



Neutral Citation: [2023] UKFTT 00340 (TC)

Case Number: TC08774

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2019/01570

Income Tax – Preliminary issues – Intermediaries legislation (IR35) – Whether applicable where an individual’s services is supplied through a general partnership – Whether, on the facts, there was a general partnership – Whether direct contract with individual – Section 49(1)(b) Income Tax (Earnings and Pensions) Act 2003 considered – Appeal allowed

Heard on: 27 February – 1 March 2023

Judgment date: 27 March 2023

Before

TRIBUNAL JUDGE BROOKS

Between

**GARY LINEKER AND DANIELLE BUX
T/A GARY LINEKER MEDIA**

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: James Rivett KC and Georgia Hicks, instructed by Clintons LLP

For the Respondents: Akash Nawbatt KC, Christopher Stone and Ishaani Shrivastava, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION ON PRELIMINARY ISSUES

INTRODUCTION & SUMMARY

1. This case concerns the intermediaries legislation (generally known as “IR 35”), contained in Chapter 8 of the Income Tax (Earnings and Pensions) Act (“ITEPA”) 2003 and the Social Security (Intermediaries) Regulations 2000, and whether it applies to income received by Gary Lineker Media (“GLM”) for the provision of Gary Lineker’s services to the BBC and to British Telecommunications Plc (“BT Sport”), for the tax years from 2013-14 to 2017-18 (inclusive) pursuant to the contracts described below.

The Contracts

2. In or around February 2013 the BBC entered into an agreement with “Mr G LINEKER and Mrs D LINEKER (“the Partnership”)” for the provision of services by Mr Lineker for the period 1 July 2013 to 30 June 2016 (or the end of the UEFA European Championship 2016 if later) (the “2013 BBC Contract”). The 2013 BBC Contract was signed by Mr and Mrs Lineker as “the Partners of **THE PARTNERSHIP**”.

3. On 1 June 2015 BT Sport entered into an agreement with Mr Lineker and Mrs Danielle Lineker “trading as [GLM] (“**Partnership**”)” for the provision of Mr Lineker’s services for the period 1 June 2015 to 31 May 2018 (the “2015 BT Sport Contract”). The 2015 BT Contract was signed by Mr Lineker “for and on behalf of” GLM.

4. On 3 June 2015 the BBC entered into an agreement with Mr Lineker and Mrs Lineker, described in the agreement as being “each a ‘Partner’, and trading as [GLM], together the ‘Partnership’”. This agreement was for the provision of the services of Mr Lineker for the period 1 July 2015 to 30 June 2020 (or the end of the UEFA European Championship 2020 if later) (the “2015 BBC Contract”). The 2015 BBC Contract was signed by both Mr and Mrs Lineker.

5. Mrs Danielle Lineker, as she was then known, is Mr Lineker’s former wife who together with him signed the 2013 BBC Contract and 2015 BBC Contract. She is now known as Danielle Bux and is, with Mr Lineker, an appellant in this case.

Issues

6. It is common ground that the following issues arise in this case:

- (1) Whether the intermediaries legislation (IR35) applies to arrangements involving the supply of an individual’s services to a client through a partnership governed by the Partnership Act 1890 in which the individual is a partner;
- (2) Whether, on the facts, GLM was a partnership;
- (3) Whether there was a direct contract between the BBC and/or BT Sport and the appellants (Mr Lineker and Ms Bux); and
- (4) Whether the appellants should be estopped from contending that there was no valid partnership.

Decision

7. Having carefully considered the evidence, arguments advanced on behalf of the parties and all the circumstances of the case, I have, for the reasons below, come to the following conclusions:

- (1) The intermediaries legislation (IR35) can apply to arrangements where an individual’s services are supplied to a client through a partnership (see paragraphs 66 to 74, below);

- (2) On the facts of this case GLM is a partnership (see paragraphs 75 to 84, below);
- (3) There were, as a matter of law, direct contracts between the BBC and Mr Lineker (and Ms Bux) and also BT Sport and Mr Lineker (and Ms Bux) (see paragraphs 85 to 94, below); and
- (4) It is therefore not necessary to determine the fourth issue regarding estoppel (see paragraph 95, below).

8. The effect of my conclusions is that because there were direct contracts, between the BBC and Mr Lineker and BT Sport and Mr Lineker, the intermediaries legislation (IR35) does not, and cannot as a matter of law, apply.

9. Accordingly, and notwithstanding GLM being a partnership, that is the end of the matter and the appeal succeeds.

REPRESENTATION

10. Mr Lineker and Ms Bux were represented by James Rivett KC and Georgia Hicks. Akash Nawbatt KC, Christopher Stone and Ishaani Shrivastava appeared for HM Revenue and Customs (“HMRC”). While I was very much assisted by their clear submissions, both written and oral, I have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching my conclusions.

PROCEDURAL BACKGROUND

11. On 13 March 2019 Mr Lineker and Ms Bux appealed against:

- (1) Determinations issued by HMRC under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (“PAYE Regs”) in respect of income tax deductible via PAYE (the “Determinations”); and
- (2) Notices issued by HMRC under s 8 of the Social Security Contributions (Transfer of Functions) Act (“SSCA”) 1999 (the “Notices”) in respect of Class 1 National Insurance Contributions (“NICs”) for the years 2013-14 to 2017-18 (inclusive).

12. Their grounds of appeal contended that HMRC had incorrectly applied the “employment status factors” in determining that the hypothetical contracts, between Mr Lineker and the BBC and Mr Lineker and BT Sport, would have been contracts of employment. Also, that HMRC had failed to fully consider the evidence relating to the contractual arrangements of GLM.

13. These grounds of appeal were amended on 14 April 2021 by the addition of two further grounds: first, that the quantum of the Determinations and Notices was excessive; and secondly, that the Notice for 2013-14 was void.

14. On 1 March 2022 I allowed an application by Mr Lineker and Ms Bux to further amend their grounds of appeal with the effect that their grounds of appeal are now as follows:

- (1) the condition imposed by s. 49(1)(b) ITEPA for the application of the intermediaries legislation is not satisfied because there was no ‘intermediary’ either as a matter of general law or on the particular facts of this case; alternatively
- (2) the condition imposed by s. 49(1)(b) ITEPA for the application of the intermediaries legislation is not satisfied because the relevant services were provided under a direct contract with each relevant client;
- (3) the condition imposed by s. 49(1)(c) ITEPA for the application of the intermediaries legislation is not satisfied because the circumstances are not such that Mr Lineker would have been regarded as an employee of the BBC and/or BT Sport; in any event;

(4) the Determinations and Notices do not correctly state the quantum of the Appellant's liability; and

(5) the Notice issued in respect of the tax year 2013-14 is void and/or of no effect because:

(a) s 8(1)(c) SSCA 1999 requires an officer of the Board to decide whether a person is or was liable; and

(b) as at the time at which the notice was issued on HMRC's own account the officer responsible for issuing the notice had not decided whether the Appellant was liable to pay contributions of any particular class.

15. On 18 October 2022, having considered the written submissions of the parties, I directed that Grounds 1 and 2 of the grounds of appeal be determined as preliminary issues. This was because both grounds raise a "succinct knockout point", ie each can be separated from the remaining grounds of appeal and that the determination of either ground will, if HMRC succeed, dispose of an aspect of the case or, if the appellants succeed, dispose of the matter entirely, (see *Wrottesley v HMRC* [2016] STC 1123).

16. I should add that the decision to determine Grounds 1 and 2 as preliminary issues was made on the understanding that the factual issues that arise in relation to these were capable of determination on the basis of construing the contracts in question and "very limited additional documentation" leaving it open for HMRC to make submissions as to whether this evidence is sufficient to discharge the burden of proof which, it is accepted, is on the appellants.

EVIDENCE

17. In addition to the documents, which were contained in an electronic bundle comprising 1,142 pages, I heard from HMRC officers Barry Connell and Michael McDermid.

18. Mr Connell was a "case worker" in HMRC's "Employment Status and Intermediaries Team" which was part of the "Wealthy and Midsized Business Compliance" part of HMRC from 5 August 2013 until 10 May 2019. As such he was responsible for considering the application of IR35 status for a number of businesses, including that of Mr Lineker and Ms Bux. He was the officer that issued the Determination and Notices in this case.

19. However, in evidence he explained that although he had issued the Determinations and Notices he was not the "decision maker". That was, he said, Mr McDermid. Mr Connell explained that although the case was in his name, his role was that of "the fact finder" and that once "all the facts" were captured he passed the matter to Mr McDermid to review and form an opinion.

20. Mr McDermid is a compliance Higher Officer at HMRC. His involvement in HMRC's review of the present case began on 9 May 2018, once Mr Connell had completed his fact finding. He explained in evidence that his role was to consider the evidence that had been gathered and issue his view, in the form of a "Status Opinion", as to whether the intermediaries legislation applied.

21. An undisputed witness statement of Mr Peter Sterling, a partner of PKF Cooper Parry LLP Chartered Accountants ("Cooper Parry"), was also admitted into evidence for the purpose of introducing the various documents on which Mr Lineker and Ms Bux rely. Mr Sterling was the partner primarily responsible for the accounting affairs of Mr Lineker and his various business entities throughout the period that is the subject of this appeal.

FACTS

22. Mr Lineker, a former professional footballer, is probably now best known for the BBC's *Match of the Day* programme which he has presented since 1999. Between 24 March

2006 and 1 August 2012 he had contracted with the BBC to provide his services as a sole trader using GLM as his trading name.

'Partnership Agreement'

23. In September 2012 at the commencement of negotiations for what was to become the 2013 BBC Contract, Lloyd Shepherd, Talent Manager at BBC Sport, having undertaken a general internal review of contractual paperwork, sought clarification of the status of GLM. In particular whether it was a partnership and, if it was, to be provided with a copy of the partnership agreement.

24. In his response, by email of 27 September 2012, Mr Sterling stated that the BBC contract had been with GLM, "as long as our files go back!". His email explained that:

"[GLM] is an "unincorporated entity". It is now a "sole trader" with Gary as the sole owner. Up until 23 March 2006 it was a partnership, with Gary's former wife Michelle being a "junior partner". When Gary and Michelle separated in March 2006, Michelle resigned as a Partner, leaving Gary as the "sole proprietor.""

25. On being informed that Mr Lineker had been contracting with it as a sole trader, the BBC insisted on the formation of a partnership to be the counterparty in the forthcoming contract. Mr Sterling, who is not a qualified lawyer, without legal advice drafted a partnership agreement (the "Agreement"). As he explained in an email of 8 October 2012 to Peter McGarvey (an adviser to Mr Lineker):

"Just cast your eye over the draft partnership agreement below. Stating the obvious, I have drawn it up and not a qualified lawyer. It may well contain areas which could be greatly improved if a lawyer was to be involved.

At the end of the day this is being done because the BBC are insisting that they deal with a partnership and not a sole trader. As such Danielle [Ms Bux] is taking on the risk of becoming a partner, with unlimited liability, and therefore it seems only right that she be paid for taking on the risk.

I have kept the suggested 'profit share' at a fixed £30k pa, so as to try and not be overly provocative to HMRC. In a worst case scenario, if they ever challenged it, the income would be re-assessed on Gary, so he'd be no worse off than now.

I've laboured the part about Danielle's role, just to demonstrate that she is required to 'play a role' and that in doing so she may be giving up other commercial opportunities of her own and that therefore she should be 'compensated' for this.

Once the decision to go ahead is made, I'll notify the VAT and tax people."

26. The Agreement, which is headed "Partnership Agreement", was dated 17 October 2012 and signed by Mr Lineker and Ms Bux.

27. Clause 1 of the Agreement records that GLM was an ongoing business that provided:

"... media related services principally in the provision of the services of Mr Lineker to third parties."

28. Clause 2 recorded that Mr Lineker wished to invite Ms Bux to join him in partnership, that Ms Bux accepted that invitation and that they agreed the principal terms of their partnership as set out in the subsequent clauses of the Agreement.

29. The nature of the business is set out in Clause 3. In essence this provides that the parties, Mr Lineker and Ms Bux, agree "that they shall work to further promote the image of Mr

Lineker” in connection with the provision of services “by the business” to third parties “principally in connection with TV and other media related activities.” They also agreed not to enter into any new activities without the agreement of both parties.

30. Clause 4 recorded that Ms Bux was entitled an to annual “fixed profit share” of £30,000 and was not entitled to any part of the business’ capital.

31. The agreement of both parties was required under Clause 5 for GLM to agree to incur bank debt, hire purchase or other similar financing arrangements.

32. Clause 6 provided that Mr Lineker was to be the sole signatory of the bank account.

33. Clauses 7 and 8 made provision for the admission of new partners (which required the consent of both Mr Lineker and Ms Bux) and the termination of the partnership (upon the giving of notice by, or death of, either Mr Lineker or Ms Bux).

34. Under Clause 9 Ms Bux agreed to make herself available to promote the business as requested by Mr Lineker and to accompany him to promotional and marketing events. She also agreed that she would not be entitled to any additional payment above her profit share for doing so in addition to agreeing to restrictions upon her other commercial activities.

35. Clause 10 provided for partnership accounts to be drawn up and gave both Mr Lineker and Ms Bux access to the business’s accounts and accounting records. By clause 11, Mr Lineker and Ms Bux acknowledged their separate responsibilities for reporting their partnership income to HMRC and settling all tax liabilities arising from the business.

36. There is no allegation that the Agreement was a sham and it is accepted that it gave rise to real rights and obligations.

Contracts

BBC Contracts

37. As noted above (in paragraph 2) the 2013 BBC Contract was entered into by the BBC, Mr Lineker and Ms Bux as the “Partnership” in or around February 2013 to provide the services of Mr Lineker, who is described as the “Contributor” in the contract. As there is little or no material difference between that contract and the 2015 BBC Contract, and to avoid duplication of contractual terms in this decision, I shall only refer to the 2013 BBC Contract.

38. Clause 1 of the 2013 BBC Contract provides:

“The Partnership [GLM] controls the exclusive services of the Contributor [Mr Lineker]. The Partnership agrees to procure and provide the Contributor’s non exclusive services to the BBC as required under this Contract and to observe and perform and (where appropriate) procure that the Contributor observes and performs the terms and conditions of this Contract.”

39. Under Clause 11.19 of the 2013 BBC Contract the Partnership provided a warranty that it would procure the signature of the “Contributor Guarantee” that was set out in schedule three of the Contract by the Contributor, “prior to signature by the Partnership of this Contract.” As Mr Rivett submitted, the terms of the Contributor Guarantee are therefore incorporated, or to use his words “baked into”, the operative provisions of the main body of the 2013 BBC Contract.

40. By Clause 2 of the Contributor Guarantee, which he signed on 21 March 2013, Mr Lineker gave his “personal guarantee”:

“... to provide my services to the Partnership as required under the Contract and to comply with all terms and conditions which require performance or compliance on my part. In particular I warrant that I will read and fully comply

with the BBC's Editorial Guidelines and Guidance and the BBC's Standards as defined in the Contract."

41. On 21 March 2013 at the behest of the BBC, a Novation Agreement between "MR GARY LINEKER ('the Broadcaster') and MR G LINEKER and MRS D LINEKER [Ms Bux] ('the Partnership')" was entered into to seek to re-categorise the basis on which the parties were contracting in respect of services provided between 1 November 2012 to 30 June 2013 (ie prior to the 2013 BBC Contract) and to place liability for tax and NIC onto Mr Lineker and/or GLM in respect of each period between 2007 and 2012.

The 2015 BT Sport Contract

42. This contract, between BT Sport, Mr Lineker and Ms Bux "trading as" GLM, the "Partnership", was entered into on 1 June 2015. In it Mr Lineker is described as the "Presenter".

43. Under its terms GLM was required to procure Mr Lineker's

"... services in respect of Programmes as BT may reasonably require in a capacity which shall include (at BT's discretion and without limitation): (a) presenter, co-presenter, anchor, co-anchor, commentator, co-commentator, pundit, host, analyst, reporter and/or interviewer; (b) live or pre-recorded; (c) studio based or on location; and/or (d) on-screen and/or in voiceover."

44. The contractual provision relating to fees provides that payment is to be made to the "Presenter" (as opposed to the Partnership) and it is the Presenter who is to raise invoices and deliver them to BT Sport.

45. Schedule 1 to the contract contains what is described as an "Inducement Letter" or "Television Presenter's Agreement". Its terms include a warranty by Mr Lineker that he is a partner in GLM which is entitled to enter into the 2015 BT Sport Contract (clause 1) and that he, personally, agrees to render all services under the Contract (clause 2).

Tax Returns

46. Although there was no material change in the way Mr Lineker provided his services or accounted to HMRC after the partnership agreement was signed the following was recorded in the "Any other information" or "White Box/White Space" section of his 2012-13 self-assessment tax return:

"[GLM] introduced Mrs Danielle Lineker [Ms Bux] to the business on 1 August 2012 and at that point [GLM] became a partnership under the reference number shown in the Partnership Pages of this tax return. Under the provisions of HMRC SP 9/86 I hereby elect that the sole trader business is treated as continuing in the same activities but in the form of a partnership. Hence the cessation rules of assessment are not applied to [GLM] nor are the opening rules applied to the new [GLM] Partnership."

47. The 2012-13 partnership tax return records in its "Additional Information" section:

"On 17 October 2012 [GLM] was merged from a sole trade into a partnership. The partnership continued to carry on exactly the same business as the previous sole trade and the accounting dates to which the accounts are drawn up also remain unchanged. As Gary Lineker previously carried out the sole trade and remains a partner in the new partnership, he is treated as continuing to trade and as such the share of his profits arising from the partnership will follow on the same "current year" basis as those profits that have arisen from his previous sole trade and as such, no overlap profits are created. Overlap profits will however be created for Danielle Lineker [Ms Bux] and these have been included on her tax return for the year ended 5 April 2013."

48. Partnership accounts were drawn up in respect of each of the relevant tax years (with a year end of 31 July) by Cooper Parry and partnership returns filed. Those returns show the turnover of GLM (income Mr Lineker had received in return for services provided) and, following appropriate deductions, the net profit. This net profit was divided between Mr Lineker and Ms Bux by allocating £30,000 to her and the balance to him.

49. Mr Lineker filed a self-assessment tax return in respect of each of the relevant tax years, 2013-14 to 2017-18, completing the partnership pages to account for the income received through GLM. Recorded in the “Your share of the partnership’s trading or professional profits” section of the returns was the income received in respect of the provision of his services to the BBC, BT Sport and other entities. For each tax year, Mr Lineker accounted for income tax and Class 4 NIC on the entirety of the income from his services, less a fixed amount of £30,000, paid to his then wife, Ms Bux (and on which she paid tax).

Contact with HMRC

50. On 21 April 2017 HMRC (Mr Connell) wrote to GLM requesting a breakdown of income of the partnership for 2013-14, 2014-15, and 2015-16 together with copies of all documentation relevant to the contracts that gave rise to that income. He confirmed that this was not an enquiry into the partnership’s partnership tax return and asked whether GLM had considered the possibility of “the partnership being subject to what is commonly referred to as the IR35 legislation.”

51. A breakdown of income in respect of a sample year and a contract with the BBC was duly provided to HMRC by Cooper Parry on 30 May 2017. Having reviewed that information, in an email of 20 June 2017, Mr Connell confirmed that he was only focussing on the engagements with the BBC and BT Sport and explained that he wanted to understand the “actual day to day working arrangements” between Mr Lineker and the BBC/BT. He requested a face-to-face meeting to discuss this.

52. A meeting was duly arranged for 17 August 2017. This was attended by Mr Lineker along with Mr Sterling and Minesh Trivedi of Cooper Parry and Mr Lineker’s agent, Jon Holmes. HMRC officers Mr Connell and Brian Watson attended on behalf of HMRC.

53. In order to enhance the efficiency of the meeting a list of 26 pre-prepared questions were provided in advance by HMRC. There was only one question that concerned the partnership. This question and answer (as clarified via email, dated 21 September 2017, from Mr Sterling following the meeting) were as follows:

“Q: When and why was the partnership set up?

A: GL was in partnership with first wife Michelle. After their separation she left the partnership and GL continued as a sole trader, GL’s second wife Danielle became a partner in 2012, to help promote GL’s image, public profile and reputation. Danielle was a celebrity in her own right.

Setting up a limited company was never fully considered as [GLM] had always traded as an unincorporated body and the partnership represented continuity. A company may have involved paying less tax as profits could have been sheltered at corporate tax rates, but a partnership represented the ‘status quo.’”

54. During the rest of 2017 and at the beginning of 2018, Mr Connell sought details from the BBC and BT about how the contracts worked in practice. On 15 and 16 February 2018, Mr Connell issued Mr Lineker and Ms Bux “t/a [GLM]” with Regulation 80 determinations in respect of income received in 2014-15 to 2016-17 (inclusive) and s 8 (SSCA) notices in respect of income received between 2013-14 to 2017-18 (inclusive). However, in the covering letter,

dated 16 February 2018, Mr Connell confirmed that he was not yet in a position to determine whether or not IR35 applied.

55. Mr Lineker and Ms Bux appealed against these determinations and notices. The letter, dated 26 February 2018, from Cooper Parry explained that the appeal was:

“... on the grounds that our discussions with HMRC, on whether the intermediaries’ [sic] legislation (“IR35”) applies to our client, in respect to the contractual arrangements between Gary Lineker ... and the BBC, are still ongoing. HMRC are still considering the information provided to them and have not reached an opinion. The Determination has been issued by HMRC as a protective measure only.”

Mr Connell’s email, of 5 March 2018, in response confirmed that the full amounts assessed had been “stood over” pending a review.

56. On 23 May 2018 Mr McDermid issued a Review Letter in respect of Mr Lineker’s relationship with the BBC, in which he concluded, having reviewed “the relationship between the BBC and [GLM] in connection with the contracts from the period 06 April 2013 onwards”, that he was of the opinion:

“... that had there been a contract between the BBC and Gary Lineker, it would be a contract of service.”

57. Following further correspondence between the parties, on 12 September 2018, Mr McDermid issued a similar Review Letter in respect of Mr Lineker’s relationship with BT Sport, concluding:

“I have reviewed the relationship between [BT Sport] and [GLM] and I am of the opinion ... that had there been a contract between [BT Sport] and Gary Linker [sic] it would be considered to be a contract of service”

58. In a letter of 18 January 2019 to Mr McDermid, Cooper Parry stated that, having taken advice from leading counsel (not Mr Rivett KC who appeared before me for the appellants), as Mr Lineker’s services were provided directly to the BBC the condition at s 49(1)(b) ITEPA 2003 was not satisfied.

59. In his response of 7 February 2019 Mr McDermid sought to alleviate Mr Lineker’s concerns by explaining that:

“... the review was one of many within the media sector, which is a particular area HMRC consider to have sufficient risk to investigate.”

Mr McDermid also asked for reasoning and documentation to support the contention that the condition at s 49(1)(b) ITEPA 2003 was not met.

60. In a letter dated 13 February 2019 Cooper Parry explained that GLM:

“... is not the true counterparty with the BBC and therefore does not satisfy the definition of ‘an intermediary’ under s.49(1)(b) ITEPA. We will argue, if necessary, that [GLM] was created at the request of the BBC and that the substance of the working arrangements was no different at all from when Mr Lineker previously provided exactly the same services to the BBC in a personal or ‘sole trader’ capacity. The true counterparties, we will argue, are the BBC and Mr Lineker in a personal capacity and that therefore the Intermediaries legislation does not apply”

61. However, on 15 February 2019, “[i]n the absence of any new information to alter the Status Opinions issued by... Michael McDermid,” Mr Connell issued the Determinations and Notices which led to this appeal. These were issued on the instruction of Mr McDermid who

had taken responsibility for the case after Mr Connell had completed his fact finding role in May 2018.

62. On 8 March 2019 Mr McDermid responded to the 13 February 2019 letter from Cooper Parry. He wrote:

“On reviewing all documentary evidence thus far, it is clear Gary Lineker is a representative of the partnership. To what extent do you claim he is not? Do you consider he was coerced into setting up the partnership, and if so, to what extent do you consider the ‘intermediaries’ legislation does not apply on that basis? Please give further reasoning on why you consider the origin of the intermediary (the Partnership) having a bearing on its existence, in line with the legislation. This point is not backed by fact or documentation, however I will consider any further information and/or evidence to substantiate your position. In the meantime, the review will continue as normal.”

63. Mr McDermid considered the issue of there being a direct contract to be a “completely new point” but, given the stage of the review, he had advised Mr Connell to go ahead and issue the Determinations and Notices. However, he said that this would not prevent him from “tak[ing] any new arguments on board.”

64. Mr McDermid also explained that, for the 8 March 2019 letter, he had taken “some wording from a senior colleague” in relation to “coercion”. Although he was unable to provide any further elucidation on the matter it appears that the reference to coercion in his letter was a response to the statement by Cooper Parry in the letter of 13 February 2019, that GLM was “created at the request of the BBC”.

65. On 13 March 2019 the appeal was notified to the Tribunal.

ISSUES

1. Application of Intermediaries Legislation to Partnerships

66. The intermediaries legislation is contained in Chapter 8 of ITEPA.

67. For the tax years with which this appeal is concerned, 2013-14 to 2017-18, s 49 ITEPA provided:

49 Engagements to which this Chapter applies

(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—

(i) 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 or the holder of an office under the client, or

(ii) the worker is an office-holder who holds that office under the client and the services relate to the office.

(2) ...

(3) The reference in subsection (1)(b) to a “third party” includes a partnership or unincorporated body of which the worker is a member.

(4) The circumstances referred to in 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.

(5) In this Chapter “engagement to which this Chapter applies” means any such provision of services as is mentioned in subsection (1).”

68. The primary argument advanced by Mr Rivett KC, for Mr Lineker and Ms Bux which I shall consider under the ‘Direct Contract’ heading below, is that in the circumstances of this case the “direct contract” limb of s 49(1)(b) ITEPA has not been satisfied.

69. Mr Rivett also contends that s 49(1)(b) ITEPA was not intended to catch arrangements such as in the present case. First, he says, that as a matter of general principle a general partnership governed by the Partnership Act 1890 in which “the worker” is a partner, which unlike a limited company (or a Scottish partnership or Limited Liability Partnership), does not have a separate legal personality, cannot be an intermediary; second, a construction of the legislation to catch such arrangements is “anti-purposive” and therefore “wrong”; third, applying the intermediaries legislation to general partnerships would offend against the principle of double taxation (see *Canadian Eagle Oil Co Ltd v R*, *Selection Trust Ltd v Devitt* [1945] 2 All ER 499 at 513; *IRC v FS Securities Ltd (formerly Federated Securities Ltd)* [1965] AC 631 per Lord Reid at 698; and *Hoey v HMRC* [2022] 1 WLR 4113).

70. However, I agree with Mr Nawbatt KC, for HMRC, who submits that Parliament made express provision in s 49(3) ITEPA for a partnership to be a “third party” and therefore an “intermediary”. As such, it is in my view clear that the intermediaries legislation does apply to partnerships.

71. In my judgment, confirmation that a partnership can be an intermediary for the purposes of the legislative provisions can also be found in s 52 ITEPA, which sets out the conditions of liability where the intermediary is a partnership, and s 164 of the Income Tax (Trading and Other Income) Act (“ITTOIA”) 2005 which provides for “special rules for partnerships” for the purposes of calculating the profits of a trade profession or vocation carried on by a firm treated as making employment payments under the intermediaries legislation.

72. With regard to Mr Rivett’s other arguments regarding the purpose of the legislation and double taxation, it is clear from the 9 March 1999 Inland Revenue Press Release IR35 (from which the name by which intermediaries provisions are generally known was derived) that the purpose of the legislation was to address the:

“... general concern about the hiring of individuals through their own service companies so that they can exploit the fiscal advantages offered by a corporate structure. It is possible for someone to leave work as an employee on a Friday only to return the following Monday to do exactly the same job as an indirectly engaged ‘consultant’ paying substantially reduced tax and national insurance.”

The IR35 press release continued, stating inter alia:

“The proposed changes are aimed only at engagements with essential characteristics of employment. They should affect only those cases where these characteristics are disguised through use of an intermediary – such as a service company or partnership.”

73. The question of double taxation was addressed by Parliament when enacting the intermediaries legislation and the following statutory provisions, which were originally contained in Schedule 12 to the Finance Act 2000, ensure that there is no double taxation when a partnership applies the intermediaries legislation.

(1) Section 56(2) and (3) ITEPA provides that the individual worker is treated as if employed by the partnership and as having received the deemed employment payment as taxable earnings;

(2) The deemed employment payment is treated, under s 56(6)ITEPA, as received by the worker in his personal capacity and not treated as general income of the partnership, ie the deemed employment payment is effectively ring-fenced for the worker;

(3) In calculating the profits of the partnership, a deduction is allowed for the deemed employment payment and the amount of employer's NICs paid by the partnership under s 163 ITTOIA;

(4) Specific provision is made under s 164 ITTOIA for how that deduction is calculated where the intermediary is a partnership;

74. The combined effect of these provisions is that if a partnership applies the Intermediaries Legislation to arrangements under which it supplies the personal services of one of its partners to a client, it will have to operate PAYE in respect of the deemed employment payment and can take a deduction when calculating its profits, with the effect that its profits are reduced. The partners do not pay tax or Class 4 NICs on the deemed employment payment and there is therefore no double taxation.

2. Whether GLM a Partnership

75. A partnership is defined by s 1(1) of the Partnership Act 1890 as:

... the relation which subsists between persons carrying on a business in common with a view to a profit.

76. In *Memec Plc v Inland Revenue Commissioners* [1998] STC 754 at 764 Peter Gibson LJ summarised the terms of the 1890 Act, saying:

“The relevant characteristics of an ordinary English partnership are these: (1) the partnership is not a legal entity; (2) the partners carry on the business of the partnership in common with a view to profit (see s 1(1) of the Partnership Act 1890 (the 1890 Act)); (3) each does so both as principal and (see s 5 of the 1890 Act) as agent for each other, binding the firm and his partners in all matters within his authority; (4) every partner is liable jointly with the other partners for all debts and obligations of the firm (see s 9 of the 1890 Act); and (5) the partners own the business, having a beneficial interest, in the form of an undivided share in the partnership assets (see *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898 at 900, [1990] 2 AC 239 at 249 per Lord Oliver), including any profits of the business.”

77. It is common ground that the question of whether a partnership exists is a question of mixed fact and law (*Keith Spicer Ltd v Mansell* [1970] 1 WLR 333 at 335).

78. Mr Rivett accepts that the Agreement is not a sham in that it did create rights and obligations but he contends that these rights and obligations do not amount to a partnership as defined by the 1890 Act.

79. I was referred to a number of authorities regarding the proper approach to adopt to determine the existence of a partnership, ie whether the statutory test in s 1(1) of the 1890 Act has been met: *Stekel v Ellice* [1973] 1 WLR 191; *Newstead v Frost* (1980) 53 TC 525; *M Young Legal Associates Ltd v Zahid Solicitors (a firm)* [2006] 1 WLR 2562; *Hodson v Hodson* [2009] EWHC 430 (Ch); *Sotheby's v Mark Weis Ltd* [2020] EWCA Civ 1570; *Tiffin v Lester Alridge LLP* [2012] EWCA Civ 35; *Patel v Barlows Solicitors (a firm)* [2021] 4 WLR 6.

80. From these I derive the following propositions which I do not understand to be disputed:

- (1) It is critical to determine (objectively) whether the parties intended to create a partnership (*Tiffin v Lester Alridge LLP* [2012] EWCA Civ 35 at [21]);
- (2) In determining their intention all the features of their agreement must be considered, regard is to be given to the “substance of the relationship, not the words used by the parties to describe it” (*Sotheby’s v Mark Weis Ltd* [2020] EWCA Civ 1570 at [84];
- (3) It is not conclusive that someone is held out to the outside world as a partner, “one must in every case look at the terms of the relationship to ascertain whether or not it creates a true partnership” (*Stekel v Ellice* [1973] 1 WLR 191 at 473);
- (4) Although it may provide “some evidence” their business is a partnership business, the terms used by the parties to describe their relationship will not be conclusive (*Patel v Barlows Solicitors (a firm)* [2021] 4 WLR 6 at [107];
- (5) While a fixed remuneration does not preclude a finding of a partnership, it is in most cases a strongly negative indication of one: *M Young Legal Associates Ltd v Zahid Solicitors (a firm)* [2006] 1 WLR 2562 at [33];
- (6) Although s 1(1) of the Partnership Act 1890 refers to the aim of making a profit, it “studiously abstain[s] from reference to any necessity that it be shared.” The partners are free to arrange for their remuneration in any manner they choose including by agreement that one partner should receive specific sums irrespective of profits (*Tiffin v Lester Alridge LLP* [2012] EWCA Civ 35 at [41];
- (7) It is not necessary for all partners to make a profit earning contribution for there to be a partnership (*Newstead v Frost* (1980) 53 TC 525 at 553); and
- (8) It is not a prerequisite for a relationship of partnership to exist that one of the partners should be involved in the management of the partnership. It is well-established that a sleeping partner can be a partner (*Hodson v Hodson* [2009] EWHC 430 (Ch) at [53].

81. Therefore, applying the statutory test, for a partnership to exist there must be first, a business, secondly, that business must be carried on by two or more persons in common, and thirdly, with a view to a profit. It is common ground that the first and third of these conditions are present in this case. However, the parties differ as to whether the business was carried on in common by Mr Lineker and Ms Bux who, it is not disputed, intended and believed (mistakenly Mr Rivett contends) that they had entered into a partnership when they signed the Agreement in October 2012.

82. With that in mind it is therefore necessary to consider the Agreement, which sets out the terms of the business relationship between Mr Lineker and Ms Bux, to ascertain whether or not it creates, in substance, a true partnership, irrespective of the words used by the parties to describe it:

- (1) Clauses 1 and 2, which Mr Rivett contends, are merely descriptive of the ongoing business of Mr Lineker and the invitation, which Ms Bux accepted, to join him in partnership in the business clearly confirm and record not only their undisputed intention to enter into a partnership but also their agreement to the terms setting out their roles and responsibilities “of their partnership”;
- (2) Mr Rivett submits that clause 3 is somewhat vague and “highly unusual” in that rather than allowing each party to bind the other as would be expected in a partnership

with business in common, it prevents one from doing anything without the agreement of the other.

However, as Mr Nawbatt says, this clause applies equally to both parties, effectively binding the party that agreed to the other's undertaking a new activity. Even if this were not the case, s 5 of the Partnership Act 1890 (the effect of which is described in the extract from *Memec*, see paragraph 76, above) would still apply and, as such, one party would be able to bind the other.

In addition, the clause also provides that Mr Lineker and Ms Bux agree that that "they" shall work to promote Mr Lineker's image. This, together with the restriction on Mr Lineker from being able to enter into any new business activities without the consent of Ms Bux is, in my judgment, consistent with there being a business in common;

(3) Although clause 4, which provides for the £30,000 payment to Ms Bux irrespective of the profits of the business, indicates that there is no direct link between that payment and the profits of the business, something described as a "strongly negative pointer towards the crucial conclusion as to whether the recipient is among those who are carrying on its business" by Wilson LJ in *M Young Legal Associates Ltd v Zahid Solicitors* at [33], it is not determinative.

As Wilson LJ also recognised, at [33], that crucial conclusion, as to whether that person is to be regarded as a partner carrying on the business of the partnership, "must be informed by reference to all the features of the agreement";

(4) Clause 5, which also limits the extent to which Mr Lineker or Ms Bux can undertake any specific financial activity or incur any debt would suggest the carrying on of a business in common.

(5) Although under clause 6 Mr Lineker is the sole signatory of the bank account, Mr Nawbatt described the clause as being "neutral" as to whether the parties carried on a business in common. He pointed out that it was not necessary for there to be involvement in the management of the business by all parties for there to be a partnership and that it is well-established that a sleeping partner can be a partner.

(6) Clause 7, which deals with the admission of new partners, is a typical clause to be found in partnership agreements. Although Mr Rivett described it as "at best" neutral, I agree with Mr Nawbatt that if they were not carrying on a business in common why would the Agreement give Ms Bux a right of veto over the admission of new partners in the business.

(7) Mr Rivett contends that clause 8, which concerns the termination of the arrangement between Mr Lineker and Ms Bux is not a feature of a typical partnership agreement which it is more likely to contain elaborate termination provisions. However, it does not necessarily follow that because the clause is drafted in more straightforward terms the parties are not carrying on a business in common.

(8) Clause 9, on which Mr Rivett particularly relies, sets out Ms Bux's obligations under the Agreement and does not provide for any corresponding obligations on Mr Lineker.

These obligations are that, in exchange for £30,000 a year, Ms Bux is to assist Mr Lineker to promote the business as requested and accompany him to promotional and marketing events. While this clause in isolation may be a "strongly negative pointer" to a business being undertaken in common it is clear from the observation of Wilson LJ, at [33] in *M*

Young Legal Associates Ltd v Zahid Solicitors that this is not the correct approach, rather it is necessary to consider “all of the features of the agreement”.

(9) Clause 10 is in my view clearly indicative of a business being carried on in common with its reference to partnership accounts and access to all business accounts and accounting records given to both Mr Lineker and Ms Bux. Similarly clause 11, under which Mr Lineker and Ms Bux acknowledge their respective responsibilities to HMRC is indicative of their intention to enter into a partnership.

(10) Mr Rivett also points out that there is no provision in the Agreement as to what would happen in the event of a loss and contends that this is because in reality there was not a partnership. However, although given the nature of the business losses were never envisaged, Ms Bux would have been exposed to a loss under s 24(1) of the Partnership Act 1890. Indeed this was recognised by Mr Sterling in his email of 8 October 2012 (see paragraph 25, above).

83. Having considered the clause of the Agreement and looked at more widely in the round, I am of the view that the Agreement is consistent with the carrying on of a business in common with a view to a profit. As such, it clearly falls within the definition in s 1(1) of the 1890 Act, leading me to conclude that GLM is indeed a partnership.

84. Although not strictly necessary, I find further support for such a conclusion from the following evidence to which *Lindley & Banks on Partnership* (21st Ed., 7-31) refers as of the type of evidence “frequently relied on in order to prove the existence of an alleged partnership”:

(1) Partnership accounts, prepared by chartered accountants, in the name of Mr and Mrs Lineker trading as GLM, for the years ended 31 July 2014, 2015, 2016, 2017 and 2018;

(2) Partnership tax returns for the years 2013-14 to 2017-18 which identified GLM as a partnership with Mr Lineker and Ms Bux as partners;

(3) The individual self-assessment returns in which it was stated that the individual concerned was “in a partnership”;

(4) The contracts entered into with the BBC and BT Sport which clearly state that GLM did so as a partnership (see paragraphs 2, 3, 4, 37 and 42, above); and

(5) The information provided to HMRC confirming the existence of a partnership at the meeting on 17 August 2017 (see paragraph 52, above) at which Mr Lineker was present.

3. Direct Contract

85. I was told that this case was the first time that the issue of whether there was a direct contract had come before the Tribunal. This is because in all previous cases in which the intermediaries legislation has been considered the intermediary concerned, with which the contract was made for the services of the worker to the client, has been a limited company and, as a result of such a company having a separate legal personality from the client who might be a director or shareholder of the company, the question of whether there was a direct contract between the client and worker has not arisen.

86. It is common ground that the statutory question posed by s 49(1)(b) ITEPA, whether the services were provided under either a contract directly between the client (which for present purposes is either the BBC or BT Sport) and the worker (Mr Lineker), or under arrangements involving a third party, envisages a binary choice.

87. Although not defined by the legislation, the meaning of a direct contract, or to use the words of s 49(1)(b) ITEPA, “a contract directly between the client and the worker” is, as Mr Rivett submits, obvious and must require, as a matter of general law, privity between the parties to it.

88. The question therefore, in the present case, is whether in regard to the 2013 BBC Contract and 2015 BBC Contract, there was a contract directly between the BBC and Mr Lineker and, with regard to the BT Sport Contract, a contract directly between BT Sport and Mr Lineker.

89. The BBC contracts were made between the BBC and Mr Lineker and Ms Bux as the “Partnership” (see paragraphs 2, 4, and 37, above). BT Sport contracted with Mr Lineker and Ms Bux trading as GLM the “Partnership” (see paragraphs 3 and 42, above). Therefore, in each case the broadcaster concerned contracted with a partnership for the services of Mr Lineker.

90. The 2013 BBC Contract and 2015 BBC Contract were signed by both Mr Lineker and Ms Bux, the 2013 BBC Contract as the “Partners of the Partnership” (see paragraph 2 above) and although they were not described after their signatures in the 2015 BBC Contract, the capacity on which it was signed is clear from the front page of that contract, ie “each a ‘Partner’, and trading as [GLM], together the ‘Partnership’” (see paragraph 4, above). The BT Sport Contract by Mr Lineker “for and on behalf” of GLM (see paragraph 3, above).

91. Section 5 of the Partnership Act provides:

Power of partner to bind the firm.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

The effect of this provision is that, as Peter Gibson LJ observed in the passage from *Memec* cited above (at paragraph 76), each partner acts as “both as principal ... and as agent, binding the firm and his partners in all matters under his authority.”

92. It must therefore follow that, as a matter of law, when Mr Lineker signed the 2013 BBC Contract, the 2015 BBC Contract and the BT Sport Contract for the provision of his services, he did so as principal thereby contracting directly with the BBC and BT Sport. As such, the intermediaries legislation cannot apply – it is only applicable “where services are provided **not** under a contract directly between client and the worker” (emphasis added). In this case Mr Lineker’s services were provided under direct contracts with the BBC and BT Sport.

93. Although such a conclusion might appear inconsistent with my conclusions that the intermediaries legislation can apply to partnerships and that GLM was a partnership as defined by s 1(1) of the Partnership Act 1890, that is not the case.

94. Had the 2013 BBC Contract, the 2015 BBC Contract and BT Sport Contract not been signed by Mr Lineker, but only by Ms Bux on behalf of GLM, Mr Lineker, the worker, would, in accordance with s 5 of the 1890 Act, be bound to provide his services to either the BBC or BT Sport, the client. Such services would be provided not under a contract directly between the BBC/BT Sport and Mr Lineker – in these circumstances the direct contract would be with Ms Bux – but under arrangements involving a third party, either Ms Bux acting as Mr Lineker’s agent in her capacity as a partner in GLM or GLM itself given that a “third party” includes a partnership of which the worker is a member.

4. Estoppel

95. Given my conclusion that GLM was a general partnership, as defined by the 1890 Act, this issue does not arise.

DECISION

96. For the reasons above, although Ground 1 of the grounds of appeal is dismissed, the appeal succeeds in relation to Ground 2. This is sufficient to dispose of the entire appeal in the appellants' favour and the appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

97. This document contains full findings of fact and reasons for the decision on the preliminary issues. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

Release date: 27th MARCH 2023