



[2022] UKFTT 00048 (TC)

TC 08400

INCOME TAX AND NATIONAL INSURANCE – intermediaries legislation – IR35 – sections 48-61 ITEPA 2003 – personal service company – contract of service or contract for services – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/02995

BETWEEN

BASIC BROADCASTING LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR JOHN WOODMAN**

Sitting in public at Taylor House, Rosebery Avenue, London on 11-15, 18 and 19 November 2019 (Judge Barbara Mosedale presiding) and by way of video hearing on 15 and 16 November 2021 (Judge Jonathan Cannan presiding)

James Rivett QC and Quinlan Windle instructed by Clintons LLP for the Appellant

Adam Tolley QC and Marianne Tutin instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. Mr Adrian Chiles is a well-known television and radio presenter. He started work at the BBC as a journalist in 1992 at the age of 25. In or about 1996 the BBC required Mr Chiles to cease his employment with a view to his services being provided through what is known as a personal service company. He set up the appellant (“BBL”) for that purpose and ceased his employment. At the same time, BBL entered into contracts with the BBC for the provision of Mr Chiles’ services. By 2010, BBL was providing Mr Chiles’ services to the BBC to present three different programmes, namely ‘The One Show’, ‘Match of the Day 2’ and ‘The Apprentice: You’re Fired’.

2. In June 2010, BBL’s contract to provide Mr Chiles’ services to the BBC came to an end and BBL entered into a contract to provide his services to ITV. Mr Chiles was to be a presenter on ITV’s new flagship breakfast television programme called ‘Daybreak’, as well as presenting ITV’s coverage of live football and certain other factual entertainment programmes. ITV’s football coverage included Champions League and international football matches. BBL contracted with ITV to provide Mr Chiles’ services in relation to those programmes. Mr Chiles ceased to be a presenter of Daybreak in November 2011 but BBL’s contract with ITV continued and he continued to present live football on ITV until 2015.

3. In 2013, BBL contracted with the BBC for Mr Chiles to present programmes on BBC Radio 5 Live. Mr Chiles continues to present programmes on BBC Radio 5 Live.

4. This appeal is concerned with tax years 2012-13 to 2016-17, covering the period from 6 April 2012 to 5 April 2017. During that period BBL provided Mr Chiles’ services pursuant to two ITV contracts (“the ITV Contracts”) and three BBC contracts (“the BBC Contracts”) in addition to other work for other parties. HMRC have issued determinations in respect of income tax and notices of decision in respect of national insurance contributions (“NICs”) to BBL for those tax years. The determinations and decisions were made on the basis of the “intermediaries legislation” also known as IR35 contained in sections 48-61 Income Tax (Earnings and Pensions) Act 2003 (“ITEPA 2003”) and equivalent provisions in the Social Security Contributions (Intermediaries) Regulations 2000 (“the 2000 Regulations”). HMRC contend that the intermediaries legislation applies to the ITV Contracts and the BBC Contracts during the relevant tax years. The income tax and NICs said to be payable pursuant to the determinations and decisions is £1,249,433 and £460,739 respectively.

5. Where the intermediaries legislation applies, it requires consideration of what are generally described as hypothetical contracts, in this case between ITV and the BBC on the one hand and Mr Chiles on the other. HMRC made the determinations and decisions on the basis that those hypothetical contracts would have been contracts of service (employment) rather than contracts for services (self-employment). In simplified terms, HMRC contend that Mr Chiles’ status for the purposes of the intermediaries legislation was that of an employee and that BBL should account for tax and NICs accordingly. BBL contends that Mr Chiles’ status for the purposes of the intermediaries legislation was that of a self-employed contractor, and there is no further liability on the part of BBL.

6. It is agreed that if the intermediaries legislation does apply, there will be a liability on the part of BBL to income tax and NICs. The amount of that liability would be a matter for agreement or a subsequent hearing.

7. The purpose of the intermediaries legislation was identified by Robert Walker LJ as he then was in *R (Professional Contractors Group & Others) v IRC* [2001] EWCA Civ 1945 at [51]:

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

8. The question whether the intermediaries legislation applies to any particular set of circumstances is determined by reference to s 49 ITEPA 2003. The equivalent provision for national insurance purposes is reg 6 of the 2000 Regulations. Both parties agree that the effect of s 49 and reg 6 for present purposes is identical and focussed their submissions on s 49. We shall do the same in this decision. Section 49 provides as follows:

“ (1) This Chapter applies where —

(a) an individual (“the worker”) personally performs, or is under an obligation personally to perform, services for another person (“the client”),

(b) the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party (“the intermediary”), and

(c) the circumstances are such that if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client.

...

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

9. The parties were originally agreed that s 49(1)(a) and (b) are satisfied on the facts in relation to both the ITV Contracts and the BBC Contracts. On that basis, Mr Chiles is “the worker”, ITV and the BBC are “the client” and BBL is “the intermediary”. The issue between the parties was whether s 49(1)(c) is satisfied. The issue could therefore be shortly stated as follows:

If the services provided by Mr Chiles were provided under contracts directly between ITV/BBC and Mr Chiles, would Mr Chiles be regarded for income tax purposes as an employee of ITV/BBC?

10. This is what is referred to as “the hypothetical contract”. There was no dispute that the actual contractual arrangements involved BBL contracting to provide services to ITV/BBC which it fulfilled through Mr Chiles. It has not been suggested by HMRC that Mr Chiles was in reality an employee of ITV/BBC. We should also make clear that there is no suggestion that Mr Chiles set out to avoid tax by supplying his services through BBL. Having said that, there are tax advantages to using a personal service company if the individual using that company would otherwise be treated as an employee of the client.

11. BBL recently sought to widen the issues. In August 2021, BBL applied to amend its grounds of appeal to add a new ground. The new ground was that the intermediaries legislation was not engaged in the relevant tax years because s 49(1)(b) is not satisfied. In particular, BBL seeks to argue that as a result of certain “side contracts” there were direct contracts between Mr Chiles and ITV/BBC for the provision of his services. HMRC opposed that application.

12. BBL has also made an application dated 12 November 2021 for disclosure of material in relation to IR35 decisions concerning television and radio presenters currently on appeal to the Upper Tribunal and the Court of Appeal.

13. We have decided to refuse both of these applications and we will set out our reasons in a separate decision notice. For present purposes therefore, we proceed on the basis that s 49(1)(b) is satisfied and on the basis of the material presently before us.

14. The parties agree that in this appeal the burden of establishing that Mr Chiles would not be regarded as an employee of ITV/BBC pursuant to the hypothetical contracts lies on BBL.

15. The parties also agree that in applying the intermediaries legislation, the Tribunal is required to carry out the following analysis (see *HMRC v Kickabout Productions Ltd* [2020] STC 1787 (“*Kickabout*”) at [6]):

(1) Identify the terms of the actual contractual arrangements and the relevant circumstances in which the individual worked.

(2) Ascertain the terms of the hypothetical contract postulated by s.49(1)(c) ITEPA 2003.

(3) Consider whether the hypothetical contract would be a contract of service or a contract for services.

16. In the event that the appeal concerning the intermediaries legislation is dismissed, issues of quantum would arise. Those issues would be determined at a later hearing. There is one issue where BBL contends that in calculating the amount of the deemed employment payment which arises as a result of the intermediaries legislation, expenses can be deducted by BBL if they would have been deductible from the taxable earnings of Mr Chiles under the hypothetical employment contract. BBL says that one expense which should fall to be deducted is the agency fees paid by Mr Chiles. That will depend in part at least on whether Mr Chiles falls within the definition of “an entertainer” in s 352 ITEPA 2003. In order to expedite this decision we have decided that this issue should be left to any quantum hearing that may be necessary.

17. The hearing of this appeal offers an unfortunate illustration of some of the awful effects of the pandemic. The appeal was heard by Judge Barbara Mosedale sitting with Mr Woodman in the period 11 – 19 November 2019. Judge Mosedale contracted Covid-19 in the early part of the pandemic and suffered from long covid. Despite several attempts, Judge Mosedale has been unable to return to judicial work and unable to write a decision. It was decided by mutual agreement of the parties and in consultation with the President of the Tax Chamber that the appeal should be partly reheard. It has not been a full re-hearing because transcripts of the evidence and submissions at the original hearing have been made available to us. Mr Woodman was a panel member at the original hearing. The parties have produced further written submissions and notes on evidence and we heard two days of oral submissions in November 2021. We are confident that we can determine this appeal justly and fairly in accordance with the overriding objective. We are grateful for the considerable efforts of all counsel and those instructing them in assisting us with our task.

18. We do not underestimate the effect that the delay in determining the appeal must have had on Mr Chiles. There are significant amounts of tax and NICs at stake and the proceedings must have cast a shadow over his life for much longer than anyone would have wished. We are grateful to the parties for the way in which they have approached a very difficult situation. Both parties’ representatives kindly expressed their best wishes to Judge Mosedale and expressed the hope that she is able to return to judicial work in the near future. We wholeheartedly endorse those sentiments.

FINDINGS OF FACT

19. We have the benefit of transcripts of the oral evidence given by various witnesses on behalf of BBL. That evidence came from Mr Chiles himself and the following witnesses:

(1) Ms Grainne Perkins, who is the director of corporate affairs of Avalon Entertainment Limited (“Avalon”). Avalon has acted as Mr Chiles’ agent since 2007 and at all material times relevant to the issues in this appeal. Ms Perkins is a solicitor, and she was responsible for negotiating BBL’s contracts with ITV.

(2) Mr Jonathan Thoday, who is the founder and managing director of Avalon. He was the manager and agent personally responsible for Avalon’s work on behalf of BBL and Mr Chiles. The Avalon group of companies also includes a television production company.

(3) Mr Tony Pastor, who is a director of Goalhanger Films Limited, an independent television production company which produces sports programmes for broadcasters including ITV and BBC. Between 2009 and 2013 he was Controller of Sport, Production at ITV and worked with Mr Chiles on ITV’s live football coverage.

(4) Mr Jonathan Crawford, who is the Head of News at Radio 5 Live. He was the Deputy Head of News and the editor of 5 Live Drive when Friday Drive was presented by Mr Chiles in 2013 and 2014.

(5) Mr Ben Monro-Davies who is an editor with Sky News. In 2014 and 2015 he was the editor of 5 Live Daily on which Mr Chiles was a presenter.

20. There were no issues as to the credibility of any witness. We are satisfied that all witnesses were seeking to provide honest and accurate evidence for which we are grateful.

21. The evidence before us also contained a significant volume of documentary evidence. We make our findings of fact on the balance of probabilities taking into account the witness statements, transcripts of the oral evidence and the documentary evidence to which the witnesses referred or to which we have been taken.

22. The parties volunteered and tried, in vain, to produce an agreed statement of facts. It is unfortunate that they were unable to do so. It appears to us that the difficulty lay not necessarily in the facts which might be agreed but in the way those facts should be expressed and the different nuances that each party sought to emphasise. This section of our decision sets out our findings of fact in relation to background matters, in broadly chronological order. They are largely undisputed facts.

23. We have already briefly described Mr Chiles’ career since joining the BBC in 1992. He has been and is a very successful broadcaster, but his career has had its highs and lows.

24. By 1996, Mr Chiles was presenting ‘Wake Up to Money’ and regular business news bulletins on BBC Radio 5 Live. He was also presenting a business television programme called ‘Working Lunch’ on BBC2. He had been an employee of the BBC and enjoyed all of the benefits and opportunities that came with that employment. In late 1995 or early 1996, in common with a large number of other BBC presenters, Mr Chiles was informed by the BBC that it wished to terminate his employment but continue to receive his services through a personal service company. Mr Chiles retained accountants to assist him with this process and BBL was incorporated on 29 March 1996.

25. New contracts covering ‘Wake Up to Money’ and ‘Working Lunch’ were put in place between BBL and the BBC. There has never been any written contract in place between BBL and Mr Chiles. Mr Chiles’ presenting work remained the same, but he had less off-air work. This meant that he had more time to devote to the specifics of presenting and he had more flexibility in how and when he did his off-air work. In practice it was sometimes necessary for him to be in the BBC offices. As a result of these new arrangements, Mr Chiles felt much less

secure in his work and that he was “on his own”. He felt that he could be taken off-air and not given any other work by the BBC which contrasted with the security he had as an employee.

26. At this stage, Mr Chiles retained Knight Ayton Management to act as his agent, and he relied on their advice and representation. They secured BBL numerous other engagements outside the BBC, including corporate work, voice overs and print journalism. He carried on this work alongside his BBC work to enhance his profile and BBL’s earnings. Knight Ayton dealt with offers of work that were coming in and they had ideas as to what other work he could be doing. He put his hat in the ring for any big jobs that were coming up and worked with Knight Ayton on a strategy for his future career. He paid Knight Ayton a fee of 10% of income from broadcasting work and 15% of income from corporate work.

27. Later in 1996, Mr Chiles started presenting a Saturday morning programme on Radio 5 Live. The contract between BBL and the BBC covering this agreement was negotiated by Knight Ayton. In 1999, the Saturday morning radio programme was re-branded ‘Chiles on Saturday’. At about the same time, Mr Chiles stopped presenting the weekday morning programme and news bulletins on Radio 5 Live.

28. In the course of his presenting roles Mr Chiles became known as a supporter of West Bromwich Albion Football Club and as having a passion for football. In 2001 he became a presenter of ‘606’, an established football phone-in show on Radio 5 Live. In 2004, the BBC launched a Sunday evening football television programme called ‘Match of the Day 2’, which Mr Chiles presented. During this period he was the presenter of a number of high-profile documentaries on BBC1 and BBC2. Mr Chiles was also the presenter for an “add on” to the genealogy series ‘Who Do You Think You Are’. This was produced by Wall to Wall Television for the BBC. BBL contracted with Wall to Wall Television for Mr Chiles to provide his services as a presenter.

29. A production company called Talkback Thames approached Knight Ayton in 2005 about Mr Chiles presenting a one-off programme for BBC3, to follow the final episode of the series ‘The Apprentice’ presented by Sir Alan Sugar. The programme was successful and Mr Chiles was asked to present a similar programme following every episode of the following season of ‘The Apprentice’. Terms were agreed between BBL and Talkback Thames and Mr Chiles became the presenter of ‘The Apprentice: You’re Fired’. During this time Mr Chiles continued to do corporate work and regular journalism. He was in the running for major jobs at other broadcasters and he developed and pursued his own pitches together with production companies although those pitches did not come to fruition.

30. In 2006, BBL contracted with the BBC to supply Mr Chiles’ services as their number two presenter for coverage of the 2006 World Cup. He continued to present ‘Working Lunch’, ‘Match of the Day 2’ and ‘The Apprentice: You’re Fired’ on television and ‘606’ for Radio 5 Live. In that year he also presented the BBC Sports Personality of the Year.

31. Following the World Cup, Mr Chiles presented a four-week pilot of an early evening programme on BBC1 that became ‘The One Show’. The One Show launched in July 2007 on weekday evenings. In preparation for the launch, Mr Chiles stopped presenting ‘Working Lunch’, ‘606’ and ‘Chiles on Saturday’.

32. By 2007 Mr Chiles had a rising public and professional profile. In September 2007, BBL engaged Hilary Jauncey to work as Mr Chiles’ personal assistant. She is self-employed and does similar work for other presenters. Ms Jauncey manages Mr Chiles’ diary and liaises with his agent, broadcasters and other clients. Ms Jauncey’s fees are included in BBL’s accounts. For the years covered by the appeal BBL paid Ms Jauncey as follows:

Period ending:	£
31 January 2013	15,903
31 January 2014	15,232
31 January 2015	21,325
31 January 2016	15,238
31 January 2017	11,914

33. In November 2007, Mr Chiles decided to engage Avalon as his agent in place of Knight Ayton. He was introduced to Avalon and Mr Thoday by a friend who was an entertainer and used Avalon as his agent. Mr Thoday did not know that Mr Chiles provided his services through BBL and did not concern himself with whether a client would contract directly or through a company. He considered Avalon to be taking on Adrian Chiles as a client rather than BBL. The appointment was confirmed in a letter from Grainne Perkins to Mr Chiles dated 12 November 2007 setting out the basis on which they would be acting as sole and exclusive management company in relation to all appearances by Mr Chiles.

34. The agreement with Avalon provided for a commission of 15% on all income from the supply of Mr Chiles' services in the entertainment industry ("the Avalon Agreement"). Avalon also agreed to collect and distribute Mr Chiles' income. The Avalon Agreement included the following provisions:

1. We act as a sole and exclusive management company worldwide in all areas of the entertainment industry including all appearances (live or recorded), publishing, brand management, adverts, sponsorship ...

...

4. We will use our best endeavours to promote and further your career and advise on all aspects of your career and reputation in the entertainment industry ...

35. Avalon receives income from broadcasters and others as agent for the person entitled to the income. The income is paid into Avalon's client account. Avalon's commission is then transferred from the client account to Avalon's office account together with any other expenses met by Avalon. The remaining amount is transferred to the person entitled to the income, in this case BBL.

36. Mr Chiles did not take any legal advice when he entered into the Avalon Agreement. He trusted Mr Thoday and simply signed it. At the time of the Avalon Agreement all Mr Chiles' work was done through BBL and he intended to continue working through BBL.

37. Mr Thoday considered that Avalon was there to manage its clients' careers. Avalon's role involved navigating the rises and falls in a client's career, helping them navigate the rise, preparing for problems when a person is most successful and then trying to manage and minimise the falls. Avalon attempted to build its clients into "*self-contained businesses*". One route through which this might be done was the creation of intellectual property, such as television formats developed or co-developed and often initially presented by the client. This might secure an income stream for the client even if the client was not working on the programme. Avalon tried to achieve this for Mr Chiles in negotiations with ITV over the commissioning of 'That Sunday Night Show' which we describe in more detail below. Avalon was involved in creating the format as a partner with Mr Chiles and Mr Chiles was entitled to a 50% share of the profit derived from the format. Avalon also looked at commercial endorsements and advertising work for clients.

38. When Mr Chiles engaged Avalon, Mr Thoday considered him to be a presenter who was becoming an entertainer and that he could be turned into a “business” and a “brand”. He drew a distinction between a “simple presenter” who turns up and reads a script and someone who creates content and brings something extra to the programmes they are presenting. He considered Mr Chiles to be firmly in the latter category and we accept that was the case.

39. During Mr Chiles’ most successful period, Avalon was not simply looking for any work, but for the right opportunities. This was because over-exposure can be damaging to a presenter or entertainer.

40. Mr Thoday’s evidence, which we accept, was that presenters are at the whim of frequently changing broadcasting executives. Broadcasters regard ‘star’ presenters as a necessary evil from the start of their contracts. A programme might fail for reasons outside the control of the presenters. When presenters are removed from a programme it can become national news, which was the case when Mr Chiles ceased presenting Daybreak.

41. Mr Thoday used the fact that Mr Chiles was presenting multiple separate programmes on the BBC as leverage in his negotiations with the BBC. This led to a substantial increase in the fees paid to BBL. The efforts of Avalon resulted in a new contract between BBL and the BBC in 2008 covering the services which Mr Chiles performed for the BBC for the programmes mentioned above.

42. In the period 2007 to 2010, Mr Chiles enjoyed a considerable run of success. Avalon was increasingly busy fielding enquiries for his services, resulting in his undertaking a wide range of engagements outside the BBC. He also carried out unpaid activities to maintain and grow his profile and turned down a variety of work. Mr Chiles developed, together with Avalon’s television production company, a chat show format that he could host. Mr Thoday persuaded the BBC to commission a pilot, that was made in 2009 although we understand it was not broadcast. It was a forerunner to “That Sunday Night Show” which Mr Chiles later presented for ITV. Mr Thoday was also preparing the ground for future work.

43. At this stage, Mr Chiles was working through BBL as a television presenter on three different BBC programmes: The One Show, Match of the Day 2 and The Apprentice: You’re Fired. He did so pursuant to a contract between BBL and the BBC signed in or about July 2008. The contract itself was not in evidence but we accept Mr Chiles’ evidence that it covered all three programmes. In relation to The Apprentice: You’re Fired, BBL contracted directly with the production company, Talkback Thames.

44. In the period 2008 to 2010 Mr Chiles worked on programmes outside the BBC. This included guest appearances on television, television commercials, at corporate events and writing newspaper articles which we set out in more detail below. He did considerable unpaid work such as participating in Sports Relief and Children in Need and unpaid guest appearances on numerous other television programmes.

45. In about 2009, ITV approached Mr Chiles about presenting live football on ITV. Match of the Day 2 on Sunday nights was in the nature of “football entertainment” and had been very successful, with ratings higher than the BBC’s flagship Saturday night programme Match of the Day. ITV wanted Mr Chiles to do the same thing with ITV’s football coverage. Mr Thoday tried to persuade the BBC to allow Mr Chiles to present football on ITV whilst still working on his other programmes for the BBC. The witnesses were not agreed on why this did not come about. It was probably because of reluctance on the part of the BBC, but there is no evidence that the BBC was expressly relying on any restriction in the contract at that time.

46. Later in 2009 or early 2010, a new Controller of BBC1 decided to replace Mr Chiles with Chris Evans on Friday editions of ‘The One Show’. Mr Chiles was unhappy about this and it

resulted in Avalon re-establishing contact with ITV. Following negotiations, ITV agreed a contract with BBL. Mr Chiles was to present a revamped daily breakfast programme to be called Daybreak, initially 5 days a week for 40 weeks a year, as well as ITV's coverage of live football matches and a series of factual entertainment programmes to be made with Avalon's television production arm. Mr Chiles was to co-produce the entertainment programmes which became a chat show called 'That Sunday Night Show'. BBL was entitled to a 50% share of production profits together with Avalon. In addition BBL was entitled to a fee from Avalon in respect of his services as a presenter.

47. The contract with ITV was negotiated by Ms Perkins on behalf of BBL. Mr Chiles had as little involvement as possible in negotiating the contract. He did not consider negotiating contracts his strong suit and it was a task he paid Avalon to do. The contract was dated 18 April 2010 ("the First ITV Contract") and was for a term of 3 years. Mr Chiles had not read the First ITV Contract in detail at the time it was agreed.

48. We shall deal with the negotiation, relevant terms and performance of the ITV Contracts and the BBC Contracts in detail below.

49. During the second half of 2010 and in 2011 Mr Chiles was presenting Daybreak, live football coverage and That Sunday Night Show. Avalon continued to field enquiries for Mr Chiles' services, but he accepted fewer engagements because he wanted to focus his energies on making these three programmes a success. He continued to develop and pitch his own ideas and he contributed to other television programmes, both paid and unpaid. He also continued to write for national newspapers. For example, he was paid £5,000 to write for one of the Telegraph newspapers in relation to the 2010 World Cup. BBL's turnover in the year ended 31 January 2011 was some £1,827,375 and it paid Avalon commission of £252,639.

50. Daybreak proved not to be as successful as had been hoped and suffered adverse press comment. ITV had started to talk about paying off Mr Chiles very soon after the programme started. In November 2011 ITV decided to replace Mr Chiles and his co-presenter on Daybreak. News of that decision appeared on the front page of a national newspaper which was damaging to Mr Chiles' reputation. However, ITV was acting within its rights under the First ITV Contract. The First ITV Contract continued in existence and Mr Chiles continued to be paid his full entitlement under the First ITV Contract.

51. The First ITV Contract contained Special Condition 3, which provided that if ITV acquired the rights to transmit not less than 16 Champions League matches on ITV1 for the third year of the First ITV Contract, then ITV should be deemed to offer BBL an extension of that contract for a fourth year on the same terms. ITV acquired those rights and BBL wrote to ITV on 23 March 2013 accepting the deemed offer of an extension. In response, ITV contended that BBL was not entitled to payment in respect of Daybreak or That Sunday Night Show under Special Condition 3. BBL instructed Herbert Smith Freehills LLP to enforce what it considered to be its rights under the First ITV Contract. Ms Perkins doubted that ITV believed their construction of the clause was correct but described the dispute as "*unwinnable*" because BBL "*could win the money and lose the gig*".

52. The dispute was settled on terms whereby ITV agreed to give BBL a new two-year contract from 1 June 2013 to 31 May 2015 for Mr Chiles to present ITV's football coverage only ("the Second ITV Contract"). In negotiating the Second ITV Contract, Mr Thoday's primary concern was to keep Mr Chiles on-screen. ITV would have given Mr Chiles a lump sum but Mr Thoday was hoping to "*trade through the difficulty*". In fact, the Second ITV Contract was not signed until 14 March 2014

53. Whilst he was negotiating the Second ITV Contract, Mr Thoday approached the BBC about Mr Chiles performing services for BBC Radio 5 Live. It was agreed with the BBC that

BBL would provide Mr Chiles' services on 42 programmes of Friday Drive between 8 November 2013 and 7 November 2014 ("the First BBC Contract"). Friday Drive was a news, current affairs and sports radio programme on Radio 5 Live airing late Friday afternoons.

54. In mid-2014, the controller of Radio 5 Live approached Avalon about Mr Chiles presenting two weekday mid-morning programmes each week, instead of Friday Drive. This approach led to an agreement dated 25 July 2014, under which BBL and the BBC agreed to terminate the First BBC Contract with effect from 5 October 2014. The Second BBC Contract covered the period 6 October 2014 to 5 April 2016, presenting twice weekly mid-morning programmes. The programmes were called Five Live Daily.

55. Mr Chiles received a message from ITV's director of sport shortly before Christmas 2014, asking to speak with him in the New Year. On 5 January 2015, ITV Rights Limited wrote to BBL terminating the Second ITV Contract with immediate effect, some 5 months early albeit in accordance with their rights under the contract.

56. Mr Chiles continued to pursue opportunities for different work and to pitch ideas to a variety of producers. He presented other programmes for production companies including the BBC, Sugar Films, Storyvault Films and First Look TV. He appeared as a guest or 'talking head' on a variety of programmes and wrote for several national newspapers. In addition, Mr Chiles spent considerable time working on numerous pitches and projects that have not come to fruition and other activity designed to raise his profile.

57. At the conclusion of the Second BBC Contract, BBL and the BBC agreed the Third BBC Contract. The predominant services required under the Third BBC Contract were presenting 86 mid-morning programmes on Mondays and Tuesdays each week. There were a limited number of additional services.

58. We can summarise the relevant contracts for the purposes of this appeal as follows:

Contract (date signed)	Start Date	End Date	Services
First ITV Contract (18 April 2010)	1 Jun 2010	31 May 2013	Co-presenting Daybreak on GMTV; presenting ITV's live football coverage; presenting 8x30 minute factual entertainment shows per year
Second ITV Contract (14 March 2014)	1 Jun 2013	31 May 2015	Presenting ITV's live football coverage and highlights programmes
First BBC Contract (3 March 2014)	8 Nov 2013	7 Nov 2014	Presenting Friday Drive on Radio 5 Live
Second BBC Contract (26 August 2014)	6 Oct 2014	5 Apr 2016	Presenting a mid-morning show on Mondays and Tuesdays on Radio 5 Live
Third BBC Contract (11 April 2016)	6 Apr 2016	5 Apr 2019	Presenting 5 Live Daily on Monday and Tuesday mornings; presenting 15 other various programmes on 5 Live; other ad hoc presenting roles.

Relevant terms of the contracts.

59. It is common ground that the starting point in determining the terms of the hypothetical contracts for the purposes of the intermediaries legislation is the terms of the actual contracts.

In this section we set out relevant terms of the various contracts. In the following section we make findings of fact in relation to the way in which certain of those terms were negotiated.

60. The ITV Contracts were entered into by various ITV entities, but in our view nothing turns on that. To simplify matters we shall simply refer to the contracting party as ITV.

The First ITV Contract

61. The agreement was for a supply of services by BBL to ITV. The Services to be supplied were defined as the services of Adrian Chiles in presenting the GMTV Programme Services, the Football Programme Services and the Factual Entertainment Programme Services. ITV entered into a separate agreement with Avalon for production of the entertainment show for which Avalon engaged Mr Chiles as the presenter. There were to be two series of this show in Contract Year 1 and Contract Year 2. There was no agreement for Avalon to continue to produce the show in Contract Year 3.

62. We are particularly concerned with the Football Programme Services which were supplied in the relevant tax years and defined as follows:

Significant creative and distinctive input and appearing as lead presenter of the Football Programmes, being the live football coverage (including, without limitation, undertaking interviews on and off screen to be included in the Football Programmes, preparing for and undertaking research for the Football Programmes ...

63. The Football Programmes comprised coverage on ITV1 of 48 matches in each contract year together with matches in the 2010 World Cup and Euro 2012. The matches comprised 16 FA Cup matches, 8 England international matches, 18 Champions League matches, 3 Europa League matches and 3 other major football matches.

64. ITV agreed to pay BBL a Guaranteed Service Fee which was payable in 10 instalments over the course of each contract year irrespective of the number of programmes undertaken by Mr Chiles. It was broadly as follows:

Contract Year 1 - £2m which comprised £1m for the Football Programme Services including World Cup 2010 and £1m for the GMTV Programme Services.

Contract Year 2 - £1.9m which comprised £900,000 for the Football Programme Services and £1m for the GMTV Programme Services.

Contract Year 3 - £2.2m which comprised £1m for the Football Programme Services including Euro 2012, £1m for the GMTV Programme Services and £200,000 for the Factual Entertainment Programme Services.

65. There was a downward adjustment in Contract Year 3 if ITV failed to acquire broadcast rights for Euro 2012 and/or Champions League football. However, this would be offset by the offer of suitable roles at a rate of £25,000 per half hour on other factual programming in addition to the Factual Entertainment Programmes.

66. Further provisions dealt with the contingency of whether ITV acquired rights to broadcast at least 16 Champions League matches in Year 3. In the event that ITV did acquire the Champions League rights for any part of the year after the end of the contract, then ITV was deemed to have offered a one year extension to the agreement on the same terms as Contract Year 3, save that what was referred to as the “subs bench clause” would not apply.

67. If ITV failed to acquire those Champions League rights, BBL had what was called a “break option”. This was a right to remove the Football Programme Services from the Services to be provided, and if it was exercised the Guaranteed Service Fee would be reduced and the exclusivity provisions referred to below would fall away. The effect would be that Mr Chiles

could in effect “follow the rights” and render similar services to a third party in Contract Year 3

68. Clause 20(c) of the terms and conditions was the subs bench clause. It provided that if Mr Chiles was ready and willing to provide the Services but was not required by ITV to provide the Football Programme Services or the GMTV Programme Services for a period of more than 12 consecutive weeks, then ITV should be deemed to be in material breach of the agreement and BBL could terminate the contract. If this occurred after 31 August 2011 then BBL would be entitled to receive the balance of the Guaranteed Service Fee as liquidated damages. In addition, Mr Chiles would be entitled to present football coverage for another broadcaster. The purpose of the subs bench clause was to mitigate the damage to Mr Chiles’ career if he was kept off-air for an extended period.

69. Exclusivity provisions appear in clauses 2-5 of the terms and conditions as follows:

2. [BBL] undertakes that it shall not and shall procure that [Mr Chiles] shall not directly or indirectly in the Territory ... during the Contract Period:

a) provide any Broadcast Services to any Third Party (save as expressly referred to in 3 below) and ‘Broadcast Services’ means the making available of [Mr Chiles’] services similar or equivalent to the Services ... via any television channel ...

b) host or appear as a presenter of any football commentary based radio programme ...

3. Notwithstanding the foregoing provisions, subject always to ITV’s prior approval (such approval not to be unreasonably withheld or delayed), [Mr Chiles] shall be entitled to undertake commercial activities involving his name, image or on-screen services, including entering into advertising, endorsement or sponsorship arrangements.

4. In addition to the provisions of clause 3 above, for the avoidance of doubt, [Mr Chiles] shall not be prevented from undertaking the following activities which shall not be subject to ITV pre-approval:

a) providing or undertaking personal or live appearances (non-televised) or public speaking engagements; or

b) making one-off guest appearances on chat shows or other television programmes, whether in peak or not; or

c) writing... a column or articles for a newspaper and ... [Mr Chiles] shall use his best endeavours to ensure that he is referred to as an ITV presenter ...;

[d] contribute to audio visual products such as books, DVDs and DTO products whether or not relating to football

In each case, provided always that such activity is not reasonably likely to interfere or conflict with the provision of the Services and, in relation to any activity references in sub-clause 4(b) above, [BBL or Mr Chiles] notifies ITV in advance.

70. The First ITV Contract assigned to ITV all relevant copyright, image and moral rights, save that Mr Chiles had the right to approve the use of his image in any marketing campaigns, such approval not to be unreasonably withheld. It also contained the following miscellaneous terms:

10. ...[BBL] warrants and undertakes that [Mr Chiles] is and shall remain at all times throughout the Contract Period an employee of BBL ...

14 ITV shall be entitled to make use of the Services and/or the products of the Services ... in such manner as it shall in its sole discretion think fit including (but not limited to) the right to make additions to, deletions from or alterations to or adaptations of the Services and/or the products of the Services ... for the purposes of any broadcast...

28. ITV shall be under no obligation to broadcast and/or transmit any programmes or films in respect of which the Services are provided save that it shall nevertheless be obliged to pay the Guaranteed Service Fee in full throughout the Contract Period subject to the terms of this Agreement.

Appendix II Provision of the Services

- 1) The Services shall be provided in accordance with Good Practice and Applicable Laws...
- 2) [Mr Chiles] shall take account of any reasonable comments presented to him verbally or otherwise by or on behalf of ITV in respect of the performance of the Services.
- 3) At the reasonable request of ITV ... [Mr Chiles] shall provide incidental promotional services of not more than 6 days per Contract Year ... as well as such additional attendances as may be required for all rehearsals, pre-production, post-production and studio work, outside broadcast production planning meetings, programme meetings ... on dates to be mutually agreed.
- 4) As part of the Services, [Mr Chiles] shall contribute to ITV websites by providing 10 to 15 minute interviews or video with reaction [post match] ... and/or such other incidental material as shall be discussed and agreed in good faith ... Any such additional appearances shall not require any additional attendances at any studio or ground ...
- 5) [Mr Chiles] shall ensure he is equipped with such articles of normal modern attire as are necessary to carry out the Services ... ITV agrees to provide the services of a stylist in relation to the Football Programmes and the Breakfast Programmes, it being acknowledged that the on screen clothing shall be provided by ITV and retained by [Mr Chiles] for his personal use.
- 6) [Mr Chiles] shall ensure he is fully aware of all important or significant events and developments in football at all times in respect of which the Services are performed by subscribing to such television, newspaper and magazine services, undertaking such research ... or otherwise as are necessary to carry out the Services in accordance with Good Practice.
- 8) If BBL is prevented from providing the Services to ITV by reason of [Mr Chiles'] illness or incapacity, BBL shall inform [ITV] immediately of the likely duration of such illness or incapacity, if known.
- 9) ITV shall arrange and pay for all expenses incurred in performing the Services (including, without limitation, all travel and accommodation arrangements) ...

71. "Applicable Laws" and "Good Practice" were defined as:

... all laws, regulations, standards determined by any governmental or regulatory authority and generally applicable industry or self-regulatory standards and codes of practice (including the rules of Ofcom)...

and

... the exercise of such skill, diligence, prudence, experience, expertise, foresight and judgement as would be expected from a skilled and experienced person complying with Applicable Laws...

72. Clause 20 of the terms and conditions provided that ITV could terminate the agreement in certain events, including BBL or Mr Chiles committing any material or persistent breach or Mr Chiles committing any serious act of misconduct likely to bring Mr Chiles or ITV into disrepute. Similarly, BBL could terminate if ITV committed any material or persistent breach.

73. Appendix IV was a schedule for Contract Year 1 setting out indicative dates on which Mr Chiles would be required to present ITV's live football coverage.

74. Mr Chiles signed what was described as an Inducement Letter dated 16 April 2010 in connection with the First ITV Contract ("the Inducement Letter"). Mr Chiles gave certain warranties and undertakings in the Inducement Letter in relation to BBL's entitlement to enter into the First ITV Contract, to ensure that BBL would observe all terms of the contract and as to the truth of all representations and warranties given by BBL. Mr Chiles also agreed that if

BBL was unable for any reason to perform the agreement then ITV would be entitled to substitute him as a direct party in place of BBL.

75. On 17 May 2011, the First ITV Contract was varied in several respects. The variations included an agreement that the Football Programme Services would be extended to cover presenting highlights programmes for a fee of £7,500 per highlights programme. ITV had previously asked Mr Chiles to present a highlights programme, but he had refused because the First ITV Contract did not cover highlights programmes. Mr Thoday negotiated the additional fee. In the event, it seems that Mr Chiles did agree to present highlights programmes in 2010 for a fee of £7,500 per programme. This agreement was formalised in the variation.

The Second ITV Contract

76. This was on similar terms to the First ITV Contract, although the Services were limited to the Football Programme Services. This section of our decision identifies relevant differences.

77. The Football Programme Services covered Champions League matches, Europa League matches, England internationals and other internationals, FA Cup matches, World Cup 2014 matches and certain friendly matches on ITV or ITV4. It also included highlight packages.

78. In addition to providing for significant creative and distinctive input from Mr Chiles, the contract stated:

... the parties agree that [Mr Chiles] is to be fully involved in the editorial and creative aspects of the Football Programmes including being invited to and attending such production meetings as may be reasonably required by ITV ...

79. The Guaranteed Service Fee was £900,000 for Contract Year 1 with an additional payment of £100,000, and £1m for Contract Year 2. There was express provision that:

... the Guaranteed Service Fee will be payable in full throughout the Contract Period (subject only to termination by ITV in accordance with clauses 20 or 21 of the terms and conditions) providing [Mr Chiles] is ready willing and able to render his Services ... [and] will not be reduced if any or all of the Football Programmes are not made ... or if [Mr Chiles] is ready willing and able to provide his Services but is not required to provide his Services ...

80. It was recorded that the Second ITV Contract, including the additional payment of £100,000, was agreed as consideration for settlement of the dispute about extending the First ITV Contract.

81. The exclusivity provisions were amended so that clauses 2 and 3 read as follows:

2. [BBL] undertakes that it shall not and shall procure that [Mr Chiles] shall not directly or indirectly in the Territory ... during the Contract Period provide any Broadcast Services to any Third Party (save as expressly referred to in 3 below), and 'Broadcast Services' means the making available of [Mr Chiles'] services in relation to any form of sports related audio and audio-visual programming the results and proceeds of which are made available to viewers ... via any television channel ...

3. Notwithstanding the foregoing restrictions, subject always to ITV's prior approval (such approval ... not to be unreasonably withheld or delayed) and subject to the provisions of clause 5, [Mr Chiles] shall be entitled to undertake commercial activities involving his name, image or on screen services including entering into advertising, endorsement or sponsorship arrangements.

82. Clause 4 also had an additional sub-paragraph identifying activities Mr Chiles could undertake without pre-approval from ITV:

4 b) hosting of, or appearing in, any sports related radio programme which is broadcast or transmitted in the Territory ... provided always that [Mr Chiles] notifies ITV in advance of any activity which involves a regular or long-term commitment.

83. By Clause 5, BBL undertook to ensure that Mr Chiles would give priority to providing the Services, subject to certain exceptions in cases of prior approval by ITV. For the avoidance of doubt it was recorded that:

...it is confirmed that ITV has provided its approval for [Mr Chiles] to host his BBC Radio 5 Live show ... on Friday of each week ... and that [Mr Chiles] shall not be required to attend production meetings ... on such days ... provided always that if [Mr Chiles] is required to host a Football Programme during the course of the weekend ... he must submit his script(s) to the relevant production team and complete all other necessary preparatory work in good time and in any event by no later than Friday of that week. For the further avoidance of doubt, if [Mr Chiles] is required to host a Football Programme on a Friday, [BBL] undertakes that it shall and shall procure that [Mr Chiles] shall give this priority over any activity in relation to the 5 Live Show or any other professional commitment or activity.

84. Clause 21 of the terms and conditions provided that ITV could terminate the agreement at any time with immediate effect but that it would pay the outstanding balance of the Guaranteed Service Fee and additional payment within 28 days. Otherwise, both parties could terminate for cause.

85. Clause 22 included an acknowledgment by the parties that:

... ITV shall have no obligation to use [Mr Chiles] in any capacity and on any programming, including in relation to the Football Programmes ...

86. Clause 22 also include a variation of the subs bench clause in that it applied if ITV did not use Mr Chiles for 5 consecutive matches, or in the case of the quarter final, semi-final or final rounds of the Champions League for 3 consecutive matches.

87. Mr Chiles also signed an inducement letter in connection with this contract. He agreed to provide the Services to ITV in accordance with the terms of the Second ITV Contract. Mr Chiles agreed that if BBL was unable for any reason to perform the agreement then ITV would be entitled to substitute him as a direct party in place of BBL.

The First BBC Contract

88. The First BBC Contract made provision for BBL to provide Mr Chiles' non-exclusive services to the BBC. The term of the contract was from 8 November 2013 to 7 November 2014 and the services to be provided, described as a "minimum commitment", were expressed to be as the presenter of 42 Friday Drive programmes. The contract fee was £50,400, and £1,200 per programme for any additional programmes. Fees were payable in equal monthly instalments in arrears.

89. The contract was expressed to incorporate the BBC General Terms of Trade (LTC) for Freelance Contributors (Service Company) ("the General Terms"). The following terms are relevant.

90. Clause 1 acknowledged that BBL controlled the exclusive services of Mr Chiles and BBL agreed to procure Mr Chiles' non-exclusive services for the BBC and that Mr Chiles would observe and perform the terms and conditions of the contract.

91. Clause 3 concerned the services to be provided by BBL:

Services

3.1 During the Term [BBL] will provide the freelance services of [Mr Chiles] to the BBC as required in Part A and reasonable ancillary services normally associated with such role including:

3.1.1 preparation, and appearing in and out of vision

3.1.2 creative input for content production (such as researching, writing and editing [Mr Chiles'] own written contributions/blogs and other associated content and revising it as required at BBL's own cost and in [Mr Chiles'] own time

3.1.3 travel as deemed reasonably necessary by the BBC

3.1.4 press, promotion and trails

3.1.5 such other services as are usually provided by a professional first class presenter

3.2 [BBL] will procure that in providing the Services [Mr Chiles] will:

3.2.1 possess all necessary skill, ability, knowledge and experience;

3.2.3 be contactable and available to provide the Services throughout any call days, if required;

3.2.4 attend at such times and places as the BBC deems reasonably necessary;

3.2.5 use all proper care and diligence; and

3.2.6 execute and complete the Services as a first class presenter conscientiously and in a professional manner at all time, fully and willingly comply with such requests as may be made by the BBC in connection with the services

92. Clause 6 contained provisions in relation to the fee payable by the BBC to BBL. Clause 6.5 stated that if BBL failed to procure delivery of the services by Mr Chiles for any reason then the BBC would be entitled to reduce the fee proportionately.

93. Clause 7 provided that the fee was inclusive of all expenses, unless specific expenses had exceptionally been agreed by the BBC.

94. Clause 8 dealt with engagements for third parties. Clause 8.1 acknowledged that Mr Chiles' services were not provided on an exclusive basis but that the BBC would have first call on his services. It was amended, principally to add the last sentence as follows:

8.1 This Contract does not require that [Mr Chiles'] services are provided on an exclusive basis. During the term the BBC will have first call on the freelance services of [Mr Chiles] to present the Friday Drive programme ... (subject only to any prior professional commitments of [Mr Chiles] which have been confirmed to the BBC Representative in writing prior to signature hereof. For the avoidance of doubt all and any ITV Football commitments that [Mr Chiles] may be required to fulfil on any Friday have been cleared and agreed in advance.

95. Clauses 8.2 and 8.3 were combined into clause 8.2 and amended to read as follows:

8.2 Neither [BBL] nor [Mr Chiles] will allow any form of publication of written material for a party other than the BBC:-

8.2.1 that includes any BBC owned content (including the Contributions) without a prior written licence from the BBC on agreed terms;

8.2.2 that is intended to include content about the BBC or its affairs;

8.2.3 that contains content that could reasonably be considered to be controversial in nature or which could compromise BBC Standards ...

96. The version of the General Terms in unamended form had read as follows:

8.2 During the Term the Contributor will not without the prior written consent of the BBC Representative provide services of any kind for any form of visual or audio content primarily intended for audiences in the United Kingdom ... for any party other than the BBC. For clarity,

BBC consent is unlikely to be given for any services for thirds parties which could reasonably be considered to be in direct competition with the Services ...

8.3 Neither the Company nor the Contributor will allow any form of publication of written material for a party other than the BBC:-

8.3.1 that features substantially similar content to the Services ...

8.3.2 that includes any BBC owned content (including the Contributions) without a prior written licence from the BBC on agreed terms;

8.3.3 that is intended to include content about the BBC or its affairs, or is for a regular writing commitment (without the prior written consent of the BBC Representative);

8.3.4 that contains content that could reasonably be considered to be controversial in nature or which could compromise BBC Standards

8.3.5 if the Services provided hereunder are either primarily for News output or otherwise primarily journalistic in nature without first obtaining copy approval from the BBC Representative (which will not be unreasonably withheld).

97. Clause 9 referred to BBC Standards and Editorial Guidelines and provided as follows:

9.1 [BBL] acknowledges that the BBC's reputation for impartiality, integrity, independence and decency (referred to as the BBC's Standards) is fundamental and agrees that the Services provided by and the activities and conduct of [Mr Chiles] must not compromise or call into question ... any of the BBC Standards.

9.2 [BBL and Mr Chiles] will ... give the BBC Representative written notification of all commercial, financial or personal interests or activities ... where the interests:

9.2.2 relate to the subject matter of any content to which [Mr Chiles] is likely to be involved;

9.2.3 could otherwise be perceived to give rise to a conflict of interest ...

9.4 In the mutual interest of the BBC, [BBL and Mr Chiles], BBL agrees and will procure that [Mr Chiles]:

9.4.1 will read the BBC Editorial Guidelines ...

9.4.2 will comply fully with:-

a) the BBC's Editorial Guidelines and Editorial Guidance,

b) the BBC's Values,

c) any other editorial policies and other BBC guidelines and policies ...

d) any applicable codes from [Ofcom]

9.4.3 will complete such editorial training as the BBC may from time to time require;

9.4.4 will not include in any of the Contributions remarks or interjections that the BBC has asked or may ask the Contributor to avoid

9.4.5 will not behave in a manner ... which does or could bring BBL or Mr Chiles into disrepute ... or which could otherwise bring the BBC or any BBC content, into disrepute ...

9.4.6 will not engage in any conduct or interests which do or could compromise or call into question the impartiality or integrity of the BBC ...

98. Clause 11 contained warranties by BBL in relation to itself and Mr Chiles as follows:

11.10 [Mr Chiles] will take reasonable care for the health and safety of others as well as [himself] in connection with the Services

11.11 [Mr Chiles] will use reasonable endeavours to attain and maintain such a state of good health as will enable the provision of the Services and will not without the BBC's written consent voluntarily engage in any hazardous pursuits which would jeopardise [Mr Chiles'] ability to fulfil the Services.

99. Clause 11 also required Mr Chiles to sign a guarantee which included the following provision:

I do not have a relationship of worker or employee in relation to the BBC and acknowledge that the BBC has no liability to me as an employee ...

100. Clause 13 contained termination provisions which entitled the BBC to terminate the contract if BBL or Mr Chiles committed a material or irremediable breach of the contract, including if Mr Chiles was unable personally to provide the Services for any reason.

101. Clause 14.1 acknowledged that the BBC's editorial control of its content was final. Clause 14.2 provided:

The BBC will not be obliged to call on the Services of [Mr Chiles] ... and will not be liable ... for any loss or damage ... as a result provided that the BBC will still be obliged to pay the Fee ...

102. It was common ground that if the BBC did not call on Mr Chiles' services then they would be obliged to pay in full for the minimum commitment of 42 Friday Drive programmes.

103. Clause 16.4 provided as follows:

16.4 BBL will not assign [the Contract] ... However [BBL] will be entitled to nominate and provide an alternative Contributor in exceptional circumstances where [Mr Chiles] is not available for reasons beyond their reasonable control ... subject to reasonable prior notice ... and such alternative provider being deemed suitable and being approved by the BBC Representative...

104. Mr Chiles also signed an undated "Contributor Guarantee" in relation to the First BBC Contract. He gave his personal guarantee in relation to various matters including:

- (1) To provide his services to BBL as required by the contract between BBL and the BBC and to comply with all terms that required performance on his part.
- (2) To make himself available for such editorial training as the BBC may from time to time require.
- (3) That he did not have a relationship of worker or employee with the BBC.

The Second BBC Contract

105. The services to be provided under the Second BBC Contract were presenting 135 mid-morning programmes on BBC Radio 5 Live on Mondays and Tuesdays. The term of the contract was from 6 October 2014 to 5 April 2016 and the total fee payable for the term of the contract was £168,750. There was an additional fee of £1,250 per programme for any additional programmes. It was provided that Mr Chiles would undertake all promotional activities in connection with the programme as reasonably requested by the BBC.

106. There were no material differences between the terms of this contract and the terms of the First BBC Contract, other than the change of programme. Miscellaneous Clause A was introduced in the Second BBC Contract. It provided that Mr Chiles would undertake all promotional activities in connection with the programmes. Mr Chiles was not aware why specific provision was made for this.

107. Mr Chiles also signed a “Contributor Guarantee” dated 21 September 2014 in relation to the Second BBC Contract in similar terms to that in connection with the First BBC Contract.

The Third BBC Contract

108. The term of the Third BBC Contract was 6 April 2016 to 5 April 2019. The services to be provided under the Third BBC Contract were for presenting on a minimum of 108 days per year. This was broken down to 86 days on Mondays and Tuesdays presenting 5 Live Daily from Salford. There was also provision for presenting on other days. 15 programmes were to be presented from London including 8 Wednesday editions of 5 Live Daily featuring Prime Minister’s Questions, a programme on 24 June 2016 in relation to the European referendum and presenting Question Time Extra. Mr Chiles was also to deputise for other presenters on 3 days and 4 days were for preparation of large outside broadcasts. It was provided that Mr Chiles would undertake all promotional activities in connection with the programme as reasonably requested by the BBC. The fee payable for the term of the contract was £405,000 with a fee of £1,250 per programme for any additional programmes.

109. Again, there were no material differences between the terms of this contract and the terms of the First BBC Contract. There was no reference to any ITV football commitment because by this stage Mr Chiles was not appearing on ITV. As indicated above, the Third BBC Contract stated the location from which most of the programmes covered by it would be broadcast.

110. Mr Chiles also signed an undated “Contributor Guarantee” in relation to the Third BBC Contract in similar terms to that in connection with the First BBC Contract.

Negotiation of the Contracts

111. The evidence before us included evidence as to the negotiations involved in the various contracts, as to which we make the following findings of fact.

The ITV Contracts

112. The First ITV Contract was negotiated by Ms Perkins on behalf BBL. The negotiations were intense and took less than seven days.

113. There was no evidence as to whether ITV was concerned as to the basis on which Mr Chiles was engaged, whether directly or through BBL. Mr Chiles simply assumed he would contract through BBL which was how he had provided all his services since 1996. No-one suggested he might do otherwise.

114. Ms Perkins sought to resolve potential commitment clashes and to give Mr Chiles flexibility in taking breaks from Daybreak and in limiting his commitment to 40 weeks a year. She was concerned to limit Mr Chiles’ obligation to work to 40 weeks, despite a general desire to maximise his exposure. This would allow him to work in other places for other people and to give him the space and time to work on other projects including his passion projects. ITV had originally wanted Mr Chiles to present all football related programming, and possibly other sports. However, Ms Perkins negotiated a limited definition of the Football Programme Services.

115. Ms Perkins tried to impose an obligation on ITV to have Mr Chiles on-air, but ITV would not agree. Instead, terms were introduced at the suggestion of Ms Perkins to provide an incentive for ITV to keep Mr Chiles on-air:

(1) The term providing that the Guaranteed Service Fee would be payable in full if Mr Chiles was ready, willing and able to perform even if he was not used by ITV.

(2) The subs bench clause in clause 20(c) provided that if ITV did not use Mr Chiles’ services for a period of more than 12 consecutive weeks then BBL could elect to terminate the First ITV Contract. If BBL elected to terminate the contract after 31 August

2011, ITV was liable to pay the full fee for the remaining period of the contract as liquidated damages. The subs bench clause was very unusual, indeed it was unique in Ms Perkins' experience. Both counsel described it as having been skilfully conceived and drafted.

(3) The Champions League break option which gave Mr Chiles the ability to "follow the rights" if ITV did not acquire the rights for Contract Year 3. Alternatively, if ITV lost the Champions League rights and Mr Chiles was not able to follow them, then he was to be given offers of suitable alternative roles which Ms Perkins considered would have to be in the "heartland" of what Mr Chiles wanted to do.

116. Paragraph 2 of Appendix II to the First ITV Contract was originally drafted to say "[Mr Chiles] shall take account of any comments presented to him...". Ms Perkins sought to amend this to say "[Mr Chiles] shall consider in good faith and if applicable take account of any comments presented to him...". ITV did not agree to this change, but the final version of the paragraph provided "[Mr Chiles] shall take account of any reasonable comments presented to him...". Having said that, this amendment was not considered to be particularly significant in the negotiations.

117. The Second ITV Contract was based on the First ITV Contract. It was under negotiation for about a year before it was signed. At this stage Avalon and BBL were in a weaker bargaining position, principally because ITV were not seeking to prise Mr Chiles from another broadcaster.

118. The exclusivity provisions were less extensive than in the First ITV Contract. Ms Perkins considered this important because "*ITV weren't paying BBL enough to take [Mr Chiles] out of the marketplace or giving him the broad range of work that we considered necessary to his future success, and by this time Adrian was not front and centre at ITV*".

119. The Second ITV Contract contained additional wording about Mr Chiles "*being invited to and attending such production meetings as may be reasonably required by ITV*". This wording was introduced following a "*slight drive*" from Mr Chiles who was seeking to "*freshen things up a bit*".

120. Mr Chiles accepted that the Second ITV Contract appeared to show ITV giving its approval in advance for his work on Friday Drive. He stated that his relationship with the controller of sport at ITV was breaking down and he suggested that this may have been Mr Thoday making sure Mr Chiles' right to work for 5 Live was in black and white.

The BBC Contracts

121. The First BBC Contract was not heavily negotiated because Mr Thoday's main concern was to secure presenting work for Mr Chiles. He said that he "*would have probably signed anything at that point*". He had very little by way of bargaining strength and the BBC General Terms were only negotiable to a very limited degree.

122. Clause 14.2 of the General Terms stated that the BBC was not obliged to call on the services of a contributor. However, Mr Thoday had a conversation with Jonathan Wall at Radio 5 Live during which he was assured that the BBC would give Mr Chiles the amount of work specified in the BBC Contracts. On that basis, Mr Thoday considered the BBC were committing to Mr Chiles being in the slot specified in each BBC Contract. During this conversation Mr Wall also said that the BBC's normal practice of not standing by onerous provisions in the General Terms would continue.

123. The BBC Contracts all consist of Part A, a 'Schedule of Services and Fee(s)', which contained individually negotiated terms and Part B containing the General Terms which were standard. In all three of the BBC Contracts, Part A included exclusivity provisions which

replaced those in the General Terms. Mr Chiles did not read the First BBC Contract in detail at the time it was agreed and was not aware that the standard terms had been amended in this regard in his BBC Contracts.

Performance of the Contracts

124. There was evidence before us as to the performance of the contracts and both parties invited us to make findings of fact in relation to Mr Chiles' performance of the Contracts. We also deal in this section with the evidence of Mr Chiles and some of the other witnesses as to their understanding of the terms of the contracts.

The ITV Contracts

125. The performance of BBL and Mr Chiles in relation to the Football Programme Services was the same under both ITV Contracts, save that a wider range of matches was covered by the Second ITV Contract.

126. We have set out above how Mr Chiles felt much less secure in his work when he moved from being an employee of the BBC to contracting with the BBC through BBL. Mr Thoday's evidence in connection with ITV, which we accept, was to the effect that ITV were "quite good" at looking after their employees but brutally commercial in relation to freelance presenters.

127. The presenting services were limited to those set out in the ITV Contracts. When ITV asked Mr Chiles to present highlights programmes prior to the variation of the First ITV Contract he only agreed to do so upon payment of an additional fee of £7,500 per programme. This was formalised in a variation of the First ITV Contract in May 2011.

128. Having been shown the exclusivity provisions, Mr Chiles accepted that under the First ITV Contract he was not allowed to present television programmes other than for ITV. However, he considered that if anything had come up he would have ended up doing it. He understood, correctly in our view, that the restriction in clause 2(b) of the Terms and Conditions was limited to live football commentary programmes rather than radio programmes about football. He accepted that there were restrictions on commercial activities but considered that if he really wanted to do something, the restrictions would not have applied to prevent him from doing it unless physically impossible.

129. Mr Thoday considered that exclusivity provisions were rarely enforced and they did not concern him in circumstances where the presenter was very successful. Mr Chiles could certainly be viewed as very successful at the time the First ITV Contract was negotiated. However, he explained that an exception to this arose in respect of football rights because the rights can move from one broadcaster to another and the rights holders may dictate or restrict who can host football coverage.

130. It was put to Mr Chiles that if a comment that was reasonable and in substance correct was made to him, he was obliged to accept it. He agreed, but then qualified his evidence to say that he would take it into account. Mr Chiles accepted ITV needed to have some right of control in relation to the way in which he performed the services so that it could discharge its regulatory obligations to Ofcom.

131. Mr Chiles' presenting style and the words he used on air were a matter for Mr Chiles providing his overall performance was of a good standard. Mr Thoday agreed that ITV had the power to tell Mr Chiles when commercial breaks were going to be taken and to require him to apologise where an apology was required under the Ofcom code. He did not agree that ITV had any broader right of control.

132. Mr Thoday was asked about paragraph 3 of Appendix II ‘Provision of the Services’. He noted that while Mr Chiles had to attend the timing was to be by mutual agreement. That would not have been the case for ITV employees attending the meeting. He considered that the incidental promotional services Mr Chiles could be required to provide would generally be carried out when Mr Chiles was available. Ms Perkins understood the word ‘conflict’ in the proviso in the tailpiece of clause 4 of the terms and conditions referred “*get in the way of*” rather than “*conflict in a commercial sense*”. We accept these interpretations.

133. We shall assume that any reader of this decision is familiar with, or at least able to familiarise themselves with the way in which TV coverage of live football matches appears on screen. In broad terms, the presenter is joined by a panel of two or three studio guest experts to discuss matters relevant to the match in the build-up, during half-time, after full-time and after any extra-time. The guests were chosen by ITV, but Mr Chiles provided suggestions which were adopted by ITV. The coverage would include commercial breaks. Mr Chiles and the guest experts were not involved in commentary of the match itself.

134. Off-screen, a programme editor is ultimately responsible for the running of the programme. It is the programme editor who leads “editorial decisions” about the running order of the programme and the content. Mr Pastor described the role of programme editor of a live football programme as similar to the editor of a newspaper. There were other professionals to whom he would defer on some matters. The director controls what images and sounds are being broadcast and is responsible for ensuring that the programme runs smoothly, visually and aurally.

135. The programme editor would personally prepare the running order of the programme. This would include writing a guide script and introductions and links which were inserted into the running order. A few days before the broadcast Mr Chiles would be sent the draft script and running order. He would rewrite the script in his own words using his own unique style. The redrafted script was reviewed, but only for accuracy and to ensure it did not clash with other planned sections that Mr Chiles might not by then have seen. The script would then be uploaded onto an autocue machine. Whenever possible ITV engaged the specific autocue operator favoured by Mr Chiles. The script only covered a small proportion of the time that Mr Chiles would be on-air; the majority of what was broadcast during a programme would be ad-libbed by Mr Chiles and the guests.

136. Mr Pastor was unaware of the employment status of presenters, in particular whether they were employed, self-employed or contracting through a personal service company. His evidence, which we accept, was that such status was irrelevant to the way in which the programme worked.

137. Mr Chiles was required by the ITV Contracts to keep up to date with football generally and to research for matches he was presenting on. He initially found the workload overwhelming but developed a system to prepare for each game by reading notes, clips and articles and trying to speak to fans or journalists knowledgeable about the teams involved. Mr Chiles estimated that he spent a similar amount of time on research and preparation to that spent broadcasting. He carried out his preparation at a location of his choosing and on his own equipment purchased at his own cost.

138. Mr Chiles would not know the specific days on which he would be presenting before the start of the football season. Champions League games were split over Tuesday and Wednesday evenings. At this time, ITV had first pick of the Tuesday games, which would almost always be a 7:45 kick-off and could be almost anywhere in Europe. The dates of games in the group stage played between September and Christmas would be known in advance. The locations and times of the knockout games would be known later. ITV were not obliged to choose which

game they wanted until shortly before the games. For FA Cup matches, including replays, the specific date might not be known until quite close to the match. Determining the date involved negotiation between the clubs, the police, ITV and the Football Association.

139. Mr Chiles usually presented from a studio in London, a studio at the stadium or from the side of the pitch. Summer tournaments were presented from an iconic location in the host country. Mr Chiles presented at least some programmes for the 2014 World Cup in Brazil from Copacabana beach. The broadcasting rights for World Cups and European Championship finals are shared by the BBC and ITV, who would not select their games in advance of the tournament. This sometimes led to broadcasters not knowing what game they would be broadcasting until two or three days before games were played.

140. In all programmes, ITV chose the location of the broadcast. External factors meant that some decisions were largely dictated by circumstances and others involved more choice on the part of ITV.

141. On the day of broadcast, Mr Chiles would arrive around three hours before the programme was scheduled to start. He would attend a pre-broadcast briefing, chaired by the programme editor who would run through the planned running order, explaining any particular issues or concerns. Mr Chiles would ask questions, make comments and try to identify interesting topics of discussion. Following the briefing, Mr Chiles would review the planned sections of video clips to be used (“VT”). He and the guest experts would then have a brief rehearsal. Depending on their experience, guests would take a greater or lesser role in deciding what VTs to use, with input from Mr Chiles and the programme editor. Guests would lead the conversation about what to analyse; this would be their choice.

142. The Ofcom Broadcasting Code affected the running of a football programme in two principal respects. Firstly, in relation to the timing of commercial breaks and secondly the need to issue an immediate public apology in certain circumstances, for example where microphones pick up swearing. As to commercial breaks, there was a strict limit on the amount of time that could be used for commercial breaks in each ‘clock hour’. Ofcom imposed stringent fines if the channel exceeded its hourly allowance. If necessary the programme editor would insist that the programme go to a commercial break at a certain point to ensure the rules were followed. He might also insist if there was a need to apologise for swearing. Mr Chiles would almost always issue any necessary apology without being told to do so, but sometimes he might not have heard the content that required the apology.

143. Mr Chiles managed discussions with the guests which were not scripted. A significant part of chairing these discussions was time-management. Guests would often have short slots in which they all had to contribute. Mr Chiles saw his role as helping guests to present their points in as interesting and efficient a way as possible. To do so, Mr Chiles would engage them in discussions off-air to identify the most relevant topics and most efficient lead-ins. During discussions between Mr Chiles and guests, the programme editor would make suggestions that could be ignored or accepted. Mr Chiles also worked hard to make the discussion informative for the viewer at home. He used his experience to get the best out of any guest, including those who were not natural for television.

144. Mr Chiles wore an earpiece that allowed him to hear the production gallery and he could speak to the gallery when he was not on-air. The programme editor, director and production assistant would use the earpiece to keep Mr Chiles informed. Many of the guests did not wear earpieces, leaving Mr Chiles to manage any necessary communication with them. When broadcasting from pitch side, communication with the gallery was effectively impossible due to the noise.

145. Live television coverage of football is a team effort. However, once a programme is on-air it would be for Mr Chiles as the presenter to hold it all together, with help from others working on the programme. Mr Chiles could develop conversations as he saw fit. The camera was on him and he had a degree of flexibility. It was the programme editor's job, where necessary, to shape the programme once it was on-air, and this might involve asking, pleading with and cajoling those in the studio. In most circumstances, in the absence of consensus if a decision has to be made it is taken by the programme editor.

146. Due to the inherent uncertainty of live football, much of the preparation for half time and full time discussions was done while the match was being played or in commercial breaks. During commercial breaks Mr Chiles might also read out short introductions and conclusions to be transferred to the autocue.

147. During the game, Mr Chiles would look for appropriate VTs, often not of the game itself but of things happening in the ground. This might give a talking point to get to a commercial break. Knowing his style, the director would also look for similar things.

148. Highlights programmes were either live with inserted VTs or pre-recorded and cut together. A programme editor employed by ITV would decide the running order of highlights programmes and ITV would have editorial control over the programme.

149. Mr Chiles has a distinctive presenting style which is a reflection of his personality. This is a positive attribute for a presenter. He said and we accept that it is "*not an act as such*" and that "*the hardest thing to do is to actually be yourself on television*". He came across as "*a football fan who has found his way from the terraces to the screen*".

150. After the programme there would be a short de-brief with the programme editor.

151. To some extent, Mr Chiles provided his own "tools of the trade" at his own expense to perform the ITV Contracts. This included maintaining a home office with a desktop computer, broadband connection and two mobile phones. He subscribed to satellite sports channels and various newspapers and periodicals. He also used his own custom-fit earpiece during broadcasts.

The BBC Contracts

152. The First BBC Contract was for Mr Chiles to present 42 episodes of Friday Drive on Radio 5 Live. The fee was inclusive of all expenses unless specific expenses were agreed in exceptional circumstances (clause 7.1). In practice, Mr Chiles would be paid travelling expenses and accommodation only in relation to outside broadcasts. The programme was presented from Salford and he was not entitled to travelling expenses from his home in London or hotel accommodation costs.

153. Mr Thoday explained that in general BBC executives would say not to worry about the detailed clauses in the General Terms. In practice, they were very rarely enforced. In respect of the exclusivity provisions, Mr Thoday could not remember a situation where a client was not allowed to do other work except in sports situations where broadcasting rights were involved. Instead, the exclusivity provisions were often used by the BBC as a way to pay a person more money without creating a precedent.

154. Mr Chiles agreed that the BBC's editorial responsibility for its programmes is final. With regards to clause 3.2.6 of the General Terms, Mr Chiles said that whether he would fully and willingly comply with a request depended on what the request was; he would only comply if the request was "*reasonable*". In practice the BBC would not require him to do something he did not want to do.

155. Mr Thoday was asked about clause 3.2.6 of the General Terms. He suggested that it could lead to an argument because it is unclear what would be a reasonable request. He considered unreasonable requests to be changing the time of a programme or totally changing the nature of the show. We took this to refer to a significant change to the timing or nature of a programme. Conversely, Mr Thoday considered that a request to do an outside broadcast would be a reasonable request. We accept Mr Thoday's view as to what would be unreasonable and what would be reasonable.

156. Mr Chiles accepted that he was obliged to present the programmes if he was required to do so by the BBC and that he was entitled to be paid whether or not he was called upon. He agreed that under clause 14 of the General Terms the BBC were not obliged to provide him with any work but that in those circumstances they would still have to pay him. In practice this would never happen because the BBC "*just haven't got the money to pay presenters not to work*".

157. Mr Chiles had never exercised BBL's contractual right to provide a substitute under clause 16.4 of the General Terms and considered it unlikely that a scenario would arise in which he would.

158. There was evidence about the BBC's Editorial Guidelines. The Editorial Guidelines were wide-ranging and covered matters such as accuracy, impartiality and conflicts of interest. They applied to employees and freelancers. Mr Chiles agreed that he was required to read and comply with the BBC's Editorial Guidelines. He accepted that he was obliged not to compromise the BBC's reputation for impartiality, integrity, independence and decency. In the case of BBC News and Current Affairs staff and freelancers, the guidelines for individuals primarily known as BBC news presenters were more prescriptive. For example, in relation to newspaper articles, advertisements and promotional activities where prior notice and/or approval was required. Similar guidelines requiring impartiality existed at ITN and Sky.

159. Mr Chiles initially accepted that he was "primarily known as a BBC news presenter" but having reflected said that "*amongst the general public [he was] not primarily known as a BBC news presenter*". He did not consider that he was classed as a 'news presenter'. However, in light of the evidence of Mr Monro-Davies and Mr Crawford we do consider that Mr Chiles would be primarily known as a news presenter for these purposes.

160. The Editorial Guidelines required a news presenter to refer any newspaper columns or one-off articles to senior management. Mr Crawford understood that for Radio 5 Live presenters this would be the 5 Live Commissioning Team and the Controller of 5 Live. He acknowledged that it was important for the BBC to have power to require a presenter to do something or not to do something to ensure compliance with the Editorial Guidelines. We accept that evidence.

161. Mr Chiles acknowledged that the BBC Editorial Guidelines appeared to require him to get clearance for articles he was going to write but stated that he had "*written countless comment pieces and had precisely none of them cleared*". He stated he currently wrote for The Guardian and had taken positions on some matters of political and industrial public policy and had never been pulled up on it. Again, we accept that evidence.

162. Mr Crawford was the editor of Friday Drive when Mr Chiles presented the programme. As programme editor he was responsible for almost all the content of the programme. He was at the apex of a team of eight or nine producers in terms of the management structure within the BBC. Presenters were outside that management structure.

163. Friday Drive was a news and sport programme with two presenters. It was usually broadcast from the Radio 5 Live Studio in Salford, although occasionally one or other presenter

would be on an outside broadcast. The decision to send a presenter on an outside broadcast was reached by consensus, although the programme editor had the final say. The presenters would alternate presenting stories. The format of 5 Live Drive was to react to the day's big stories at the end of the day. Mr Crawford tried to give Friday Drive more of a feel-good atmosphere where possible. He expected presenters to be up to date with the news but was not concerned with how they did so.

164. When Mr Chiles presented Friday Drive there was a regular slot in which he spoke with Mark Lawrenson, a well-known ex-footballer and BBC pundit. They would spend five to ten minutes discussing football, and in particular that weekend's fixtures. Mr Chiles was free to, and did, talk about Champions League games and while he would not mention ITV expressly, a large part of the audience would be aware of his presenting role for ITV. It would not be acceptable for any presenter to promote programmes for other broadcasters whilst on air.

165. A production meeting would be held at 9.45am each Friday morning. Generally, the presenters were not involved. The editor would call Mr Chiles to discuss provisional decisions reached in the meeting and to invite his views and suggestions. This call and discussion were not done with all presenters. Mr Chiles was always contributing suggestions that regularly resulted in changes to the planned running order. Mr Chiles could not insist that any particular item was covered.

166. Mr Chiles would arrive in the BBC offices by 2pm, giving him two hours of preparation time. There would then be a 'run through' with the presenters, the editor and other BBC production staff. Mr Chiles would then be engaged in reviewing the prepared material and further research.

167. Once on-air, Mr Chiles and his co-presenter would be in the studio with the output editor and some engineers in their eyeline behind a window. The presenters wore headphones allowing communication with the output editor. The producers would prepare a cue that was in the electronic running order for each programme. The cue contained the introductions and for live interviews some suggested questions that the presenter was generally free to use as they saw fit. Mr Crawford considered that it was theoretically open to him to say "*You have to ask this question*" but did not remember ever doing so. Mr Crawford accepted that he could not physically make a presenter say anything on-air.

168. Mr Chiles would occasionally alter the words of introductions, although not where he was required for legal reasons to read it word-for-word. There was also considerable scope for ad-libs and in-studio exchanges. When conducting interviews, Mr Chiles would usually add to the pre-planned questions before going on-air and then think up further questions during the interview.

169. After the programme there was a short debrief. There was scope for Mr Crawford to have one-on-one discussions with presenters where he had concerns about their style or approach or if there had been complaints.

170. In relation to performance of the Second and Third BBC Contracts, Mr Monro-Davies described the mid-morning show, 5 Live Daily. It was a news magazine programme with a single presenter based on people's experiences of life. In his oral evidence he described it as a news programme that had space left to deal with topics that arose that day. He agreed that the programme was predominantly news. He subsequently described it as "*breaking news and sport from across the UK*". The mid-morning show involved more human-interest stories and hard, but not top-line, news. 5 Live Daily was different from Friday Drive in that it had only one presenter and less of a requirement to cover as many news stories, allowing it to be more discursive.

171. Between 30% and 50% of the content was planned before the day of the broadcast, with the rest planned on the day. For planned material, the presenters were sent briefs that Mr Monro-Davies considered they were obliged to read. He also considered that there was an obligation on the presenters to keep up to date with news and current affairs and be prepared for the programme.

172. At the time, Mr Monro-Davies was the editor of the mid-morning show. It had two presenters working on different days of the week. It was important that there was some consistency across the programmes but Mr Monro-Davies would regularly discuss plans for future programmes with Mr Chiles and it was intended that presenters would have scope to bring their own character to the programme.

173. Mr Monro-Davies ran the programme as a team effort, although he considered it would have been open to him to be more 'executive'. He could not recall any circumstances in which he had ever needed to be 'autocratic'.

174. The decision about the running order of the programme lay with the editorial team. The editor has ultimate responsibility for the output of the programme. Mr Monro-Davies gave examples of the times when he would take a decision, give instructions and expect others to follow them: very fast-moving situations, reporting legally sensitive stories and stories involving children. He described this as involving a "command and control" structure.

175. On days when Mr Chiles was presenting, the production team would arrive at 6am and Mr Chiles would arrive around 7am for the production meeting. Mr Chiles attended this meeting and was an active contributor. His views were important but not decisive. BBC journalists prepared scripts for each item on the programme, but there was no requirement that these be read out word for word, except when they had been legally approved. Ad-libbing on scripts was encouraged. Mr Chiles would often amend the scripts in advance and would often change them further when on-air. The presenter needed to bring life to the material, which would have been impossible to script because of the amount of discussion with guests.

176. The briefs consisted of very basic information such as the name and other details about the guest, details of any story they were coming on air to discuss and possibly some additional background information about the issues to be discussed. These were research briefs, not scripts, and would generally be written on one side of A4. As for scripts, about 60 seconds of headlines at the top of the hour would be scripted. Introductions or 'cues' were also scripted but the presenter could choose to ad-lib around them. These scripts were generally about 20 to 30 seconds of material.

177. After the programme there would be a short debrief.

178. Again, to some extent, Mr Chiles provided his own "tools of the trade" at his own expense to perform the BBC Contracts. The cost of subscriptions to newspapers and periodicals for this purpose was some £1,100 per year. In addition to the items referred to in connection with the ITV Contracts, he purchased his own portable recorder and a headset and microphone to conduct interviews. The total cost of that equipment was some £2,700.

Other income and work of BBL

179. The principal factual dispute between the parties concerned the other income and work of BBL. Even then, the issue between the parties was the extent to which BBL had discharged the burden on it of establishing the nature and extent of BBL's other income and work.

180. Mr Chiles' evidence was that BBL contracted with nearly 100 different third parties in the period 1996 to 2019 to provide Mr Chiles' services. In the same period BBL and Mr Chiles undertook a significant amount of other work in relation to commercial projects which did not,

or at least have not so far borne fruit. He also turned down a significant number of appearances on television.

181. Mr Chiles gave evidence of contracts BBL entered into to supply his services from 2001 onwards. This work was in addition to the programmes we have already described. For example, in the period 2001 to 2006 it included:

- (1) Presenting high profile documentaries on BBC1 and BBC2, including documentaries produced by independent production companies.
- (2) Playing himself in a comedy film "Sex Lives of the Potato Men".
- (3) Researching and authoring a book involving a psychological study of football supporters.
- (4) Writing two or three pieces a month for various national newspapers and magazines covering business and sport.

182. Clearly, Mr Chiles was very busy presenting various BBC programmes in the period 2006 to 2008 described above and it is not clear what other work he did in that period. In the period 2008 to 2010 his other work included:

- (1) Coverage of the 2008 European Championship finals and the 2008 Beijing Olympics for the BBC. His 2008 contract with the BBC was extended to cover this work.
- (2) Providing his services to Avalon in 2009 for a pilot commissioned by the BBC for what became That Sunday Night Show. He worked with Avalon in creating the format and producing the programme.
- (3) A keynote speech at the Institute of Credit Management annual conference.
- (4) Guest appearances on "Al Murray's Happy Hour" and "Lee Nelson's Well Good Show", both produced by Avalon.
- (5) A series of columns and one-off articles for The Sun.
- (6) Participation in the 2008 National Identity Fraud Prevention Week.
- (7) Working on television commercials for the Mirror and the Daily Mail.
- (8) Writing, producing and presenting a DVD of World Cup "Goals Gaffes and Glory".
- (9) Contributions to other television programmes including "Strictly Come Dancing: It Takes Two" and "Loose Women".
- (10) Presenting awards at the BBC Teaching Awards Ceremony.

183. In 2010 and 2011, BBL contracted for Mr Chiles to contribute to a television programme called "Piers meets Lord Sugar", and weekly columns for The Sun and The Telegraph.

184. Mr Chiles said that between April 2012 and April 2017, BBL entered into 40 separate agreements with some 25 different third parties for the provision of Mr Chiles' services. We accept his evidence and describe the nature of Mr Chiles' income from these third parties below. The principal income was derived from the following engagements:

- (1) Fees from Avalon in connection with That Sunday Night Show. He was paid for his work as a presenter and was also entitled to a share in any production profits as a result of his involvement in creating and producing the show. It is not clear whether there were any profits.

- (2) Presenting a documentary series on BBC2 called “My Mediterranean with Adrian Chiles”. Mr Chiles had become known as a presenter and journalist with a Catholic faith. He had written about his experiences in The Tablet and this led to the documentary.
- (3) Speaking at a UK Trade and Investment Great Global Investment Conference in Rio de Janeiro.
- (4) Presenting the Institute of Chemical Engineers Global Awards.
- (5) Presenting the Royal Television Society Northern Ireland Programme Awards.
- (6) Writing and presenting a television documentary called “Whites v Blacks: How Football Changed a Nation” produced by Sugar Films for the BBC.
- (7) Various other ad hoc television appearances.

185. Mr Chiles was constantly thinking about and working on other projects and proposals. Avalon was constantly looking ahead to identify future engagements and income streams. All the work described in this section was carried out by Mr Chiles through BBL. Mr Chiles has provided all his services through BBL since 1996.

186. BBL also contracted to provide the services of Jane Garvey, a well-respected broadcaster at the BBC. Mr Chiles married Ms Garvey in September 1998. In or about 1999, Ms Garvey became an equal shareholder in and director of BBL. At that stage BBL contracted to provide Ms Garvey’s services as a broadcaster and other engagements to third parties. That remained the position until 2009 when they were divorced. Mr Rivett did not expressly seek to rely on any aspect of BBL’s commercial relationship with Ms Garvey and we mention it solely for the purposes of completeness.

187. HMRC provided us with an analysis of BBL’s income in the relevant tax years. We can summarise that analysis in the following table which illustrates the proportion of BBL’s income in the years 2012-13 to 2016-17 derived from the ITV Contracts, the BBC Contracts and other income:

Tax Year	Total Income £	ITV Income %	BBC Income %	Other Income %
2012-13	2,423,242	90.3	0	9.7
2013-14	1,121,739	98	1.9	0.1
2014-15	1,005,930	90.8	6.3	2.9
2015-16	342,193	59.6	30.1	10.3
2016-17	214,298	0	77	23

188. HMRC say that based on this analysis, Mr Chiles was almost entirely financially dependent on the ITV contract in 2012-13, 2013-14 and 2014-15. His financial dependency shifted gradually to the BBC once the Second ITV Contract was terminated in 2015. They say that in the latter part of 2015-16 and in 2016-17, BBL and Mr Chiles were very substantially financially dependent on the BBC.

189. We can see from the descriptions in BBL’s accounting records that the “other income” for each year comprises the following amounts:

Tax Year	Other Income £	Description
2012-13	235,742	Some £223,000 of this sum was BBL's income from Avalon in connection with That Sunday Night Show. The balance appears to be sums from ad hoc newspaper columns and contributions to television programmes.
2013-14	739	It is not clear what this sum relates to.
2014-15	29,255	Some £23,000 relates to guest appearances on ad hoc television programmes – The Chase Celebrity and Room 101. The balance appears to be sums from ad hoc newspaper articles.
2015-16	35,168	Some £30,600 relates to presenting “My Mediterranean with Adrian Chiles”. The balance appears to be ad hoc newspaper articles and contributions to television programmes.
2016-17	49,298	This principally comprised income from contributions to “Whites v Blacks: How Football Changed a Nation” (£13,000), presenting RTS Northern Ireland Programme Awards (£10,000), speaking at the UK Trade and Investment Great Global Investment Conference (£10,000), presenting the IChemE awards (£10,000). The balance appears to be sums from ad hoc newspaper articles and contributions to television programmes.

190. BBL produced its own version of HMRC's income analysis, treating income from Daybreak pursuant to the First ITV Contract as other income. We can summarise BBL's income analysis as follows:

Tax Year	Total Income £	ITV Income %	BBC Income %	Other Income %
2012-13	2,423,242	44.9	0	55.1
2013-14	1,121,739	79.2	1.8	19.0
2014-15	1,005,930	70.0	6.3	23.7
2015-16	342,193	0	30.1	69.9
2016-17	191,857	0	74.3	25.7

191. There was no challenge by either party to the underlying figures produced in their respective income analysis. The only challenge by BBL was to the principle of treating income from the Daybreak element of the First ITV Contract as ITV Income.

192. The rationale for this was that BBL submits that HMRC have conceded that income from Daybreak is not income that would be caught by IR35. However, we do not consider that HMRC made such a concession. The limit of their concession was that they were not seeking to assess tax and NICs in relation to that income. They did not concede that it was not caught by IR35.

THE HYPOTHETICAL CONTRACTS

193. We now come to consider the terms of the hypothetical contracts. Section 49(1)(c) ITEPA 2003 requires us to focus on the contracts and arrangements pursuant to which the services are provided. Both parties invited us to do this by reference to each of the contracts described above. It was common ground that the terms of the hypothetical contracts will be

very close to the terms of the actual contracts between BBL and ITV/BBC. However, different terms may be imported into the hypothetical contracts by reference to the circumstances generally, including the way in which the contracts were performed.

194. The Upper Tribunal in *Atholl House* described the approach as follows:

54. ...the parties' subsequent conduct might amount to a relevant "circumstance" (for the purposes of section 49(1)(c) of ITEPA and Regulation 6 of the Regulations) such that different terms should be imported into the hypothetical contract.

55. However, it would not, in our judgment, be correct simply to construct the hypothetical contract by reference to Ms Adams's and Mr Paterson's imperfect, and sometimes incorrect, understanding of the terms of the Written Agreement. That would be to place too much weight on matters not necessarily relevant to the construction of the hypothetical contract which – after all – will have governed the hypothetical legal relationship between Ms Adams and the BBC from its inception.

56. The construction of the hypothetical contract involves the court in a "counter-factual" exercise: if Ms Adams and the BBC had concluded the contract directly between themselves, what would its terms have been? In this case, the Written Agreement represents a safe starting point, since it was what the BBC agreed with the Company and what the Company (controlled by Ms Adams) agreed with the BBC. However, the following additional points must be borne in mind:

(1) During the tax years in issue, Ms Adams and the BBC enjoyed a harmonious and reasonable working relationship. The precise terms of the Written Agreement did not matter greatly since there was no occasion on which one party needed to insist upon the strict contractual terms subsisting between the Company and the BBC. In short, there was no "flashpoint" at which one party asserted a right which the other party was inclined to resist. Such flashpoints are of extraordinary value in working out precisely what the parties (albeit after the event) intended.

(2) Suppose, for example, in the "real world", the BBC had insisted on its right (as we have found it) of first call, Ms Adams had strenuously resisted the right so exercised, and the BBC had capitulated without much demur. Or, by contrast, the BBC had serially insisted on this right, and Ms Adams had complied without demur? Simply focussing on the parties' harmonious conduct, and ignoring such counter-factual questions, runs the risk of ignoring the reality (if that word can be used in a hypothetical case) of the terms of the Written Agreement as transposed into the hypothetical contract.

(3) In short, in considering the terms of the hypothetical contract regard must be had to what can be drawn from certain hypothetical "flashpoint" scenarios, like the one described. There is nothing particularly artificial in this. The fact is that in the real world, when a genuine and not a hypothetical contract is being construed, there will likely be a "flashpoint" where the parties' intentions will be manifested for the court (as appropriate) to take into account.

195. We shall seek to identify the terms of the hypothetical contracts on that basis, although there was no evidence of any flashpoints as such, apart from the question of highlight programmes. We set out in Annexes 1-5 our findings as to the terms of the hypothetical contracts. In this section we set out our reasons for concluding that those are the relevant terms, focussing on the terms in dispute. In the end, most of the terms of the hypothetical contracts were agreed.

196. In construing the terms of the actual contracts, it was common ground that contracts are interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean (*Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[13]).

197. In certain circumstances this may be qualified in the context of employment contracts, where the relative bargaining power of the parties may be relevant in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement in such cases may have to be gleaned from all the circumstances of the case, of which the written agreement is only a part (*Autoclenz v Belcher* [2011] ICR 1157 at [20]-[35]). Mr Rivett originally sought to rely on *Autoclenz* in relation to the effect of certain terms of the BBC Contracts, including clause 3.2.6 which he submitted should be limited to reasonable requests. In the end, he simply relied on arguments as to how the terms of the actual BBC Contracts would be reflected in the hypothetical BBC Contracts.

198. It was common ground that the hypothetical ITV Contracts would not cover presenting Daybreak. As a result it is necessary to make consequential adjustments to the fees payable under the First ITV Contract and the restrictions on providing similar services to third parties.

199. The principal issues between the parties as to the terms of the hypothetical ITV Contracts were as follows:

(1) HMRC say that it was a term of the hypothetical ITV Contracts that ITV would have a general right to control what was done, where it was done, when it was done and in so far as necessary how it was done. We do not consider that this was a term of the hypothetical contracts as such. This is essentially one of the questions we must answer in considering whether the hypothetical contracts were contracts of service or contracts for services.

(2) BBL says that it would have been a term of the hypothetical ITV Contracts that the parties would not have intended to create an employment contract. We do not consider that we can infer such an intention from the surrounding circumstances. We consider that the parties would have intended the terms of the hypothetical contract to be in the terms we have set out in the Annexes. It is then a question of law as to whether that contract has the effect of creating an employment contract.

(3) BBL says that there was no obligation on ITV to provide work, and that ITV had expressly refused to incorporate such an obligation in the First ITV Contract. HMRC say that there was at least an implied obligation on ITV to provide work based on a mutual understanding between the parties and the regularity with which work was in fact offered to Mr Chiles. In this regard we prefer the submission of BBL. Clearly ITV intended to provide Mr Chiles with work, but the reason the subs bench clause was incorporated and provision was made for the Guaranteed Service Fee to be payable in full even if Mr Chiles was not used by ITV was because there was no obligation on ITV to use Mr Chiles' services.

200. Issues (1) and (2) above also arose in relation to the hypothetical BBC Contracts. We treat issue (1) in the same way. As to issue (2), we are satisfied that the BBC would not have wanted Mr Chiles as an employee. That was the reason they had originally required him to leave his employment and contract through BBL. Further, it was an express term of the Contributor Guarantee that he would not have any relationship of worker or employee with the BBC.

201. The following further points arise in relation to the hypothetical BBC Contracts:

(1) BBL says that clause 3.2.6 of the First BBC Contract would involve a requirement on the part of Mr Chiles only to fully and willingly comply with reasonable requests made by the BBC. Mr Chiles' evidence was that he would only comply with reasonable requests made by the BBC and that the BBC would not require him to do anything which he did not want to do. We have also referred above to Mr Thoday's evidence about this

clause. In a sense this is at the heart of the question of control. Mr Chiles would not do anything which he would consider to be unreasonable. Equally, we doubt the BBC would require Mr Chiles to do anything which it considered to be unreasonable. Mr Thoday gave examples of what he considered to be unreasonable requests, namely significant changes to the timing or nature of a programme. We agree with Mr Thoday that the BBC could not make such changes, but the real question is whether the BBC could require Mr Chiles to do something which it considered reasonable but Mr Chiles considered unreasonable. For present purposes we consider that the hypothetical BBC contracts would only require Mr Chiles to comply with requests of the BBC which were objectively reasonable.

(2) BBL contended that the hypothetical BBC Contracts would contain a more simplified version of clause 9 of the First BBC Contract. It does not appear to us that anything turns on whether the provision is in the more detailed form of clause 9 or the simplified version which we have adopted in the hypothetical BBC Contracts.

(3) HMRC say that if BBL nominated an alternative contributor pursuant to clause 16.4 and the BBC accepted that nomination then the BBC would be responsible for paying that person. BBL did not expressly take issue with this reading of the contract, but for our part we note that clause 16.4 makes provision for BBL not just to nominate but also to provide an alternative contributor. It seems to us therefore that BBL would be responsible for payment. However, we have found that Mr Chiles never exercised the right and considered it unlikely he ever would. In those circumstances we do not consider that this would form part of the hypothetical contract.

THE LAW – EMPLOYMENT OR SELF-EMPLOYMENT

202. In this section we consider the authorities as to what amounts to employment and how it is to be distinguished from self-employment. At the same time, we deal with some of the issues that arise between the parties as to the principles to be derived from those authorities.

203. There is no statutory definition of employee or employment in this context. The classic statement on the test to identify a contract of service is that of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

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

204. The first stage in the test is generally known as “mutuality of obligation”. The second condition is that of control to a sufficient degree. The third condition operates as a negative condition. If the first two conditions are satisfied, the contract will be a contract of employment unless there are other provisions of the contract or other factors which are inconsistent with that conclusion and of sufficient importance that the Tribunal can conclude that the contract is not one of service (see *Ready Mixed Concrete* at p516 to 517 and *Weight Watchers (UK) Ltd v HMRC* [2012] STC 265 at [41] to [42] and [111]).

205. Mr Rivett took us on a journey through the well-known line of authorities in this area, focussing on the facts of those cases in order to put the propositions of law that they identified into context. We have taken note of the facts of those cases but we shall not rehearse them in this decision, save where they are directly relevant to the propositions of law. They do at least illustrate the way in which the propositions of law are applied to the particular facts of the case. However, we recognise that cases such as this turn very much on their own facts and it is

necessary to apply the principles of law to those facts. It is also relevant to note what was said by the Court of Appeal in *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318:

23. Clearly as society and the nature and manner of carrying out employment continues to develop, so will the court's view of the nature and extent of the 'mutual obligations' concerning the work in question and 'control' of the individual carrying it out ...

206. In the following sections we consider the authorities in relation to each of these three separate conditions. We apply the principles to be derived from the authorities when we come to consider the issues in the present appeal.

Mutuality of obligation

207. The mutuality of obligation to personally perform work offered and to pay remuneration is the "irreducible minimum ... necessary to create a contract of service" (see *Carmichael v National Power Plc* [1999] 1 WLR 2042 at 2047).

208. The obligation must be to personally perform the work which was recognised by MacKenna J in *Ready Mixed Concrete*:

There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be ...

209. Hence the existence of a right to provide a substitute to perform the work may be relevant. It is the right to provide a substitute that will be relevant. It does not matter that the right in practice was not used (see *Autoclenz Ltd v Belcher* at [19]). However, the existence of a right to substitute is not determinative of self-employment (see *Usetech Ltd v Young* [2004] EWHC 2248 (Ch) at [53]). Further, the Court of Appeal in *Pimlico Plumbers* said that the "*unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally*". In that case, the Supreme Court noted at [34] that the right of substitution was not unfettered, but limited to substitutes coming from the ranks of other Pimlico plumbers.

210. It is clear that the requirement for mutuality of obligation is not simply to the effect that to have a contract of employment there must be a contract. There must be something more than that. Mr Rivett submitted that what was required was an obligation on the client to provide some work, for which it would make payment, and an obligation on the individual to perform some work, for which he would be entitled to payment.

211. We were referred to *Weight Watchers* where Briggs J as he then was described the test of mutuality of obligation in the following terms:

22. The first of MacKenna J's three conditions is commonly labelled mutuality of obligation. In any particular case it may serve one or both of two distinct purposes. The first is to determine whether there is a contractual relationship at all between the relevant parties. This is of particular importance in three cornered or triangular cases, for example where the work of the alleged employee is provided by an employment agency to one of its corporate customers: see for example *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, where, in the context of such a triangular example, Elias J said, at para 11 that: "The significance of mutuality is that it demonstrates whether there is a contract in existence at all."

23. There are however numerous cases (and the present is one of them) where there is no doubt that the relevant parties had a contractual relationship with each other, but the question is whether the mutual obligations are sufficiently work-related. That is a central issue in the present appeal.

212. We were also referred to what was said at [30] and [31] in relation to what were described as “discontinuous work” arrangements where an individual works on and off for the same client:

30. Contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories. The first consists of a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work. The second consists of a series of discrete contracts, one for each period of work, but no over-arching or umbrella contract. The third, hybrid, class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the over-arching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable national insurance regime apply to the work done by the Leaders, it is clearly sufficient if there is identified either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods during which the Leader’s work is carried out.

31. In cases where reliance is placed on discrete contracts for periods of work it is in my judgment still necessary to show that the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done...

213. The question of mutuality was recently considered by the Court of Appeal in *HMRC v Professional Game Match Officials Limited* [2021] EWCA Civ 1370 (“PGMOL”). We were referred to various passages from the judgment of the Court of Appeal. The case concerned agreements between PGMOL and individual football referees to officiate at matches including Premier League and English Football League matches. The FTT held that there were overarching contracts between the referees and PGMOL covering the whole of the football season, and discrete contracts covering each match. Those findings were not appealed. The FTT went on to find that there was no mutuality of obligation either in the overarching contracts or the discrete contracts. The Upper Tribunal upheld those findings. In relation to mutuality of obligation and the discrete contracts it held as follows:

100. ...we do not accept that a contract which provides merely that a worker will be paid for such work as he or she performs contains the necessary mutuality of obligation to render it a contract of service: the worker is not under an obligation to do any work and the counterparty is not under an obligation either to make any work available or to provide any form of valuable consideration in lieu of work being available.

101. We do not accept, in this regard, Mr Nawbatt’s submission that the statements of principle as to what is necessary to establish mutuality of obligation sufficient to found an employment relationship in the cases we have referred to in section E above are inapplicable to the Individual Contracts, merely because the cases themselves involved longer term or “overarching” contracts. The principles are of general application.

214. The Court of Appeal considered the relationship between mutuality of obligation in the overarching contract and in the discrete contracts. It summarised the position at [118] as follows:

118. *McMeechan, Clark, Carmichael and Prater*, which bind this Court, are all cases in which this Court considered, in one way or another, the relationship between mutuality of obligation in an overarching contract and in a single engagement. They establish at least three propositions.

(i) The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.

(ii) In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negating such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.

(iii) A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.

119. Those authorities do not support any suggestion that the criterion of mutuality of obligation is the sole, qualifying test for the existence of a contract of employment, so that if there is some mutuality, but it is not the right kind of mutuality, there can be no contract of employment. On the contrary, those authorities, and the other authorities to which we were referred, suggest that the court has to look at all the circumstances in the round before deciding whether or not there is a contract of employment. The Court of Appeal in *McMeechan* specifically rejected a submission to that effect by the Secretary of State. The Court of Appeal in *Prater* rejected similar submissions by the appellants in that case.

215. The Court of Appeal held at [122] that the FTT had been wrong to consider that there was no mutuality of obligation in the discrete contracts because either party could pull out of an engagement before a match:

122. The first of the FTT's two main reasons for deciding that there was no contract of employment as respects the individual engagements was lack of mutuality of obligation. It considered that the fact that either side could pull out of the engagement before a game, without any breach of contract, or any sanction, negated the necessary mutuality of obligation. In my judgment, the FTT erred in law in deciding that the ability of either side to pull out before a game negated the necessary mutuality of obligation. The authorities which I have referred to above, in para [68], show that that is not the correct legal analysis. The correct analysis is that if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial. The contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other.

216. The Court of Appeal also held that the Upper Tribunal had been wrong to find at [100] of its decision that there was no mutuality of obligation in the discrete contracts:

124. The authorities I have summarised above show that the UT erred in law in concluding in paragraph 100 that the individual contracts could not be contracts of employment if they merely provided for a worker to be paid for the work he did, and, in paragraph 101, in concluding that the statements about the mutuality of obligation which is necessary to found an overarching contract also apply to individual engagements. The UT also erred in law in upholding the conclusion of the FTT that provisions in a contract which enabled either side to withdraw before performance negated the necessary mutuality of obligation.

217. Mr Rivett submitted that *PGMOL* concerned single engagement contracts and provided no meaningful assistance in relation to overarching contracts, such as the ITV Contracts in the present appeal. In the context of that submission we note that the Court of Appeal in *PGMOL* referred to the difficulties of analysis at [48]:

48. Where an employee works seasonally, or intermittently, he may need to establish, in order to show that he has the necessary continuity of employment, that his relationship with his employer was governed by an overarching contract during the periods when he is not actually working. It is necessary to recognise, when considering the reasoning in any decision of the EAT (or of the Court of Appeal on appeal from the EAT), that in some cases, the employee had to establish that there was an overarching contract between him and his putative employer which bridged any gap between periods of work, and that in other cases, he did not, and that the criteria which apply to

overarching contracts do not necessarily apply to contracts for a specific piece of work or engagement. It is further necessary to recognise that the legal reasoning in these decisions may not apply across the board, and to recognise which parts of the reasoning were essential to the actual decision in the case, and which parts were obiter. A further complicating factor is that some of the decisions analyse tri-partite relationships between employment agencies, their clients, and applicants/claimants, and that there is no tri-partite relationship in this case.

218. Mr Tolley submitted that simply because the client may exercise a choice to withhold work or the employee had a right to refuse work does not mean that the obligations are not sufficiently work-related. The focus is whether there is an obligation on the worker to work and the client to provide or pay for it. This was the issue between the parties. Mr Rivett's submission was that there must be some obligation on the client to provide some work.

219. We accept Mr Tolley's submissions in this regard. We do not find specific support for his submission in the judgment of the Court of Appeal in *PGMOL*. However, it is clearly supported by a decision of Langstaff J sitting in the Employment Appeal Tribunal in *Cotswold Developments Construction Ltd v Williams* [2005] UKEAT 0457 where he stated:

55. We are concerned that Tribunals generally, and this Tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is *some* obligation upon an individual to work, and some obligation upon the other party to provide or pay for it.

220. This passage was cited with approval by Elias J also in the EAT in *James v Greenwich LBC* :

16. The authorities do not speak with one voice as to precisely what mutual obligations must be established. The relevant cases were analysed carefully by Langstaff J in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, paras 19—23. As he points out, sometimes the employer's duty is said to be to offer work, sometimes to provide pay. The critical feature, it seems to us, is that the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as *Carmichael v National Power plc* [1999] ICR makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment.

17. In short, some mutual irreducible minimal obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field; and the issue of control determines whether that contract is a contract of employment or not.

221. It was pointed out to us that Elias J in a subsequent case corrected the impression given in these passages that the issue of control was determinative. However, that does not affect the endorsement given to *Cotswold Developments*. Further, the language used to describe mutuality of obligation in these two authorities is echoed in the reference to a "work-related" obligation by Briggs J in *Weight Watchers* in which he referred to both cases.

222. Mr Tolley also submitted that an expectation derived from practice that work will be provided during the contract may give rise to a legal obligation to provide work for these purposes (See *St Ives v Heggarty* UKEAT 0107/08 and *Kickabout* at [35]). We accept that submission, although Mr Rivett said no such obligation arose on the present facts.

Control

223. A sufficient right of control in respect of what is to be done, and where, when and how it is to be done is an important requirement of an employment relationship, but by itself it is not decisive. The key question in this regard is not whether in practice the worker has actual day to day control over his own work, but whether there is, to a sufficient degree, a contractual right of control (see *White v Troutbeck* [2013] IRLR 286 at [40]-[43] per Richardson J, upheld in the Court of Appeal at [2013] IRLR 949, and *Morren v Swinton and Pendlebury BC* [1965] 1 WLR 576). The question whether control is “sufficient” for this purpose must take into account the practical realities of the particular industry, considering those aspects of the performance of work that can be controlled in that industry.

224. In identifying whether there is a right of control, the starting point is the express terms of the contract. If the express terms do not answer the question, then it is necessary to consider the matter by way of implication – see *Ready Mixed Concrete* at p515F:

... Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

‘What matters is lawful authority to command, so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.’ – *Zuijus v Wirth Brothers Pty Ltd* ((1955), 93 CLR 561 at p 571.).

To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

225. The Upper Tribunal in *Christa Ackroyd Media Ltd v HM Revenue & Customs* [2019] UKUT 326 (TCC) considered that passage at [47] and said as follows:

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

226. The significance of control was considered by the Court of Appeal in *Montgomery*. That was a case of an agency worker seeking to establish that she was an employee of the agency. Buckley J (with whom Brooke and Longmore LJ agreed) considered the position of employees with a high degree of autonomy. He stated as follow at [19]:

19. MacKenna J made plain [in *Ready Mixed Concrete*] that provided (i) and (ii) are present (iii) requires that all the terms of the agreement are to be considered before the question as to the existence of a contract of service can be answered. As to (ii) he had well in mind that the early legal concept of control as including control over how the work should be done was relevant but not essential. Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment. MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which I take the first few lines only:

‘The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.’

227. The same point was made by Vinelott J in *Walls v Sinnott* [1987] STC 236 at p246c in relation to a professional singer who lectured in music at a technical college:

The other point that was very much stressed by the taxpayer is the modest degree of control which in practice was exercised by the governors and the principal of the college. In some contexts the degree of control exercised may be very important in deciding whether someone is an employee or servant, but in the case of a senior lecturer at a college of further education, more particularly one who like the taxpayer came into teaching from active work as a singer, it is not surprising to find that he was given a very wide degree of latitude in the organisation of his work and time.

228. In *PGMOL* at [69], the Court of Appeal endorsed what was said by the High Court of Australia in *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, quoted above.

229. The focus in cases such as the present is on the ‘what’, ‘how’, ‘when’ and ‘where’ the services are performed. The Upper Tribunal in *Atholl House* described it as follows at [92(2)]:

In determining whether the right of control exists in a sufficient degree, the putative employer’s power to decide what is to be done, the way in which it is to be done, the means to be employed in doing it and the time and the place where it is to be done must all be considered (*Ready Mixed Concrete* at 515F). As a shorthand we will, like the parties, refer to this as control over the “what”, the “how”, the “when” and the “where”.

230. In *Ready Mixed Concrete*, MacKenna J referred at p515F to control as including the power of deciding the thing to be done. We accept that may be relevant in certain circumstances but we agree with Mr Rivett that in considering control over what is to be done, it is important to bear in mind the contractually agreed description of the work that is to be done. A client can clearly require the contractually agreed description of the work to be done, but that may not say anything about the nature of the relationship. On the other hand, the fact that the worker cannot be moved from one task to another outside the scope of the contractually agreed description of work does not mean that there is not sufficient framework of control. A sufficient framework of control can still exist where a skilled worker is engaged for a specific task (see *Kickabout* at [80] and *Atholl House* at [94]-[97]).

231. The authorities show that direct control over how the work is to be done is not essential for an employment contract. What is required is a sufficient framework of control. This was emphasised by the Upper Tribunal in *Christa Ackroyd Media* when discussing what was meant by a sufficient framework of control at [54]:

54. ... we do not consider that Buckley J [in *Montgomery*] was addressing the granular mechanics of control in this context. In the first place, there is no discussion which would indicate that particular performance tools such as appraisals or line managers were material. If the passage is read as a whole, the point being made is simply that set out in *Humberstone v Northern Timber Mills* and cited in *Ready Mixed Concrete*, namely that what mattered in determining control was not the practical exercise of day-to-day control and whether “actual supervision” was possible, but “whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions”. That point is made clear in *White v Troutbeck*, where the Employment Appeal Tribunal (at paragraphs 40 to 42) expressed the question as whether the owner of an estate who left a servant in charge of a property “retained the right to step in and give instructions concerning what was, after all, their property”, pointing

out that the delegation of day-to-day control did not mean that the owner had “divested himself of the contractual right to give instructions to them”.

232. A similar approach was taken by the Court of Appeal in *PGMOL* at [69]:

69. A further legal issue is what degree of control is necessary. At this stage, all I need to say is that I agree with the UT that the FTT directed itself correctly in para [16] on the criterion of control. The FTT referred at [163] to a statement in para [19] of *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269, [2001] ICR 819 that there must be a ‘“sufficient framework of control” ... in the sense of “ultimate authority” ... rather than there necessarily being day-to-day control in practice’...

233. As to where and when the work is to be done, we consider that the relevance of the fact that work is required to be done at a certain location and at a certain time will depend on the circumstances. If a painter is engaged to paint a house over a particular weekend, clearly he is required to provide his services at that house and at that time. The client is contractually entitled to require the work to be done at that location and at that time, but that might say little if anything about the nature of the relationship. In circumstances where it does, for example because the painter is regularly required to paint different houses at different times, the existence of control is not determinative because other factors may show that the painter is self-employed in business on his own account.

234. Mr Rivett submitted that we should be wary about finding control from the nature or quality of the service itself. As we understood the submission, it was that where the contracting parties agree that certain things should be done, no relevant right of control can be identified from the fact that the worker can be required to do that thing. There was no control over the worker in the performance of what had been agreed to be done. A similar submission was made in *Atholl House*, in relation to an argument that employees can generally be moved to different tasks at the employer’s command. The argument was rejected at [97] as follows:

97. It follows that we do not accept [*Atholl House*’s] submission that the absence from the hypothetical contract with Ms Adams of any clause allowing the BBC to deploy on tasks other than the Kaye Adams Programme is fatal to the argument that the BBC had sufficient control at the second Ready Mixed Concrete stage. We do, however, accept that the presence or absence of such a provision would be of some relevance in determining whether there is ‘some sufficient framework of control’.

235. It seems to us that the context will always be important. *White v Troutbeck* involved persons who were engaged as caretakers and managers of certain accommodation and to prepare it for occasional visits by the owner. The EAT held that there was a right to control the way in which the services were provided. It stated at [49]:

49. ...Given the many duties which Mr White and Ms Todd undertook, it would be particularly surprising if there was no right to give them instructions concerning ground-keeping and house-keeping in connection with a visit. Clear words would, in my judgment, be required to divest Troutbeck, the owners of what was in part a home for them to visit, of the right to give reasonable instructions about the house and grounds during the period of a visit...

236. We shall return to Mr Rivett’s submission when we come to consider the services Mr Chiles agreed to provide.

237. It is clear that what amounts to a sufficient contractual right of control will vary with the industry in which the individual works. Mr Rivett submitted that obligations which necessarily apply to everyone within an industry have little to say about whether a client has sufficient control to establish a worker as an employee. We did not understand Mr Rivett’s submission

to go so far as to say that such rights should be left out of account. His submission was that they have little weight in the context of TV and radio presenters.

238. Mr Tolley submitted that this submission was wrong in law. It was wrong to leave a contractual right of control out of account merely because it is a right required by the client to comply with regulatory obligations or because it is a right that applies in respect of all people engaged by the organisation. The Upper Tribunal in *Christa Ackroyd Media* said as much at [59] when rejecting the taxpayer's submission that control imposed in order to ensure compliance with the BBC's Editorial Guidelines could not be relevant where the guidelines applied to employees and non-employees alike:

59. In this appeal, Mr Maugham's argument on this issue probably amounts to an assertion either that the obligations imposed on Ms Ackroyd under Clause 9 of the Contract are not relevant to control because of the BBC's reasons for imposing them, or that because the BBC's obligations under the Guidelines applied in relation to content provided by all content providers, they were not properly part of the relevant context in considering ultimate control. We do not accept either argument.

239. Control in the context of compliance with regulatory rules was considered by the Upper Tribunal in *Atholl House*:

105. In his submissions, Mr Gordon sought to downplay the significance of this control as being mere 'editorial control' that was imposed only to meet the BBC's regulatory guidelines and could only be exercised after the event by imposing sanctions on Ms Adams if she failed to comply. We disagree. The control was significant and related to the very tasks that Ms Adams could be required to perform.

106. The BBC also had some control over the 'how'. Under the hypothetical contract, it could require Ms Adams to adhere to the BBC's and OFCOM's guidelines. Admittedly, there was little that the BBC could do in 'real time' if Ms Adams breached those guidelines. However, as we have observed at para [92](4) above, this is not necessary and, in any event, the BBC retained a right to impose sanctions should Ms Adams fail to adhere to its stipulations as to how the show should be conducted.

240. We agree with Mr Tolley that such rights of control are relevant and important. Mr Tolley also submitted that a contractual right of control which is only exercisable after the performance of the service is still a relevant element of control. That must be right and reflects what the Court of Appeal said at [130] in *PGMOL*, accepting the Upper Tribunal's conclusion that it was irrelevant that PGMOL could not step in during a match to impose a sanction for breach of a term of the contract:

130. ... as the UT recognised, the authorities do not require that an employer's directions be 'enforceable, in the sense that there is an effective sanction for their breach'. I do not consider that there is any such requirement, or that, for the purposes of the control criterion, an employer's directions are only enforceable contractual obligations if there is an effective sanction for their breach...

241. We also note what was said by the Supreme Court in relation to a similar argument in *Uber BV v Aslam* [2021] UKSC 5 at [102]:

102. I would add that the fact that some aspects of the way in which Uber operates its business are required in order to comply with the regulatory regime - although many features are not - cannot logically be, as Uber has sought to argue, any reason to disregard or attach less weight to those matters in determining whether drivers are workers. To the extent that forms of control exercised by Uber London are necessary in order to comply with the law, that merely tends to show that an arrangement whereby drivers contract directly with passengers and Uber London acts solely as an agent is not one that is legally available.

242. Absence of control as to the detailed way in which work is performed is not inconsistent with the employment of a skilled person (see *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576 per Lord Parker CJ at 582A-C; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 per Lord Griffiths at 384A; and *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318 per Buckley J at [19]).

243. The significance of control is that the employer can direct what the employee does, not necessarily how he does it (see *Catholic Child Welfare Society & Ors v Various Claimants* [2012] UKSC 56 per Lord Phillips at [36]):

36. In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase "master and servant", the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.

244. The same point was made in the context of a radio presenter in *Kickabout* at [80]:

80. Moreover, the FTT's finding that Talksport had 'relatively narrow' control over what tasks Mr Hawksbee performed does not prevent the sufficient framework of control from being present. As HMRC submitted, skilled employees are frequently engaged to perform tasks with a very narrow compass. Footballers and ophthalmic surgeons are examples. Cooke J noted in *Market Investigations v Minister of Social Security* [1968] 3 All ER 732 at 739, [1969] 2 QB 173 at 187 that appointment to do a specific task at a fixed fee is not inconsistent with a contract being a contract of service.

Other provisions

245. There was a fundamental disagreement between the parties as to the proper approach to the third stage of the *Ready Mixed Concrete* analysis.

246. Mr Tolley described the purpose of the third stage as being to test whether, notwithstanding the existence of mutuality of obligation and the existence of a sufficient right of control, the terms of the contract as a whole were inconsistent with a contract of employment. He relied on what was said by Briggs J in *Weight Watchers* at [42]:

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

247. The Upper Tribunal in *Kickabout* made the same point in terms that stage three "does not proceed from what might be termed a 'standing start'".

248. Mr Rivett submitted that the strength of the prima facie case at this stage will vary with the level of control established at stage two and the importance of control to the nature of the work being performed. In particular, he submitted that control was less relevant at this stage in

cases concerning skilled workers. He relied in his skeleton on what was said in *Morren v Swinton & Pendlebury BC* at p581-582:

...clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of the master of a ship, an engine driver, or a professional architect, or as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do work, therefore the absence of control and direction in that sense can be of little, if any, use as a test.

249. Mr Rivett also relied on what was said in *Ready Mixed Concrete* at p516-517:

An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.

250. Those passages do not support the propositions put forward by Mr Rivett. What was said in *Morren* by Lord Parker CJ was simply that control is not decisive, which is entirely consistent with the approach outlined by Briggs J. What was said by MacKenna J in *Ready Mixed Concrete* was simply that control is a necessary factor but not sufficient in itself. Again, entirely consistent with the approach of Briggs J.

251. More to the point is Mr Rivett's reliance on the decision of the Upper Tribunal in *Matthews v HM Revenue & Customs* [2012] UKUT 229 (TCC) which concerned cruise ship entertainers who contracted with various cruise lines for short term engagements. The taxpayers sought to establish that they were employees but their appeal to the FTT was dismissed. In doing so, the FTT considered the question of control. It weighed various factors including the fact that the cruise director exercised a great deal of control and said at [12]:

12. In giving weight to the various factors listed above control is the principal one relied on by the Appellants. We consider that much of this is required by the context of a cruise ship. The passengers have paid for their trip and the staff (whether employed or self-employed) are paid to serve the passengers. It is to be expected that the staff will be closely controlled so as to achieve the cruise line's objective because the staff are in the public eye at all times. This factor seems to us to have less bearing on the employment status of the staff than might be the case if the context were different. It is not the case that self-employed have complete freedom over what they do...

252. The matter came on appeal before Mann J sitting in the Upper Tribunal, where the taxpayers argued that the FTT had failed to give proper weight to the degree of control exercised by the cruise lines and if it had done so it would have found that the taxpayers were employees. He dismissed the appeal on the following basis:

15. The characterisation of the relationship in this case is an assessment that has to take into account a number of factors. The First-tier Tribunal clearly identified those factors and their choice has not been criticised. What is criticised on analysis is the relative weight given to those factors and in particular to the relative weight given to control. It seems to me that that criticism is misplaced.

16. First, control does not have the degree of primacy which Mr Boddington's submissions give it. True it is that it is the second of three matters listed in *Ready Mixed Concrete*, but it is not given a determinative status there. It is a necessary but not sufficient factor. The third element of MacKenna J's formulation leaves room for a lot of other factors, and in this case those factors are those listed by the First-tier Tribunal apart from those falling within his category one.

17. Second, once that is understood, there is no apparent error in the First-tier Tribunal approach to the question of control. They weighed the control against other matters and in particular the pattern of engagements, and made their assessment. That is something they were entitled to do. It does not matter that one cannot identify what rung of the ladder control was 'relegated' to. That is not a relevant inquiry. It was considered and found to be not determinative enough. Other factors pointing the other way were more significant. In fact, the degree of control was explained away in the words (at [12]):

‘[12] ... It is to be expected that the staff will be closely controlled so as to achieve the cruise line's objective because the staff are in the public eye at all times. This factor seems to us to have less bearing on the employment status of the staff than might be the case if the context were different ...’

18. That is an entirely justifiable conclusion. For example, the requirement of a certain degree of behaviour when 'off duty' and not performing is not control over the employment activities and the performer. It is a degree of control which is required because the performers are part of a community confined on a ship for days on end and in which the ship has its own standards. It is not really related to the engagement as a performer at all. The requirement to comply with the ship's regulations is probably a requirement imposed on all people on the ship; crew, passengers, entertainers and all others. The First-tier Tribunal's reasoning is, therefore, perfectly clear and perfectly justifiable. There is no error of logic, law or principle. I can detect no ground for interfering with the decision, and although it is not relevant in those circumstances, would go so far as to say that I would be very likely to have reached the same conclusion myself had I been called on to take the decision based on the material in the decision itself.

253. It does not seem to us that any of the authorities prior to *Matthews* explicitly considers the weight that should be given to control in the third stage. It is however clear from *Matthews* that weight is to be given to control at the third stage and the weight to be attached to it will depend on all the circumstances, including the nature and extent of the control which has been found to be sufficient at stage two. It is notable that all the cases talk about the existence of control “in a sufficient degree”. It is clear from that language that there may be different levels of control and it is not therefore surprising that the level of control found to exist at stage two should be taken into account in what the authorities demonstrate is a balancing exercise at stage three.

254. This approach is also consistent with what was said by Henderson J in *Dragonfly Consulting Limited v HM Revenue & Customs* [2008] EWHC 2113 (Ch):

52. On the strength of the oral evidence, the Special Commissioner was in my view fully entitled to conclude that Mr Bessell's performance of his duties was subject to a degree of supervision and quality control which went beyond merely directing him when and where to work. In the case of a skilled worker, you do not expect to find control over how the work is done. Conversely, in the case of a self-employed worker in business on his own account you would not normally expect to find regular appraisal and monitoring of the kind attested to by Mr Palmer and Miss Tooze. The weight and significance to be attached to this evidence was a matter for the Special Commissioner, and in my view it was open to him to conclude that the nature and degree of the control by the AA under the hypothetical contract was on balance a pointer towards employment.

255. Mr Tolley submitted that *Matthews* was simply a classic example of the stage three test. It did not support Mr Rivett's submission that mutuality of obligation and control can be found at stages one and two but taken away at stage three. However, that was not Mr Rivett's submission. He did not suggest that there might be a finding at stage two that there is control to a sufficient degree, but a finding at stage three that there was an insufficient degree of control. The question of control is not a binary question in the sense that there is control or

there is not. It is whether the control which is present is sufficient to found a contract of service, which in our view is a matter of degree.

256. It is at least common ground that when stage one and stage two are satisfied, there is prima facie a contract of employment. It appears to us that what the parties are not agreed on is the strength of that prima facie case in the circumstances of this appeal. Stage three involves a balancing exercise consistent with what was said by Briggs J in *Weight Watchers*. It is necessary to look at the contract as a whole. We will address that balancing exercise when we come to consider the facts of the present appeal.

257. Mr Rivett also submitted that an important factor at this stage is the presence or absence of a duty of fidelity. He submitted that such a duty is central to any employment relationship. We accept that an employment contract will expressly or implicitly contain duties such as confidentiality and non-competition. Mr Rivett's submission, which we consider below, was that we should not construe the ITV Contracts and the BBC Contracts as employment contracts because to do so would be inconsistent with the existence of the duty of fidelity in those contracts.

258. Long term contracts where the whole or substantially the whole of the individual's working week is devoted to performing the services tend to suggest employment (see *Usetech Ltd* at [59]). *Hall v Lorimer* [1992] 1 WLR 939; [1994] 1 WLR 209 was a case involving a freelance vision mixer who was found to be self-employed. At p945B Mummery J viewed as relevant the degree of continuity in the relationship, how many engagements were performed and whether they were performed mainly for one person. He also considered it useful to consider whether the person performing the services was 'part and parcel' of the organisation of the other party. Similarly, Nolan LJ suggested at p218C in the Court of Appeal that the extent to which the individual was dependent upon or independent of a particular paymaster and the duration of engagements may be significant.

259. It is not inconsistent with a contract of employment that the individual is free to work for others, either as an employee or in the course of self-employment (see *Davies v Braithwaite* [1931] 2 KB 628 at 635; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 186G and *Fall v Hitchen* at 298C). Mr Tolley acknowledged that restrictions on work for third parties is not an aspect of control, but is relevant at the third stage. Cooke J stated as follows in *Market Investigations* at p186F:

Nor is there anything inconsistent with the existence of a contract of service in the fact that Mrs Irving was free to work for others during the relevant period.

260. In *Market Investigations Ltd*, Cooke J suggested at p184G that the question of whether a worker is an employee could be answered by determining whether the individual who performs the services is performing them as a person in business on his own account. There is no exhaustive list of factors, but he identified a number of relevant factors at p185A-B as follows:

- (1) whether the worker provides his own equipment;
- (2) whether he hires his own helpers;
- (3) what degree of financial risk he takes;
- (4) what degree of responsibility for investment and management he has; and
- (5) whether and how far he has an opportunity of profiting from sound management in the performance of his task.

261. The first two factors need no explanation. Financial risk involves the ability to earn a profit or make a loss from how the work is performed. The paradigm case is where there is a fixed fee and the worker stands to lose if the work is delayed or profit if the work is done

quickly (see for example *Global Plant Ltd v Secretary of State for Social Security* [1972] 1 QB 139 per Lord Widgery at p152). In this context, the risk only of not being able to find alternative employment is not a relevant factor as it is a risk shared by all casual employees (see *Lee Ting Sang v Chung Chi-Keung* at p384D).

262. In the context of this case, Mr Tolley submitted that financial risk should not be confused with reputational risk. The same risks are faced by many employees. He also submitted that financial risk was to be considered in the context of the particular engagement, and not the activities as a whole. We accept those submissions, save that in our view financial risk in the context of the activities as a whole may be relevant to whether a worker is in business on their own account.

263. In the case of a profession or vocation the question of whether the individual is in business on his own account may not be very helpful. In such cases a significant factor may be “the extent to which the individual is dependent upon or independent of a particular paymaster for financial exploitation of his talents” (*Hall v Lorimer* per Nolan LJ at p218). Conversely, an indicator of self-employment may be the extent to which the individual is able to exploit their talents in the wider market and to a number of clients.

264. Any statement within the actual contract between the worker, intermediary and client as to whether the parties intend their relationship to be one of employment may be given some weight in a borderline case. This appears to derive from *Ready Mixed Concrete* at p513A and was adopted by Henderson J in *Dragonfly Consulting* at [55]:

55. I would not, however, go so far as counsel for HMRC who submitted that, as a matter of law, the hypothetical contract required by the IR35 legislation must be constructed without any reference to the stated intentions of the parties. If the actual contractual arrangements between the parties do include statements of intention, they should in my view be taken into account, and in a suitable case there may be material which would justify the inclusion of such a statement in the hypothetical contract. Even then, however, the weight to be attached to such a hypothetical statement would in my view normally be minimal, although I do not rule out the possibility that there may be borderline cases where it could be of real assistance.

265. The Upper Tribunal in *Atholl House* focused at the third stage on whether the taxpayer was in business on her own account. It described its approach as follows:

79. We agree with HMRC that any analysis of whether a person is carrying on business on their own account needs to be approached with appropriate rigour. The task is not simply to accumulate impressions and test them against a pre-conceived notion of what constitutes employment. Rather, the task is to consider, at the third Ready Mixed Concrete stage, whether the taxpayer’s status as a person carrying on business on his or her own account is sufficient to displace the prima facie evaluative conclusion reached following the first two stages, that the person is an employee. However, we do not agree that the task can only be performed by reference to the contract whose status is in issue or evidence relating to the tax years in dispute. The reason why a self-employed plumber doing some work on the first day of a tax year is not an employee is to be found not just in the contractual terms and conditions governing that piece of work, but also in the continuum of that plumber’s working life over previous tax years. A conclusion that the plumber is not an employee can be sustained even without a painstaking review of every single engagement undertaken over the past few years. A similar position applies in Ms Adams’s case. If the facts demonstrate that her professional life both in the tax years in dispute, and in previous tax years, involved her carrying on a business on her own account, and if the hypothetical contract with the BBC would be regarded as entered into in the course of that business, that would be perfectly capable of supporting a conclusion that the hypothetical contract was not one of employment.

266. In relation to economic dependence, Mr Rivett pointed to what the Upper Tribunal said in *Atholl House* at [113]:

113. As we have noted at 111(2), the FTT concluded that Ms Adams's activities under the hypothetical contract were similar in nature to those she performed in the course of her self-employed profession. HMRC argue that the extent of Ms Adams's economic dependency on the BBC constituted a relevant difference so that the hypothetical contract was nevertheless one of employment. That difference is of potential relevance. If the hypothetical contract took up a significant amount of Ms Adams's time, or introduced a significant a degree of economic dependence on the BBC, those factors could, by analogy with the judgment in *Fall v Hitchen* negative the inference that she entered into that contract as part of her profession as a freelance presenter. That said, we agree with the FTT's statement at [113] of the Decision that matters such as this need to be judged by reference to an appropriately broad sample of Ms Adams's professional career rather than simply by reference to a snapshot in the two tax years in dispute. As the Master of the Rolls observed in *O'Kelly*, it is conceptually possible for a person to provide services to just a single customer, but to remain an independent contractor. By parity of reasoning, any economic dependence on the BBC in the particular tax years under appeal should not automatically lead to a conclusion that she would have been an employee in those years, but has to be understood in the context of Ms Adams's profession as conducted in surrounding tax years.

267. The Upper Tribunal in *Atholl House* found that whilst there was mutuality of obligation and a sufficient framework of control, the taxpayer was in business on her own account and that this displaced the prima facie conclusion that there was a contract of employment.

268. The absence of terms for holiday pay, sick pay or pension entitlements does not necessarily indicate that the hypothetical contract is not one of employment. The actual contract would not have contained such terms because it was entered into between the client and the intermediary and not the individual worker. It will carry little if any weight (see *Atholl House* at [74] and *Kickabout* at [92]).

269. As mentioned above, Mr Rivett referred us to the facts of a number of the authorities. He started with one of the earliest cases, *Davies v Braithwaite* which involved an actress who appeared in films, stage plays, on the radio and on records. Unsurprisingly, she was held to be self-employed and having a series of engagements in the course of exercising her profession. The engagements could not be considered to be separate contracts of employment.

270. In *Ready Mixed Concrete*, MacKenna J was concerned with delivery drivers working for a company selling concrete. The drivers were required to comply with the conditions of their licences and other rules and regulations. The driver was required to make the vehicle available to the company at all times of the day or night and could not operate as a haulier of goods except under the contract. The company could require the driver to operate the vehicle himself on any day up to the maximum number of hours permitted by law. However, the driver could, with the company's consent, appoint a competent driver to operate the truck in his place.

271. MacKenna J considered the third stage of his test to be the most important one on the facts of the case. He stated his conclusion at p525G onwards. In particular:

It is now time to state my conclusion, which is that the rights conferred and the duties imposed by the contract between Latimer and the company are not such as to make it one of service. It is a contract of carriage.

I have shown earlier that Latimer must make the vehicle available throughout the contract period. He must maintain it (and also the mixing unit) in working order, repairing and replacing worn parts when necessary. He must hire a competent driver to take his place if he should be for any reason unable to drive at any time when the company requires the services of the vehicle. He must do whatever is needed to make the vehicle (with a driver) available throughout the contract

period. He must do all this, at his own expense, being paid a rate per mile for the quantity which he delivers. These are obligations more consistent, I think, with a contract of carriage than with one of service. The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's.

If (as I assume) it must be shown that he has freedom enough in the performance of these obligations to qualify as an independent contractor, I would say that he has enough. He is free to decide whether he will maintain the vehicle by his own labour or that of another, and, if he decides to use another's, he is free to choose whom he will employ and on what terms. He is free to use another's services to drive the vehicle when he is away because of sickness or holidays, or indeed at any other time when he has not been directed to drive himself. He is free again in his choice of a competent driver to take his place at these times, and whoever he appoints will be his servant and not the company's. He is free to choose where he will buy his fuel or any other of his requirements, subject to the company's control in the case of major repairs. This is enough. It is true that the company are given special powers to ensure that he runs his business efficiently, keeps proper accounts and pays his bills. I find nothing in these or any other provisions of the contract inconsistent with the company's contention that he is running a business of his own. A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.

272. Mr Rivett pointed to the particular facts that the drivers contractually agreed to comply with all relevant rules and regulations, and also had to get the approval of the company in relation to any substitute driver. We have already dealt with that submission.

273. Mr Rivett referred us to *Market Investigations* in the context of whether a worker is in business on their own account. That case concerned interviewers working for a market research company. The Minister of Social Security had held that the worker was an employee for national insurance purposes. Each engagement gave rise to a series of separate contracts of service. In dismissing the company's appeal, Cooke J found that the company had extensive control over the worker, and that looking at the contract as a whole the worker was not in business on her own account and that it was not inconsistent with a series of contracts of service. It is clear that Cooke J regarded the test of whether the worker was in business on her own account as an important factor. He described it as follows:

The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that 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.

274. In *Lee Ting Sang* at p382, the Privy Council said that the matter had never been better put than by Cooke J in this passage.

275. *Hall v Lorimer* concerned a vision mixer working for a number of production companies pursuant to short term contracts. He used very expensive equipment belonging to the production companies and worked at studios owned or hired by the production companies. On six occasions he provided a substitute to carry out work he had contracted to do. The Inland

Revenue accepted that the most useful test in the circumstances was that stated by Cooke J in *Market Investigations*, namely whether he was in business on his own account.

276. Nolan LJ giving the judgment of the Court of Appeal at p216E endorsed the following view expressed by Mummery J in that case:

In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J said in *Walls v Sinnett (Inspector of Taxes)* [1986] STC 236 at 245: "It is, in my judgment, impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight was given by another tribunal to the common facts. The facts as a whole must be looked at, and a factor which may be compelling in one case in the light of the facts of that case may not be compelling in the context of another case.

277. He went on to say at 218C:

Again the question whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation. A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business. For my part I would suggest there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent on or independent of a particular paymaster for the financial exploitation of his talents may well be significant. It is, I think, in any event plain that Cooke J was not intending to lay down an all-purpose definition of employment. For example, his test does not mention the duration of the particular engagement or the number of people by whom the individual is engaged. Cooke J said that he took account of the fact that the lady concerned was free to work as an interviewer for others but added that there was no finding that she did so (see [1968] 3 All ER 732 at 740, [1969] 2 QB 173 at 188). This is of little assistance in the present case, of which the most outstanding feature to my mind is that the taxpayer customarily worked for 20 or more production companies and that the vast majority of his assignments, as appears from the documentary evidence, lasted only for a single day.

278. Finally, it is not appropriate to adopt a mechanistic or 'check list' approach. Different factors will have difference significance and weight in each case. Having considered all the relevant factors, it is necessary to stand back from the detail and make a qualitative assessment of the facts as found (see *Hall v Lorimer* per Nolan LJ at p216, approving the views of Mummery J in the High Court).

CONSIDERATION OF THE ISSUES

279. We must now apply these principles to the various hypothetical contracts and our findings of fact as to the circumstances in which they arose. There is an issue between the parties as to the relevance of circumstances and arrangements before and after the particular tax years with which we are concerned. Mr Rivett submitted that to form a view on the some of the factors relevant for the purposes of applying the principles requires consideration of an appropriately broad sample of the individual's career (see *Atholl House* at [79] and [113] quoted above). The relevant circumstances include other work done by Mr Chiles before, during and after the contractual period under consideration. Mr Tolley submitted that was not appropriate and

indicated that this was one of the issues to be considered by the Court of Appeal in *Atholl House*. Whilst the issue may go further, for present purposes we are bound by the decision of the Upper Tribunal in *Atholl House*.

280. We shall consider the parties submissions on the facts by reference to the established three stage test.

(1) Mutuality of Obligation

281. We can deal with mutuality of obligation quite briefly in light of our analysis of the authorities.

282. It is common ground that there was mutuality of obligation in relation to the BBC Contracts. The issue at this stage arises solely in relation to the ITV Contracts. Mr Tolley suggested that BBL's acceptance that there was mutuality in relation to the BBC Contracts but not the ITV Contracts was illogical and that there were no material differences between the two. It is not necessary for us to determine whether that is right, and we shall therefore focus on the ITV Contracts.

283. Mr Rivett submitted that there can be no mutuality of obligation in circumstances where ITV had no obligation to call upon Mr Chiles' services or to provide him with work and had specifically refused to agree to such an obligation in negotiations for the First ITV Contract. Mr Chiles had been concerned that ITV might go off him and not use him as a presenter. It is important for a television presenter to be seen on television in order to maintain their profile. However, ITV would not agree to any obligation to use Mr Chiles. Both parties envisaged that ITV might not require Mr Chiles to work and the Guaranteed Service Fee would be paid in circumstances where no work was provided.

284. Mr Rivett further submitted that the First ITV Contract had been carefully drafted from ITV's perspective to ensure that there was no obligation on ITV to provide Mr Chiles with work. If no work was offered, then Mr Chiles could terminate the contract and work for other broadcasters.

285. We have set out above our views based on the authorities as to what is required to establish mutuality of obligation. We accept that the present appeal concerns what may be viewed as overarching contracts and that there are no discrete contracts. However, we are not concerned with a situation where there are periods where Mr Chiles was not provided with work by ITV. The fact is that ITV did call on Mr Chiles to provide his services throughout the ITV Contracts, at least in relation to the Football Programme Services. The circumstances fall within the proposition described by the Court of Appeal in *PGMOL* at [118(iii)]. Work which was offered was in fact done for payment. Whilst there was no obligation on ITV to offer work, it was anticipated that it would offer work and it made payment for the work which was done. In our view the ITV Contracts involved work-related obligations on both ITV and Mr Chiles so that they are properly characterised as involving mutuality of obligation in the relevant sense.

286. The ITV Contracts fall fairly and squarely within the principles described by Langstaff J in *Cotswold Developments* and by Elias J in *James*. There is some obligation on Mr Chiles to work, and some obligation on ITV to provide or pay for it. The obligations under the ITV Contracts are clearly located "in the employment field". They relate to the provision of and payment for work which must be personally performed by Mr Chiles.

287. This is also consistent with *Usetech Ltd* where Park J stated at [64]:

64. ...It is only where there is both no obligation to provide work and no obligation to pay the worker for time in which work is not provided that the want of mutuality precludes the existence of a continuing contract of employment.

288. In the circumstances, we are satisfied that the ITV Contracts involved mutuality of obligation and the first stage of the test is satisfied for the ITV Contracts and the BBC Contracts.

(2) Control

289. We now consider whether each of the contracts involved a sufficient framework of control to constitute contracts of employment. We are concerned with whether ITV and/or BBC had a sufficient framework within which they could control what was to be done by Mr Chiles, where it was to be done, when it was to be done and how it was to be done. It is necessary for us to look at the contracts separately. We shall do so by reference to the hypothetical ITV Contracts and the hypothetical BBC Contracts. Before doing so we shall make some general observations.

290. What matters is control over Mr Chiles in the performance of his services. It is important to bear in mind what services Mr Chiles had agreed to perform. He had agreed to provide his services not as a presenter generally, but as the presenter of specific television and radio programmes.

291. We have previously referred to Mr Rivett's submission that where the parties agree in the contract what work is to be done, no relevant right of control can be identified from the fact that the worker can be required to do that work. He submitted that there is a logical and legal distinction between control exercised by both parties entering into the contract and control exercised under the contract. Where the parties set out detailed provisions as to how the contract will work there is less scope to establish control at this stage. He submitted, for example that compliance with Ofcom rules and BBC Editorial Guidelines was "baked in to the nature of the services".

292. We accept that what is important is control exercisable as a result of the contractual relationship between the parties. In other words, the control must be derived from the contract, either the express terms or by implication. Further, we accept the broad proposition that the definition of the services to be provided may affect the extent to which there is control. If the services to be provided are defined in detail there may be less scope for the client to exercise control over what is done, where it is done, when it is done and how it is done. Much will depend on the nature of the services being provided and the context in which they are provided.

293. For example, Mr Chiles contracted to provide his services presenting ITV's live football coverage. It is common ground that he could not be required to present highlights programmes until the First ITV Contract was varied. The fact ITV could not require him to do this was a result of the way in which the services were defined. However, the absence of control in this respect says little if anything about ITV's control over Mr Chiles in his performance of the services he had agreed to provide.

294. We do not agree with Mr Rivett's suggestion that because Mr Chiles was agreeing to present programmes in accordance with Ofcom rules or BBC Editorial Guidelines, the broadcasters' control in that regard was irrelevant. What is relevant is control of Mr Chiles in the performance of his services as a presenter pursuant to the contract. In our view, those services are properly considered to be the services of a presenter, with the rules and guidelines defining the way in which the services are to be provided rather than the services themselves.

295. The contracts in this case specifically define what services Mr Chiles might be required to perform. They are the services of a presenter on specific television and radio programmes. Given the specific definition of the services, there was little scope for the broadcasters to control or direct what Mr Chiles could be required to do. That can be contrasted with an

individual simply contracting to provide services for a set number of hours per week. In that case, it may be easier to establish the requisite control. For example, a right to direct the individual as to what, when, where and how the services are to be provided. In the present case there were clearly no rights on the part of the broadcasters to direct Mr Chiles to present different types of programmes at significantly different times or on different days.

296. HMRC place considerable reliance on fact that Mr Chiles was under the editorial control of ITV and the BBC. In particular, in the case of ITV he was required to comply with the Ofcom rules and in the case of the BBC with Ofcom rules and the BBC Standards and Editorial Guidelines.

297. Realistically, it would ordinarily be viewed as part of the role of any television or radio presenter to act in accordance with Ofcom rules and the broadcaster's editorial guidelines. Some presenters might have more or less editorial input than others. In the present case, editorial control clearly lay with the broadcasters. In our view editorial control of the programme, including the form and content of the programme and where necessary the right to require particular language to be used by the presenter, to interview a particular guest or to require the presenter to move to a commercial break, is a relevant and important element of control for these purposes. The Upper Tribunal has taken the same view in other cases. For example, in *Atholl House* at [105] quoted above.

298. Such control may exist more in principle than in practice. During a programme there is limited scope for instruction. More generally, Mr Chiles has a particular way of presenting and engaging with the audience which is why he was engaged by ITV and the BBC. It would not make sense for the broadcasters to try and change his style. Any editorial disagreements would be resolved collaboratively. Ultimately, ITV was entitled to require Mr Chiles to take account of any reasonable comments. The BBC was entitled to require Mr Chiles to comply with all objectively reasonable requests in connection with the services he provided.

299. The role of a presenter in the programmes Mr Chiles was presenting does not simply involve turning up at the studio or location to present the programme. The presenter must be involved in the pre-production process. The contracts in the present case did not require Mr Chiles to attend at specific locations and times to prepare for the programmes. The First ITV Contract required his attendance at rehearsals and pre- and post-production meetings on mutually agreed dates and subject to prior professional commitments. In the Second ITV Contract it was required that he should be invited to and attend such production meetings as may reasonably be required by ITV. In the BBC Contracts, Mr Chiles would be required to comply with all objectively reasonable requests which we consider would include attendance at pre-production meetings.

300. The authorities show that there is less scope for control in the case of skilled persons. What is relevant is control so far as there is scope for such control. It is not necessary to have control in the sense of power to micro-manage the way in which the services are provided. In other words it is not necessary to have "the granular mechanics of control" described in *Christa Ackroyd Media*. In the present context we would include within the description of granular control what Mr Tolley described as "control at the moment of performance". Hence, the power of ITV or BBC to require Mr Chiles to ask certain questions or to approach an interview in a certain way bears very little weight in this analysis.

301. Mr Tolley submitted that the fact Mr Chiles was an employee of BBL is also relevant to the question of whether there was a sufficient framework of control. It is said to establish as a matter of principle that a right of control is possible. Further, the arrangement between BBL and Mr Chiles is part of the circumstances which must be taken into account for the purposes of s 49(1)(c). HMRC also point to the fact that there are many terms in the ITV Contracts and

the BBC Contracts which require BBL to procure Mr Chiles to do certain things. It is said that for BBL to comply with the contracts, BBL must have been entitled to control the services of Mr Chiles.

302. We are satisfied that Mr Chiles was an employee of BBL. BBL warranted in clause 10 of the First ITV Contract that Mr Chiles was its employee. Further, in the Inducement Letter Mr Chiles warranted, to the best of his knowledge and belief, the truth of all matters on which BBL had itself given a warranty. The structure of the contracts is consistent with Mr Chiles, in his capacity as a director of BBL, agreeing to enter into the contracts with ITV and then in his capacity as an employee of BBL performing the services of a presenter. There is no evidence that Mr Chiles' status as an employee of BBL changed at any time after the First ITV Contract. Mr Chiles readily accepted in cross-examination that he was an employee of BBL.

303. However, we do not consider that Mr Chiles' status as an employee of BBL really assists in determining whether there would be a sufficient framework of control pursuant to the hypothetical contracts to constitute Mr Chiles an employee of the broadcasters. We must focus on the terms of the hypothetical contracts in determining whether the necessary framework of control is present.

304. With these observations in mind we turn to consider the hypothetical contracts themselves and the surrounding circumstances.

ITV Contracts

305. The ITV Contracts required Mr Chiles to present its live football coverage and highlight programmes. The programmes were to be aired on dates and times chosen by ITV to fit in with the fixture lists of the relevant competitions. The choice of which matches to cover was akin to a matter of editorial control for ITV. We have already identified that editorial control is an important factor. In our view, the fact that ITV could require Mr Chiles to present the programmes on those days and at those times carries no further weight in determining whether there was a sufficient framework of control for these purposes.

306. ITV had some limited control in the sense that they could require Mr Chiles to attend rehearsals and pre-production meetings on mutually agreed dates. They had no control over when and where Mr Chiles carried out his research or other preparation for his appearances.

307. We acknowledge that ITV generally had no "in the moment" control over how the services were performed, but that is a feature of all forms of skilled work. ITV through the programme editor had authority and responsibility in relation to production matters and content, including the running order. The editor could direct Mr Chiles as to the timing of commercial breaks and public apologies.

308. It is significant that ITV could require Mr Chiles to take account of their reasonable comments in the performance of his services and that ITV would have final editorial control over the programmes. ITV were required to ensure compliance with Ofcom rules and were entitled to ensure that Mr Chiles provided his services in accordance with those rules.

309. Taken together, we consider that these terms gave ITV a significant measure of control as to how Mr Chiles performed his services.

310. Overall, we are satisfied that there was a sufficient framework of control to constitute Mr Chiles, prima facie, an employee of ITV pursuant to the hypothetical ITV Contracts.

The BBC Contracts

311. Mr Chiles agreed to present specific radio programmes for the BBC. The programmes were to be aired on specific days and broadly at specific times. The fact that the BBC could require Mr Chiles to present those programmes on those days and at those times does not indicate that the BBC had control as to when and where Mr Chiles should provide his services. The BBC could not require Mr Chiles to provide his services at any other time or place, although we accept there was provision for the BBC to require Mr Chiles to attend at such times and places as the BBC should deem reasonably necessary. It seems to us that the latter provision would fall to be narrowly construed in the context of the programmes Mr Chiles had agreed to present, but it does at least give the BBC some element of relevant control over Mr Chiles in the performance of his services.

312. The Second and Third BBC Contracts also required Mr Chiles to undertake promotional activities in connection with the programmes as reasonably requested by the BBC. Again, this was part of the services Mr Chiles agreed with the BBC that he would provide. It is not a factor indicating that the BBC had control over what Mr Chiles would do in the performance of his services. These were the very services he had agreed to perform.

313. We acknowledge that the BBC generally had no “in the moment” control over how the services were performed, but that is a feature of many forms of skilled work. The BBC through the programme editor had authority and responsibility in relation to production matters and content, including the running order. The editor could direct Mr Chiles as to the timing of public apologies or as to the language to be used where a script had been legally approved.

314. It is significant that the BBC could require Mr Chiles to comply with objectively reasonable requests in the performance of his services and that the BBC would have final editorial control over the programmes. The BBC were required to ensure compliance with Ofcom rules and were entitled to ensure that Mr Chiles provided his services in accordance with those rules. They were also entitled pursuant to the BBC Contracts to require Mr Chiles to comply with BBC Standards and Editorial Guidelines.

315. There was express provision whereby the BBC could require Mr Chiles to avoid specific remarks or interjections. They could require Mr Chiles to comply with all objectively reasonable requests in connection with the services.

316. Taken together, we consider that these terms gave the BBC a significant measure of control as to how Mr Chiles performed his services.

317. Overall, we are satisfied that there was a sufficient framework of control to constitute Mr Chiles, *prima facie*, an employee of the BBC pursuant to the hypothetical BBC Contracts.

(3) Other provisions and factors

318. At this stage we take into account that there is mutuality of obligation in relation to all the hypothetical contracts and a sufficient framework of control to establish a *prima facie* case that Mr Chiles would be performing his services as an employee.

319. We have found that the broadcasters do have a sufficient measure of control to establish a *prima facie* case that there is a contract of employment. However, we do not consider that the extent of the broadcasters’ control in either case is a compelling factor. Essentially, we must consider whether there are other provisions of the contracts or other factors which displace the *prima facie* case and require a conclusion that the contracts are contracts for services rather than contracts of employment.

320. In our view the most significant factor that might displace the *prima facie* case that Mr Chiles was an employee under the hypothetical contracts is whether he was in business on his

own account. But only if the hypothetical contracts can properly be seen as part of that business. That is the approach taken by the Upper Tribunal in *Atholl House* and in other cases. It involves a value judgment and will depend on various factors which will carry different weight in the overall analysis

321. Mr Rivett's principal case was that Mr Chiles was in business on his own account and he submitted that the evidence in support of that case was overwhelming.

322. The position is slightly more nuanced than that. As a matter of fact, Mr Chiles was not in business on his own account at any stage. He was an employee of BBL throughout the period after 1996. However, it seems to us that for present purposes we must consider whether work done by Mr Chiles through BBL would, if it had been done by Mr Chiles on his own account, give rise to a conclusion that he was in business on his own account. Neither party suggested that we should adopt any different approach.

323. Mr Tolley pointed out that BBL bears the burden of establishing that Mr Chiles should be treated as being in business on his own account. He submitted that there was a lack of documentary evidence which meant that we should not make any finding that Mr Chiles was in business on his own account. In particular, we could not assume that any other contracts entered into by BBL would themselves not subject to IR35.

324. We agree with Mr Tolley that we are not in a position based on the evidence and submissions before us to make any findings in relation to the status of the First ITV Contract so far as it relates to Daybreak or as to work done for the BBC on long-standing programmes such as Match of the Day 2 and The One Show. However we do consider that we have sufficient evidence from Mr Chiles to form a conclusion as to the nature of his other work, including work done for the BBC through independent production companies.

325. In relation to BBL's other work, Mr Chiles' evidence was not challenged. We infer on the basis of our findings of fact that Mr Chiles' other work would not be considered that of an employee. We agree with Mr Rivett that Mr Chiles should be treated as being in business on his own account in all the tax years under consideration. The real question is whether the hypothetical contracts were entered into as part of that business, or whether they should properly be viewed as contracts of employment separate to the business.

326. The principal factors which in our view establish that Mr Chiles was in business on his own account may be summarised as follows:

(1) Since at least 2001, Mr Chiles had provided his services as a broadcaster and journalist to a significant number of clients. We have described the extent of this work in our findings of fact. Some of that work was one-off, in the sense that it related to one-off programmes. Some related to short series of programmes. The work was wide in its scope, including not just presenting programmes and writing newspaper articles and columns, but also appearing in commercials, presenting awards at award ceremonies and speaking at commercial conferences.

(2) Mr Chiles had a significant number of clients. In the period 1996 to 2019 he contracted with nearly 100 different third parties.

(3) In addition to this work, Mr Chiles undertook work on other commercial projects which did not bear fruit and turned down other work including television appearances. We are satisfied that in the period from 2007 onwards when Avalon was appointed Mr Chiles was building a reputation and a career working through BBL.

(4) Avalon was appointed to act as Mr Chiles' agent. Their role was to act as his management company in all areas of the entertainment industry. They were to use their

best endeavours to promote and further Mr Chiles' career and reputation in the entertainment industry. Mr Chiles paid Avalon a fee of 15% of his income from the entertainment industry.

(5) In September 2007 Mr Chiles engaged a personal assistant to manage his diary and to liaise with Avalon, the BBC and his other clients. The personal assistant was self-employed and in the period 2012 to 2017 Mr Chiles paid her on average £15,900 per year.

(6) In 2009 Mr Chiles and Avalon were looking to produce a factual entertainment show which Mr Chiles would present and which was pitched to the BBC. The BBC commissioned a pilot, but the show was not adopted. It was later adopted by ITV. Mr Chiles had helped to create the format and was a co-producer entitled to a share of the production profits. He was ultimately engaged by Avalon to present the programme.

(7) Throughout the relevant tax periods Mr Chiles continued to seek and obtain other work apart from his work under the ITV Contracts and the BBC Contracts. He entered into 40 separate agreements with some 25 different third parties.

(8) The income earned by Mr Chiles in the period 2012 to 2017 excluding his income as a presenter for ITV and the BBC under the hypothetical contacts was some £350,000. We have described the sources of that income in our findings of fact and some two thirds of it was earnings from Avalon in relation to That Sunday Night Show. There was very little other income in tax year 2013-14, although the reason for that is not clear.

327. Mr Tolley invited us to treat the engagement of Avalon by Mr Chiles as his agent as a neutral factor. He submitted that employees in the entertainment and sporting fields might have agents whilst self-employed individuals might not have agents. We accept that the whole purpose of s 352 ITEPA 2003 is to allow certain employees in the entertainment industry to obtain tax relief for the costs of employing an agent. We note that HMRC contend that this relief would not be available to Mr Chiles because he is not an entertainer.

328. We do not agree that employing an agent is a neutral factor. In our view it points towards Mr Chiles being in business on his own account. It is certainly not decisive, far from it, but in our view it is a factor which indicates self-employment. Employees do not generally give up 15% of their employment income to an agent. We have no evidence as to how common it might be for employees in the broadcasting industry to engage agents. As to employees generally, we were given the example of professional footballers as a category of employees who engage agents. Whilst it is not unheard of for employees to engage agents, it must be viewed generally as an exception rather than the rule.

329. Similarly, in relation to BBL's expenditure on a personal assistant. Mr Tolley submitted in this context that we should distinguish expenditure as a matter of choice and expenditure necessary in the performance on the contract. He submitted that the fact Mr Chiles paid for administrative support was a matter of choice and a neutral factor. We do not consider that there is much significance in the fact Mr Chiles engaged a personal assistant as a matter of choice rather than necessity. If it was a matter of necessity and Mr Chiles was not reimbursed by ITV or the BBC then that would certainly point to self-employment. However, even where it is a matter of choice we consider it is indicative of self-employed status. Employees do not generally engage the services of an assistant at their own expense to better perform their duties.

330. Looking at Mr Chiles' activities as a whole we consider that Mr Chiles was at least able to benefit from sound business management. He had engaged Avalon to manage his activities and a personal assistant to manage his diary and his contacts. These were commercial decisions involving significant costs. They could have positive or negative effects financially. Clearly,

he was hoping that it would help to maximise the income from his activities, putting to one side for the moment that his activities might include income from employment opportunities.

331. Overall it is clear that throughout the period from at least 2007 onwards, Mr Chiles through BBL was building a business. Avalon was helping him to build that business.

332. We must now consider whether the hypothetical contracts are separate contracts of employment with ITV and BBC, or whether they should be seen as part of Mr Chiles' business. At this stage, there are factors which point both ways. The authorities contain guidance on this issue which we have outlined above. These factors must be taken together with the existence of the necessary mutuality of obligation and the sufficient framework of control which we have held constitute the hypothetical contracts as *prima facie* contracts of employment. We must consider these matters in the round, standing back and taking an overall view of the situation.

333. We note that the contracts involved Mr Chiles working for competing broadcasters at the same time. He presented live football programmes for ITV and news and sports radio programmes for the BBC. Considerable research and preparation for both ITV and BBC was carried out at the time and place of his choosing. Mr Chiles also provided some of the tools and resources required for the better performance of his duties. These are matters which in our view point to the ITV and BBC Contracts being part of the business he was conducting on his own account, albeit not strongly.

334. HMRC rely on a number of factors which they say are consistent only with the hypothetical contracts being properly regarded as contracts of employment rather than as part of Mr Chiles' business.

335. It is said that Mr Chiles' services were integrated into the businesses of ITV and BBC. We do not consider that is correct. He was an integral part of the programmes on which he appeared, but beyond that he was not integrated into their businesses.

336. Reliance was placed on the absence of any right of substitution. There was an express prohibition on providing a substitute presenter in the hypothetical ITV Contracts and for the reasons we have given no right to provide a substitute in the hypothetical BBC Contracts. We consider that this reflects the nature of the industry in which Mr Chiles was operating. His business did not involve supplying presenters. It involved supplying his own services as a presenter. The absence of rights to provide a substitute does not indicate that these contracts were outside Mr Chiles' established business activities.

337. HMRC relied on the fact that Mr Chiles was not exploiting a brand in the sense of intellectual property rights. Mr Tolley submitted that the concept of Mr Chiles having a brand, referred to as such by the witnesses, may also be viewed as Mr Chiles having a career in broadcasting. We accept that is the case. However, what is significant is Mr Chiles' reputation as a broadcaster and journalist with third parties. In the same way that a business might exploit a brand, Mr Chiles could exploit his skills and reputation by way of business, or indeed by way of employment. In our view it is a neutral factor.

338. HMRC also relied on restrictions in the contracts, principally the ITV Contracts limiting Mr Chiles' right to work for third parties. It was said that restrictions in the ITV Contracts were consistent with employment but that the absence of restrictions in the BBC Contracts was a neutral factor. There is little in the authorities as to the significance of such restrictions. In our view, the restrictions in the hypothetical ITV Contracts and the absence of restrictions in the hypothetical BBC Contracts say little if anything about the status of Mr Chiles. ITV would have a legitimate interest in protecting their football broadcasting rights whether Mr Chiles was an employee or a self-employed contractor. Equally, we accept that a contract of employment will not necessarily involve exclusivity, especially when the employment is part-time.

339. As mentioned above, Mr Rivett submitted that the contracts could not be contracts of employment because Mr Chiles would owe conflicting duties of fidelity to both ITV and the BBC in the periods when he had contracts with both broadcasters. We do not accept that there was any real conflict on the facts. Mr Chiles was presenting ITV's football coverage whilst at the same time presenting a news and sport radio programme for the BBC. The fact that his radio programme might involve and did involve some discussion of football matches which were being covered by ITV does not in our view give rise to any real conflict or likely breach of any duty of fidelity. Both broadcasters were content for Mr Chiles to appear on the other platform.

340. The most significant factors relied upon by HMRC were:

- (1) The duration of the contracts,
- (2) The contribution the contracts made to Mr Chiles' income, and
- (3) The absence of financial risk in performing the contracts.

341. The ITV Contracts were for three years, extendable to four years, and two years respectively. The BBC Contracts were for one year, eighteen months and three years respectively. The length of the contracts does in our view indicate that they were contracts of employment rather than part of Mr Chiles' business. However, it is notable that the contracts were not what might be called full-time contracts.

342. In relation to the provision of the Football Programme Services for ITV, the First ITV Contract required Mr Chiles to present 48 matches a year together with coverage of World Cup and European Championship finals and occasional highlights programmes. There were also incidental services in connection with those matches but it was work which Mr Chiles could combine with other work commitments. Notably, presenting Daybreak 5 days a week for 40 weeks a year in the first year of the First ITV Contract. We infer that the commitment in relation to the Football Programme Services throughout the ITV Contracts constituted considerably less than half of Mr Chiles' working time.

343. The same can be said in relation to the BBC Contracts. The First BBC Contract involved Mr Chiles presenting on one day a week for 42 weeks a year, considerably less than half Mr Chiles' working time. The Second and Third BBC Contracts each involved approximately two days a week, again less than half Mr Chiles' working time.

344. In the circumstances we consider that the significance to be attached to the length of the ITV Contracts is diminished.

345. Mr Chiles clearly had time over and above his commitments under the ITV Contracts and the BBC Contracts to conduct his business. We have set out above the income he derived from his business in the relevant tax years and the nature of the work he was carrying out in those years. It is not uncommon for businesses to have a small number of good, long-standing clients who effectively form the backbone of a business, a factor which we have noted was recognised by the Upper Tribunal in *Atholl House* at [113] quoted above.

346. HMRC's income analysis shows that the ITV Contracts and the BBC Contracts certainly comprised the bulk of Mr Chiles' income in the relevant tax years. Mr Tolley submitted that ITV and BBC were a source of consistent, regular and predictable income for Mr Chiles, which we accept.

347. We have set out above HMRC's income analysis and BBL's income analysis which removes the income from Daybreak. In evaluating the significance of the income analysis we consider that it is appropriate to take out the income received from Daybreak, but for the reasons given above it is not appropriate to treat the income from Daybreak as "Other Income".

We do not know whether it would be regarded as income from employment or self-employment. On that basis, BBL's table can be re-stated as follows:

Tax Year	Total Income £	ITV Income %	BBC Income %	Other Income %
2012-13	1,323,399	82.2	0	17.8
2013-14	931,740	97.7	2.3	0
2014-15	798,210	88.4	8.0	3.6
2015-16	138,293	0	74.6	25.4
2016-17	191,857	0	74.3	25.7

348. Income from the ITV Contracts comprised more than 80% of BBL's overall income in the first three years. In the last two years, income from the BBC Contracts comprised approximately 75% of BBL's income. In our view this is a factor supporting the prima facie case that the ITV Contracts and the BBC Contracts were contracts of employment. Again however, it is not uncommon for a business to have individual clients contributing a large proportion of turnover. In this case it is not one client doing so, but one client doing so in the first three years and being replaced with another client in the latter two years. The figures also reflect the fact that the ITV Contracts were particularly lucrative for Mr Chiles and were entered into when he was at the height of his career to date.

349. It is true that the contracts themselves did not involve financial risk in the sense that there was no prospect of Mr Chiles suffering a loss on the contracts themselves. The contracts were essentially for fixed fees over the terms of the contracts. Mr Chiles was not in a position to profit from sound management in the performance of the individual contracts. The contracts did not require any significant investment in capital. Clearly there were circumstances in which the fees would not be paid, but that was only in the case of a breach of contract by Mr Chiles. The risk of not being able to find work at the end of a fixed-term contract is a risk shared by all employees.

350. We have accepted Mr Chiles' evidence that he considered that he was "at risk" throughout his career once he left his employment at the BBC in 1996. His reputation rose and then fell. Every time he presented a programme his reputation was at risk. However, this is the sort of risk that applies to every presenter, whether they are employed on a fixed-term contract or as a self-employed contractor.

351. However, it seems to us that the absence of financial risk in the performance of the hypothetical contracts arises from the nature of the services Mr Chiles was supplying. He was providing his own services as a professional television and radio presenter. Whether the contracts were contracts of service or contracts for services they were unlikely to involve any financial risk, save that he would not be paid if he was not ready and willing to provide his services.

352. Mr Chiles had a number of clients in his existing business. It is notable that he was working for both ITV and BBC at the same time in the period November 2013 to May 2015. The services provided by Mr Chiles for ITV and BBC fell fairly and squarely within the scope of his existing business activities. In relation to ITV, Mr Chiles was also involved co-producing That Sunday Night Show on behalf of ITV, which we are satisfied was part of his existing business.

353. As we have said, Mr Chiles could profit from sound business management of his activities generally. He conducted his activities in a business-like manner. The Avalon

Agreement applied to his income from the hypothetical contracts in the same way as it applied to his other work. Mr Chiles' personal assistant helped him to better perform his duties under the hypothetical contracts as she did in relation to his other work.

354. We must stand back and look at the circumstances as a whole. Those circumstances include the prima facie existence of a contract of employment given the existence of mutuality of obligation and a sufficient framework of control. We take into account the nature and extent of the framework of control we have found to exist. We also take into account the nature and extent of the business which we have found Mr Chiles is to be treated as conducting on his own account. In all the circumstances we consider that Mr Chiles is to be treated as entering into the hypothetical contracts as part and parcel of that business. They were contracts for services and not contracts of employment. We conclude therefore that the condition in s 49(1)(c) ITEPA 2003 is not satisfied in relation to the ITV Contracts or the BBC Contracts in any of the relevant tax years.

355. In reaching that conclusion we have not given any weight to the expressed intention of the parties in the BBC Contracts that they would not constitute Mr Chiles an employee of the BBC.

CONCLUSION

356. For all the reasons given above we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

357. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

Release date: 09 FEBRUARY 2022

ANNEX 1
Hypothetical First ITV Contract

1. Mr Chiles would personally provide his services to ITV.
2. The contract would be for a term of 3 years from 1 June 2010 to 31 May 2013. Mr Chiles would be entitled to extend the term of the contract by an additional year in the event that ITV acquired rights to broadcast at least 16 Champions League matches in the 2013-14 season.
3. Mr Chiles would provide services of significant creative and distinctive input appearing as lead presenter on football programmes. The football programmes would be the live coverage on ITV1 of a maximum of 48 matches in various competitions together with all matches covered on ITV1 at the World Cup 2010 and Euro 2012 matches. He would also appear as a presenter of highlights programmes.
4. Mr Chiles would provide the following incidental services:
 - (1) Promotional services of up to 6 days per contract year.
 - (2) Contributions to ITV websites in the form of 10-15 minute post-match interviews and reaction.
 - (3) Attendance at rehearsals, pre-and post-production work and meetings at the reasonable request of ITV on mutually agreed dates and subject to Mr Chiles' prior professional commitments.
5. Mr. Chiles would research and keep up to date with football news so as to be able to carry out the services in accordance with good practice and all applicable laws and regulatory standards, including the Ofcom rules. He would exercise such skill, diligence, prudence, experience, expertise, foresight and judgement as would be expected from a skilled and experienced presenter.
6. ITV would pay Mr Chiles £1m in year one, which included coverage of World Cup 2010, £900,000 in year 2 and £1m in year 3, which included coverage of Euro 2012. In relation to highlights programmes he would be paid £7,500 per programme. The fees were payable in 10 instalments.
7. The fees would be paid irrespective of whether ITV required Mr Chiles to present the programmes. ITV would have no obligation to provide work or call on Mr Chiles to provide his services but if it did not it would still be required to pay the fees.
8. Mr Chiles could extend the term of the contract by an additional year if ITV obtained rights to broadcast Champions League matches for any part of the year after 31 May 2013.
9. ITV would arrange and pay for all expenses reasonably incurred by Mr Chiles in providing the services. He would be provided with the services of a stylist with on-screen clothing being provided by ITV which could be retained by Mr Chiles for his personal use.
10. Each party could terminate the agreement in the event of a material or persistent breach by the other party. Further:
 - (1) ITV could terminate in the event of Mr Chiles committing any serious act of misconduct likely to bring himself or ITV into disrepute.
 - (2) Mr Chiles could terminate if his services were not required by ITV for 12 consecutive weeks. If this occurred after 31 August 2011, Mr Chiles would be entitled to the balance of fees payable under the contract.

(3) Mr. Chiles could terminate if ITV failed to acquire the rights to broadcast Champions League matches in contract year 3 without any exclusivity provisions binding him, allowing him to follow the Champions League rights.

11. ITV had the right to choose on which matches Mr Chiles should provide his services, the location from which the programme was broadcast and the time of the programme.

12. In relation to programme content, Mr Chiles would be required to take account of any reasonable comments presented to him by or on behalf of ITV in the performance of the services.

13. ITV would have final editorial control over the programmes.

14. Save as expressly provided, ITV would have no contractual right to require Mr Chiles to perform the services in any particular manner.

15. Mr. Chiles would have no contractual right to be paid for absence caused by sickness, holiday or paternity. In the event he was unable to present a particular programme for such reasons he would be in breach of contract which may, depending on whether it was considered to be a material or persistent breach, give rise to a right for ITV to terminate the contract.

16. Mr Chiles had no right to provide a substitute presenter. If a substitute was required then ITV would engage and be responsible for paying the substitute.

17. Mr Chiles would be prohibited from performing similar services for third parties in relation to any form of programming. For this purpose, the similar services would be presenting live or highlights coverage of football matches and associated services on television or radio broadcast in the UK. He would not be prevented from presenting television or radio programmes generally, whether or not they included discussions about football.

18. Mr Chiles would be entitled to undertake commercial activities involving his name, image or on-screen services such as advertising, endorsement or sponsorship arrangements with the prior approval of ITV. He would not require ITV's approval for the following activities provided that they were not reasonably likely to interfere with his provision of the services to ITV:

- (1) Personal and live (non-televised) appearances and public speaking engagements;
- (2) One-off guest appearances on chat shows and other television programmes;
- (3) Writing newspaper articles and columns;
- (4) Contributions to audio-visual products such as books and DVDs whether or not relating to football.

ANNEX 2
Hypothetical Second ITV Contract
(Material Differences)

1. The contract would be for a term of 2 years from 1 June 2013 to 31 May 2015.
2. Mr Chiles would personally provide services of significant creative and distinctive input and appearing as lead presenter on such football programmes as ITV might reasonably require. The football programmes would be the live coverage and highlights on ITV 1 or ITV 4 of matches in various competitions including World Cup 2014.
3. ITV would pay Mr Chiles £900,000 in year one and £1m in year 2 which included World Cup 2014. The fees were payable in 10 instalments.
4. Mr Chiles would be fully involved in the editorial and creative aspects of the programmes including being invited to and attending such production meetings as may be reasonably required by ITV, save where he was presenting the 5 Live Show for BBC 5 Live on Fridays.
5. The restriction clauses were amended so that Mr Chiles would be prohibited from performing services in the UK in relation to any sports related audio or audio-visual programming available via any television channel or online.
6. Mr Chiles could undertake commercial activities such as advertising, endorsement and sponsorship activities with the prior approval of ITV, not to be unreasonably withheld. He was not required to obtain ITV's approval for hosting or appearing in any sports related radio programme subject to advance notice of any regular or long-term commitment. For the avoidance of doubt, ITV gave its approval to Mr Chiles hosting the 5 Live Show on Fridays.
7. Mr Chiles would give priority to providing the services over any other activity and would not enter into any commitment which was reasonably likely to interfere with his ability to provide the services.
8. The termination clauses were in similar form, save that:
 - (1) ITV could terminate the agreement on notice with immediate effect in which case it would pay the balance of fees due under the agreement.
 - (2) Mr Chiles could terminate if his services were not required by ITV for 5 consecutive matches or in the case of the quarter final, semi-final or final rounds of the Champions League for 3 consecutive matches. In that event, Mr Chiles would be entitled to the balance of fees payable under the contract.

ANNEX 3

Hypothetical First BBC Contract

1. Mr Chiles would provide his services to the BBC.
2. The contract would be for a term of 1 year from 8 November 2013 to 7 November 2014.
3. Mr Chiles would provide his services as a presenter of Friday Drive on BBC Radio 5 Live for a minimum of 42 programmes together with reasonable ancillary services, including preparation, creative input and travel. Friday Drive would be aired on late Friday afternoon and early Friday evening. Subject to that, the BBC could require Mr Chiles to attend at such times and places as they deemed reasonably necessary.
4. BBC would have no obligation to call on Mr Chiles to provide his services, but the expectation and understanding was that they would do so. In the event that his services were not required the BBC would still be required to pay the fees.
5. The fee was £50,400 which was equivalent to £1,200 per programme and was payable monthly in arrears. The fee for each additional programme would be £1,200.
6. If Mr Chiles was not available to present a programme then the BBC could reduce the fee proportionately.
7. Mr. Chiles would be required to be up to date with news and current affairs and would carry out the necessary research and any other non-studio preparatory work at the times and location of his choice. Mr Chiles would bear the costs of doing so and any other expenses of providing the services unless exceptionally agreed by the BBC in advance.
8. In providing his services Mr. Chiles would do so with all necessary skill, ability, knowledge and experience, use all proper care and diligence, read legally approved scripts as written and otherwise comply with all objectively reasonable requests as may be made by the BBC in connection with the services. He would not include any remarks or interjections the BBC had asked him to avoid.
9. Mr. Chiles would have no contractual right to be paid for absence caused by sickness, holiday or paternity or enjoy any of the other benefits provided routinely by the BBC to its staff. In the event he was unable to present a particular programme for such reasons his fees would be reduced proportionately.
10. Absence for any reason would amount to a breach of contract and could, depending on whether it was considered to be a material breach, give rise to a right for the BBC to terminate the contract.
11. Mr. Chiles would not be subject to any exclusivity provisions, or other restrictions on providing his services to third parties. However, the BBC would have first call on his services for the Friday Drive programme, save that any commitments in respect of ITV football were treated as having been cleared and agreed in advance.
12. Mr. Chiles would be required to comply with UK laws, radio industry rules and regulations and BBC Standards and Editorial Guidelines. He would be required to complete such editorial training as the BBC may require.
13. Mr Chiles would not allow any form of publication of written material for a party other than the BBC that was intended to include content about the BBC, or which could reasonably be considered to compromise BBC Standards.

14. Mr Chiles would not behave in a manner which could bring himself or the BBC into disrepute.
15. Mr Chiles would not engage in any conduct or interests which could compromise or call into question the impartiality or integrity of the BBC.
16. BBC would have final editorial control over the programmes.
17. The BBC would be entitled to terminate the contract if Mr Chiles committed a material or irremediable breach of the contract, including if Chiles was unable personally to provide the services for any reason.
18. It was not intended that the contract would constitute Mr Chiles an employee of the BBC.

ANNEX 4
Hypothetical Second BBC Contract
(Material Differences)

1. The contract would be for a term of 18 months from 6 April 2014 to 5 April 2016.
2. Mr Chiles would provide his services as a presenter of a mid-morning programme on Radio 5 Live (5Live Daily) on Mondays and Tuesdays for a minimum of 135 programmes and undertake all promotional activity in connection with the programmes as reasonably requested by the BBC together with reasonable ancillary services, including preparation, creative input and travel.
3. The fee was £168,750 which was equivalent to £1,250 per programme and was payable monthly in arrears. The fee for each additional programme would be £1,250.

ANNEX 5

Hypothetical Third BBC Contract (Material Differences)

1. The contract would be for a term of 3 years from 6 April 2016 to 5 April 2019.
2. Mr Chiles would provide his services as a presenter of 5Live Daily, mid-morning on Mondays and Tuesdays for a minimum of 86 programmes per year from Salford, 15 programmes from London to include 8 Wednesday programmes featuring PMQs, a programme on the day after the European Referendum and Question Time Extra, 3 days deputising for other presenters and 4 preparation days for outside broadcasts. He would also undertake all promotional activity in connection with the programmes as reasonably requested by the BBC together with reasonable ancillary services, including preparation, creative input and travel.
3. The fee was £405,000 which was equivalent to £1,250 per programme and was payable monthly in arrears. The fee for each additional programme would be £1,250.
4. There was no reference to any ITV football commitment because by this stage Mr Chiles was not appearing on ITV.