Neutral Citation Number: [2018] EWCA Civ 1794

Case No: A3/2017/1441

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mrs Justice Proudman and Judge Greg Sinfield
[2017] UKUT 0113 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2018

Before:

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between:

ADECCO UK LIMITED **AJILON (UK) LIMITED** **BADENOCH AND CLARK LIMITED** **HY-PHEN.COM LIMITED** **LAWSON BISHOP FINANCIAL LIMITED** **MODIS INTERNATIONAL LIMITED** **ROEVIN MANAGEMENT SERVICES LIMITED** **SPRING PERSONNEL LIMITED** **SPRING TECHNOLOGY STAFFING SERVICES LIMITED**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Miss Valentina Sloane (instructed by **Enyo Law**) for the **Appellants**
Miss Eleni Mitrophanous and Miss Laura Prince (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 10 & 11 July 2018

- -

Approved Judgment

Lord Justice Newey:

1. The appellants (to which I shall refer simply as "Adecco") are employment bureaux supplying clients with temporary staff ("temps"). This appeal relates to the extent to which the fees that Adecco charges in connection with temps who are not its employees are subject to value added tax ("VAT"). One way in which the question raised can be expressed is: what is it that, for VAT purposes, Adecco supplies to its clients?

2. Adecco maintains that it does no more than introduce candidates to clients and provide ancillary (in particular, payment) services. It is, Adecco argues, the temps themselves, and not Adecco, who supply their work to the clients. On that basis, Adecco claims that VAT is not payable on the totality of the sums that it receives from clients (which in large part represent payment for the temps' services), but only on the element attributable to the introduction and ancillary services that it supplies itself.

3. HM Revenue and Customs ("HMRC"), on the other hand, deny that any such distinction falls to be made. According to HMRC, Adecco is obliged to account for VAT on everything that it is paid by a client. The temps' services, HMRC say, are supplied to clients by Adecco.

4. The First-tier Tribunal ("the FTT") (Judge Barbara Mosedale) and the Upper Tribunal ("the UT") (Proudman J and Judge Greg Sinfield) each agreed with HMRC, albeit for somewhat different reasons. Adecco now, however, challenges that conclusion in this Court.

Basic facts

Adecco's business models

5. As the FTT explained (in paragraph 3 of its decision), Adecco has these three business models:

> "(1) Employed temps: it employs persons who it assigns to its clients on a temporary basis. There is an employment contract between Adecco and the employee under which the employee agrees to act exclusively for Adecco and Adecco guarantees to find a minimum number of paid assignments for the employee;
>
> (2) Non-employed temps: these are the subject of this appeal…. They are persons who are on the books of Adecco but are not considered to be employed by that company. Adecco may introduce them to clients looking for a temporary worker to undertake an assignment. The temps are not obliged to accept any assignment offered and Adecco is not obliged to find them an assignment. Nevertheless, Adecco undertakes with these persons to pay them for the work they do for Adecco's clients and is classed as their 'employer' for various regulatory matters, including the working time regulations and payment of PAYE/NIC. Adecco's payment by its clients will

> be periodic and normally calculated as an amount representing the payment Adecco must make to and on behalf of the temp plus a commission element.
>
> (3) Contract workers: these are self employed workers which Adecco may introduce to a client, and with whom the client will enter into a separate contract direct with the contract worker to provide the work required. They are not Adecco's employees in any sense, and Adecco does not undertake to pay them. Adecco's charge to its clients will typically be a one-off fee (albeit normally calculated by reference to the contract worker's rate of pay and the length of the assignment)."

6. There is no dispute as to the correct VAT position as regards categories (1) and (3). So far as the former (employed temps) are concerned, the parties agree that Adecco makes supplies of staff and must account for VAT on all its charges. With respect to category (3) (contract workers), it is common ground that Adecco supplies just introductory services and is liable for VAT only on the fees for such introductions. The contract workers' services are supplied to clients by them, not Adecco.

7. The present proceedings concern category 2 (non-employed temps). In that connection, the parties agreed that the FTT could take sample contracts used by one of the appellants, Badenoch & Clark, as representative of those adopted by all the appellants. One such contract was made between Badenoch & Clark and a temp, the other between Badenoch & Clark and a client. There was no contractual relationship at all between temps and clients.

The sample contracts

8. Taking first the contract between Badenoch & Clark (to which I shall in future refer as "Adecco") and a temp, the preamble to this stated that the temp was "engaged by us to undertake an Assignment for a Client". "Assignment" was defined as "the services to be provided by you to the Client in the form and for the term set out in the Confirmation Letter", "Client" as "the person, firm or corporate body … requiring your Services through [Adecco] as further defined in the Confirmation Letter". "Confirmation Letter" meant "the letter confirming the Assignment and setting out further terms of the Assignment", while "you or your" referred to "the temporary worker to be supplied through [Adecco] on Assignment with the Client …".

9. Clause 1 of the contract set out what the temp agreed to do and included the following:

> "1.1 in your capacity as a PAYE worker to perform each Assignment professionally, promptly and efficiently and in good faith using your own skill and expertise and with due care and to the best standards;
>
> …
>
> 1.3 to be subject to the legitimate instructions, monitoring, direction, supervision, management, control of the

> Client … to the extent required for the proper performance of the Assignment and to abide by the rules and regulations of the Client … and the terms of the Assignment …
>
> 1.4 to keep accurate weekly written records on [Adecco] standard Timesheets (or as otherwise directed) of time spent performing the Assignment for the Client … and at the end of each week to have such records (where applicable) agreed and signed by a person authorised to do so by the Client … and to submit the signed records to [Adecco];
>
> 1.5 to comply with any Special Terms set out in the Confirmation Letter or other relevant document and the procedural rules we may provide to you from time to time relating to processing of contractual matters for temporary workers;
>
> 1.6 to fully indemnify us against any loss, claim or damages (including costs) arising from any breach of this Agreement or any negligent or unlawful act or omission or wilful misconduct by you …; and
>
> 1.7 to inform us immediately if the Client … fails to provide any facilities to enable you to perform the Assignment, or refuses or fails to sign a Timesheet as required under clause 1.4 or offers you any work, whether temporary or permanent, other than under an Assignment through us, or if for any reason you do not consider the work suitable for you."

10. Clause 3 specified what the temp must not do and included this:

> "3.4 during an Assignment other than for sickness take any period of absence or leave without our prior agreement and in the case of leave entitlement (please also see clause 4) without having submitted a leave request form in accordance with [Adecco] procedures."

11. Clause 4 said this about absence and holidays:

> "4 You acknowledge and agree that:
>
> 4.1 you are not entitled to any payment during any period of absence due to any cause except to the extent required by law;
>
> 4.2 because unauthorised absence or absence due to sickness may result in a breach of obligations which we owe to the Client during an Assignment you shall

> notify us as soon as possible and by 9 a.m. on each day of any absence and give the best indication you are able to of any likely period of absence and the reason for the absence;
>
> 4.3 during periods when you are not engaged on an Assignment your engagement with us is temporarily suspended and … you may work for any other person or company and such periods will not be taken into account in calculating statutory leave entitlement;
>
> 4.4 you shall be entitled to 24 days paid leave ... ;
>
> 4.5 any unauthorised absence or absence due to sickness not notified to us under clause 4.2 shall be deemed to be annual leave taken by you and will be recorded by us as such;
>
> 4.6 you may not give notice to take annual leave within the first 14 days from the start date of an Assignment. Thereafter you shall give us and the Client no less than 14 days written notice of any intention to take annual leave …"

12. Clause 5, dealing with Adecco's obligations, stated:

> "We may from time to time find work for you, but do not guarantee that any such work will be found or provided to you and we do not accept any liability if we do not locate any such work for you; when we have found work we will send to you a Confirmation Letter. Further we accept no liability if the work is not suitable, and we accept no liability for the actions, torts or breach of contract or obligation by the Client …"

13. In clause 6, Adecco agreed, subject to clause 4, that it would pay the temp at the rate set out in the Confirmation Letter for work performed satisfactorily during an Assignment. It was specifically stated that:

> "Payment shall be made whether or not the Client has paid [Adecco]".

14. Clauses 7 to 10 provided for termination and suspension of the agreement. Either party was entitled to terminate the agreement by serving written notice for a period of seven days or such other period as was set out in the Confirmation Letter or with immediate effect in a case of material breach of the agreement. Under clause 8, Adecco could terminate the agreement immediately without notice:

> "8.1 prior to the Commencement Date [of the services described in the Confirmation Letter]; or
>
> …

> 8.3 if in our reasonable opinion or in the opinion of the Client, you fail to provide a satisfactory service to the Client; or
>
> …
>
> 8.5 if the Client … (in its sole discretion) demands your removal for any reason."

Clause 10 allowed Adecco, at its sole discretion, to suspend the operation of an Assignment without pay at any time and for any period by informing the temp of the suspension.

15. Clause 11 included the following:

> "11.9 in an Assignment only the Client … has the right to direct, manage, supervise and control your work;
>
> 11.10 we are not your employer, any implied duty on the part of us as if we were your employer is excluded and nothing in this agreement shall imply or is intended to imply that there exists between you and us a contract of employment. This Agreement is a temporary work contract for services only, and in particular neither Party has any obligation to provide to, or carry out work for, the other following completion of an Assignment;
>
> …
>
> 11.16 no third party shall have any rights under the Contracts (Rights of Third Parties) Act 1999 in connection with this Contract …"

16. Turning to the sample contract between Adecco and a client, this was used for contract workers as well as non-employed temps, with some provisions applying to both and others only to one or the other. Evidence that a client taking on someone other than a contract worker probably would not know whether the person was an employed or a non-employed temp indicated, the FTT observed (in paragraph 56 of its decision), that "the same standard contract between Adecco and its clients would be used for all three types of worker [i.e. contract workers, employed temps and non-employed temps], albeit some terms only applied to contract workers, and some terms only applied to non-contract workers".

17. The preamble to the contract between Adecco and a client stated that it and the "Confirmation Letter" together formed the entire contract between Adecco and the client. The preamble proceeded to explain that Adecco "has been assigned to Supply Workers to the Client on Assignments". "Assignment" was defined in clause 1 as "the work to be performed by a Worker or intended to be performed by a Candidate under these Standard Terms". "Worker" "includes Temporary Workers and Contract Workers", and "Temporary Worker" meant "a Candidate Engaged by the Client on an

Assignment whereby the worker contracts with, and is paid by, [Adecco]", while "Contract Worker" referred to "a Candidate Engaged by the Client on a fixed-term Assignment and whereby the Contract Worker contracts directly with, and is paid by, the Client".

18. The following further definitions were to be found in clause 1:

    i) "Candidate" meant "the person, personnel or limited company introduced to the Client by [Adecco]";

    ii) "Confirmation Letter" meant "the letter or other communication setting out further terms of a Worker Assignment";

    iii) "Engage, Engaged or Engagement" meant "to employ, engage, retain or otherwise accept services from a Candidate introduced or otherwise Supplied by [Adecco] whether directly or indirectly in any capacity whatsoever (including as a permanent placement)";

    iv) "Introduced, Introduces or Introduction" meant "the provision by [Adecco] to the Client of any details relating to and identifying a Candidate whether written or oral";

    v) "Supply or Supplied or Supplies" meant "the provision by [Adecco] to the Client of a Worker to perform an Assignment"; and

    vi) "Services" meant "the selection, recruitment and payrolling of a Candidate on Assignment with the Client".

19. Clause 2.3 provided that "[a]ll Workers supplied by [Adecco] are engaged by [Adecco] under contracts for services". In clause 3.1, Adecco undertook to use its reasonable endeavours to ensure that Candidates were efficient, honest and reliable. Clause 3.2 provided that, during the period of an Assignment, each Worker "will be under the Client's direction, supervision, management, and control as to the manner in which they perform the Assignment".

20. The payment of fees in respect of Temporary Workers was addressed in clause 4.1, which included the following:

> "4.1.1 The Client shall pay [Adecco's] fee (as specified separately in writing to the Client, or as otherwise agreed) for each hour actually worked by a Temporary Worker. [Adecco] will pay each Temporary Worker. [Adecco] will invoice the Client weekly for all fees due. If the Temporary Worker proves wholly unsatisfactory to the Client at the commencement of an Assignment then, provided the Client notifies [Adecco] within the first two hours of the Temporary Worker's assignment (time to be of the essence), no charge or fee will be payable for the hours worked by the Temporary Worker up to the time of the notification. In all other circumstances, the Client is

> not entitled to decline a timesheet on the basis of dissatisfaction with the work performed by the Temporary Worker ….
>
> …
>
> 4.1.4 It is hereby acknowledged that where there is a supply of PAYE workers, [Adecco's] fee will incorporate a figure for employers' national insurance and holiday pay which shall be calculated at the statutory rate from time to time in place. Any subsequent statutory adjustments shall adjust the fee accordingly."

21. Clause 5.1 provided for Adecco's liabilities to be limited. It stated:

> "Save as in the event of [Adecco's] own negligence in the performance of the Services for which [Adecco] hereby indemnifies the Client, neither [Adecco] nor its staff shall be liable for any loss or damage caused to the Client, their staff or their property or to any third party as a result of an Introduction of, or failure to Introduce, a Candidate or the Supply of, or failure to Supply, a Worker or Candidate (including, for the avoidance of doubt, any acts or omissions of the Candidate or Worker Introduced or Supplied)."

22. Clause 7 dealt with termination of the Assignment. Clause 7.1 explained that the Client could terminate the Assignment of a Temporary Worker by serving written notice on Adecco for a period of seven days or such other period as was set out in the Confirmation Letter. Clause 7.2 provided that the Assignment of a Temporary Worker was terminable by either party with immediate effect in the event of a material breach of the contract between Adecco and the Client, a material breach by the Temporary Worker of the agreement between Adecco and the Temporary Worker or any breach of any duty of care owed by the Temporary Worker to the Client.

23. Clause 9.9 provided:

> "In the event that the services of a Temporary Worker prove to be unsatisfactory to the Client, then the Client shall, as soon is reasonably practical, contact [Adecco] to discuss and propose actions to be taken."

24. We were taken to a sample "Confirmation Letter". This related to a candidate's "temporary assignment" as a "Homelessness Prevention Officer" on the basis that the notice period would be one week.

Findings made by the FTT

25. The FTT said, among other things, the following about the arrangements between Adecco, the temps and the clients:

    i) "Adecco was not obliged to offer any assignment to a temp on its books, and if it did offer an assignment with a client, the temp was not obliged to accept it.

Nor was there any exclusivity on either party's side: Adecco had many temps on its books at any one time and would send the CV of as many of these temps as it considered suitable to a client to consider for any particular assignment. It left it to the client to choose the temp to whom the assignment would be offered (if any). And the temp could be signed on with any number of agencies" (paragraph 37 of the FTT's decision);

ii) Adecco was required under its contracts with the temps to pay them irrespective of whether it received payment from its own clients, and there was no evidence that it assumed such obligations *because* of the regulatory framework mentioned in paragraph 31 below (paragraph 85);

iii) "[I]f the temp was terminated by the client within the first two hours, Adecco had to pay the worker without receiving payment from its client and therefore would make a loss on that assignment" (paragraph 62). Thus (as the FTT said in paragraph 63):

> "For the first two hours, Adecco was at risk if the temp's work was unsatisfactory to the client. This was not true for contract workers";

iv) Adecco "could not and did not tell the temp how to carry out the assignment" (paragraph 106);

v) Adecco did not monitor the performance of its temps. The client terminated the assignment if it found the temp's work unsatisfactory. Adecco "protected its reputation and its desire to obtain repeat business from its clients by vetting the CVs of temps for suitability before presenting them to clients rather than by monitoring their performance during an assignment" (see paragraphs 30 and 31);

vi) Adecco did not conduct appraisals of its non-employed temps. Nor did either Adecco or its clients have disciplinary procedures for such temps. "Neither Adecco nor its clients needed disciplinary procedures in order to manage an unsatisfactory or unwanted temp. They could be dismissed without repercussions on (at most) 7 days notice" (see paragraph 36);

vii) "The standard temp contract required the temp to agree holidays in advance with Adecco. The reality was that this contractual clause was not enforced. The temp would agree holidays with the client and the first that Adecco would usually know of it was when the temp failed to submit a timesheet covering the holiday period" (paragraph 41);

viii) Adecco rarely exercised its rights to terminate or suspend an assignment and then only where there were real concerns over the client's solvency. Adecco "was at real risk in such a case as it would be liable to pay the temps for work performed irrespective of whether the client paid Adecco" and so "carried out careful credit checks on its clients" (see paragraph 71);

ix) "[V]irtually all assignments ended because either the temp or the client chose, for whatever reason, to end them and … Adecco might not even discover this until some time after the termination" (paragraph 34); and

x) Adecco "did not break its charges down between the gross wages paid to and on behalf of the temp and its own commission". In practice, however, "clients would frequently negotiate a rate of commission with Adecco" and "where such a rate was agreed, the client would be able to calculate from what Adecco charged it, what the gross pay of the temp actually was" (paragraph 79).

The origins of the present proceedings

26. The proceedings with which we are concerned arose out of the decision of the FTT (Judge Berner and Dr Small) in *Reed Employment Ltd v Revenue and Customs Commissioners* [2011] UKFTT 200 (TC), [2011] SFTD 720. That case, like this one, concerned the provision by an employment bureau (viz. Reed) of non-employed temps. The FTT concluded (in paragraph 91) that the supplies made by Reed to its clients "were supplies of introductory and ancillary services, and the consideration for those supplies was the gross commission element of the charge rate paid by the client to Reed, that is, the charge rate less the pay rate paid by Reed to the temp worker and associated national insurance contributions". In other words, VAT was not payable on sums paid to Reed by a client in respect of the hours worked by a temp.

27. Adecco had previously accounted for VAT on the total amount received from a client, including sums attributable to temps' work. Following the *Reed Employment* decision, Adecco claimed repayment of payments representing non-employed temps' remuneration during the period form 1 April 2007 to 31 December 2008. HMRC having rejected the claims (for sums totalling £11,125,661), Adecco appealed to the FTT.

The legislative framework

The Principal VAT Directive

28. Council Directive 2006/112/EC on the common system of value added tax ("the Principal VAT Directive") explains in article 1(2) that the principle of the common system of VAT "entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services". Amongst the transactions subject to VAT are "the supply of goods for consideration within the territory of a Member State by a taxable person acting as such" (article 2(1)(a)) and "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" (article 2(1)(c)). Article 14(1) defines "supply of goods" to mean "the transfer of the right to dispose of tangible property as owner", while by article 24 "supply of services" refers to "any transaction which does not constitute a supply of goods". By article 73, in respect of a supply of goods or services:

> "the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party …".

Article 79 states that the "taxable amount" does not include, among other things, "amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account" (see article 79(c)).

29. Article 10 of the Directive is also noteworthy. This serves to prevent an employee from being a "taxable person".

The Value Added Tax Act 1994

30. As would be expected, the Value Added Tax Act 1994 contains provisions to similar effect. Under section 4(1), VAT is to be charged on "any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him". "Supply" includes "all forms of supply, but not anything done otherwise than for a consideration" (section 5(2)(a)) and "anything which is not a supply of goods but is done for a consideration … is a supply of services" (section 5(2)(b)). In general, "[a]ny transfer of the whole property in goods is a supply of goods" (paragraph 1(1) of schedule 4).

The Conduct of Employment Agencies and Employment Businesses Regulations 2003

31. The Employment Agencies Act 1973 distinguishes between "employment agencies" and "employment businesses". "Employment agency" refers to "the business … of providing services (whether by the provision of information or otherwise) for the purpose of finding persons", while "employment business" means "the business … of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity" (see section 13). Under regulation 8 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, an employment agency is barred from paying, or making arrangements for the payment of, a temp whom the agency has introduced or supplied to a client. As is explained in guidance issued by the Department for Trade and Industry, the regulation was designed "to ensure that, where a recruitment company is supplying temporary workers, it only ever supplies those temporary workers as an employment business". By regulations 14 and 15, an employment business must agree terms with a temp that include "an undertaking that the employment business will pay the work-seeker in respect of work done by him, whether or not it is paid by the hirer in respect of that work" and "the length of notice of termination which the work-seeker will be required to give the employment business, and which he will be entitled to receive from the employment business, in respect of particular assignments with hirers".

The Tribunal decisions

The FTT decision

32. After an extensive review of the authorities (which, however, could not extend to the decision of the Supreme Court in *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509, which had not yet been decided), the FTT arrived at this conclusion as to the legal principles that fell to be applied:

> "283. In conclusion, in a situation where B agrees to pay A to provide goods and/or services to C, and C agrees with B to pay for the goods and/or services provided by A, then a *Redrow* 'follow the liability to pay' analysis applies to decide to whom A's supply is made. This is because the legal relationships reflect the economic reality and the outcome is consistent with the Princip[al] VAT directive because final consumption is taxed. In other words, A's supply is to B, and B makes an on-supply to C.
>
> 284. But where a *Redrow* 'follow the liability to pay' analysis does not lead to tax on final consumption, because although A makes a supply to B (of providing goods/services to C), B does not on-supply A's services to C, then C's consumption will be untaxed, and, applying *Baxi/Aimia/WHA*, economic reality requires the supply to be seen as made to the final consumer."

33. Applying these principles to the facts, the FTT said this (in paragraph 306):

> "The point is that the economic reality which matters for VAT purposes is the identity of the final consumer. If the final consumer is not the person with liability to pay for the thing consumed, whether goods or services, then economic reality does not match the contractual position. Here Adecco's client is the final consumer of the work undertaken by the temps, for all the reasons give[n] by the appellant: but under the contracts Adecco's client does have liability to pay for the work it consumes. So economic reality is consistent with the contracts. And so *Tolsma/Redrow* apply and Adecco, as it was entitled to be paid by its clients, … for the full fee (wages plus commission) for the temps' work, so Adecco must account for VAT on the full fee. Its claim for repayment is refused as it did not account for more VAT than it was liable to account for."

The UT decision

34. On appeal to the UT, neither HMRC nor the UT adopted the FTT's analysis of the legal principles. Even so, the UT arrived at the same conclusion as the FTT. Like the FTT, the UT decided that "Adecco made a supply of the provision of the non-employed temps to the clients in return for the total fees paid by the clients" (paragraph 51 of its decision).

35. The UT considered that "determining the nature of a supply and who is making and receiving it is a two-stage process" (paragraph 43 of the decision). It explained:

> "The starting point is to consider the contractual position and then consider whether the contractual analysis reflects the economic reality of the transaction. If, as a matter of contract, a

> party undertakes to provide services to another person in return for consideration from the other or a third party then there is, subject to the question of economic reality, a supply to the other person for VAT purposes. If the person who provides the consideration is not entitled under the contractual documentation to receive any services from the supplier then, unless the documentation does not reflect the economic reality, there is no supply to the payer. The contractual position normally reflects the economic reality of the transactions but will not do so where, in particular, the contractual terms constitute a purely artificial arrangement."

36. As regards the case before it, the UT concluded that "the contractual arrangements clearly show that Adecco supplied the temps to the clients and the temps agreed with Adecco to be so supplied (albeit with the right to refuse an Assignment)" (paragraph 47 of the decision) and that there was "nothing artificial about the agreements between the temps and Adecco and Adecco and the clients" (paragraph 48). The UT also said that it did "not accept the argument that the fact that Adecco did not receive and use or consume the secretarial and other services provided by the temps leads to the conclusion that Adecco cannot make a supply of the temps to the clients", observing that "[t]hat would be inconsistent with one of the early cases in this area: *C&E Commissioners v Reed Personnel Services* [1995] STC 588" (paragraph 47).

37. The UT went on (in paragraph 50 of the decision):

> "What then was the economic and commercial reality of the transactions in this case? It seems to us that, looking at all the circumstances, Adecco agreed to provide temps, who would carry out work, to the clients. The temps agreed with Adecco that, in return for payment by Adecco, they would work for the clients in relation to whom they accepted an Assignment. Although the temps were, of course, the only ones who could provide their secretarial, administrative or technical services to the clients, that is nothing to the point. Only Adecco could supply the temps to the clients and, absent or in breach of the agreements, the temps could not work for the clients except through their agreement with Adecco. The definition of 'supply' in the contract between Adecco and the clients makes clear that what Adecco was supplying was the provision of a temp to perform an Assignment. Further, clause 4.2 of the agreement between the temp and Adecco recognises that any unauthorised absence or absence due to sickness could result in Adecco breaching its obligations to the client during an Assignment. If Adecco's obligations to the client were merely to introduce the temp to the client and then make payments to the temp for work done, it is difficult to see how absence by the temp could be a breach of Adecco's obligations under its contract with the client. Absence would only be a breach if Adecco was obliged to provide the temp to the client. That Adecco was supplying the temps is also shown by the fact that

> Adecco had rights to suspend an Assignment and termination rights in the contracts with both the temps and the clients. We consider that the fact that the client paid Adecco, as a principal, a fee which was calculated by reference to the temp's hourly rate and a commission indicates that the client considered that it was paying Adecco for the provision of the temp. Finally, our analysis puts the non-employed temps and the employed temps in the same position for VAT purposes. There was no dispute that, in the case of the employed temps, Adecco made a supply of the temps. It appears to us that the economic and commercial reality should be the same in the case of supplies of both types of temp, especially as the client would not necessarily be able to distinguish between them, and that supports the view that, in economic reality, Adecco supplied the temps."

Legal principles

38. The following propositions can, I think, be derived from the case law:

i) The concept of a "supply" is "an autonomous concept of the EU-wide VAT system" (the *Airtours* case, at paragraph 20, per Lord Neuberger);

ii) A supply of goods or services "for consideration", within the meaning of article 2(1) of the Principal VAT Directive, "presupposes the existence of a direct link between the goods or services provided and the consideration received" (Joined Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners* [2010] STC 2651, at paragraph 51 of the judgment of the Court of Justice of the European Union ("CJEU"); see also Case 102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the judgment);

iii) A supply of services "is effected 'for consideration', within the meaning of art 2(1) of [the Principal VAT Directive], and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-653/11 *Revenue and Customs Commissioners v Newey* [2013] STC 2432, at paragraph 40 of the CJEU's judgment; see also Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the judgment);

iv) All or part of the consideration can, however, potentially come from someone other than the recipient of the supply. Article 73 of the Principal VAT Directive refers to consideration being received "from the customer *or a third party*" and, consistently with that, "it is not a requirement … that, for a supply of goods or services to be effected 'for consideration' … the consideration for that supply must be obtained directly from the person to whom those goods or services are supplied" (Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners*, at paragraph 56 of the judgment). In *Revenue*

and Customs Commissioners v Loyalty Management UK Ltd [2013] UKSC 15, [2013] STC 784, Lord Reed explained (at paragraph 67):

> "consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part…. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded a priori. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply."

In a similar vein, Lord Neuberger said in the *Airtours* case:

> "[57] When the Court of Justice speaks of 'reciprocal performance' it is looking at the matter from perspective of the supplier of the services and it requires that under the legal arrangement the supplier receives remuneration for the service which it has performed. It is not necessary that the recipient of the service is legally responsible to the supplier for payment of the remuneration; it suffices that the arrangement is for a third party to provide the consideration. Were it otherwise, taxpayers could structure their transactions so as to escape liability to pay VAT, so long as they could meet the economic reality test.
>
> [58] When this court has discussed third party consideration in what is now art 73 of the Principal VAT Directive it has similarly not restricted it to consideration provided alongside, or in performance of, a legal obligation of the recipient—see *WHA Ltd*, at [56] per Lord Reed, in which the garage provided a service to the insured car driver but the insurer alone was responsible for remunerating the garage, and *Loyalty Management UK Ltd*, at [67] per Lord Reed";

v) "[C]onsideration of economic realities is a fundamental criterion for the application of the common system of VAT", including "as regards the identification of the person to whom goods are supplied" (Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners*, at paragraph 39 of the judgment; see also *Newey*, at paragraph 42 of the judgment). When deciding whether the person who pays for a supply is himself the recipient of

it, therefore, it can be important to have regard to the economic realities as well as the contractual relationships. In *Newey*, the CJEU explained as follows:

> "43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction … have to be identified.
>
> 44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

39. The significance of, respectively, contractual relationships and economic realities has been the subject of comment in several recent cases in the Supreme Court. In *WHA Ltd v Revenue and Customs Commissioners* [2013] UKSC 24, [2013] STC 943, Lord Reed commented (at paragraph 27):

> "The contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point."

In *Secret Hotels2 Ltd v Revenue and Customs Commissioners* [2014] UKSC 16, [2014] STC 937, Lord Neuberger said:

> "[34] In the present proceedings, it has never been suggested that the written agreements between Med and hoteliers, namely the Accommodation Agreements, were a sham or liable to rectification. Nor has it been suggested that the terms contained on the website …, which governed the relationship between Med and the customers …, were a sham or liable to rectification. In these circumstances, it appears to me that (i) the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of the Accommodation Agreement and the website terms ('the contractual documentation'), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as art 306 is concerned.

> [35] … In order to decide whether the FTT was entitled to reach the conclusion that it did, one must identify the nature of the relationship between Med, the hotelier, and the customer, and, in order to do that, one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party."

In the *Airtours* case, Lord Neuberger said (at paragraph 50):

> "From these domestic and Court of Justice judgments, it appears clear that, where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then, unless the documentation does not reflect the economic reality, the payer has no right to reclaim by way of input tax the VAT in respect of the payment to the supplier."

40. Various recent cases have involved issues as to whether the person paying for a supply was its recipient or, on the other hand, was providing third party consideration. One such was the *Baxi* case which the CJEU heard with that relating to *Loyalty Management UK Ltd*. There, a boiler manufacturer (Baxi) set up a loyalty scheme to encourage customers to buy its products and sub-contracted the operation of the scheme to a company referred to as @1. A customer would be charged the same for a boiler whether or not he participated in the reward scheme. If, though, he did so, he would be awarded points which could be exchanged for other goods ("loyalty rewards"), which @1 would provide to the customer. The CJEU concluded that the economic reality was that the goods were supplied by @1 to the customers rather than Baxi (paragraph 42 of the judgment), noting (at paragraph 48):

> "@1 is not only entitled to transfer the loyalty rewards to customers as if it were the owner of them but, in fact, it is the owner of them. It is also clear from the order for reference that @1 distributes the loyalty rewards to the customers."

The CJEU also said:

> "61. It is evident from the order for reference in Case C-55/09 that the payments made by Baxi to @1 correspond to the retail sale price of the loyalty rewards with the addition of the costs of packaging and delivery and, that, accordingly, @1 obtains a profit margin consisting of the difference between the retail sale price of the loyalty rewards and the purchase price at which @1 acquired those rewards.
>
> 62. Accordingly, as is, moreover, acknowledged by both the United Kingdom government and the Commission, a payment such as that at issue in the main proceedings in Case C-55/09 can be divided into two elements, each of which corresponds to a separate service.

> 63. Consequently, the purchase price constitutes the consideration for the supply of loyalty rewards to the customers, whereas the difference between the retail sale price, paid by Baxi, and the purchase price paid by @1 in order to acquire the loyalty rewards, namely the profit margin, constitutes the consideration for the services which @1 supplies to Baxi."

41. That case can be contrasted with the Supreme Court decision in *Revenue and Customs Commissioners v Loyalty Management UK Ltd*. That concerned the Nectar reward scheme, promoted by Loyalty Management UK Limited ("LMUK"). The scheme depended on a network of contracts between LMUK and, first, members of the scheme ("collectors", who would hold Nectar cards), secondly, retailers of goods and services ("sponsors", who would pay for their customers to have points credited to their accounts with LMUK if they produced Nectar cards) and, thirdly, other retailers ("redeemers"), from whom cardholders would receive goods or services, at no or reduced cost, in exchange for points. LMUK claimed to be entitled to deduct as input tax the VAT element of the payments which it made to redeemers on the basis that they were consideration for the supply to it of services by the redeemers. The Supreme Court, by a majority, agreed.

42. Lord Reed, who gave the leading judgment, summarised the arrangements in these terms (in paragraph 8):

> "In essence, therefore, when sponsors pay LMUK for the points issued to collectors, they are paying LMUK for granting the collectors the right to receive goods and services in exchange for their points. The redeemers provide the collectors with the goods and services to which their points entitle them, and LMUK pays the redeemers the redemption value of the points. It is thus by means of the redeemers' performance of their contractual obligations to LMUK that LMUK fulfils the obligations which it has undertaken to the sponsors and collectors and so carries on its business."

Later in his judgment, Lord Reed said:

> "[77] … The appeal before this court is concerned with the claim of LMUK, a taxable person, to deduct input tax. LMUK's business is of an unusual character. Through the Nectar scheme, it provides collectors with a contractual right to obtain goods and services from redeemers in exchange for points. It is common ground before this court that that is a taxable supply, and that the taxable amount is the whole of the consideration which is received by LMUK. The counterpart of the right supplied to collectors is an obligation on the part of LMUK to procure that redeemers provide goods and services in exchange for points. The payments made to redeemers constitute the cost of fulfilling that

obligation, and are therefore a cost of LMUK's business.

[78] Applying the principles summarised at [73] and [74], above, VAT should be chargeable on LMUK's taxable supplies only after deduction of the VAT borne by LMUK's necessary costs. The most obvious of those costs, as I have explained, is the cost of securing that goods and services are provided to collectors in exchange for their points: that is to say, the payments made by LMUK to the redeemers. The principles summarised at [73] and [74] therefore indicate that LMUK should be authorised to deduct from the VAT for which it is accountable the VAT charged by the redeemers, so that it accounts for VAT only on the added value for which it is responsible. Only in that way will VAT be completely neutral as regards LMUK.

[79] It is implicit in that approach that the transaction between a redeemer and LMUK involves a taxable supply by the former to the latter. That analysis appears to me to be consistent with economic reality. LMUK carries on a genuine business for its own benefit. It issues the points in its own name and on its own behalf: it is not a mere cipher for the sponsors. As a matter of economic reality, the payments which it makes to redeemers are an essential cost of its business. Its business model is to sell the right to receive goods and services, pay redeemers to provide the goods and services, and derive a profit from the difference between its income from the sponsors and its expenditure on the redeemers.

[80] There is a legal relationship between the redeemer and LMUK pursuant to which there is reciprocal performance. In accepting points, which have no inherent value, in exchange for goods or services, the redeemer is acting in a manner which is only explicable because of its agreement with LMUK, under which LMUK will pay it for doing so. LMUK pays it for doing so because its business is dependent on redeemers accepting points in exchange for the provision of goods and services. The only economically realistic explanation of LMUK's behaviour is the value to LMUK itself of the redeemers' acceptance of points in exchange for the provision of goods and services.

[81] In these circumstances, it can in my view be said that the remuneration received by the redeemer represents

> the value to LMUK of the service which the redeemer provides (cf *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509, [1994] ECR I-743, para 14; *Customs and Excise Comrs v First National Bank of Chicago* (Case C-172/96) [1998] STC 850, [1998] ECR I-4387, paras 26 to 29)."

43. In the *WHA* case, WHA had been appointed to provide claim handling services in relation to motor breakdown policies issued by NIG. When a car covered by such a policy broke down, the garage would invoice WHA for the repair work. The Supreme Court nonetheless held that there was "no supply of repair services by the garages to WHA" (paragraph 18, per Lord Reed, with whom Lords Hope, Walker, Mance and Carnwath agreed). Arriving at his conclusions, Lord Reed said:

> "[56] As I have explained, under the contract of insurance NIG undertakes to the insured that it will meet the cost of the repair. It does not undertake to repair the vehicle. If NIG were to perform the contract by itself paying the garage, that would be an example of third party consideration … : that is to say, consideration for a supply which the person providing the consideration does not himself receive, but which he pays for, in this example, in order to discharge an obligation owed to the recipient of the supply. On this hypothesis, the garage supplies a service to the insured by repairing his or her vehicle, and NIG meets the cost of that supply because it has undertaken to the insured that it will do so, and has received premiums from the insured as the consideration for its giving that undertaking. In that situation, the breakdown is a risk: an event insured against. The cost of the repair is the cover: it is not the consideration for a service provided to the insurer.
>
> [57] The interposition of reinsurers does not alter that position. Neither, on the facts found by the tribunal, does the interposition of WHA. In economic reality, when WHA pays for the repairs it is merely discharging on behalf of the insurer (via the chain of contracts connecting it to NIG, through Viscount and Crystal) the latter's obligation to the insured to pay for the repair. WHA's role, in relation to the aspect of its business concerned with the payment of the garages, is to act as the paymaster of costs falling within the cover provided by the policies. The interposition of WHA does not, by some alchemy, transmute the discharge of the insurer's obligation to the insured into the consideration for a service provided to the reinsurer's agent."

44. *U-Drive Ltd v Revenue and Customs Commissioners* [2017] UKUT 112 (TCC), [2017] STC 806 was a similar case. U-Drive carried on a vehicle hire business. When one of its vehicles was involved in an accident resulting in damage to a vehicle belonging to a third party, U-Drive would sometimes agree with the third party that, as an alternative to an insurance claim, it would pay for the vehicle to be repaired. On the same day that they released their decision in the present case, Proudman J and Judge Sinfield, again sitting in the Upper Tribunal, held that U-Drive was not the recipient of any supply by the repairer. They said (at paragraph 44 of their decision):

> "Taking account of all the circumstances, it appears to us that, in economic reality, UDL simply agreed to pay for the repair of the Car Owner's vehicle. UDL had no interest in the repairs other than as a means by which to meet (at reduced cost) a liability that would otherwise be incurred through Parallel. The fact that UDL contracted to pay the Repairers direct did not, in all the circumstances, make UDL the recipient of any supply by the Repairers."

The present case

45. Miss Valentina Sloane, who appeared for Adecco, argued that, contrary to the UT's conclusion, Adecco supplied no more than introductory and ancillary services to the clients. The temps, she said, supplied their services direct to the clients.

46. Miss Sloane focused on paragraph 50 in her criticisms of the UT decision. Although, she argued, the UT began the paragraph by asking itself what the economic and commercial reality of the transactions was, it did not in fact conduct an appropriate analysis of the position. It did not look beyond the contractual provisions, failed to take account of the FTT's findings as to how things worked in practice, overlooked the regulatory context and ignored aspects of the contracts that favoured Adecco's case. Miss Sloane noted in this connection that Lord Hope observed in *Revenue and Customs Commissioners v Loyalty Management UK Ltd* (at paragraph 110) that "[a] case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis", which, she suggested, was lacking here. Miss Sloane also made the more specific point that the UT was mistaken in thinking (in paragraph 47 of its decision) that the decision of Laws J in *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588 supported its views. In the circumstances, Miss Sloane submitted, this court should re-make the decision and hold that the temps' services were supplied by the temps themselves or, failing that, remit the matter to a differently constituted Tribunal.

47. Miss Sloane stressed that a VAT supply need not involve either a contract between the supplier and the recipient or payment by the recipient. Miss Sloane sought support, too, in features of the sample contracts. That between Adecco and a temp referred, she pointed out, to the temp undertaking an assignment "for a Client", to "the services to be provided by [the temp] to the Client" and to the temp being under the client's control. As regards the contract between Adecco and a client, this, she said, defined "Services" as the "selection, recruitment and payrolling" of a candidate, confirmed that the temp was to be under the client's "direction, supervision, management, and control", included no promise by Adecco that the temp would

perform any particular work, limited Adecco's liabilities further by means of a broad exclusion clause and contained an undertaking by Adecco that it would pay the temp. It is relevant as well, Miss Sloane maintained, that the regulatory framework (as to which, see paragraph 31 above) prevented Adecco from acting as the clients' agent in paying temps. Miss Sloane suggested that it is also significant that a client would decide who to choose out of the candidates Adecco put forward; that Adecco had no control over a temp in advance of his taking up his assignment with the client; that Adecco would not appraise temps or monitor their performance; that Adecco was not in practice involved with matters relating to temps' holiday or sick leave; that Adecco rarely exercised its termination and suspension rights; that, were there problems with a temp, the client would simply terminate the assignment; and that clients could potentially negotiate or discover the extent to which its payments to Adecco were attributable to commission for the latter.

48. There is, I think, substance in Miss Sloane's contention that the UT misunderstood the effect of Laws J's decision in *Customs and Excise Commissioners v Reed Personnel Services Ltd*, but I do not think that is of any real significance: the *Reed Personnel* case did not play an important part in the UT's reasoning. Nor is there any question of the UT having overlooked the need to consider the economic and commercial reality. It expressly asked itself what that reality was in the opening sentence of paragraph 50 of its decision, and there is no reason to think that it was not addressing the issue in the remainder of the paragraph. In so far as points it made reflected contractual provisions, that will be because the UT considered that they also corresponded to the economic and commercial reality.

49. In any case, I agree with Miss Eleni Mitrophanous, who appeared for HMRC with Miss Laura Prince, that the UT arrived at the correct conclusion. My reasons include these:

    i) There can plainly be no question of the temps having provided their services under contracts with the clients: no such contracts existed. Whatever scope there may be for argument as to the extent of Adecco's obligations to its clients, the contractual position must, I think, be that the temps' services were provided to clients in pursuance of the contracts between, on the one hand, Adecco and its clients and, on the other, Adecco and the temps;

    ii) Although the contract between Adecco and a temp referred to the temp undertaking an assignment "for a Client" and providing services "to the Client", it also spoke of the client requiring the temp's services "through Adecco" and of the temp being supplied "through Adecco";

    iii) While temps were to be subject to the control of clients, that was something that the temps agreed with Adecco, not the clients. Further, the fact that the contract between Adecco and a temp barred any third party from having rights under the Contracts (Rights of Third Parties) Act 1999 confirms that the relevant provisions were to be enforceable only by Adecco, which, on the strength of them, was able to agree with its clients that the temps should be under their control. Adecco can fairly be described as conferring such control on its clients;

iv) Adecco paid temps on its own behalf, not as agent for the clients. Had Adecco received sums from clients merely as "repayment of expenditure incurred in the name and on behalf of" clients, it would have been able to invoke article 79 of the Principal VAT Directive, but it did not and could not. It is fair to say (as Miss Sloane did) that the regulatory framework made it impossible for Adecco to act as the clients' agent in paying temps, but the FTT was not persuaded that that was why Adecco had assumed the obligations it had and, in any event, I cannot see why the tax position should be determined by reference to arrangements other than those that in fact existed and which Adecco could not legally make;

v) That leads to a broader point: that Adecco by no means dropped out of the picture once it had introduced a temp to a client. It was responsible for paying the temp (and for handling national insurance contributions and the like) and had to do so regardless of whether it received payment from the client and even if the client had rejected the temp in the first two hours and so escaped any liability. While, moreover, Adecco did not often need to exercise them, it enjoyed rights of termination and suspension; a client was to contact it if a temp proved unsatisfactory; and it was to Adecco (not the client) that a temp undertook not to take unauthorised leave. As regards the last of these points, it is noteworthy (as the UT said) that the contract between Adecco and a temp proceeded on the basis that a temp's unauthorised absence could "result in a breach of obligations which we owe to the Client";

vi) In a different context, the word "payrolling", which featured in the definition of "Services" in the contract between Adecco and a client, might suggest an administrative role. It is plain, however, that Adecco did not perform just administrative functions in relation to the temps. The temps, after all, were entitled to be paid by Adecco, not the clients;

vii) Adecco charged a client a single sum for each hour a temp worked. It did not split its fees into remuneration for the temp and commission for itself;

viii) Although Adecco did not conduct appraisals of temps, there was no evidence that the clients (to whom, on Adecco's case, the temps' services were supplied) had disciplinary procedures for temps either (see paragraph 36 of the FTT's decision);

ix) I cannot see that the fact that Adecco had no control over a temp in advance of his taking up his assignment with the client can matter. Suppose, by way of comparison, that a building contractor entered into a contract with a self-employed plumber for the latter to undertake work that would enable the contractor to fulfil his own obligations to an employer. It could hardly be suggested that the fact that the plumber had had no prior obligation to take on the job would preclude him from supplying services to the contractor and the contractor in turn supplying services to the employer. Such back-to-back arrangements are, of course, commonplace;

x) There is no suggestion that any of the contractual provisions was artificial, a sham, liable to rectification or vitiated for any other reason;

xi) The present case is very different from *Baxi*, *WHA* and *U-Drive*. In none of those three cases was the role of the person who paid for the supplies comparable to Adecco's. In *WHA*, neither NIG nor WHA had undertaken to repair vehicles. WHA was discharging on NIG's behalf, not an obligation to effect repairs, but one to meet their cost, so it was appropriate to see it as providing third party consideration rather than as the recipient of the repair services. In *U-Drive*, similarly, the payer "simply agreed to pay for the repair", as a means of meeting a financial obligation. As for *Baxi*, this involved the supply of goods and, since such a supply consists of "the transfer of the right to dispose of tangible property as owner" (see paragraph 28 above), the recipient of the supply was plainly the customer to whom the loyalty rewards were provided;

xii) Adecco undoubtedly supplied the services of employed temps to its clients. It is true that an employee cannot be a taxable person (see paragraph 29 above), but, even so, it would be surprising if what Adecco supplied were more limited with a non-employed temp than an employed one, especially since the same contract between Adecco and a client was used in each case and a client would be unlikely to know whether the temp was employed or non-employed;

xiii) In all the circumstances, it seems to me that, both contractually and as a matter of economic and commercial reality, the temps' services were supplied to clients via Adecco. In other words, Adecco did not merely supply its clients with introductory and ancillary services, and VAT was payable on the totality of what it was paid by clients.

50. As indicated earlier (in paragraph 26), the FTT arrived at a contrary conclusion in its 2011 decision in the *Reed Employment* case. In its view, "the supplies by Reed to its clients in respect of the temp workers are supplies of introductory services and other ancillary services" (paragraph 86 of the decision). In paragraph 90 of its decision, the FTT said this:

> "In our judgment the payment which Reed makes to the temp worker of the amount calculated by reference to the pay rate is a payment made by Reed on behalf of the client in satisfaction of the consideration for the supply by the temp worker to the client. To this extent, as we have stated above, that payment is not a cost component of Reed's own supply. It can in our view only be analysed as a payment by Reed on behalf of the client, for which Reed is subsequently reimbursed by the client. That element of the charge rate cannot therefore be consideration for Reed's own supply to the client of the introductory service. The consideration for Reed's own supply is accordingly the amount of the total charged by Reed to the client less the amount of the consideration for the temp worker's supply to the client, which is paid by Reed to the temp worker and reimbursed by the client through the pay rate element of the charge rate."

A little earlier, the FTT had said this in paragraph 88:

> "In our view, in ascertaining the nature of a supply it is relevant to have regard to what it is that the supplier is capable, as a matter of contract, of providing, and on that basis to consider what in economic reality has been supplied. In the case of Reed, at no time did Reed exercise control over its temp workers, such that control could be ceded by Reed to its clients. The obligations owed by a temp worker to Reed did not amount to an ability of Reed to exercise control over the temp worker, and in any event those obligations commenced only after the temp worker had accepted the assignment, and accordingly had come under the control of the client. The making of a supply of staff must in our view, at the least, connote a passing of control of staff from the supplier to the person receiving the supply. There is no such passing of control in this case. Absent that factor, Reed was capable only of making a more limited supply, which can, in our view, be characterised only as a supply of introductory services, along with the ancillary services to which we have referred."

51. I am not persuaded by these points. In the first place, Reed, like Adecco, paid temps in discharge of obligations of its own, not as agent for any client. It cannot therefore be said in any meaningful way that Reed paid a temp "on behalf of" the client, that Reed was "reimbursed" by a client or that such a payment was "not a cost component of Reed's own supply". Secondly, Reed, like Adecco, could perfectly well, in my view, supply more than the "introductory and ancillary services" found by the FTT without having had any pre-existing control over the temps. Thirdly, the "control of the client" to which the FTT referred in paragraph 88 of its decision must have been derived from the arrangements between the client and Reed. Temps did not agree with clients that they would be subject to their control. It seems to me that Reed, like Adecco, will have been able to confer control on its clients by virtue of its own contracts with the temps.

52. Unsurprisingly, the contractual provisions that applied as between Reed and its clients and temps were not identical to those relevant to the present case. I do not think, however, that the distinctions can justify the conclusion that the FTT arrived at in the *Reed Employment* case. It seems to me, with respect, that the case must be considered to have been wrongly decided.

53. For completeness, I should mention that one of Adecco's grounds of appeal was to the effect that the UT had failed to acknowledge and address an alternative argument based on the decision of the House of Lords in *Customs and Excise Commissioners v Redrow Group plc* [1999] STC 161. The argument in question proceeded on the basis that, even if the undertaking of obligations by a temp in relation to his performance of an assignment for a client could be characterised as a VAT supply by the temp to Adecco, there was a distinct supply to the client of the temp's services and the temp's charges related to that. However, Miss Mitrophanous subjected the thesis to convincing criticism in her skeleton argument and I did not understand Miss Sloane to pursue the point in her oral submissions before us. In the circumstances, I need say no more about it.

Conclusion

54. I would dismiss the appeal.

Lord Justice David Richards:

55. I agree.

Lord Justice Patten:

56. I also agree.