: [2003] EWHC 645 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th March 2003

Before :

THE HONOURABLE MR JUSTICE HART

Between :

SYNAPTEK LIMITED **Claimant**

− and −

MR GRAEME YOUNG (HM IN$PECTOR OF TAXES) **Defendant**

Mr Conrad McDonnell (instructed by Bond Pearce) for the Claimant
Mr Clive Sheldon (instructed by Solicitor of Inland Revenue) for the Defendant

Hearing dates 27th and 28th February 2003
Handdown Judgment 28th March 2003

Approved Judgment

I direct that pursuant to CPR PD 39A para 6 1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

××××××××.
The Honourable Mr Justice Hart

Mr Justice Hart:

1. This is an appeal by way of case stated against the decision of the General Commissioners for the South Shields Division of Tyne and Wear dated 4th September 2002 dismissing an appeal by Synaptek Limited ("Synaptek") against a Notice of Decision of the Inland Revenue dated 30th April 2001 in the following terms:

> That the circumstances of the arrangements between Gordon Stutchbury and EDS for the performance of services from 1 May 2000 to 29 October 2000 are such that, had they taken the form of a contract between Gordon Stutchbury and EDS, Gordon Stutchbury would be regarded for the purposes of Parts I to V of the Social Security (Contributions and Benefits) Act 1992 as employed in employed earner's employment by EDS.
>
> That Synaptek Limited is treated as liable to pay primary and secondary Class 1 Contributions in respect of the worker's attributable earnings from that engagement."

2. The case concerns the application of what is popularly known as the IR35 legislation, the background to which is explained in the judgments of Burton J at first instance and Robert Walker LJ on appeal in *On the application of Professional Contractors Group Limited, R v IRC [2001] STC 659, [2002] STC 165.* That legislation (for income tax purposes contained in Finance Act 2000, and for social security purposes contained in the Social Security Contributions (Intermediaries) Regulations 2000) applies typically to small "service" companies which provide the services of a particular individual to a client who requires those services. This case concerns the latter regulations ("the Regulations"). In the present case Synaptek was the service company, Gordon Stutchbury ("Mr Stutchbury"), a software engineer, the individual whose services were supplied, and (subject to a wrinkle which I mention below) EDS the client to whom the services were supplied. The position is additionally complicated by the fact that there was no contractual relationship between Synaptek and EDS Synaptek's agreement to provide the services was made with NES Computer Services Limited ("NESCO"). EDS was itself providing services (as successor to the government IT Services Agency ("ITSA")) the Benefits Agency at the Inland Revenue site at Longbenton.

3. Regulation 6(1) provides as follows:

> (1) These Regulations apply where:−
>
> (a) an individual (‘the worker') personally performs, or is under an obligation personally to perform services for the purposes of a business carried on by another person (‘the client'),
>
> (b) the performance of those services by the worker is carried out, not under a contract directly between the client and the worker, but under

arrangements involving an intermediary, and

(c) 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 Part 1 to V of the Contributions and Benefits Act as employed in employed earner's employment by the client"

4. It was common ground that Synaptek was an "intermediary" for the purposes of the Regulation, that Mr Stutchbury personally performed services, and that (subject to the wrinkle) those services were provided for the purposes of a business carried on by EDS. It was accepted by Synaptek that "the arrangements" included the terms of the contract between Synaptek and EDS and the terms of the contract between EDS and NESCO, and that "the circumstances" referred to in Regulation 6(l)(c) include the arrangements and the detail of the day to day performance of those contracts, including any matters not expressly stipulated in those contracts.

5. The General Commissioners, after reciting that Mr Stutchbury had given oral evidence to them and listing documentary material which had been placed before them, expressed their findings of fact as follows:

5.1 Mr Stutchbury is a consultant in software engineering and is in business on his own account. Following a number of employments, including a technical apprenticeship at NEI Reyrolle (switchgear manufacturers) and a period in the Police Force, he sought a career in computing. He qualified in 1987 and worked initially for a nuclear medicines company in Surrey.

5.2 In 1990 Mr Stutchbury purchased an off−the−shelf company Sisterfield Ltd, whose name he subsequently changed to Synaptek Ltd, the Appellant in this case. Mr Stutchbury and his wife are the only shareholders and directors. Mrs Stutchbury is also the Secretary of the Company and is responsible for the administration. This has involved visits from the Contributions Agency and from the VAT Inspector and contact with the company's accountants. Mr Stutchbury has made substantial investment in his company and the Accounts to 30.04.01 show the accumulated cost of Computer Equipment to be £29,835. The Appellant had in the past engaged a total of four employees and had undertaken work for many customers in its twelve year history.

5.3 EDS is an American Company which has a number of Government contracts including one to supply computer software and services to the Benefits Agency at Longbenton, Newcastle upon Tyne. EDS do not have sufficient permanent staff for this work and so recruit additional help. EDS do not deal directly with suppliers of consultancy services, particularly smaller businesses such as the

Appellant. When engaging suppliers, EDS use the services of agencies, for, example NESCO. The agency is responsible for payment to the Appellant and, if the agency goes into liquidation, the Appellant will not be paid.

5.4 On 15 December 1999 the Appellant entered into an agreement with NESCO under which Mr Stutchbury was to undertake work for ITSA - DSS at Longbenton, Newcastle upon Tyne. The role of ITSA was subsequently taken over by EDS through the terms of the agreement of 15 December 1999 continued to be observed without any material difference to the Appellant or to Mr Stutchbury. For the period referred to in the Notice of Decision, therefore, the work was to be undertaken for EDS.

5.5 The Agreement of 15 December 1999, applied to the relevant period, contained the following features:

(i) The Appellant would secure that Mr Stutchbury carried out the services required by EDS

(ii) The services were to be carried out at the DSS building at Longbenton though that location could be changed by agreement between the Appellant and NESCO at any time.

(iii) It was open to any of the three parties, NESCO, the Appellant or EDS, to terminate the agreement by four weeks written notice to other two parties. Further, it was open to EDS or NESCO to terminate the Agreement with immediate effect if Mr Stutchbury failed to carry out the services to the satisfaction of EDS.

(iv) Mr Stutchbury was to work for at least 37.5 hours per week and payment would be at the hourly rate of £42. There would be no sick pay or holiday pay. The cost of travelling to work was provided for in the hourly rate. Each week Mr Stutchbury was to complete a timesheet which had to be authorised by EDS and submitted to NESCO. Payment would only be made by NESCO on production of a duly completed timesheet and an appropriate invoice.

(v) In the interest of continuity, the Appellant was to procure that the work was undertaken by Mr Stutchbury personally. The Appellant could substitute alternative personnel but only with the approval of EDS.

(vi) The Appellant would remain the employer of Mr Stutchbury.

(vii) The intellectual property in the software developed by Mr Stutchbury was to belong to EDS.

5.6 Mr Stutchbury was an expert in his field. He worked on two projects at Longbenton. Subject to problems arising on either project, it was up to Mr Stutchbury how he did the work and when he did it. He did not take his own staff with him. For the most part he worked alongside employees of EDS. From time to time, when requested, he would go to the aid of employees of other firms on the site. He did not seek permission, though usually informed a co−worker or the job manager as a matter of courtesy. The time involved was included in his normal timesheet to NESCO, Mr Stutchbury did not work any fixed hours. He was inclined to work longer hours at the beginning of the week. Mrs H Docherty, an employee of EDS, was his Line Manager and she managed the projects

5.7 Site security was controlled by the Inland Revenue who had the ultimate say on who could enter, and this extended to everyone. Mr Stutchbury was issued with a Pass.

5.8 Mr Stutchbury did not use his own equipment on the site but he did take his own books for reference.

5.9 At various times during the course of his involvement with EDS, Mr Stutchbury undertook other work for unconnected parties including PTS Services and Ainleys This was in his own time, largely in the evenings and at weekends.

5.10 Although there was a right of substitution in the event, for example, of Mr Stutchbury's illness, consent was never sought. Any substitute would have had to be suitably qualified and meet with the approval of EDS. Mr Stutchbury would have been a good judge of suitable qualification since he had successfully introduced three individuals to EDS. Mrs Stutchbury could not have acted as a substitute for her husband.

5.11 The facts of this case bear a close similarity to the facts in F.S. Consulting Limited v Patrick McCaul. The principles set out by the Special Commissioners in that case would, therefore, be a useful guide."

6. They then set out (in paragraph 6) what Synaptek's contentions had been. These included a number of assertions of fact which were not the subject of express findings.

Then, after setting out the Inland Revenue's contentions, and listing some 23 authorities to which they had been referred, they proceeded to their conclusion in

the following terms:

> We the Commissioners who heard the appeals decided:−
>
> 1. Having considered all the elements of this case, and the recent decisions to which we have been referred, we have decided on balance that, if there had been a contract between Mr Stutchbury and EDS for the period 1 May to 29 October 2000, it would have been a contract of service with Mr Stutchbury as employee.
>
> 2. We have therefore decided that the circumstances fall within Regulation 6(1), Social Security Contributions (Intermediaries) Regulations, 2000, and that the Notice of Decision by the Inland Revenue dated 30.04.2001 should stand."

7. Mr McDonnell, on behalf of Synaptek, observed that there is very little in the way of reasoning in the Case Stated. Such reasoning as there is has to be inferred from their reference to the cases to which they were referred. I agree with the comment but do not think that it is a legitimate criticism. The General Commissioners' duty is to find the facts and state their conclusions see the General Commissioners (Jurisdiction and Procedure) Regulations 1994, regulations 13 and 20(2). The extent to which they may be under a duty, in a case where their findings depend on resolving issues of pure fact, to explain why they have arrived at particular findings is not a matter which I need to consider. In the present case their particular findings of fact are not (save as mentioned below) challenged as not being open to them on the evidence which was before them.

8. Deciding, in a borderline case, whether a particular contract is a contract of service or a contract for services is notoriously difficult. It arises in a number of contexts, most commonly today in an income tax or social security context or in the application of employment protection legislation. In general the question is regarded as one of fact, or as it is sometimes put, a question of mixed fact and law, the evaluation and determination of which is a matter for the fact−finding tribunal (see, e.g. *Cooke v Blacklaws* [1985] STC 1, *Sidey v Phillips* [1987] STC 87, *O' Kelly v Trust House* Forte [1983] IRLR 369, at 381−383, *Clark v Oxfordshire Health Authority* [1998] 1RLR 125). If, however, the question falls to be resolved solely by reference to the contents of a written contract, the question is regarded by the court as a question of law.

9. The distinction is illuminated by a passage from the speech of Lord Hoffmann in *Carmichael v National Power plc* [1999] 1 WLR 2042, where he said at pp. 2048D− 2049C):

> I add a few words only on the troublesome distinction between questions of fact and questions of law.
>
> The difficulties which have arisen in this area are, I think,

attributable to the historical origin of the distinction in trial by jury and the pragmatic way in which the courts have applied it. In his Hamlyn Lectures on *Trial by Jury* (1956), Lord Devlin said (at p.61):

The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries."

Included in the second category is the construction of documents in their natural and ordinary meaning. An uninitiated person might have thought that, for example, the interpretation of a letter written by a layman stating the terms upon which he offered work to someone else, should be a question of fact, best decided by an employment tribunal (formerly an industrial tribunal: see the Employment Rights (Dispute Resolution) Act 1998), which was likely to be more familiar with the relevant background than a judge. But the opposite is the case: see *Davies v Presbyterian Church of* Wales [1986] 1 WLR 323. This rule may be part of the explanation for the otherwise remarkable fact that the Employment Appeal Tribunal has a majority of lay members although it has jurisdiction to hear appeals only on questions of law. As Lord Devlin explains (at pp. 97−98) the rule was adopted in trials by jury for purely pragmatic reasons. In mediaeval times juries were illiterate and most of the documents which came before a jury were deeds drafted by lawyers. In the eighteenth and nineteenth centuries the rule was maintained because it was essential to the development of English commercial law. There could have been no precedent and no certainty in the construction of standard commercial documents if questions of construction had been left in each case to a jury which gave no reasons for its decision. Thus the rule that the construction of documents is a question of law was well established when industrial tribunals were created and has been carried over into employment law.

It was this rule upon which the majority in the Court of Appeal relied as entitling them to say that the construction of the exchange of letters between the C.E.G.B and the respondents, together with any terms which could be implied be law into the contract which they created, was a question of law. I agree with my noble and learned friend the Lord Chancellor that even if this was the case, I would prefer the construction adopted by the industrial tribunal to that of the majority in the Court of Appeal. But I think that the Court of Appeal pushed the rule about the

> construction of documents too far. It applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact."

10. It was submitted by Mr McDonnell that the question under Regulation 6(1) necessarily involved a question of law, since the Commissioners were not being invited to make findings of fact as to what were the actual contractual arrangements, but had rather to consider whether the rendering of services under the terms of a hypothetical contract should be regarded as employment in employed earner's employment by the client. In order to answer that question, the Commissioners had first to hypothesise, or construct, the terms of the relevant contract. Once that exercise had been done, the determination of the question whether the contract was one of service or for services was, he submitted, necessarily a question of law.

11. I do not accept that submission. The inquiry which Regulation 6(1) directs is in the first instance an essentially factual one. It involves identifying, first, what are the "arrangements involving an intermediary" under which the services are performed, and, secondly, what are the "circumstances" in the context of which the arrangements have been made and the services performed. The legal hypothesis which then has to be made is that the arrangements had taken the form of a contract between the worker and the client. To the extent that "the arrangements" are in the particular case to be found only in contractual documentation, it may be true to say that the interpretation of that documentation is a question of law. Even in that case, however, the findings of the fact−finding tribunal will be determinative of the factual matrix in which the interpretative process has to take place, and influential to a greater or lesser degree in enabling the essential character of the arrangements to be identified. Where, on the other hand, the arrangements cannot be located solely in contractual documentation, their identification and characterisation is properly to be described as a matter of fact for the fact−finding tribunal. The fact that the tribunal is then asked to hypothesise a contract comprising those arrangements directly between the worker and the client does not, by itself, convert the latter question from being a question of mixed fact and law into a pure question of law.

12. The significance of the point is, of course, that if the question is characterised as one of fact, or of mixed fact and law, this court can only interfere if it concludes that the decision reached by the Commissioners is an impossible one on the facts found by them or that they have misdirected themselves. If, on the other hand, it is

a question of law this court is free to substitute its own opinion. In a context where the answer to be given depends on the relative weight to be given to a number of potentially conflicting indicia, the distinction may be of critical importance: in the one case the decision of the Commissioners is conclusive and in the other it is not. As I understood his submissions, Mr McDonnell's argument that the question here was one of law was founded solely on the proposition that the hypothesis required to be made by Regulation 6(3) necessarily involved a point of law. Subject to that proposition his submissions appeared to me to assume that the task of the Commissioners was to make appropriate findings of fact and to evaluate their weight in the traditional manner in relation to the fundamental issue of service or services. Indeed the main thrust of his submissions was, not that the Commissioner's had been wrong so to approach the matter, but that insufficient weight had been given by the Commissioners to certain matters of pure fact (in particular the way in which Mr Stutchbury in fact conducted himself in providing the services). He did not, as I understood him, submit that the question before the Commissioners could be determined solely by reference to the Contractual documentation to which they were referred.

13. It is not clear from the stated case how the Commissioners approached the task of identifying the relevant "arrangements". As already indicated, in his written submissions Mr McDonnell argued that the "arrangements" encompassed the terms of the contract between ‘Synaptek' and NESCO (which were before the Commissioners) and the terms of the contract between NESCO and EDS (which were not). He further argued that the "circumstances" referred to in Regulation 6(1)(c) included the arrangements and also the detail of the day to day performance of those contracts, including any matters not expressly stipulated in those contracts. Although the case stated is not explicit, it appears to me that this analysis was adopted by the Commissioners.

14. On that analysis the starting point of the inquiry lay in the provisions of the contract between Synaptek and NESCO ("the NESCO agreement"). Its principal features are summarised in paragraph 5.5 of the stated case but for ease of exposition it is desirable to set out in extenso its provisions. In that agreement Synaptek is referred to as "the Company", Mr Stutchbury as "the Company Employee". The particulars annexed to the agreement were in the following form:

The Particulars (L9793)
15 December 1999

1.	**Client**	ITSA - DSS
2.	**The Subcontractor**	
2A	**Company**	Synaptek Limited
	Company Number	2475448
2B	**Company Employee**	Gordon Stutchbury
3.	**Reporting to:** .	David Cummings

4.	**Location:**		Longbenton
5.		**Services:**	Support Technician - Futures
6.	**Start Date:**	1 May 2000	
7.	**Finish Date:**	29 October 2000	
8.	**Notice Period:**	4 weeks	
9.	**Rate:**	42.00 per hour	
10.	**Hours per week:**	37.5	
11.	**Additional Services Rate:**	Pro rata	
12.	**Additional Info:**		

15. So far as material the provisions of the agreement itself included the following:

2 COMMENCEMENT

2.1 The Contract will commence on the Start Date and will expire automatically without notice being required from either party on the Finish Date (Particulars Sections 6 and 7) or earlier termination in accordance with Clause 8 below.

×.

3. CONTRACT

3.1 No variation of these terms shall be binding unless agreed in writing and signed by a Director of NESCO and of the Company and by the Company Employee.

3.2 Except as amended in accordance with sub−clause 3.1 these terms constitute the entire agreement between the parties and supersede all previous written and oral negotiations and representations.

3.3 In the event of conflict between these terms and any terms of business of the Company these terms shall prevail.

3.4 Should any of these terms be or become unenforceable the validity of the remaining terms will not be affected.

3.5. The Company will ensure that the Company Employee performs the obligations of the Company and of the Company Employee under this agreement.

4. THE COMPANY AND THE COMPANY EMPLOYEE

4.1 It is the client's responsibility to provide the Company and the Company's responsibility to provide the Company Employee with detailed and accurate description of the Services.

4.2 The Company shall supply to NESCO an up−to−date and accurate curriculum vitae and any supporting documents for the Company Employee.

4.3 The Client will allocate work to the Company and the Company will allocate work to the Company Employee. NESCO has no responsibility for supervising, directing or controlling the Company Employee.

4.4 The Company shall procure that the Company Employee carries out the services in a diligent and professional manner and in compliance with all instructions, rules, procedures, regulations, codes, laws and policy guidelines of the Client relating to conduct, health and safety at work, security, confidentiality and secrecy, fire and accident risk and all other matters which may affect the Company Employee at the Location.

×.

4. 11 The Company Employee agrees with each of NESCO and the Client that he will be bound by and comply in all respects with these terms.

5. LOCATION AND HOURS

5.1 The Location may be changed by agreement between the Company and NESCO at any time.

5.2 The normal working week for the company Employee is specified in the Particulars Section 10.

5.3 If at any request of the Client the Company Employee agrees to provide additional services outside the normal working week, details shall be included in the Company Employee's weekly time sheet and NESCO will pay for such services at the Additional Services Rate specified in the Particulars.

5.4 The Company will ensure that the Company Employee gives such notice as the Client may require to the Client and NESCO of proposed holiday leave.

6. TIMESHEETS/INVOICING/PAYMENT/VAT

6.1 The Company Employee must submit to NESCO a timesheet for each week worked signed by or on behalf of the Client to whom the Company Employee shall give one copy.

6.2 No payment will be made unless and until properly completed and counter−signed timesheet and appropriate invoice from the Company have been received by NESCO.

6.3 The Company will submit to NESCO such written information as NESCO requests in support of such invoices including but not limited to copies of its certificate of incorporation of the Company and VAT registration document where appropriate.

6.4 In any event no payment will be made by NESCO to the Company in respect of any contractual period not actually worked including notice periods.

×.

8. TERMINATION

8.1 NESCO, the Company or the Client may terminate this Contract at any time for any cause by giving written notice to the other two parties of the period set out in the Particulars Section 8 expiring at any time.

8.2 If the Company Employee

8.2.1 fails to supply the Services to the satisfaction of the Client or does anything detrimental to the interests of the Client or NESCO; or

8.2.2 shall be guilty of any criminal act;

then the Client or NESCO may given written notice to the Company terminating this contract and to the Company Employee terminating the provision of the Services with immediate effect and in either case this contract shall thereupon terminate.

8.3 If the Client cancels its requirement for the Company Employee on or before the Start Date NESCO may terminate this contract by notice in writing with immediate effect and without liability for compensation.

8.4 In the event of termination of this contract by the Client NESCO and the Company shall forthwith provide to each other full written particulars of the reason for the termination so far as the same are known.

8.5 If the Company or the Company Employee fails to observe these terms to (in the reasonable opinion of NESCO) a material and significant extent and fails to remedy the same within seven days of notice from NESCO requiring it to do so then NESCO has the right to terminate this contract forthwith and without any liability to the Company.

8.6. If NESCO fails to observe these terms to (in the reasonable opinion of the Company) a material and significant extent and fails to remedy this same within seven days of notice from the Company requiring it to do so then the Company has the right to terminate this Contract forthwith and without liability to NESCO of any kind.

8.7 Termination of this Contract shall take effect without prejudice to any accrued rights, and liabilities of either party.

9. SUBSTITUTION

9.1 In the interests of continuity the Company shall use its best endeavours to procure that the Services are provided by the Company Employee personally but may with the consent of the Client substitute alternative personnel subject to procuring that such alternative personnel are bound by the terms of this agreement.

9.2 The Company shall procure that the Company Employee shall not for a period of six months following the termination of this agreement for any reason without the prior written approval of a Director of NESCO be engaged directly or indirectly in the provision of services similar to those supplied by the Company hereunder to the Client or any associated or subsidiary personal company firm or organisation.

10 OFF−SITE FACILITIES AND TRAINING

10.1 The Company shall procure that the Company Employee has adequate computer facilities at its premises or the Company Employee's home or office and that the Company Employee spends such time there at no cost to NESCO as may be necessary for the provision of the Services to a proper and professional standard including preparation, testing and revision of any aspect of the Services provided at the Location.

10.2 The Company shall be responsible for ensuring that the Company Employee, and any other person provided pursuant to these terms, has the necessary qualifications and competence for the proper performance of the Services and the Company shall be responsible for the costs of all training which may from time to time be necessary to comply with the provisions of this clause.

.

15. EXCLUSIONS AND INDEMNITY

15.1 Save as herein provided NESCO shall not be liable to the Company or the Company Employee in any event in contract, tort (including negligence and breach of statutory duty) or otherwise howsoever and whatever the cause thereof.

15.1.1 for any increased costs or expenses;

15.1.2 for any loss of profit, business, contracts, revenues, or anticipated savings; or

15.1.3 for any special indirect or consequential damage of any nature whatsoever.

15.2 The Company will indemnify NESCO against all action proceedings claims or demands in any way connected with this contract brought or threatened as a result of any act or omission by the Company or the Company Employee and shall effect professional identify insurance for not less than £1 million in respect of any such act or omission."

16. For the purposes of Regulation 6(1) the respective obligations of Mr Stutchbury and EDS have to be identified and, on the hypothesis that there was a contract between them, a conclusion formed as to whether that contract is a contract of service or a contract for services. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. Mackenna J. expressed that test in the following terms at p.515:

> A contract of services 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."

17. The authorities show that there is no one test which is conclusive for determining into which category a particular contract falls. As Nolan L.J. put it in *Hall v. Lorimer* [1994] S.T.C. 23 at p.28: "In cases of this sort 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."

18. Mr McDonnell submitted that in the present case every relevant aspect of the circumstances and the arrangements was incompatible with employment and was indicative of the provision of services. He put at the forefront of his case the circumstances that Mr Stutchbury (through Synaptek) was, as found by the Commissioners, in business on his own account (see paragraphs 5.1 and 5.2 of the case stated) and continued to work for other clients during the period of his engagement with EDS (see paragraph 5.9*)* . In *Market Investigations Ltd v. Minister of Social Security* [1969] 2 Q.B. 173, Cooke J. said at pp 184−5.

> the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been. compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. 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 that factors which may be of importance are such matters as 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"

19. Mr McDonnell submitted that once it is estab1ished that a person was in business on his account that is an extremely powerful pointer to the fact that the particular engagement by the individual is one for services rather than of service. For that proposition he relied on the decision of Rowlatt J in *Davis v Braithwaite* (1933) 18 T.C. 198. That case raised the question whether the earnings of an actress from a variety of engagements over three years of assessment were assessable as profits of her profession or vocation under Schedule D or as profits from her employment as an actress under Schedule E. The real point at issue was her liability to tax in respect of her American earnings, and on that question it was in her interest to argue that each separate engagement represented a separate contract of employment to which Schedule E applied. Rowlatt J. held on the particular facts that the argument could not succeed. In my view, nothing in his judgment can be read as authority for the proposition that there is anything like a presumption that any engagement entered into by a person who is in business on his account is a contract for services rather than a contract of service (and indeed Mr McDonnell did not suggest that the evidential burden shifted). As Pennicuik V−C said in *Fall v Hitchen* [1973] 1 WLR 66 at 74 (in a passage approved of by the Court of Appeal

in *Hall v. Lorimer* [1994] S.T.C. 23 at 31):

> [Rowlatt J in *Braithwaite]* nowhere says that if an actor enters into a contract in such terms as to amount to what he calls a post, then that actor, is not chargeable under Schedule E but under Schedule D. On the contrary, it is implicit in the whole of his judgment, it seems to me, that if a professional person, whether an actor or anybody else, enters into a contract involving what the learned judge calls a post, then that person will be chargeable in respect of the income arising from the post under Schedule E notwithstanding that he is at the same time carrying on his profession, the income of which will be chargeable under Schedule D."

20. The fact that Synaptek (and notionally Mr Stutchbury) was in business on its (notionally his) own account is no doubt an important contextual circumstance to be taken into account in determining whether the particular notional contract under which Mr Stutchbury was engaged by the client was one for services or of service. But it is no more than that. The weight to be given to it was, in my judgment, a matter for the General Commissioners. That they took it into account is clear from their reference to the point in paragraphs 5.1 and 5.2 of the stated case.

Mutuality of Obligation

21. The main point on which Mr McDonnell relied as showing that the Commissioners had misdirected themselves as a matter of law was their treatment of the question whether there was sufficient mutuality of obligation in the notional contract for it to be recognisable as a contract of service. In paragraph 6.7 of the stated case the Commissioners had recorded Synaptek's contention on this point in the following terms:

> 6.7 EDS were not obliged to provide work for Synaptek and Synaptek were not obliged to work EDS. A mutuality of obligation normally essential to a contract of service, was accordingly absent."

22. This passage appears to have been a reflection of written submissions made by Mr Stutchbury where similar words occur in the context of the comment that "At the end of this contract I will leave for another company, as I came to EDS from another company. When the job is complete I will move on as I have done for the past 10 years for something more interesting and/or more money;" and, following a reference to *O'Kelly v Trust House Forte* that "EDS will dispose of Synaptek's services once the contract with BA [Benefits Agency] expires. There is no obligation for Synaptek to continue working for EDS and EDS are not obliged to provide work. There is also a 4 week termination clause so EDS can terminate the contract early."

23. These passages suggest that the argument being advanced before the Commissioners related to the existence of any obligation on EDS to enter into the contract in the first place rather than to the question whether there was any obligation on EDS to provide work during the currency of the contract. The only way in which the Commissioners dealt with the argument was in the first sentence of paragraph 5.5 (iv) of the stated case, implicitly rejecting the submission.

24. Before me Mr McDonnell directed his fire at the question of EDS' obligations to provide work during the currency of the contract. He submitted that, on the true construction of the NESCO agreement (assuming equivalent provisions to be found in the notional contract between EDS and Mr Stutchbury) there was no such obligation on EDS. He submitted that the effect of the contractual provisions, properly construed, was that EDS was perfectly free during the currency of the contract not to provide Mr Stutchbury with any work.

25. There is now a considerably body of authority on the question whether an obligation on the employer to provide work is necessarily and in all cases an indispensable attribute of a contract of employment: see *Nethermere (St Neots) Ltd v Gardiner* [1984] 1RLR 240, *McLeod v Hellyer Brothers Ltd* [1987] 1RLR 232, *Clark v Oxfordshire Health Authority* [1998] 1RLR 125 and *Montgomery v Johnson Underwood Ltd* [2001] 1RLR 269. It is unnecessary in the present case to examine these since Mr Sheldon on behalf of the Inspector accepted that if, taking the period of the notional contract as a whole EDS was under no obligation to provide work, the necessary element of mutuality was indeed lacking for that period.

26. The argument that EDS was under no such obligation was founded entirely on the provision in Clause 6.4 of the NESCO contract that:

> In any event no payment will be made by NESCO to the Company in respect of any contractual period not actually worked including notice periods."

Mr McDonnell submitted that this provision had effect irrespective any contractual period had not been worked: it might be simply because EDS had been unable or unwilling to provide work.

27. In my judgment that is not the correct way to read this provision. Its purpose is to emphasise that payment is dependent not only on the completion of proper timesheets and invoices, but also on actual work having been done. It does not, in my judgment, detract from the obligation on the client reflected in Clause 4.3 to "allocate work to the Company." Moreover, if the contract is read as containing no obligation on the client to provide work, it is quite impossible to see what purpose is served by the termination provisions in Clause 8.

<u>The Right of Substitution</u>

28. In *Express and Echo Publications v Tanton* [1999] 1RLR 367, CA, it was held that a clause in a driver's contract providing that "[i]n the event that the contractor is unable or unwilling to perform the services personally, he shall arrange at his own expense entirely for another suitable person to perform the services" was incompatible with the contract having been one of employment. The E.A.T has subsequently held (see *MacFarlane v Glasgow City Council* [2001] 1RLR 7) that a more limited power of delegation is not necessarily inconsistent with a contract of employment. In the present case the provision in question (Clause 9.1 of the NESCO agreement) does not give Synaptek any *right* to perform the services by anyone other than Mr Stutchbury. The effect of the contract is that, unless and until agreed otherwise, the services do have to be performed personally by Mr Stutchbury. In addressing the question whether that provision pointed to the contract being one for services rather than of employment, the Commissioners were entitled in my judgment to regard it as simply one fact among others, and, in assessing the weight to be given to it**,** to take into account the extent to which the provision was utilised in practice.

Misplaced reliance on *FS Consulting Ltd v McCaul*

29. Mr McDonnell submitted that the Commissioners could be shown to have misdirected themselves by their invocation, in paragraph 5.11 of the stated case, of this decision of Special Commissioner Dr. Brice reported at [2002] SIC (SCD). The contractual arrangements in that case bore some similarity to those in the present case, but there were several distinguishing features. In particular the working hours of the "employee" in that case were less flexible than Mr Stutchbury's, there was a greater degree of control by the client over the services performed by the "employee," there was no obligation on the "employee" to maintain his own tools and equipment or undertake his own training, there was no provision for the "employee" to have professional indemnity insurance, and the "employee" had never worked for more than one "client" at a time.

30. Had there been anything ‘in the case stated to suggest that the Commissioners thought that the facts in *F.S. Consulting* were indistinguishable from those in the present case, there would have been a powerful argument for saying that they must have misdirected themselves. However, all that they say is that the facts "bear a close similarity" and that the principles set out by the Special Commissioner therefore provide "a useful guide." The relevant principles identified by Dr Brice are set out in paragraph 44 to 51 of her Decision. She there began by stating the principle that the question is one of fact to be determined having regard to all the relevant circumstances. She then went on to summarise the effect of *Ready Mixed Concrete, Market Investigations, Hall v. Lorimer* and *McManus v. Griffiths.*

31. In the present case no less than 23 authorities were cited to the Commissioners. Their reference to the principles set out in *F.S. Consulting* seems to me to have been no more than an efficient and economical way of encapsulating the relevant principles, and one which was justified by the close contextual similarity of the facts in that case to the present one. It does not in my judgment demonstrate that

they misdirected themselves.

Conclusions

32. If (as I have held) the Commissioners did not misdirect themselves in law, there plainly was evidence before them which made the conclusion which they reached a possible one. In support of the contention that the contract was one for services, reliance could be placed (1) on the fact that Synaptek (and notionally Mr Stutchbury) was in business on its (notionally his) own account, (2) the limited control by EDS of time at which and the manner in which Mr Stutchbury performed the services, (3) the right of substitution, (4) the fact that Synaptek was responsible for Mr Stutchbury's training and the provision of computer facilities at its own premises, (5) the express provisions in Clause 12 of the NESCO agreement in relation to intellectual property rights, (6) the requirement in Clause 15.2 of the contract for professional indemnity insurance, (7) the flexibility of the hours worked by Mr Stutchbury and (8) the use by him of his own reference books (as to which Mr McDonnell submitted that insufficient weight had been given to potential character as tools of his trade). On the other side of the coin, however, were the facts (1) that the minimum hours to be worked were broadly equivalent to a normal working week, (2) that the only risk borne by Mr Stutchbury was the insolvency of NESCO/EDS, (3) that the duration of the contract was for a fixed period (of 6 months) rather than in relation to the completion of a particular project, (4) that Mr Stutchbury worked alongside EDS employees and was sufficiently integrated with its workforce to have a line manager and (5) the requirement in Clause 4.4 of the NESCO agreement (not in fact expressly adverted to by the Commissioners) that he comply with all EDS instructions. The relative weight to be given to the various factors (all of which are either mentioned or alluded to in the case stated) was a matter for the Commissioners. It is not possible, in my judgment, to say that they were wrong in law in the conclusion at which they arrived.

Error in the Notice of Decision

33. There was one respect in which the Notice of Decision was erroneous, and the error was not corrected, by the Commissioners. This is the wrinkle to which I referred in paragraph 2 above. The Notice of Decision was directed to the arrangements between Mr Stutchbury and EDS during the period from 1st May 2000 to 29th October 2000. In fact, for the period from 1st May 2000 to 31st August 2000 the arrangements were not with EDS but with ITSA.

34. The error, such as it was, appears to have arisen from the way in which Synaptek described the arrangements in initial correspondence with the Inspector. Although the fact of the transfer of undertaking by ITSA to EDS as from 1st September 2000 was in evidence before the Commissioners no significance was attached to it by the parties, and no relevant finding made by the Commissioners. The facts are, however, not in dispute. The point has only come to be taken as an afterthought by Synaptek's present advisors in the course of the appeal process.

35. Had the point been taken before the Commissioners it is impossible to see what difference it would have made to the result save that they would almost certainly have thought it right to amend the Notice of Decision by the insertion of appropriate wording in relation to the period from 1st May 2000 to 31st August 2000. The only factual difference between the earlier (ITSA) period and the later (EDS) period is that in the former case the "right" of substitution was deleted from the NESCO agreement as from 6th May 2000. It is a fair inference that this was done at the prompting of ITSA which, as a government agency, did not wish to be associated with a contractual provision which lent colour to an argument that the arrangements should, for IR35 purposes, be interpreted as providing for services rather than for employment. However that may be, it is plain that Synaptek's separate arguments in relation to the earlier period would, if anything, have been weaker than in relation to the later period.

36. Had the point been taken before the Commissioners they would have had the power to amend the Notice of Decision in an appropriate manner and otherwise to confirm it: see Section 10 of the Social Security Contributions (Trustor of Functions,) Act 1999. Since the facts were not in dispute there is no point in remitting the case to them to consider the point. The Court has power to make the necessary amendments to the Commissioners' determination (see Section 56(6) of the Taxes Management Act 1970) and I propose to exercise that power.