

National insurance - earnings of workers supplied by service companies etc. - provision of services through intermediary - worker establishing information technology company - company contracting with agency for provision of information technology services to client of agency - whether company liable for national insurance contributions on earnings of worker - whether, if arrangements had taken the form of a contract between worker and client, worker would have been regarded as gainfully employed by the client - Social Security Contributions (Intermediaries) Regulations 2000 SI 2000/727, Reg 6(1)(c) - Social Security Contributions and Benefits Act 1992, section 4A

THE SPECIAL COMMISSIONERS

ANSELL COMPUTER SERVICES LIMITED

Appellant

- and -

**DAVID RICHARDSON
(HM INSPECTOR OF TAXES)**

Respondent

Special Commissioner: G AARONSON QC

Sitting in London on 23 March and 16 April 2004

David Smith, Accountax Consulting Limited, on behalf of the Appellant

Kevin Gleig, HMIT, Regional Appeals Unit on behalf of the Respondents

DECISION

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The nature of these appeals

1. These appeals are brought by Ansell Computer Services Limited (“ACSL”) which has its registered office in St Albans, Hertfordshire. ACSL has been in business since 1986.
2. From that time until the present Mr Michael Ansell has been a director and shareholder in ACSL and, quite clearly, is its key asset.
3. Mr Ansell is a very experienced, and very highly regarded, computer software engineer, with particular expertise in the defence sector. For several years he has been working on the software elements of weapons and other defence systems, acting as part of a large team of specialists given the overall task of designing, developing and testing the relevant electronic systems.
4. In the periods in question Mr Ansell worked at the premises of two different companies working in the defence sector. The first was Alenia Marconi Systems Limited (“Marconi”) and the second was BAe Systems Avionics Limited (“BAe”). Mr Ansell’s work for both of the companies was at the same premises (BAe had taken over some of the work previously carried out by Marconi following the acquisition in 1999 of the defence electronics business of GEC and the Marconi group by British Aerospace PLC).
5. As a matter of form ACSL’s appeal is against Decision Notices given by Mr M Justin, an officer of the Board of Inland Revenue, under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999. The Decision Notices in question relate to the officer’s opinion as to whether ACSL is liable to pay National Insurance Contributions in respect of the payments made by Marconi and BAe for the work performed by Mr Ansell. This potential liability arises from what is commonly referred to as the “IR35” legislation - i.e. the Schedule E and NIC rules first announced in the Inland Revenue Press Release No 35 following the Spring Budget of 2000. In brief, these rules apply where a person (described as “the worker”) is made available to work for some other person (described as “the client”) by a third party (usually the worker’s own limited company and referred to as “the intermediary”). Applying those terms to the present case, Mr Ansell is “the worker”, his company ACSL is “the intermediary”, and Marconi and BAe were “the clients”.
6. I will in due course refer to the legislation, the contractual arrangements (so far as they can be ascertained or inferred), the nature of Mr Ansell’s work and the way in which he provided it. I will also summarise the guidance given in the case law. I have used the word “summarise” advisedly, as the alternative would be to write

7. a decision of inordinate length, given the fact that the parties' skeleton arguments together run to about 90 pages and cite well over 30 authorities. I mention this not to criticise the parties, whose arguments were very helpful and well presented.
- 5 The point I am making is simply that cases of this sort have to be decided upon an overall view of the facts in the light of the guidance given by earlier cases.
8. At the heart of the dispute is the question whether Mr Ansell would have been employed under a contract of service if (contrary to the actual contractual arrangements) he worked for the clients under a direct contract. To put it another way, supposing that Mr Ansell had worked for Marconi and BAe under a direct contract between him and them, would he have been their employee?
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9. Both parties agree that what might be referred to as the onus of proof (i.e. satisfying me that the supposed relationship would have been a contract for the provision of services (i.e. as an independent contractor and not as an employee)) rests upon the Appellant, ACSL.
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10. For the reasons which I shall explain, I have formed the view that Mr Ansell would, on the supposed direct contractual relationship with Marconi and BAe, have worked for them in the periods in question as an independent contractor, and not as an employee.
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The Decision Notices

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The appeals against the Decision Notices

11. In January 2001 Mr Ansell asked the Inland Revenue for formal decisions on two periods of work which he performed. The first was from 1 July 2000 until 30 September 2000, when he worked for Marconi. The other was from 2 October 2000 to 30 March 2001, when he worked for BAe. The Inspector gave his opinion on 27 December 2002. This was disputed by the Appellant whose representatives asked for formal Decision Notices to be issued. These were made on 16 May 2003.
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The relevant legislation

12. Section 75 of the Welfare Reform and Pensions Act 1999 inserted, with effect from 22 December 1999, a new section 4A into the Social Security Contributions and Benefits Act 1992.
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13. That new section enabled the Treasury to make Regulations which would give effect to the IR35 proposals for NIC purposes. The key provisions of section 4A are as follows –

45 “(1) Regulations may make provision for securing that where –

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- (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 (within the meaning of the regulations) referable to arrangements involving a third person (and not referable to any contract between the client and the worker), and
- 10 (c) *the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of this Act as employed in employed earner’s employment by the client,*

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relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of employed earner’s employment of his.

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(2) For the purposes of this section –

- (a) “the intermediary” means –
- 25 (i) where the third person mentioned in subsection (1)(b) above has such a contractual or other relationship with the worker as may be specified, that third person, or
- (ii) where that third person does not have such a relationship with the worker, any other person who
- 30 has both such a relationship with the worker and such a direct or indirect contractual or other relationship with the third person as may be specified; and
- (b) a person may be the intermediary despite being –
- (i) a person with whom the worker holds any office or employment, or
- (ii) a body corporate, unincorporated body or
- 40 partnership of which the worker is a member;

and subsection (1) above applies whether or not the client is a person with whom the worker holds any office or employment.

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(3) Regulations under this section may in particular, make provision –

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- (a) for the worker to be treated for the purposes of the applicable provisions of this Act, in relation to the specified amount of relevant payments or benefits (the worker's "attributable earnings"), as employed in employed earner's employment by the intermediary;
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- (b) for the intermediary (whether or not he fulfils the conditions prescribed under section 1(6)(a) above for secondary contributors) to be treated for those purposes as the secondary contributor in respect of the worker's attributable earnings."

14. The expression "employed earner's employment" in subsection 4A(1)(c) is explained in section 2 of that Act as meaning employment either under a contract of service or in an office with emoluments chargeable to income tax under Schedule E.

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15. The Regulations empowered by section 4A of the 1992 Act are the Social Security Contributions (Intermediaries) Regulations 2000. The key passage in the Regulations is to be found in paragraph (1) of Regulation 6 which is in very similar (but not identical) terms to the provisions of subsection 4A(1) of the 1992 Act. The differences are accounted for by the fact that some of the expressions are terms defined elsewhere in the Regulations. Regulation 6(1) reads as follows

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"(1) These Regulations apply where —

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- (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,
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- 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 Parts I to V of the Contributions and Benefits Act as employed in employed earner's employment by the client.*
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(2) Paragraph (1)(b) has effect irrespective of whether or not —

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- (a) there exists a contract between the client and the worker, or
- (b) the worker is the holder of an office with the client.

(3) Where these Regulations apply —

- 5 (a) the worker is treated, for the purposes of Parts I to V of the Contributions and Benefits Act, and in relation to the amount deriving from relevant payments and relevant benefits that is calculated in accordance with Regulation 7 (“the worker’s attributable earnings”), as employed in employed earner’s employment by the intermediary, and
- 10 (b) the intermediary, whether or not he fulfils the conditions prescribed under section 1(6)(a) of the Contributions and Benefits Act for secondary contributors, is treated for those purposes as the secondary contributor in respect of the worker’s attributable earnings,
- 15 and Parts I to V of that Act have effect accordingly.

- (4) Any issue whether the circumstances are such as are mentioned in paragraph (1)(c) is an issue relating to contributions that is prescribed for the purposes of section 8(1)(m) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (Decision by Officer of the Board).”
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16. There is no dispute that Mr Ansell is “the worker” for the purposes of Regulation 6 (and also section 4A of the 1992 Act). Likewise there is no question that Marconi (and, subsequently, BAe) is “the client” for the purposes of Regulation 6 (and the “third person” referred to in section 4A).
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17. The dispute turns solely upon the question whether the circumstances are those described in sub-paragraph 6(1)(c) of the Regulations (corresponding to subsection 4A(1)(c) of the 1992 Act), which I have italicised for ease of reference.
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The Evidence

- 35 18. Three witnesses gave evidence. The first was Mr Michael Ansell, “the worker” in relation to each of the two contracts under dispute.
19. The second was Mr Paul McIntosh, who was an employee of BAe, and was the Project Software Manager for the particular project on which Mr Ansell worked.
- 40 This project involved the development of certain radar systems. Evidence as to the nature of the systems, and the particular elements of it on which Mr Ansell and others worked was given in sufficient detail for me to form a broad understanding of it. Given that the work relates to elements of defence systems I do not think it appropriate to go into any more detail than is necessary in this written Decision. Accordingly, for present purposes I shall simply describe this project as “the D Project”.
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20. The final witness was Mr David Coulbeck. At the material time he was employed by Marconi as Software Project Manager on the earlier of the two defence projects on which Mr Ansell worked. For the same reason as applies to the D Project I think it sufficient to note that the Marconi project involved the software for part of a guidance system, and I shall refer to it simply as “the B Project”.
21. Each of these witnesses produced a witness statement, upon which they were examined and cross-examined. Mr Ansell was called as witness for the Appellant, represented by Mr David Smith. He was cross-examined by Mr Kevin Gleig for the Inland Revenue. Mr McIntosh and Mr Coulbeck were witnesses for the Inland Revenue, and were called by Mr Gleig and cross-examined by Mr Smith.
22. I consider that each of the witnesses gave evidence to the best of their recollection. For the most part the evidence of each of them was consistent with the evidence given by the others, and also with the (fairly scant) relevant documentation. There was, however, one significant point on which the evidence of Mr Ansell was inconsistent with that of Mr Coulbeck (while, on the same point, Mr Ansell’s evidence was consistent with the evidence given by Mr McIntosh). This related to the question whether Mr Ansell could be required to work on any given occasion during the period of his contract (as Mr Coulbeck thought was the case) or whether, on the other hand, Mr Ansell was free to take time off to suit his own convenience without seeking the permission of Mr Coulbeck in his capacity as Project Manager. I shall discuss this in a little more detail later on, but on this point I have formed the view that Mr Ansell’s evidence is to be preferred as representing the true contractual state of affairs. Mr Coulbeck, I believe, assumed that he had the power to require Mr Ansell to work on any specified occasion. But since he was not involved in making the contractual arrangements and the issue had not come up in practice he probably did not know what the true position was.

The Contractual Chain between Mr Ansell and Marconi

23. From the evidence before me the contractual chain linking Mr Ansell with Marconi was as follows. On 30th June 2000 ACSL (“the intermediary” for the purposes of the IR35 rules, and “the supplier” as described in the contract) entered into a contract with a company called Centre Dynamics Limited (“CDL”) (described in the contract as “the agent”). Under this agreement CDL would find an “End-user” for the services supplied by ACSL. The contract was expressed to be for an unlimited period, until terminated by breach or mutual consent. It included terms entitling CDL to terminate the agreement if the supplier fails to perform the tasks required for any End-user with reasonable skill.
24. The agreement also contained a detailed provision enabling ACSL to withdraw from part of the work placed by CDL with the End-user, provided (i) that the End-user was given reasonable notice, (ii) that the absence would not interfere with the

overall achievement of the work programme or its agreed timetable, and (iii) if appropriate ACSL would offer a suitably qualified substitute to continue the work for the End-user.

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25. One other significant term needs mentioning. The contract included a provision which required CDL to conclude an agreement with each End-user which itself reflects the terms of the agreement between ACSL and CDL. It was specifically provided that such an agreement would include, inter alia, a substitution clause in the form contained in the ACSL-CDL agreement, the effect of which is summarised above.

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26. So far as payment is concerned, the agreement provided that CDL would pay ACSL £40.20 per hour for the work performed by ACSL, subject to a maximum number of hours set out in a schedule (which specified the services to be rendered to the End-user). That schedule stated that the total number of hours would not be expected to exceed 550.

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27. Applying the provisions of that agreement to the known facts in the present case, the agreement was as follows. ACSL would provide the services of Mr Ansell to Marconi for the purpose of carrying out work of a particular nature, for what was expected to be a maximum of 550 hours; CDL would pay ACSL at the rate of £40.20 per hour. The agreement does not control the amount of money which CDL would charge Marconi, which would be a matter for negotiation between CDL and Marconi. The difference between the price paid by Marconi to CDL and the price paid by CDL to ACSL would represent CDL's profit margin.

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28. To continue the contractual chain, it is clear that some arrangement was entered into by CDL with Marconi, under which Mr Ansell would be provided as a contractor to work on the B Project. There is, however, no signed contract to this effect, nor was any evidence on this given by CDL which, I was told, is no longer in business. Regrettably there is also no clear evidence as to this contractual link from Marconi itself, as Mr Coulbeck made it clear that he was not responsible for the contractual terms governing the engagement of contractors. The problems that can arise by imposing the tax or NIC liability under the IR35 legislation upon an intermediary (ACSL), while providing no means of enabling the intermediary to require "the client" (Marconi in this case) to explain its contractual arrangements with another party (CDL in this case) has been commented on by the Special Commissioner Dr Avery Jones in *Lime-IT Limited -v- Justin* [2003] STC (SCD) 15 at page 20a; and, more extensively, by the Special Commissioner Dr Brice in *Tilbury Consulting Limited -v- Gittins* No 1 [2004] STC (SCD) 1. I share their concern; but in the present case I consider that the material before me is sufficient to enable me to form a view as to the nature of this particular link in the contractual chain.

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29. The relevant documents, much relied on by Mr Gleig, take the form of amendments to purchase orders raised by Marconi on CDL. They are barely

legible, and are cryptically expressed. For instance, one of them refers to extending the “L of L”. From the witness evidence it is tolerably clear that “L of L” stood for the “limit of liability” of Marconi, and the amount of the LoL represented the maximum number of hours at an agreed hourly rate (£42 in the case of one of the documents) for which Marconi would engage the services of Mr Ansell. Following extensive discussion and questioning the witnesses on this, it seems that this really did represent the *maximum*, and was not a fixed number of hours for which Marconi was agreeing to engage Mr Ansell’s services.

30. On the evidence which I have heard it seems that the parties were, in practice, able to get on with the arrangement in a practical way and without difficulty. I conclude that the practical arrangement agreed between CDL and Marconi was that Mr Ansell would work at Marconi on the specified project for a number of hours which was not expected to exceed 550. Because of the absence of clear evidence on the point, I have not been able to conclude whether or not Marconi had been made aware by CDL of the key terms of the agreement between ACSL and CDL. Specifically I do not know whether Marconi had been made aware of, and agreed to, the substitution provisions in the ACSL-CDL contract. However, I infer from the evidence of the witnesses that the practice of substitution was recognised by Marconi (and also BAe), even though it would rarely arise in practice.

The framework in which Mr Ansell worked in practice at Marconi

31. I have already described the written contractual links, so far as they can be found. I shall now flesh out the relationship between Mr Ansell and Marconi from the witness evidence given before me.
32. Mr Ansell, together with a few other individuals, was engaged as a contractor to work on the B Project. There were in fact four teams, each comprising approximately six individuals, with each team devoting itself to a particular element of the software package involved in the B Project. Although his engagement (as the personnel provided by CDL to Marconi) was for the 3 months beginning July 2000, this was in fact a renewal of similar arrangements which had started 2 years earlier. It was explained to me that the B Project had a number of stages, with different elements being involved in each stage. The policy of Marconi was to use permanent employees for the majority of the work, with specialist contractors being added to the teams where necessary to ensure that the teams could accomplish their respective tasks as each stage of the B Project came to be worked upon. The non-employee contractors were, in a sense, “buffer stock”, being personnel who would supplement the teams with the necessary expertise, but on the basis that they could be dispensed with without the complications which employment law imposes in respect of employees. Indeed, Mr Coulbeck was of the view that he could dispense with the services of Mr Ansell, and other contractors in his position, on as little as one day’s notice if, for

whatever reason, he did not consider that their contribution was needed to complete any given stage of the project.

- 5 33. So far as working hours were concerned, Mr Ansell was adamant that he was not obliged to work any particular number of hours in any given day or week, that he could turn up when he liked (subject only to safety considerations, which I shall expand upon in a moment). He was also adamant that he could take time off at his own choosing, say to play golf if he wished; and in such case he did not have to seek permission from Mr Coulbeck or anyone else, and would merely inform them as a matter of courtesy. While Mr Coulbeck did not share this view I have, as noted earlier, concluded that Mr Ansell's evidence is to be preferred on this point, particularly since it coincided with the views of Mr McIntosh (who was Mr Coulbeck's opposite number in the BAe contract).
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- 15 34. As it happens, Mr Ansell was as diligent as he was skilled, and he did in fact work fairly conventional hours, so that his perceived freedom to turn up or not as he wished was a matter of principle rather than practice. There were also a number of significant factors which encouraged Mr Ansell to work at conventional times. First, he was part of a team which worked on particular elements of a particular phase of a weapon development programme. If his work lagged behind that of his colleagues, or raced too far ahead of them, there would be problems in co-ordinating their output. Secondly, as his computer programming work was wholly involved in secret defence projects it was inevitably the case that it had to be carried out on a secure computer system housed in a secure building. This meant that he had to use a particular computer at a particular workstation, and therefore could not do any of the actual work at home or elsewhere using a laptop etc. Thirdly, some of the non-computer equipment which he had to use from time to time was extremely expensive (certain items costing over £1 million) and therefore obviously having to be located in secure premises; but some of it could also be quite dangerous to use. Mr Ansell's evidence on this was graphic: when asked why he would not be permitted to work late at night in the secure premises, he explained that this was for "safety reasons. The company did not want people getting electrocuted whilst using expensive equipment". It seems that the chances of catastrophic events of that sort occurring would considerably increase if he, or any other contractor or employee, was permitted to work alone long before or long after normal working hours.
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- 40 35. Although, for the reasons described, Mr Ansell was not permitted to carry out his work anywhere outside the designated secure premises, and using the designated secure computer system, he did in fact spend a few hours each week at home keeping himself abreast of new thinking and developments in his field. His evidence was that he would spend up to 5 hours a week doing this without any remuneration from Marconi and, insofar as it involved books or journals etc., at his own expense. This contrasted with the position of an employee, who would ordinarily expect to do this work during paid time, and with any out of pocket expenses borne by the employer.
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36. As regards the number of days or hours worked on each particular phase of the project, Mr Ansell agreed that he did in fact work consistently throughout the 3 month period of the contract; but explained that this was so for the reasons described above - essentially to ensure that his work dovetailed with the work of colleagues in his team, and also with the work of the other teams working on the same phase of the development. He was clear in his own mind, however, that he was providing his services to achieve a particular task in the allotted timeframe, and that he had no right to expect that he would be offered the opportunity to work on the next phase. As it happened, however, he was re-engaged at the end of each phase until completion of the B Project.
37. So far as supervision and control was concerned, the evidence was that Mr Ansell had considerable expertise and therefore did not need instruction or control, in the traditional sense, as to how he carried out his responsibilities. However, he was working as part of a team which was working in conjunction with other teams, and consequently his work, like that of everyone else, had to be overseen by the project manager. Mr Ansell was also expected to take part in peer discussions, and did so regularly and diligently.
38. Finally, in a number of practical respects Mr Ansell, like other contractors, was treated differently by Marconi from its employees. For example he was not entitled to join the employee social club, or to use employee on-site parking facilities. He did not have any entitlement to a company pension plan, or share options, or company-related bonus payments, or healthcare or a company car. So far as pay was concerned, he did not receive sick pay or holiday pay, was not entitled to statutory paternity pay or redundancy payments if his particular work was curtailed. These were some of the practical consequences of being (as a matter of general law) a contractor, and not an employee, and hence falling outside the legislation and the non-statutory practices which benefited and protected employees. Indeed, avoiding the need to make these protections and benefits available to contractors was one of the commercial reasons that led Marconi to engage people like Mr Ansell as contractors and not as employees. This was a genuine commercial advantage sought by Marconi, and the corresponding disadvantage was something which Mr Ansell was genuinely prepared to accept in order to attain the greater element of flexibility and independence which contractor status conferred.

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The contract with BAe in practice

39. Mr Ansell explained that by the end of September 2000 the B Project was just about complete and, so far as he was concerned, "my packages of work were complete".

40. Shortly beforehand he had a chance meeting with Mr McIntosh in the car park of the building where Mr Ansell was working on the B Project. At that time Mr McIntosh was the project software manager for the D Project (relating to certain radar systems). He was responsible for building the team to run the project, and had already engaged four BAe employees, some of whom had extensive experience. However, he considered that there was a need for the particular expertise which someone like Mr Ansell could bring, and wanted him to join the team.
41. The contractual arrangements involving Mr Ansell and BAe were very similar to those which I have described earlier in relation to Marconi. On 30th September 2000 ACSL entered into an agreement with CDL, in terms which are not materially different from the 30th June agreement described above. The services to be provided would be for a total number of hours not expected to exceed 1,000, and the rate of payment (as in the earlier agreement) was to be £40.20 per hour.
42. Again, as with the Marconi agreement, there is no evidence as to the arrangements entered into by CDL with BAe. Given that the arrangement seemed to work perfectly well in practice, I infer that BAe were broadly aware of CDL's agreement with ACSL (or, at least, with Mr Ansell). I also conclude that BAe were generally aware of the possibility of substitution if Mr Ansell would for some reason be unable to complete his work.
43. As to the practical aspects of the BAe arrangement, the evidence of Mr McIntosh (who, as noted above, was called as a witness by the Inland Revenue) was wholly consistent with that given by Mr Ansell. So far as concerned Mr Ansell's hours of work, holiday arrangements, notification of prospective absence etc., Mr McIntosh was quite clear that the arrangements concerning Mr Ansell were significantly different from those which applied to employees. For example, so far as holiday arrangements were concerned, the cross-examination was as follows -
- Question: "I am more concerned with the process of him [Mr Ansell] having to get permission or not."
- Answer: "There is no defined process in our company that I am aware of that requires contractors to ask for permission to take holiday."
- Question: "Is it fair to say that, in that regard, he would be different from an employee -"
- Answer: "He was different, definitely, in that area."
44. On another significant point Mr McIntosh echoed the evidence of Mr Coulbeck. So far as BAe was concerned, the only problems that would arise with the payment to Mr Ansell would be if his work *exceeded* the estimated and budgeted time. The time in this context was the six month period beginning 1st October, during which Mr Ansell was expected to work for no more than the specified number of hours for a total cost (to BAe) of approximately £51,480. If, for

5 whatever reason, there was insufficient work for Mr Ansell to do to justify that cost, then he would simply do less and the money would be saved. As Mr McIntosh put it "That is not a problem if I do not need his services, if we underspend; the only problem would occur if we exceeded that time." This was consistent with the general policy relating to contractors. When asked why he did not hire Mr Ansell for 18 or 24 months (being the estimated length of time to complete the D Project) he replied:

10 "Because the policy in the company would be that contractors are hired for the shortest period of time and then when their services are no longer required, you get rid of them. But of course you would look at the end of a period if you still have tasks to carry out, you would resubmit the form, resubmit the justification, explain why you need someone and effectively
15 start the process of recruitment again. But the company does not really encourage project managers to keep contractors longer than they need to be kept."

20 45. At this point (which has relevance to Mr Smith's argument based on mutuality of obligation) it is worth recalling the comments of Mr Coulbeck. In re-examination Mr Gleig asked Mr Coulbeck the following:

25 Question: "Mr Smith asked if you had an obligation to provide work for Mr Ansell. In the period that is under review, which is the three month period, did you have an obligation to provide work throughout that period?"

30 Answer: We had taken him on because we wanted him to do something, so if we suddenly found we no longer had any work, the project was cancelled or some such, then we would have closed the contract. He would have left us."

35 Question: "How would you have given him notice?"

Answer: "I believe, it was very short, like a day, I could give; whereas with a permanent member of staff I could not do that. It would be a much bigger issue because it was then redundancy."

40 46. As to the question of substitution, Mr McIntosh stated that the contracts manager of BAe informed him that he was in principle prepared to allow a substitution, providing of course that a suitable candidate could be found. On that aspect the evidence was that it would be hard but not impossible to find suitable candidates, and that Mr Ansell might know some suitable individuals with the requisite level of security clearance.

45 47. As with the Marconi arrangement, BAe did not give Mr Ansell rights relating to parking, car, pensions, share options, healthcare etc. There was no material difference between this aspect of his engagement with BAe and his engagement with Marconi.

48. As with the Marconi arrangements, Mr Ansell was in fact re-engaged on the D Project by BAe at the end of the six months, and has subsequently been further re-engaged so that he was still working on the project shortly before the hearing.

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Overall impression as to bona fides

49. Standing back and taking the evidence of all three witnesses together, I am satisfied that the contractor relationship was seen by the respective parties (i.e., Mr Ansell on the one hand and Marconi and BAe on the other) as being significantly different from employment, and as having commercial advantages which were perceived by each of them to outweigh the disadvantages. I am satisfied that the arrangements were entirely bona fide, and were not designed to disguise or re-label what in reality would be thought of as employment.

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Guidance from the cases

50. Having reached my conclusions on the evidence, I now turn to consider the guidance given by previous decisions in this and related areas.

51. As I mentioned at the outset, each of the written skeleton arguments given to me by Mr Smith and Mr Gleig referred very extensively to cases which have considered the difference, in various contexts, between employment and independent contractor status. I appreciate their diligence, and I have in reaching my conclusion taken account of the comments which they have made in relation to those cases.

52. However, the path which needs to be followed, while occasionally presenting new and unexpected vistas, is by now fairly well trodden, and I do not mean to belittle the effort of Mr Smith and Mr Gleig by confining myself to a handful of cases that seem to me to raise the relevant points.

53. I shall start with a very recent decision on the IR35 legislation, and the first (so far as I am aware) that has reached the High Court. This is the case of *Synaptek -v- Young* [2003] EWHC 645 (Chancery), a decision of Hart J. The case concerned the provision of computer software services through an intermediary company. The General Commissioners had decided that, on balance, under the hypothetical contract between the worker and the client the worker would have been an employee. Hart J held that the Commissioners' conclusion was clearly a possible one, and that they had not misdirected themselves in law, and accordingly he dismissed the appeal against their decision.

54. Hart J's judgment is a convenient place to recall the basic principles that have been developed over the years by the courts to differentiate between a contract of employment and a contract for the provision of services. At paragraph 16 he referred to the test propounded by MacKenna J in *Readymixed Concrete (South East) Limited -v- Minister of Pensions and National Insurance* [1968] 2 QB 497

at 515. This test has been cited on countless occasions. MacKenna J expressed the test in the following terms:-

5 “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.
- 10 (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.”

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55. This is clearly an important authority, although I would respectfully comment that I do not find this test to be invariably helpful. Expressions such as “for his master” and “control in a sufficient degree” can in some situations raise questions as to how one can tell whether those words are applicable to the case in hand; and
20 the third requirement, to the effect that the other provisions of the contract have to be consistent with its being a contract of service, involves, as it seems to me, an element of circularity.

56. In paragraph 17 of his judgment Hart J refers to the judgment of Nolan LJ in *Hall*
25 -v- *Lorimer* [1994] STC 23 at 28-29, where he said -

 “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.”

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57. At paragraph 18 of his judgment Hart J referred to the judgment of Cooke J in *Market Investigations Limited -v- Minister of Social Security* [1969] 2 QB 173 at 184-185. Cooke J said that -

35 “... 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
40 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
45 sole determining factor; and that factors which may be of importance are such matters as whether the man performing the service 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.”

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58. I accept that, on the facts of the present case, Mr Ansell did little of the particular things which Cooke J enumerated as factors which may be of importance. Mr Ansell did not hire his own helpers; he provided his own equipment only for a few hours a week at home; he did not take on any great financial risk (although he was dependent for his remuneration upon payment by CDL to ADSL); and he did not have any significant opportunity to profit from sound management in the performance of his task, whether with Marconi or with BAe. Indeed, Mr Gleig emphasised these very points in urging me to conclude that Mr Ansell should be regarded, on the hypothetical contractual arrangement between himself and Marconi/BAe, as an employee.

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59. However, as Cooke J made clear, those particular factors *may* be of importance; but, on the facts of any particular case, they may not. In the present case I consider that they are not of sufficient importance. This is because the very nature of Mr Ansell’s work, shrouded as it has to be in secrecy and performed in isolation from anyone apart from other individuals with similar levels of security clearance, does not permit him to exercise his profession in the entrepreneurial way that would be available to someone working in less sensitive areas of activity (whether in the I.T. field or elsewhere).

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60. In this situation it seems to me appropriate to look more to other factors to help decide on which side of the line the hypothetical contractual arrangement would fall. The factors which appear to me to be of greater significance in the present case are:-

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(i) the absence of any obligation on Marconi or BAe to keep Mr Ansell in work throughout the 3 months/6 months period of his respective engagements;

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(ii) the absence of any obligation by Mr Ansell to put in a particular amount of work, whether each day or each week or in aggregate during his period of engagement;

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(iii) the ability which Mr Ansell had to take time off at his own choosing, without seeking permission from the team leaders at Marconi or BAe; and

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(iv) the ability to withdraw and suggest a substitute individual (which both Mr Ansell and Marconi/BAe regarded as genuine, even though it was very unlikely that the situation would in fact arise); and

- (v) the various other practical matters (no company car, sick pay, holiday pay, social club etc.) which differentiated contractors from employees at a daily practical level.

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61. I should mention one additional point which Mr Smith put forward very forcefully. He urged that Mr Ansell could not as a matter of law be regarded as an employee, because there was no obligation on Marconi or BAe to continue to use his services, and hence no “mutuality of obligations”. He referred me to the case of *Montgomery -v- Johnson Underwood Limited* [2001] WCA Civ 318. This case concerned a claim for unfair dismissal by a telephonist who worked at a local company, but was given that job by an employment agency. The question arose as to whether she should be regarded as an employee of the local company or of the employment agency. The Court of Appeal held that the employment tribunal had erred in holding that the applicant was employed by the employment agency, notwithstanding that there was little or no control, direction or supervision of the applicant by the agency. The tribunal also considered that the absence of mutuality of obligation appeared to them to be largely irrelevant to the specific engagement. Longmore LJ said this:-

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“Whatever other developments this branch of the law may have seen over the years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment: see *Nethermere (St Neots) Limited -v- Gardiner* [1984] IRLR 240, 245 per Stephenson LJ approved in *Carmichael -v- National Power PLC* [2000] IRLR 43, 45 per Lord Irvine of Lairg LC.”

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62. Given this clear statement by Longmore LJ, I see considerable force in Mr Smith’s submission. Certainly the evidence given by Mr Ansell and Mr Coulbeck suggests that Marconi could have been entitled to terminate Mr Ansell’s activities at virtually no notice; and Mr McIntosh’s evidence likewise indicated that BAe might have considered itself able to terminate Mr Ansell’s work at a time of its choosing.

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63. I also note that Hart J in *Synaptek* referred to a number of cases which consider the issue as to whether mutuality of obligation is, as a matter of law, an irreducible requirement of a contract of employment. At paragraph 25 he said this

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“There is now a considerable body of authority on the question whether an obligation on the employer to provide work is necessary and in all cases an indispensable attribute of a contract of employment: see *Nethermere (St Neots) Limited -v- Taverna and Gardiner* [1984] IRLR 240, *McLeod -v- Hellyer Bros Limited* [1987] 1 WLR 728, *Clark -v- Oxfordshire Health Authority* [1998] IRLR 125 and *Johnson Underwood Limited -v- Montgomery* [2001] EWCA Civ 318.”

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64. However, for myself I find that the question as to what elements of an arrangement are themselves critical to the existence of that mutuality is not always straightforward. I have reached the clear conclusion on all the evidence that Mr Ansell would not have been an employee in the hypothetical contract which the IR35 legislation requires us to construct. Accordingly, it is unnecessary for me to decide whether, as a matter of law, there would be insufficient mutuality of obligation to support an employee relationship.

Conclusion

65. In his Notice of Decision given on 16th May 2001 Mr Justin on behalf of the Board of Inland Revenue stated -

“1. That the circumstances of the arrangements between Mr M J Ansell and Aliena Marconi Systems Limited for the performance of services from 1 July 2000 to 30 September 2000 are such that, had they taken the form of a contract between Mr M J Ansell and Aliena Marconi Systems Limited, Mr M J Ansell 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 Aliena Marconi Systems Limited.

2. That Ansell Computer Services Limited is treated as liable to pay primary and secondary Class I Contributions in respect of the worker’s attributable earnings from that engagement.”

A similar decision was given in respect of the arrangements between Mr Ansell and BAe from 2nd October 2000 to 30th March 2001.

66. I disagree. Having considered the evidence I have concluded that the circumstances of the arrangements between Mr Ansell and Marconi/BAe are such that, had they taken the form of a contract between Mr Ansell and those companies, that contract would have been one for the provision of services and not of employment.

67. Accordingly the appeals succeed.

GRAHAM AARONSON QC
SPECIAL COMMISSIONER

Release Date: 29 July 2004

SC 3061/03

CASES REFERRED TO IN SKELETON ARGUMENTS

- 5 *Bank voor Handel en Scheepvaart NV v The Administrator of Hungarian Property* 35
 TC 311
- Barnett v Brabyn* [1996] STC 71
- Battersby v Campbell* [2001] STC 189
- 10 *Carmichael v National Power* [1999] 1 WLR 2042
- Clark v Oxfordshire Health Authority* [1998] IRLR 125
- 15 *Davis v Braithwaite* (1933) 18 TC 198
- Express and Echo Publications Limited v Tanton* [1999] IRLR 367
- F S Consulting Limited v McCaul* [2002] STC (SCD) 138
- 20 *Global Plant Limited v Secretary of State of Social Security* [1971] 1 QB 139
- Hall (HM Inspector of Taxes) v Lorimer* CA [1994] STC 23
- 25 *Lee Ting Sang v Chung Chi-Keung* [1990] IRLR 236
- Lime-IT Limited v Justin* [2003] STC (SCD) 15
- Market Investigations Limited v Minister of Social Security* [1968] 3 AER 732
- 30 *Massey v Crown Life Insurance* [1978] 1 WLR 676
- McLeod v Hellyer Brothers Limited* [1987] IRLR 232
- 35 *McManus v Griffiths* (1997) 70 TC 218
- McMeechan v Secretary of State for Employment* [1997] IRLR 353
- Montgomery v Johnson Underwood* [2001] EWCA Civ 318
- 40 *Morren v Swinton and Pendlebury Borough Council* (1965) 1 WLR 576
- Mrs MacFarlane & Mrs Skivington v Glasgow City Council* [2001] IRLR 7 EAT
- 45 *Narich Property Limited v Commissioner of Payroll Tax* [1984] ICR 286
- Nethermere (St Neots) Limited v Gardiner* [1984] ICR 240

- O’Kelly v THF* [1983] 3 All ER 456
- 5 *Professional Contractors Group v CIR* [2001] STC 629
- Propertycare Limited v Gower* 2003 EAT/547
- 10 *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497
- Stevedoring & Haulage Services Limited v Fuller* [2001] EWCA Civ 651
- Stoddart v Cawder Gold Club* [2001] EAT/87300
- 15 *Stuncroft Limited v Havelock* 2001 EAT (unreported)
- Swan Hellenic Limited v Secretary of State for Social Services* 1983 QBD (unreported)
- 20 *Synaptek Limited v Young* [2003] EWHC 645 (Ch)
- Tilbury Consulting Limited v Gittins (No 2)* [2004] STC (SCD) 72
- 25 *WHPT Housing Association Limited v Secretary of State* 1981 ICR 737
- 30