117TACD2021

BETWEEN/

[redacted]

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. The Appellant, Mr. [redacted] is a sole trader, trading under the style and title of [redacted] *clinic*' (hereafter '*the clinic*'). The clinic provides dental, medical and gynaecological services to patients. The Appellant is a businessman and is not a qualified dentist or doctor. The Appellant entered into a number of contracts with dentists, doctors and a dental hygienist for the provision of medical and dental services to patients attending the clinic.

2. The appeal concerns the question of whether dentists, doctors and the dental hygienist engaged by the Appellant are in receipt of emoluments from an employment within the meaning of section 112 of the Taxes Consolidation Act 1997, as amended, ('TCA 1997'), or whether they are self-employed persons chargeable to tax under Case I Schedule D in respect of income of a trade. The Appellant contended that they were independent contractors working pursuant to contracts for services, while the Respondent contended that they were employees working pursuant to contracts of service. The Respondent raised notices of estimate on 18 October, 2016, in accordance with section 990 TCA 1997, regarding PAYE, PRSI and USC, totalling €93,593.58 in respect of the tax years of assessment 2012, 2013, 2014 and 2015 and the Appellant duly appealed.

Background

3. The Appellant is a sole trader, trading as '[redacted] *clinic'*. The clinic was established in 2009 and is located in [redacted] The clinic provides dental, medical and gynaecological services to patients. The Appellant is not a qualified doctor or dentist. The Appellant entered into a number of contracts with doctors, dentists and a dental hygienist *('the practitioners'*) for the provision of medical and dental services to patients of the clinic.

4. For the tax years of assessment 2012 to 2015, the Appellant made payments to seven individuals who provided medical/dental services on behalf of the clinic namely, four dentists (Doctors [redacted], [redacted] and [redacted] one dental hygienist (Ms. [redacted] and two gynaecologists, (Doctors [redacted] and [redacted]

5. The dentists were engaged under a contract titled '*Dental Associate Agreement'* which referred to the Appellant as '*the Practice Owner'* and the dentist as '*the Associate'.* The dental associate agreement comprised nineteen clauses and a schedule of eight parts. The dental hygienist and gynaecologists were engaged under written contracts comprising nine clauses (eight clauses in the case of one gynaecologist, Dr. [redacted] which referred to the Appellant as [redacted] *Medical Centre'* and for ease of reference these contracts are referred to from time to time as the '*doctors' contracts'*. The dental associate agreement and the dental hygienist and doctors' contracts are set out at **Appendix I** below.

6. The Appellant did not operate PAYE, PRSI and USC but treated the doctors, dentists and dental hygienist as independent contractors working under contracts for services and it is the Appellant's characterisation of the practitioners as such, which forms the basis of dispute in this appeal.

7. The Appellant provided the use of premises, fixtures, fittings and equipment to the practitioners, for the provision of services to patients of the clinic. This included a functioning surgery for both dentists and doctors.

8. The dentists were provided with a room equipped with a dental chair, access to an x-ray machine and dental instruments including; examination tools (a mirror and probes), manipulation tools, treatment tools (dental drill and burs), restorative tools (excavators, burnishers and pluggers) and removal tools (dental forceps, elevators and chisels). Clause 4.1 of the dental associate agreement provided a licence to the dentist to use the surgery premises and equipment for the duration of the term of the dental associate agreement. The dental hygienist was provided with a room equipped

with a dental chair and hand scalers. The doctors were provided with a room equipped with a gynaecology chair and access to an ultrasound scanner.

9. The dentists, dental hygienist and doctors were responsible for providing their own work clothing, personal protective equipment, various portable instruments and some medicines.

10. The clinic advertised online the set rates charged to patients for a menu of treatments and procedures. Advertising was undertaken by the Appellant in the name of [redacted] Clinic. No evidence of any practitioners charging separate rates was identified by the Respondent nor adduced in evidence by the Appellant.

11. Nursing and reception staff employed by the Appellant under contracts of service, were remunerated by the Appellant, and wore [redacted] Clinic uniforms. Clinic utility bills were discharged by the Appellant.

12. The dental associate agreement at clause 4.2 specified the working days and hours of each dentist. In general the dentists worked two to three full days per week. The Appellant stated that a practitioner could change his/her hours if required. There was no evidence at hearing that any of the dentists departed from their contracted hours. The Appellant in evidence stated that where practitioners were unavailable, appointments could be cancelled and rescheduled.

13. Dr. [redacted] a dentist, was engaged by the Appellant for a period of time in 2014. The contract furnished on behalf of Dr. [redacted] omitted to specify her particular days and hours of work and the photocopy supplied obscured some of the sub-clauses of clause 5 of the dental associate agreement. The contract provided that Dr. [redacted] would receive 50% as opposed to 40% of gross patient fees. This contradicted prior written submissions filed by the Appellant which stated that Dr. [redacted] received 40% of gross patient fees. Other than these details, the document comprised the same or similar terms to the other dental associate agreements. There was no evidence from the Appellant that any of the dentists were required to contact the Appellant to inform him of their nominated days or hours of work. His evidence was that dentists worked the hours specified at clause 4.2 of their contracts. Based on this evidence (and for the purposes of the analysis below) it is assumed that Dr. [redacted] had specified contractual hours that for some reason were omitted from the copy of the contract furnished. Even if I am incorrect in that assumption and Dr. [redacted] was required to nominate her availability to work certain days, my determination regarding the question of whether the dentists were employed under contracts *of* or *for* service(s) remains unchanged.

14. As regards the dental hygienist and the doctors, their contracts did not specify the hours for which they were contracted to work but required each practitioner to contact the Appellant to nominate the days on which he/she was available to work. The Appellant stated that the doctors worked approximately one or two days per month depending on the demand for their services and the dental hygienist worked a number of days per week.

15. Appointments for services were centrally booked through clinic reception and patients were introduced to practitioners for treatment. Payments were made and processed at clinic reception and receipts were issued on [redacted] Clinic headed paper. Appointments were scheduled into the dentists' contracted hours or in the case of the doctors and dental hygienist, into their nominated days. The practitioners could also request appointments to be scheduled in relation to their patients.

16. The Appellant submitted that the practitioners or some of them had other work streams in other practices and one of the dentists held a [redacted] The Appellant did not identify by name (though did identify by location in some instances) the other practices. The Appellant did not state whether dentists working elsewhere had done so in compliance with clause 10 of the dental associate agreement which required that the location of such work be in excess of 50 miles distance from the clinic. The practitioners themselves were not called to give evidence in relation to their other work.

17. The Appellant stated that the practitioners were not entitled to sick pay or holiday pay, did not attend staff functions and did not have promotion prospects within the clinic.

18. While clause 6 of the dental associate agreement provided that patient records and charts were the '*property of the treating dentist',* clause 6 provided that the patient data was retained and stored at the clinic and would be provided to the dentist on request. On termination of the dental associate agreement, all patient records and other details relating to the patients would be transferred to the Appellant '*or to a practice member'* approved by the Appellant who was responsible for the continuing care of such patients.

19. Data in relation to patient fees was compiled and computed by the Appellant. The Appellant carried out a monthly reconciliation in relation to each practitioner to determine fees due to the practitioner in a given month. The practitioners invoiced the Appellant on a periodic basis and practitioners' financial records were reconciled with those of the Appellant to ensure that the percentage of fees paid to the practitioners accorded with the terms of their contracts, which provided for

practitioners to receive 40% or 50% of gross patient fees (clause 2 of the doctors' contracts and clause 5(d) and part 5 of the dental associate agreement). The contract in relation to Dr. [redacted] provided that she was entitled to receive 50% of gross patient fees however, the Appellant in prior written submissions stated that Dr. [redacted] received 40% of fees charged to patients. The dentists' fee was paid net of laboratory fees. The Appellant stated that the dentists utilised the services of dental laboratories without input from [redacted] Clinic with regards to a preferred supplier.

20. For PRSI and general medical services ('GMS') patients, the patients provided insurance details at clinic reception and payment in relation to these patients came directly from the insurer to the practitioner. The payments formed part of the monthly reconciliations prepared by the Appellant. In this appeal the assessments raised by the Respondent did not include payments received directly by practitioners from insurers (which were received net of professional services withholding tax ('PSWT')). The assessments subjected to tax those monies received by the Appellant, which were subsequently paid by the Appellant to practitioners.

21. Payment made by patients at clinic reception was lodged to the clinic bank account (the Appellant's bank account) and accounted for as turnover in the Appellant's financial accounts. Payments to the practitioners were treated as expenses in the Appellant's accounts. The practitioners registered as self-employed with the Respondent, engaged their own accountants and filed their own tax returns.

22. While the dental associate agreement and the doctors' contracts contained substitution clauses (considered below, paragraphs 177-188), the provision of a substitute to perform duties of a practitioner did not occur in practice.

23. In the event that the practitioners were required to correct faulty or substandard work, they were obliged to do so in their own time and at cost to themselves. In practice, this did not occur in relation to the doctors. The Appellant stated that it arose in relation to dentists and that they carried out the work during their lunch hours or between other patient appointments.

24. Practitioners were responsible for their own professional indemnity and public liability insurance costs. The practitioners were responsible for their own continuing professional development ('CPD') and any additional training was undertaken at the practitioner's own discretion, time and cost.

25. Dental practitioners were expressly prohibited from asserting a claim to goodwill in relation to patients treated while working at the practice (clause 13), from canvassing patients away from the practice (clause 14.2 of the dental associate agreement) and

in the event a dentist left the clinic, the dentist was prohibited from practicing within a radius of 50 miles for a period of 12 months (clause 15). The Appellant stated that some practitioners had no patients when they commenced working at the clinic but that one in particular brought patients with her from a previous practice.

26. One of the dentists departed the clinic in acrimonious circumstances, claiming she was owed money which had not been paid by the Appellant. The Appellant's position was that he did not owe the money. The money was not paid to the dentist in question and Appellant cited this as an example of the financial risk of the dentist being a self-employed person. He stated that the dentist did not commence legal action under employment legislation and that this evidenced that the dentist was self-employed *'as it would be common place for a disgruntled person acting as an employee to take legal action against an employer'*.

Legislation

Section 112 TCA 1997 – Basis of assessment, persons chargeable and extent of charge

(1) Income tax under Schedule E [shall be charged for each year of assessment] on every person having or exercising an office or employment of profit mentioned in that Schedule, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatever therefrom, and shall be computed on the amount of all such salaries, fees, wages, perquisites or profits whatever therefrom for the year of assessment.

(2)(a) In this subsection, "emoluments" means anything assessable to income tax under Schedule E.

Section 522 TCA 1997 - Obligation on authorised insurers

Subject to section 523(1), where under a contract of insurance a claim is made to an authorised insurer in respect of relevant medical expenses –

(a) The insurer shall, subject to section 529A, discharge the claim by making payment to the extent of the amount of the benefit, if any, due under the contract –

(i) to the practitioner who provided the professional services to the subscriber or member concerned to whom the relevant medical expenses relate, or,

(ii) to the employer of the practitioner who provided the professional services to the subscriber or member concerned, where the professional services to which the claim relates were provided by the practitioner in the practitioner's capacity as employee rather than on the practitioner's own account,

and

(b) The subscriber or member, as the case may be, shall be acquitted and discharged of such amount as is represented by the payment as if the subscribed or member had made such payment.

Section 990 - Estimation of tax due for year

(1)Where the inspector or such other officer as the Revenue Commissioners may nominate to exercise the powers conferred by this section (in this section referred to as "other officer") has reason to believe that the total amount of tax which an employer was liable under the regulations to remit in respect of the respective income tax months comprised in any year of assessment was greater than the amount of tax (if any) paid by the employer in respect of those months, then, without prejudice to any other action which may be taken, the inspector or other officer –

(a)may make an estimate in one sum of the total amount of tax which in his or her opinion should have been paid in respect of the income tax months comprised in that year, and

(b)may serve notice on the employer specifying –

(i)the total amount of tax so estimated,

(ii)the total amount of tax (if any) remitted by the employer in relation to the income tax months comprised in that year, and

(iii)the balance of tax remaining unpaid.

[(1A) (a)Where—

(i)a notice is served on an employer under subsection (1) in relation to a year of assessment (being the year of assessment 2000-2001 or a subsequent year of assessment), and

(ii)prior to the service of the notice, the employer had failed to submit to the Collector-General, in relation to that year of assessment, the return required by [Regulation 31 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001)]

then, if, within 14 days after the service of the notice, the employer—

(I)sends that return to the Collector-General, and

(II)pays any balance of tax remaining unpaid for the year of assessment in accordance with the return, together with any interest and costs which may have been incurred in connection with the default,

the notice [may], subject to paragraph (c), stand discharged and any excess of tax which may have been paid [may] be repaid.

(b)If, on expiration of the period referred to in paragraph (a), the employer has not complied with subparagraphs (I) and (II) of paragraph (a), the balance of tax remaining unpaid as specified in the notice shall become due and recoverable in the like manner as if the balance of tax had been charged on the employer under Schedule E.

(c)Where action for the recovery of tax specified in a notice under subsection (1) has been taken, being action by means of the institution of proceedings in any court or the issue of a certificate under [section 960L], so much of paragraph (a) as relates to the discharge of the notice shall not, unless the Collector-General otherwise directs, apply in relation to that notice until that action has been completed.]

[(d)Where –

(i)the amount of tax estimated in a notice under subsection (1) is remitted and the return required by Regulation 31 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001) is not submitted, or

(ii)the inspector or other officer has reason to believe that the amount estimated in the notice is less than the amount which the employer was liable to remit,

the inspector or other officer may amend the amount so estimated by increasing it and serve notice on the employer concerned of the revised amount estimated and such notice shall supersede any previous notice issued under subsection (1).]

(2)Where a notice is served on an employer [under this section] [and prior to such service the employer had sent to the Collector-General the return required by [Regulation 31 of the Income Tax (Employments) (Consolidated) Regulations 2001 (S.I. No. 559 of 2001)]

[(a)an employer aggrieved by a notice served under this section on that employer may appeal the notice to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of that notice;]

(b)on the expiration of that period, if no notice of appeal is received or, if notice of appeal is received, on determination of the appeal by agreement or otherwise, the balance of tax remaining unpaid as specified in the notice or the amended tax as determined in relation to the appeal shall become due and be recoverable in the like

manner and by the like proceedings as if the balance of tax or the amended tax had been charged on the employer under Schedule E.

(3)A notice given by the inspector or other officer [under this section] may extend to 2 or more years of assessment.

Submissions in brief

26. The matter at issue in this appeal was whether dentists, doctors and a dental hygienist ('*the practitioners*') working at the clinic were working under contracts *of* service or whether they were working under contracts *for* services. The Appellant contended that the practitioners were independent professionals working under contracts for services. The submissions of the parties can be summarised as follows;

Mutuality of obligation

27. The Appellant submitted that mutuality of obligation was absent in the practitioners' contracts and that irrespective of the legal tests to be applied in ascertaining whether a contract is one *of service* or *for services*, the contracts herein could not be determined to be contracts of service and thus the estimates raised under section 990 TCA 1997, could not be allowed to stand. The Respondent submitted that the Appellant relied on the presence of mutuality of obligation in the practitioners' contracts to carry on his business and that the contractual relationship between the Appellant and the practitioners contained the requisite mutuality of obligation. Submissions on mutuality are set out in further detail at paragraphs 81-120 below.

Employment/self-employment

28. In relation to whether the Appellant's contracts with the practitioners constituted of contracts *of service* or contracts *for services*, the Respondent contended that the relevant legal tests indicated that the contracts were *of service*, while the Appellant submitted that the application of these tests supported his view that the contracts were *for services.* Submissions in relation to the applicable legal tests are set out in further detail at paragraphs 121-200 in the analysis below.

<u>Miscellaneous submissions</u>

29. The analysis in relation to whether the practitioners were self-employed independent contractors or whether they were employees of the clinic requires a detailed consideration

of all aspects of the Appellant's business and his relationship with the practitioners. Some of those considerations are dealt with hereunder as follows;

Dental Hygienist

30. The Appellant stated that Ms. [redacted] the dental hygienist, worked a number of days per week at the clinic and was engaged as an independent contractor. In accordance with clause 2 of her written contract, she received 50% of the fees charged to patients and she invoiced the Appellant for work carried out. The Appellant stated that Ms. [redacted] determined the days upon which she saw patients at the clinic. The Appellant, on the instruction of the dental hygienist, scheduled the relevant patient appointments. The Appellant stated that when Ms. [redacted] came to work at the clinic, she brought her existing book of patients. The Appellant submitted that as a result, she was in business on her own account in her working relationship with the Appellant. The Appellant stated that when she left the clinic following a dispute, he noticed that some of her patients stopped attending. The Appellant stated that Ms. [redacted] took business with her. The Appellant stated that there is a new dental hygienist working at the clinic who is treated and taxed as an employee.

31. The Respondent put it to the Appellant that a dental hygienist must work under the care of a registered dentist and that carrying on trade as a sole practitioner with her own patient book, independent of a registered dentist would not be possible. The Appellant stated that this was correct. The Appellant submitted that the obligations on the hygienist pursuant to the provisions of the Dentists Act, 1985, did not determine the law on whether an individual was employed or self-employed.

32. The dental hygienist was contracted to the Appellant on the same terms as the doctors and her employment status is considered in further detail below.

GMS/PRSI

33. The services provided by the practitioners pursuant to their contracts generated the relevant patient fees (turnover) of the clinic. The private fees paid by patients at clinic reception were paid to the Appellant and the Appellant transferred to the practitioner, the practitioner's share of such fees following the preparation of a monthly reconciliation. Fees in relation to PRSI/GMS patients were received by the practitioners from insurers and were received net of PWST. The fee sharing percentages contained in the practitioners' contracts (clause 2 of the doctors' contracts and clause 5(d) and part 5 of the dental associate agreement) applied to both PRSI/GMS fees and private fees and the monthly reconciliation accounted for and included both PRSI/GMS fees and private fees.

34. The Respondent submitted that there was no requirement for insurance companies to pay practitioners directly and that if the practitioners had (in view of the Respondent) correctly identified themselves as employees, insurance payments could have been made directly to the Appellant as employer, pursuant to section 522(a)(ii) TCA 1997, from 1 January 2014.

35. All fees, whether PRSI/GMS or private, were generated by the practitioners on foot of services carried out in the clinic in accordance with the terms and conditions of their contracts. The receipt by practitioners of patient fees from insurers in relation to GMS/PRSI patients, does not characterise the nature of the contract between the Appellant and the practitioners in terms of determining whether it is a contract *of* or *for* service(s) and consequently, I attach minimal weight to the insurance arrangements surrounding these particular payments.

36. The Respondent stated that the payments which were received directly by the practitioners for GMS/PRSI patients were received net of PSWT and have not been included by the Respondent in the assessments under appeal. On behalf of the Respondent it was stated that the assessments subjected to tax, monies paid by patients of the clinic to the Appellant which were subsequently paid to practitioners by the Appellant, in the agreed fee sharing percentages.

Insurance

37. Practitioners were responsible for their own professional indemnity and public liability insurance costs and the Appellant contended that this was consistent with their characterisation as self-employed independent contractors. The Respondent submitted that all medical and dental practitioners whether self-employed or employees are required to carry their own insurance. In this regard, the Respondent submitted that minimal significance should be attributed to the fact that practitioners carried their own insurance and I accept this submission on the part of the Respondent.

Joint venture

38. The Appellant submitted in his letter of 29 March, 2019, that he and the practitioners viewed the arrangements as a '*joint venture type relationship'* where revenues and costs were split and where the practice was run on a collegiate basis.

39. The Appellant submitted that the contracts held by the practitioners with health insurers formed the practitioners' contribution to the joint venture. In this regard it is important to be clear that the source of these fees was not the insurer *per se*, but the medical and dental services provided by the practitioners to patients of the clinic. The practitioners were

contracted to share these fees with the Appellant on the same terms at the same percentages as all other fees generated by the provision of their services.

40. The submission that the Appellant and the practitioners intended their engagement to be a joint venture, is not supported by clause 17 of the dental associate agreement which provides:

> *17.1 Nothing herein shall constitute this Agreement as a Partnership or Joint Venture between the Parties;*
> *17.2 In this Agreement nothing shall be deemed to make the Associate an employee of the Practice Owner, or to make any party the agent for any other party, for any purpose whatsoever.*

41. The practitioners in this appeal were not called to give evidence and there was no evidence that the practitioners were involved in the formation or establishment of [redacted] Clinic. Further, there was no written joint venture agreement. The Appellant established the clinic, set the policies and standards of the clinic and formulated the method of remunerating the practitioners. In addition, the Appellant exercised control over the location, the opening hours and the premises. The Appellant was solely responsible for the employment and remuneration of nursing and reception staff. Significantly, the practitioners had no role in the management, strategic operation or development of the clinic as an enterprise. On balance, I find there was insufficient evidence to support the Appellant's contention that there was a joint venture in existence between the Appellant and the practitioners.

Evidence and findings

42. The dental associate agreement and the dental hygienist and doctors' contracts are set out at **Appendix I** below.

Witness evidence

43. Evidence was provided by the Appellant, Mr. [redacted]

44. The Appellant in his evidence stated that it was his intention and the intention of the practitioners that they be treated as self-employed persons. While the dentists worked the hours specified at clause 4.2 of their contracts, the doctors worked approximately one or

two days per month depending on the demand for their services. The Appellant stated that where practitioners were unavailable, appointments would be cancelled and rescheduled.

45. The Appellant stated that the practitioners were not entitled to sick pay or holiday pay, did not claim motor or travel expenses and did not attend staff functions. He stated that the practitioners did not direct clinic employees and did not wear clinic uniforms. In addition, the Appellant stated that the practitioners did not have promotion prospects within the clinic and that there were no professional development obligations placed on them by the clinic. He stated that the dentists and doctors looked after their own continuing professional development.

46. The Appellant stated that he was not obliged to provide any work to the practitioners or to try to ensure on a given day when a practitioner was allocated clinic hours, that there was sufficient work. He stated that the practitioners had control over when they scheduled their own personal engagements for example, if not available on a given morning they may choose a different morning within which to schedule appointments. He stated that there would be days when patients would cancel appointments and the appointment would be rescheduled to a date and time when the practitioner was available or if necessary, would be scheduled for another practitioner working at [redacted] Clinic.

47. The Appellant stated that he had no control over how the dentists, dental hygienist and doctors conducted their work.

48. The Appellant stated that the two doctors informed him when they were available for work and when patients should be booked in for appointments. In written submissions, the Appellant stated that on the instruction of the practitioners, he scheduled patient appointments. Further, there was a centralised booking system in place in the clinic which allowed patients to call and request appointments which were subsequently scheduled by reception staff. (The Respondent on this point stated that the Revenue intervention strongly indicated that the clinic scheduled all appointments for practitioners.)

49. The Appellant stated that where there was an error with a patient, the practitioner was obliged to follow up and perform any necessary corrections in his/her own time. He stated that the practitioner could fit this in between patients or on lunch breaks. He stated that he did not remunerate the practitioners for remedying their errors.

50. In terms of equipment provided, he stated that equipment was provided by him on site but that some doctors provided their own portable instruments.

51. In terms of remuneration, the Appellant stated that there was no minimum remuneration requirement for practitioners at the clinic. He stated that private patients paid the clinic

but that for PRSI/GMS patients, the practitioner received payment directly from the insurer and a reconciliation of fees would then take place based on the agreed fee sharing percentages. He stated that dentists also discharged other costs such as laboratory fees. He stated that there was no *per diem* rate.

52. When asked during direct examination: '*How do doctors see the* [redacted] *practice*?' he stated that they see it as an extension of their own practices. He stated that doctors carry their own goodwill. He stated that Dr. [redacted] had her own practice in another location and was also a [redacted] He stated that some dentists were newly qualified and had no goodwill and no clients when they started at the clinic. He stated that when the dental hygienist joined the practice she brought her own patients and when she left the practice she took her business with her. He stated that both doctors had other practices in different locations.

53. In relation to payment, the Appellant stated that when a patient called the clinic, the appointment is booked with [redacted] Clinic. He stated that payments were made to the clinic by patients at clinic reception. He stated that payment by card goes to a business bank account in his name, trading as [redacted] Clinic. He stated that a receipt is issued by clinic reception on [redacted] Clinic headed paper.

54. He stated that he carried out monthly reconciliations to work out how much money was to be paid to each practitioner and that a practitioner would then be issued with a balancing statement in relation to their account with [redacted] Clinic. When asked whether the balancing statement would issue to the practitioners on [redacted] Clinic headed note paper, he stated that it would not. The Respondent's official then produced one of the balancing statements on [redacted] Clinic headed note paper and the Appellant stated that he might or might not issue the balancing statements on [redacted] Clinic headed note paper. The Appellant subsequently stated that paying the practitioners on [redacted] Clinic headed paper was not especially significant and that sometimes the dentists paid the Appellant at the month end and not the other way round.

55. When asked about clinic utility bills he stated that he paid them. When asked whether fixtures and fittings were provided, he stated that he provided them and confirmed that he claimed capital allowances on them.

56. In terms of staff he stated that there were no dental nurses but that there were reception staff, all of whom were employees and were taxed as employees.

57. When asked by the Respondent who paid for advertising he stated that the costs were sometimes split. (However, there was no financial or documentary evidence of the sharing of advertising costs). He stated that he had a website which advertised online and provided

a price list. He stated that the prices were advertised under '[redacted] *clinic*'. The Respondent put it to the Appellant that Dr. [redacted] a dentist, had informed the Respondent that there was no advertisement by him and that he relied on the advertisement of the clinic. The Appellant responded that that wouldn't surprise him as the clinic does not advertise names, just services.

58. In relation to the dental hygienist, the Appellant stated that the hygienist received approximately 50% of fees she generated. The Appellant stated that she left the clinic following a dispute. The Appellant stated that there is now a new dental hygienist working at the clinic who is treated and taxed as an employee. The Respondent put it to the Appellant that a dental hygienist must work under the care of a dental practitioner and is not permitted to have his/her own client list or to open his/her own independent practice and the Appellant stated that this was correct.

59. One of the dentists, Dr. [redacted] departed the clinic in acrimonious circumstances, claiming she was owed money which had not been paid by the Appellant. The Appellant's position was that he did not owe the money. The money was not paid to Dr. [redacted] and the Appellant cited this as an example of the financial risk of the dentist being a self-employed person. He stated that the dentist did not commence legal action under employment legislation and that this evidenced that the dentist was self-employed *'as it would be common place for a disgruntled person acting as an employee to take legal action against an employer'*.

60. Clause 7 of one of the gynaecologist's contracts provided: *'Apart from the premises and related fixtures and fittings the Gynaecologist will provide any ancillary equipment required.'* A similar clause was contained in the dental hygienist's contract. The Appellant submitted that the doctors were responsible for the provision of the following portable equipment; stethoscopes, medications, cervical swab testing equipment, intrauterine devices, instruments for insertion/removal of marina coils, speculums, work clothing and personal protective equipment.

61. The Appellant submitted that the dentists were responsible for the provision of the following portable equipment: work clothing and personal protective equipment, manipulation tools, treatment tools, restorative tools, removal tools, orthodontic instruments including a camera equipped with a special lamp for photography and related software package (which the Appellant submitted cost in the region of €4,000), endodontic instruments (which the Appellant submitted cost from €30-€300), dental loupes (which the Appellant submitted cost in the region of €2,000) and endodontic motors (which the Appellant submitted cost in the region of €5,000).

62. The Appellant submitted that the dental hygienist was responsible for the provision of an ultrasound cavitron scaler which the Appellant submitted carried a cost in the region of

€6,000. The Appellant stated that he understood that some practitioners obtained loans to acquire equipment necessary to perform their duties.

63. The Respondent stated that the practitioners did not claim capital allowances that would substantiate the levels of capital expenditure identified in relation to the portable tools. As the practitioners were not called as witnesses, there was no evidence from them to confirm that they had incurred these costs in relation to portable tools nor did the Appellant provide any financial or documentary evidence in support of this submission. As such, the Respondent did not accept the uncorroborated evidence of the Appellant in relation to portable tools.

Operation of contracts and evidential findings

64. Based on the evidence, I find that while portable equipment may have been provided by some of the practitioners, there was insufficient evidence to substantiate or corroborate the Appellant's claim that substantial expenditure was incurred by the practitioners in the provision of portable equipment.

65. I find there was an absence of cogent evidence in support of the existence of a joint venture as alleged by the Appellant.

66. On the evidence, the contract did not, in its day to day operation, function *verbatim* its terms. In particular, I find as follows;

- While the terms of the practitioners' contracts contained substitution clauses, in practice, practitioners' absences were covered without the need to substitute. On the evidence, neither the dentists nor the doctors at any stage engaged and paid (at cost to themselves) a substitute. In reality, the business responded to practitioner unavailability by cancelling and rescheduling appointments rather than by substitution.

- The Appellant stated that the dental hygienist and doctors informed the Appellant when they were available for work and when patients should be booked in for appointments (contract clause 4). In written submissions, the Appellant stated that

on the instruction of the practitioners, he scheduled patient appointments. There was a centralised booking system in place in the clinic which allowed patients to call and request appointments which were then scheduled by reception staff. While the doctors may have requested certain patients to be scheduled, it is clear that appointments were also scheduled (at the request of patients) by clinic staff, into the days on which the practitioners confirmed that they were available to work.

- The recital to the dental associate agreement provided that the Appellant and the dentist '…*have agreed an arrangement set forth in this Agreement on foot of which the Associate can carry on practice as an independent practitioner at the Surgery but subject to the payment to the Practice Owner of a contribution to the overheads of the Practice Owner on terms and conditions more particularly set out herein'.* However, there was no evidence that overheads were separately billed to individual dentists or that fees were calculated in accordance with itemised overheads. In addition, there was no evidence that practitioners were consulted in relation to overheads, overhead management or the mitigation of overhead costs. The Appellant in evidence stated that he paid the clinic utility bills. On the evidence, I am satisfied that overheads were discharged by the Appellant and not by the practitioners.

- The dental agreement provided at clause 19(iii) that: '*The Practice Owner and the Associate have participated jointly in the negotiation and preparation of this Agreement…*' however, the Appellant led no evidence that suggested the contracts were jointly negotiated and in the absence of evidence from the practitioners, the standardised nature of the contracts (with the exception of Dr. [redacted] fee sharing rate) suggests there was minimal negotiation on behalf of individual practitioners in relation to the terms of the contracts.

Material findings of fact

67. Based on the evidence, I make the following material findings of fact;

a) I find as a material fact that in practice, the dental hygienist and the doctors would contact the Appellant in accordance with clause 3 of their contracts to provide an instruction to the Appellant in relation to the days they were available to work. The doctors worked approximately one or two days per month depending on the demand for their services while the dental hygienist worked a number of days per week. Patient appointments were subsequently scheduled into these days.

b) While the terms of the practitioners' contracts contained substitution clauses, in practice, practitioners' absences were covered without the need to substitute. On the evidence, neither the dentists nor the doctors at any stage engaged and paid (at cost to themselves) a substitute. In reality, the business responded to practitioner unavailability by cancelling and rescheduling appointments rather than by substitution. I find as a material fact that the provision of a substitute to perform duties of a practitioner at cost to the practitioner did not occur during the relevant tax years of assessment.

c) The Appellant stated that he had a website which advertised online in the name of the clinic, the set rates charged to patients for a menu of treatments and procedures. The Appellant stated that he did not set the rates but that practitioners set the rates based upon the services they provided. When asked by the Respondent who paid for advertising, the Appellant stated that the costs were sometimes split. However, there was no financial or documentary evidence of the division of this cost as between the Appellant and the practitioners and no evidence that the practitioners had a role in the clinic website. In addition, no evidence of practitioners charging separate rates was identified. Dr. [redacted] a dentist, informed the Respondent that there was no advertisement by him and that he relied on the advertisement of the clinic. I find on the evidence that the rates charged for procedures and treatments at the clinic were set by the Appellant and that clinic advertising costs were borne by the Appellant.

ANALYSIS I – Contract

68. In the High Court case of *Minister for Agriculture v Barry* [2011] IEHC 43, Mr. Justice John Edwards clarified the sequence in which legal questions were to be considered in cases involving the characterisation of employment contracts as contracts either *of* or *for* service(s), stating that the analysis must commence with a consideration of whether the relationship between the employer and the worker was subject to one or more contracts. At paragraph 43, Edwards J. stated;

> *'In each instance it was incumbent on the tribunal to ask three questions. The first question was whether the relationship between each respondent and the appellant was subject to just one contract, or more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.'*

69. Each of the practitioners working at [redacted] Clinic entered into a written contract with the Appellant, which set out the terms and conditions governing their relationship with the Appellant (set out at *Appendix I* below). The contracts were terminable on notice.

70. Individuals providing work may do so under a single contract, under multiple individual contracts or under a combination of both. The possibilities were articulated by Judge Edwards in the *Minister for Agriculture v Barry* at paragraph 44, where he stated;

> *'As I have stated, there were various possibilities. It was, of course, possible that each of the respondents, respectively, was employed under a single contract which, upon a thorough examination of the circumstances, might fall to be classified as either a contract of service or a contract for services. However, another possibility was that on each occasion that the temporary veterinary inspectors worked they entered a new contract, and these contracts, depending on the circumstances, might fall to be classified as contracts of service or contracts for services. A third possibility is that on each occasion that the temporary veterinary inspectors worked they entered a separate contract governing that particular engagement, which might be either a contract of service or a contract for service, but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of overarching master or umbrella contract, if you like, to offer and accept employment, which master or umbrella contract might conceivably be either a contract of service or a contract for services or perhaps a different type of contract altogether.'*

71. In the UK case of *Weight Watchers (UK) Ltd. and ors v Revenue and Customs Commissioners* [2011] UKUT 433 (TCC). Briggs J. at paragraph 30 described the possibilities as follows;

> *'30. Contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories. The first consists of a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work. The second consists of a series of discrete contracts, one for each period of work, but no overarching or umbrella contract. The third, hybrid, class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the overarching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified*

sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable national insurance regime apply to the work done by the Leaders, it is clearly sufficient if there is identified either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods during which the Leader's work is carried out.'

72. The dental associate agreement provided that the agreement *'shall continue until determined in accordance with the provisions hereof'* (clause 1) and that the dentists '*shall use every reasonable endeavour to utilise the Surgery for the following times:…*'. The agreement provided that the Appellant granted the dentist a temporary licence to use the surgery, premises and equipment for the duration of the agreement (clause 4.1) and stipulated the days and hours per week in which a dentist was scheduled to work (clause 4.2). Thus, the dentists worked under a single written contract with the Appellant, containing their scheduled days and hours of work, which operated on a continuous basis pending termination thereof in accordance with clause 14.

73. By contrast, the dental hygienist and doctors' contracts required the doctors to provide an instruction to the Appellant in relation to the days upon which they were available to work, in accordance with clause 3 of their contracts which provided;

'***WHEREAS*** [practitioner name] *being a self employed individual does hereby agree to provide Gynaecological services ("Services") to* [redacted] *Medical Centre on an arms length basis under the following terms:*

…..

3. [redacted] *medical centre agrees to schedule appointments on instruction of Gynaecologist with regards to days.'*

74. In the recent High Court case of *Karshan (Midlands) Limited trading as Dominos Pizza v Revenue Commissioners,* [2019] IEHC 894, Mr. Justice Tony O'Connor delivered judgment on the matter of whether Dominos' delivery drivers worked under contracts *of* or *for* service(s). O'Connor J. found that the pizza delivery drivers worked under an over-arching written 'umbrella' contract supplemented by individual contracts for assignments of work. The Court found that the written umbrella contract required a driver to initiate an agreement with *Dominos* as a driver who required work was obliged to put his name on an availability sheet. Once the driver was rostered for shift(s) of work, there were contract(s) in existence supplemental to the over-arching umbrella contract.

75. The UK case of *Weight Watchers (UK) Ltd. and ors v Revenue and Customs Commissioners* [2011] UKUT 433 (TCC) examined *inter alia*, the contractual relationships between Weight Watchers (UK) Ltd. and the persons it engaged ('leaders') to arrange and conduct meetings of consumers of the Weight Watchers programme. The UK Upper Tax and Chancery Tribunal agreed that although there was a continuous contractual relationship between Weight Watchers and each leader in accordance with an overarching umbrella contract, each meeting or series of meetings was conducted pursuant to a specific contract which incorporated, to the extent applicable, the terms of the umbrella contract. Briggs J., at paragraph 79 of the decision stated:

> '*the FTT concluded that, in relation to any specific meeting or series of meetings, Leaders conducted them pursuant to specific contracts for the taking of those meetings, rather than pursuant to any general umbrella agreement. Further, I am equally satisfied that the FTT concluded that, in addition to meeting-specific contracts, there was indeed an overarching or umbrella contract between WWUK and each Leader, dealing in particular with obligations of Leaders affecting them otherwise than when taking meetings.*'

76. While clause 3 of the contracts in this appeal required the dental hygienist and doctors to provide an instruction to the Appellant in terms of the days upon which he/she was available for work, clause 3 provided expressly for the Appellant's agreement in this regard once the days were specified by the doctor/dental hygienist. The Appellant stated that the doctors worked approximately one or two days per month depending on the demand for their services while the dental hygienist worked a number of days per week. Once the Appellant accepted notification by the doctors/dental hygienist of their nominated days of work (agreed in accordance with clause 3) and the Appellant scheduled appointments into those days, there was a contract for the assignment of work which the doctor/dental hygienist was obliged to fulfil subject to his/her entitlement to provide a substitute in accordance with clause 6.

77. Multiple individual contracts for separate engagements of work may form contracts of service in certain circumstances. In *Karshan*, the High Court concluded that the multiple individual contracts for assignments of work (which were supplemental to the over-arching umbrella contract) constituted contracts of service.

78. In the UK case of *Quashie v Stringfellows* [2013] I.R.L.R. 99, Lord Justice Elias at paragraph 10 of that judgment, Elias LJ. stated;

'Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in Meechan v Secretary of State for Employment [1997] IRLR 353, [1997] ICR 549 and Cornwall County Council v Prater [2006] EWCA Civ 102, [2006] 2 All ER 1013, [2006] IRLR 362.'

79. I am satisfied that the doctors and the dental hygienist worked under a hybrid contract consisting of an over-arching umbrella contract (the written contract) supplemented by multiple individual contracts for assignments of work (containing one or more days of work) and that the dentists worked under a single written contract which specified at clause 4.2 their hours and days of work.

80. However, for a contract to constitute a contract of service, it must be established that mutuality of obligation is present and that aspect is addressed in the second part of the analysis below.

ANALYSIS II - Mutuality of obligation

81. In *Minister for Agriculture v Barry* [2011] IEHC 43, Mr. Justice Edwards, at paragraph 47 stated;

'*The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. .... Accordingly, the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that the relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further; whatever the relationship is, it cannot amount to a contract of service.*

82. The above passage was quoted and approved in *Mansoor v Minister for Justice* [2010] IEHC 389, in *McKayed v Forbidden City Ltd*. [2016] IEHC 722, and in *Brightwater Selection (Ireland) Ltd. v Minister for Social and Family Affairs* [2011] IEHC 510, where Mr. Justice Gilligan stated that: '*the mutuality consideration is by no means a determinative test, but is an irreductible minimum of a contract of service*.' More recently, the dicta was cited and approved by O'Connor J. in the High Court case of *Karshan (Midlands) Limited trading as Dominos Pizza v Revenue Commissioners,* [2019] IEHC 894.

83. Thus, for a contract of service to exist, there must be mutuality of obligation, *i.e.* an obligation on the employer to provide work and an obligation on the employee to perform the work for his employer. The authorities are clear on the fact that while an individual is working, there is a contract in existence in which mutuality of obligation is present.

84. In *Stephenson v Delphi Diesel Systems* [2003] 1 ICR 471 Elias J. said at paragraph 13;

> *'The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations*.'

85. If the contract is a contract of service, mutuality will be present throughout the existence of the contract and not simply in respect of the period of time when the work is being carried out.

86. The Appellant submitted that the requisite mutuality was absent because there was no obligation on the Appellant to provide patient appointments or to try to ensure on a given day that there was sufficient work to generate a minimum income. The Appellant submitted that there was no obligation on the practitioners to accept and carry out patient appointments as the practitioners were entitled to turn down or cancel patient appointments. The Appellant submitted that appointments could be cancelled by a practitioner if the practitioner was unavailable due to illness, if the appointment was not profitable or if the practitioner was double booked. The Appellant stated that on one occasion, a practitioner turned down a patient due to encountering hostile behaviour. In addition, the Appellant submitted that mutuality was absent because the practitioners were entitled to provide a substitute to provide the work.

87. The Respondent submitted that the clinic did in practice provide patients to the practitioners (having advertised its services to prospective patients) and that the

practitioners carried out the necessary treatments. While practitioners could refuse to see particular patients, the Respondent submitted that in reality, that was not the practice. The Respondent submitted that while a practitioner could cancel or reschedule an appointment, it did not follow that mutuality was absent. The Respondent submitted that the clinic business model strongly relied on mutuality of obligation. The Respondent submitted that mutuality was present for the duration of the relevant contracts and that in practice, substitution did not occur but that patient appointments were simply cancelled and rescheduled.

88. Each of the practitioners working at [redacted] Clinic entered into a written contract with the Appellant. The dental associate agreement provided that the contract *'shall continue until determined in accordance with the provisions hereof'* (clause 1). The contract was terminable on notice in accordance with clause 14. The dental hygienist and doctors' contracts provided: *'This agreement to remain in place unless terminated by means of 8 weeks notice by either party*' (clause 9 of the contracts of Dr. [redacted] and Ms. [redacted] and clause 8 of Dr. [redacted] contract).

89. The Appellant submitted that he was not obliged to provide work and the practitioners were not obliged to accept work and that mutuality of obligation was absent in respect of both the dental associate agreement and the doctors' contracts. The dental associate agreement contained a mutuality of obligation clause at 5(g), which provided as follows; *'The Practice Owner may introduce to the Associate patients desirous of dental advice or treatment but the Associate shall be under no obligation to accept for advice or treatment any patient so introduced and vice-versa'.*

90. The contract contained several other provisions citing obligations of the dentists to provide their services and to treat patients of the clinic including, treatment post termination of the contract.

91. Clause 3 of the dental associate agreement provided: *'The Associate will faithfully and to the best of his/her skill carry on the business of dental practitioner and shall be responsible and liable for the provision of dental treatments to patients of the Practice Owner to the highest ethical and clinical standard:..'*

92. Clause 4.1 provided: *'The Practice Owner grants the Associate a temporary licence for the duration and term of this agreement for the sum of €1.00 (receipt of which is hereby acknowledged by the Practice Owner) to use the Surgery during Surgery opening hours (set out at 4.2 below) and the Surgery premises and equipment therein provided always that such licence is non exclusive and is for the temporary convenience of the parties only and nothing in this agreement shall constitute a tenancy in respect of the Surgery.'*

93. Clause 4.2 of the dental associate agreement provided: *'The Practice Owner shall cause the Surgery to be available at the following times, except on days agreed by the parties to be holidays and the Associate shall use every reasonable endeavour to utilise the Surgery for the following times:..'*

94. Clause 5(c) provided: *'During the continuance of the Agreement the Associate shall:- Attend to all cases with all reasonable promptitude and exercise all reasonable skill in the treatment given and prescribed; ...'*

95. Cause 5(e) of the dental associate agreement provided: '*The Associate shall complete treatment plans for patients solely and exclusively under his/her own care (unless otherwise agreed with the Practice Owner) and shall not attend any of the Practice Owner's patients or of any other dentist in the practice otherwise than on the Practice Owner's behalf or on behalf of any other dentist in the practice. If the Practice Owner requests treatment of his/her patients then the Associate shall exercise proper professional skill and diligence in the rendering of his services and in such circumstances the Associate shall make and collect from patients such charges for attendance as may be prescribed/agreed with/by the Practice Owner.'*

96. Clause 5(f) provided: *'The Practice Owner shall not place any restriction on the patients that the Associate may attend or the types of treatment that he/she may provide, provided always that the Associate shall have due regard to their professional competency.'*

97. Clause 16 provided: *'On termination the Associate will also be required at the option of the Practice Owner to complete treatment for each patient unless otherwise agreed with the Practice Owner.'*

98. Clauses 5(i) and 9 provided that the associate would be exclusively responsible for providing remedial care for failed treatments in accordance with Part 7 which provided: *'Each party shall be responsible for his own patient's emergencies out of hours. By arrangement and agreement each party shall endeavour to provide emergency cover'.*

99. The dental associate agreement contained a substitution clause at 5(o) which provided: *'The Associate may provide and appoint a suitably qualified Locum to cover any planned absences and shall notify the Practice Owner of such proposed Locum arrangements.'*

100. The dental hygienist and doctors' contracts did not contain a mutuality of obligation clause. They did contain an express agreement on the part of the practitioners to provide the work in question and an express agreement on the part of the Appellant *'to schedule appointments on instruction of the* [gynaecologist/dental hygienist] *with regards to days'.* The relevant extract is as follows;

> '***WHEREAS*** [practitioner name] *being a self employed individual does hereby agree to provide Gynaecological services ("Services") to* [redacted] *Medical Centre on an arms length basis under the following terms:*
>
> *.....*
>
> *3.* [redacted] *medical centre agrees to schedule appointments on instruction of Gynaecologist with regards to days.'*

101. The dental hygienist and doctors' contracts also contained the following substitution clause (clause 6), considered below.

> *Service may not be personally provided by* [name of gynaecologist] *subject the following terms:*
>
> - *The relevant gynaecologist must be directly sub contracted to* [name of gynaecologist]
> - *The provisions of this agreement apply to sub contractor*
> - [name of gynaecologist] *provides documentary evidence of insurance cover in respect of public liability and professional indemnity on behalf of sub contractor.*

102. The Appellant contended that the dentists and doctors had no obligation to accept and carry out patient appointments as the practitioners were entitled to turn down or cancel patient appointments and were also entitled to provide a substitute.

103. The dental associate agreement contained a standard mutuality of obligation clause at clause 5(g) which provided: *'The Practice Owner may introduce to the Associate patients desirous of dental advice or treatment but the Associate shall be under no obligation to accept for advice or treatment any patient so introduced and vice-versa'.* However, the inclusion of such a clause does not necessarily indicate that mutuality of obligation is absent. In the recent High Court judgment of O'Connor J. in *Karshan (Midlands) Ltd. Trading as Dominos Pizza,* the inclusion of a similar clause in an umbrella contract (clause 14 in that case) did not result in a finding by the Court that mutuality was absent.

104. Mutuality clauses were also considered in the UK cases of *Pimlico Plumbers Ltd. v Smith* [2018] UKSC 29 and *Autoclenz Ltd. v Belcher* [2011] UKSC 41. The case of *Pimlico Plumbers Ltd. v Smith* [2018] UKSC 29 contained a clause, the import of which was; no obligation to offer and no obligation to accept work. In *Pimlico*, the UK Supreme Court, upholding the Court of Appeal, found that mutuality of obligation was present on the basis that Mr. Smith was obliged to work a minimum number of hours per week in accordance with his contract. Mr. Smith's contractual obligation was without prejudice to his entitlement to decline a particular assignment. The fact that Mr. Smith was not under an obligation to accept every particular piece of work available did not mean that he was relieved of the obligation to work a minimum number of hours per week nor did it mean that mutuality of obligation was absent.

105. In *Autoclenz*, also a judgment of the UK Supreme Court, the dispute between the parties related to, in part, the classification of the working contracts of a group of car valeters. The contract provided that the car valeters *'will not be obliged to provide* [their] *services on any particular occasion nor, in entering into such agreement, does Autoclenz undertake any obligation to engage* [their] *services on any particular occasion.'* In that case there was a practice of Autoclenz requiring the valeters to provide advance notification if they were unavailable for work which, the Court concluded, meant that there was an obligation to attend for work unless a prior arrangement had been made. Leading the judgment of the Court, Lord Clarke, at paragraph 35 stated '*the true agreement will often*

have to be gleaned from all the circumstances of the case, of which the written agreement is only a part' (which dicta was cited by Lord Leggatt in the recent UK Supreme Court case of *Uber B.V. v Aslam* [2021] UKSC 5). Lord Clarke, at paragraph 37, quoting paragraphs 35-38 of the judgment of Employment Judge Foxwell in the UK Employment Tribunal, continued;

> *'37. I am satisfied that the claimants are required to provide personal service under their agreements with the respondent notwithstanding the substitution clause that was introduced in 2007. I do not find that this clause reflects what was actually agreed between the parties, which was that the claimants would show up each day to do work and that the respondent would offer work provided that it was there for them to do. Mr Hassell confirmed in evidence that this was the true nature of the agreement between the parties and that his work could not have been done without an understanding that the valeters could be relied on to turn up and do the work put in front of them. I have of course noted that in 2007 the respondent introduced a clause saying that there was no obligation on it to offer work or on the claimants to accept work. I find that this clause was wholly inconsistent with the practice described in paragraph 18 of Mr Hassell's witness statement where he refers to a requirement for valeters to notify him in advance if they were unavailable for work. This indicates that there was an obligation to attend for work unless a prior arrangement had been made. In my judgment these factors place these new clauses within the proposition identified at paragraph 58 in the judgment [of Elias J] in [Consistent Group Ltd v Kalwak] and I find that the substitution clause and the right to refuse work were unrealistic possibilities that were not truly in the contemplation of the parties when they entered into their agreements.'*

106. The UK legislation in these cases considered the meaning of '*worker'* for the purposes of section 230(3)(b) of the UK Employment Rights Act 1996 and regulation 2(1) of the National Minimum Wage Regulations 1999 and of the Working Time Regulations 1998. While there are differences in *Pimlico* and in *Autoclenz* (i.e. the contract in *Pimlico* specified a minimum number of hours to be worked while the contract in *Autoclenz* did not actually reflect what was agreed between the parties) the reasoning in these cases is of assistance insofar as it does not support the proposition that if there is such a clause (i.e. a clause which provides that the provider of work has no obligation to offer work and the putative recipient has no obligation to accept work) that mutuality of obligation is absent.

107. In this appeal, while there was no clause obliging the dentists to work a minimum number of hours as such, the dentists' hours were stipulated at clause 4.2 of their contracts which also provided: *'the* [dentist] *shall use every reasonable endeavour to utilise the Surgery for the following times…'*

108. While the dental associate agreement did not contain a stipulation that the contracts would apply to the substitute, the substitution clause, clause 5(o), required notification to be provided to the Appellant in the event of '*any planned absences*'. In this regard, the contract provided that the dentist *'shall notify the Practice Owner of such proposed locum arrangements'*. Thus the contract aimed to an extent to regulate the provision of the substitute by notifying the Appellant, though in practice the clause was not invoked as no substitution occurred.

109. The Appellant submitted that if a patient insisted on seeing a practitioner in the case of an emergency, a practitioner who was present would accommodate the patient, the fee sharing percentages appropriate to the practitioner seeing the patient would be honoured and the absent practitioner would not be paid as they had not completed the work. This accords with clause 5(e) of the dental associate agreement, which allows a dentist in the clinic to attend the patients of another dentist in the clinic on agreement of the Appellant. The Appellant also submitted that had substitution occurred, the substitute would have been paid directly by the practitioner and not by the Appellant. However in practice, no dentists at any stage engaged and paid (at cost to themselves) a substitute. In reality, the business responded to practitioner unavailability by cancelling and rescheduling appointments rather than by substitution.

110. The dental council code of practice regarding professional behaviour and ethical conduct, effective as of 2 February, 2012, provides at clause 4.7: *'If you accept a patient for treatment, you must complete the agreed course of treatment safely and to a satisfactory standard.'* Thus, the dentist had certain professional obligations towards their patients which they were bound by the code of practice to abide. These duties were recognised by the dental associate agreement at clause 5(a) which provided: *'During the continuance of the agreement the Associate shall:- when acting as Associate observe and conform to all regulatory requirements and professional standards of or affecting the Dental Profession*.' Clause 16 provided: *'On termination the Associate will also be required at the option of the Practice Owner to complete treatment for each patient unless otherwise agreed with the Practice Owner.*

111. The fact that a dentist could opt not to accept every particular patient or that a dentist could cancel a specific appointment, did not mean that the dentists were relieved of the obligation to work the remainder of their contracted hours in a given day or week, nor did

it relieve them of work related obligations in relation to a given patient for the remainder of a course of treatment. The right to cancel an appointment or series of appointments was qualified by the requirement to provide advance notification to the Appellant and/or to reschedule the appointment for a time when the dentist was available to perform the work. More generally, the dentists were obliged to continue to provide work in accordance with the terms and provisions of the dental associate agreements, pending termination thereof. I am satisfied that the provisions of the dental associate agreements and their operation in practice contained the requisite mutuality of obligation.

112. In relation to the dental hygienist and doctors, clause 3 of the written contract contained an agreement on the part of the Appellant to schedule appointments into their days of work as instructed by them. The Appellant stated that the dental hygienist and doctors informed the Appellant when they were available for work and that they worked approximately one or two days per month depending on the demand for their services, while the dental hygienist worked a number of days per week. Once the Appellant accepted notification by the dental hygienist and doctors of their nominated days of work, and scheduled appointments into those days (clause 3), there was a contract for the assignment of work which the doctor/dental hygienist was obliged to fulfil subject to his/her entitlement to provide a substitute in accordance with clause 6. The doctors' contracts did not contain a mutuality of obligation clause.

113. The recent High Court case of *Karshan (Midlands) Ltd. trading as Dominos Pizza,* considered the question of whether pizza delivery drivers working for Dominos Pizza worked under contracts of service or for services. In *Karshan*, the contracts under consideration comprised an overarching umbrella contract, supplemented by individual contracts in respect of assignments of work. The relevant clauses were clauses 12 and 14 which provided as follows;

> Clause 12 provided: *'The Company accepts the Contractor's right to engage a substitute delivery person should the Contractor be unavailable at short notice. Such person must be capable of performing the Contractor's contractual obligations in all respects.'*
>
> Clause 14 provided: *'The Company does not warrant or represent that it will utilise the Contractor's services at all; and if it does, the Contractor may invoice the company*

at agreed rates. The Company, furthermore, recognises the Contractor's right to make himself available on only certain days and certain times of his own choosing. The Contractor, in turn, agrees to notify the Company in advance of his unavailability to undertake a previously agreed delivery service.'

114. In *Karshan*, O'Connor J. (paragraphs 59 and 60 of the judgment) observed that the drivers did not hire assistants but that one driver was replaced with another driver from the Appellant's pool of drivers. The substitute driver was then paid by the Appellant and the Appellant prepared the relevant invoice. The Court found that the substitute was not a sub-contractor of the original driver. As regards mutuality, O'Connor J. held that the individual contracts in respect of assignments of work contained the requisite mutuality of obligation.

115. The substitution clause in the dental hygienist and doctors' contracts provided that where the service was not personally provided by the contracted practitioner, the substitute would be directly sub-contracted to the original practitioner. Conversely it provided that *'The provisions of this agreement apply to sub contractor*' (clause 6) which provided for the substitute to enter into his/her own contract with the Appellant for the provision of work.

116. Although the doctors in this appeal were permitted under the terms of their contracts to appoint or provide a substitute, in practice, substitution clauses were not invoked as the business responded to practitioner unavailability by cancelling and rescheduling appointments rather than by substitution.

117. I do not accept that the contracts were absent mutuality of obligation on the basis that the practitioners could from time to time cancel and/or reschedule certain patient appointments. In the event that appointments were cancelled at the request of a practitioner, the practitioner was not relieved of work related obligations in relation to the remainder of the appointments scheduled. Thus the practitioner remained bound by the terms and conditions of his/her respective contract which in the case of the dentists, continued pending termination thereof and in the case of the dental hygienist and doctors, continued at least for the duration of that particular assignment.

118. For the reasons set out above, I am satisfied that the Appellant has not shown that mutuality of obligation was not present for the duration of the practitioners' contracts.

119. In *Minister for Agriculture v Barry*, Edwards J. at paragraph 47 stated;

> ' *… if mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further*.'

120. Thus while mutuality of obligation was present in the practitioners' contracts, it does not necessarily follow that the contracts were contracts of employment. The requisite legal analysis must follow in order to ascertain whether the contract is one of employment or of self-employment.

ANALYSIS III – Employment v Self-Employment

121. It is established in law that an employee works under a contract of service while a self-employed individual or independent contractor works under a contract for services. A number of tests have been developed by the Courts to establish whether an individual is working under a contract *of service* or *for services*. The relevant analysis is set out below.

Control

122. One of the criteria traditionally applied by Courts in legal analysis regarding the question of whether a contract was one *of* or *for* service(s) is the criterion of control. In *Roche v Patrick Kelly and Co. Ltd.* [1969] IR 100, Walsh J. stated:

> *'[w]hile many ingredients may be present in the relationship of master and servant, it is undoubtedly true that the principal one, and almost invariably the determining one, is the fact of the master's right to direct the servant not merely as to what is to be done but how it is to be done. The fact that the master does not exercise that right, as distinct from possessing it, is of no weight if he has the right*.'

123. In *Ready Mixed Concrete (South East Ltd.) v Minister of Pensions* [1968] 2QB 497, MacKenna J. identified control as one of the conditions of a contract of services as follows;

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

124. At page 515 of the report, McKenna J. described the element of control in the following terms;

> *'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done.*'

125. The significance of the control test lessened over time, particularly where the labour was highly skilled. In *In Re Sunday Tribune Limited* [1984] IR 505, Carroll J. in the High Court stated:

> *'The simple test is whether the employer possessed the right not only to control what work the employee was to do but also the manner in which the work was to be done. However, that test is no longer of universal application. In the present day, when senior staff with professional qualifications are employed, the nature of their employment cannot be determined in such a simplistic way.'*

126. Further, Carroll J. cited the following passage from Ungoed-Thomas J. in *Beloff v Pressdram Ltd* [1973] 1 All ER 241, as follows:

> *'It thus appears, and rightly in my respectful view, that, the greater the skill required for an employee's work, the less significant is control in determining whether the employee*

is under a contract of service. Control is just one of many factors whose influence varies according to circumstances.'

127. In *Denny & Sons (Ireland) Ltd. v Minister for Social Welfare* [1998] 1 IR 34, at page 50, Keane J. stated at page 49 of the report;

'*At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In Cassidy v Ministry of Health [1951] 2 KB 343, it was pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see Queensland Stations Property Ltd v Federal Commissioner of Taxation [1945] 70 CLR 539.*

In the English decision of Market Investigations v Min of Soc. Security [1969] 2 QB 173, Cooke J, at p 184 having referred to these authorities said:-

> *"The observations of Lord Wright, of Denning LJ and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."*

128. The Appellant exercised no control in the performance of the medical/dental work by practitioners as the work required independent clinical judgment on the part of the

practitioners and was capable of performance only by qualified individuals. The Appellant himself was not a qualified dentist or doctor. To provide the services through the clinic, the Appellant was required to acquire the services of the practitioners. Reliance was placed by the Appellant on the practitioners' professional standards and codes of conduct and in the dental associate agreement this reliance was express (clause 5(a)).

129. While the Appellant had no control in how the work was performed, the Appellant controlled the place of work, the clinic hours within which work was to be performed and the management of the clinic as an enterprise.

130. As regards the place of work, the practitioners were required to carry out their work at the Appellant's premises, the [redacted] clinic, located in [redacted] in [redacted] (clause 4.1 of the dental associate agreement and clause 1 of the doctors' contracts). Practitioners were provided with a fitted surgery premises and equipment for provision of the work. In addition, the Appellant provided the use of a reception and employed nursing and reception staff to assist.

131. The practitioners were required to provide their services within the opening hours of the clinic which were stipulated by the Appellant. (In the dental associate agreement, the times and days were specified at clause 4.2). The Appellant stated that the doctors worked one and two days per month depending on the demand for their services and that the dental hygienist worked a number of days per week. Practitioners could cancel or reschedule an appointment if required.

132. The methodology behind the system of remuneration of the practitioners was established by the Appellant and the operation of the clinic as an enterprise was established, managed and controlled by the Appellant. The Appellant exercised control over the location and provision of services, the advertisement of those services and the receipt of bookings through a centralised booking service.

133. In addition, the Appellant exercised control over standards and policies (dental associate agreement clauses 5(m), 5(n) and Part 8) and the retention of patient records and charts (clauses 6 and 13). The dentists were required to attend practice meetings (clause 5(l)), were prohibited from treating patients in premises other than the clinic unless it was more than 50 miles distance from the surgery (clause 10) and were prohibited from canvassing patients away from the practice or asserting any entitlement to patient goodwill including on termination of the contract (clauses 5(e), 13, 14.2). Per clause 7 of the dental associate agreement, all payments and correspondence were to be carried out through the clinic address unless otherwise agreed. On termination, the Appellant could require a dentist to complete treatment for outstanding patients (clause 16).

134. The Appellant in evidence stated that the dentists and in particular the doctors have control over when they schedule their own personal engagements and stated that for example, a practitioner may not be available on a given morning and may choose a different morning within which to schedule appointments. However, in the current labour market, such flexibility is an increasing feature of modern working relationships including some contracts of employment. In my view, this aspect of flexibility does not weigh significantly in favour of the practitioners being independent contractors, as submitted on behalf of the Appellant.

135. In *Denny & Sons (Ireland) Ltd. v Minister for Social Welfare* [1998] 1 IR 34, at page 50, Keane J. stated;

> *'It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.'*

136. While the Appellant exercised no control in how the practitioners performed their work, the degree of control over how the work is performed, while a factor to be taken into account, is no longer a decisive factor in the analysis.

137. In terms of control, the Appellant determined the place of work, set the hours within which the work was carried out, provided the necessary premises and equipment, provided nursing and reception staff, discharged overheads, set the policies and standards of the clinic and ultimately, controlled the management and operation of the clinic as an enterprise.

138. On balance, I am satisfied that the elements of control present in the working relationship between the Appellant and the practitioners point towards the existence of contract(s) of service.

Integration

139. In *Stevenson, Jordan and Harrison Ltd. v McDonald and Evans* [1952] 1 TLR 101, Lord Denning, at page 111 stated;

> *'One feature which seems to run through the instances is that, under a contract of service a man is employed as part of the business, whereas under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it.'*

140. In *In re Sunday Tribune Limited* [1984] IR 505, at page 507, Carroll J. described the integration test as follows;

> *'The test which emerges from the authorities seems to me, as Denning LJ said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it, or, as Cooke J. expressed it, the work is done by him in business on his own account'.*

141. The practitioners working for the Appellant worked part-time. In this appeal, the dentists worked two to three days per week, the dental hygienist worked a number of days per week and the doctors worked approximately one and two days per month depending on the demand for their services. In *In re Sunday Tribune*, Carroll J., found that two of three journalists worked under contracts *of* service. In relation to the first journalist who worked part-time, the Court stated that *'The fact that he worked part-time does not change the nature of his employment. A person may be an employee even though employed part-time;'*

142. The integration test asks whether the practitioners were integrated into and formed part of the Appellant's business or whether they were accessory to it. The Appellant submitted that the practitioners were not integrated into the clinic as they did not have promotion prospects within the clinic, were not entitled to sick pay or holiday pay, did not attend staff functions, did not have a clinic phone number or e-mail address and were not required to wear a uniform.

143. The Appellant submitted that patients were aware that their relationship was with their treating practitioner and not with the Appellant and that the patients were thus patients of the practitioners and not of the Appellant. While it is not surprising that a

patient would consider their relationship to be with their treating dentist or doctor as opposed to the clinic owner, the relationship under consideration in this appeal is the contractual relationship between each practitioner and the Appellant, not the doctor-patient relationship and I attach minimal significance to this particular submission.

144. In terms of booking an appointment, patients did not contact practitioners to arrange appointments but contacted clinic reception. Fees were not paid to the practitioner but were paid at clinic reception and deposited in the bank account of the Appellant. The dentists were expressly prohibited from making a claim to any goodwill relating to patients treated while working at the clinic (clause 13 of the dental associate agreement).

145. In the current labour market, a taxpayer may find that with advances in technology and increases in remote working, he or she is less physically present in the workplace than before however, this was not the case in this appeal. The work of the practitioners was carried out on clinic premises and within clinic opening hours. Surgical equipment and fittings were provided by the Appellant. Portable equipment was provided by some of the practitioners. Nursing and reception staff were employed by the Appellant to assist.

146. The fact that the practitioners did not have clinic e-mail and telephone numbers, did not wear uniforms, did not attend social functions and did not have promotional prospects in the clinic does not lead me to the conclusion that they were *not* integrated into the business. Their work was carried out on site on clinic premises, they engaged with clinic staff as appropriate and they generated the turnover of the clinic. The [redacted] Clinic was in the business of the provision of dental and medical services to patients and without the services of the practitioners, the Appellant would not have been able to conduct and promote this business. If the Appellant's submission is that the work of the practitioners was accessory to the business, then whose work was integral? The Appellant, not being a qualified dentist or doctor, was himself unable to provide the services. He engaged the practitioners precisely for this purpose.

147. I am satisfied that the work of the practitioners formed an integral part of the business and was not merely accessory to the business. The integral nature of the practitioners to the Appellant's business raises the implication that in ordinary course they would not be an outsourced service and would not be independent contractors. The fact that the practitioners worked part-time does not change the nature of their respective contracts. Integration in such terms signals the existence of contracts of service however the integration test alone is not conclusive and the additional legal tests are considered below.

The enterprise test

148. In *Market Investigations Ltd. v Minister of Social Security* [1969] 2 QB 173, Cooke J. stated, at page 184-185;

> *'….. the fundamental test to be applied is this; 'Is the person who has engaged himself to perform these services, performing them as a person in business on his own account?' if the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task*.'

149. This test has been endorsed in a number of Irish High Court and Supreme Court judgments including *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare, Minister for Agriculture v Barry* and *McKayed v Forbidden City Ltd*.

150. In particular, Keane J. in *Denny*, at page 50, stated; *'The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.'*

151. In this appeal, the practitioners did not provide their own premises, fixtures or fittings. Medical and dental surgeries were fitted out and provided by the Appellant to the practitioners under licence. The Appellant provided non-portable medical and dental equipment while some practitioners provided items of handheld or portable equipment.

152. Had each practitioner been in business on his/her own account, one might have expected that they would manage their own respective patient lists or employ staff to assist them however, the Appellant employed nursing staff and reception staff for this purpose.

153. The contracts provided that the practitioners could sub-contract their services however, on the evidence, neither the dentists nor the doctors at any stage engaged and paid (at cost to themselves) a substitute. In reality, the business responded to practitioner unavailability by cancelling and rescheduling appointments rather than by substitution.

154. Overheads of the clinic were discharged by the Appellant. While the recital to the dental associate agreement referred to the fees payable to the Appellant as '*a contribution to the overheads of the Practice Owner*' there was no evidence that fee sharing percentages were calculated in accordance with itemised overheads or that practitioners were consulted in relation to overheads. Advertising of clinic services (which did not use the practitioners' names) was arranged and paid for by the Appellant.

155. The Appellant cited the fee sharing percentages of 40/50% and stated that the practitioners could maximise their income by seeing as many patients as possible within their contracted hours. However, their ability to do this was limited by the number of hours they were contracted to work and by the number of patients they could realistically and competently attend within those hours. The practitioners received a stipulated percentage of their patient fees and this figure could not be negative.

156. The Appellant submitted that further indicators that the practitioners were in business on their own account included; the fact that the practitioners were exclusively responsible for providing remedial care for failed treatments (clause 7 of the doctors' contracts and clause 5(i) of the dental associate agreement), the fact that the practitioners undertook their own continuing professional development and the fact that they filed their own tax returns.

157. As regards the dentists, they were not truly independent of the Appellant in relation to any other work they may have had as this was subject to a restriction clause in that as clause 10 of the dental associate agreement provided that the dentists could pursue other work streams outside of their contracted hours *'provided the location of such work is more than 50 miles distance from the surgery'*. In terms of goodwill, dentists were prohibited from canvassing patients away from the practice or asserting any entitlement to patient goodwill including on termination of the contract (clauses 5(e), 13, 14.2). The doctors' contracts did not contain clauses relating to restriction or goodwill.

158. The Appellant's submission was that both doctors carried on practices in other locations and had staff to assist in the running of those practices. The Appellant stated that some practitioners had patients in other practices who travelled to attend them in [redacted] Clinic. The Respondent submitted that if the practitioners were in business on their own account and if they had other income streams from other practices, there would be no economic sense in the practitioners agreeing to see their patients in [redacted] Clinic

where a 40%/50% fee would be payable to the clinic. As the practitioners were not called to give evidence, the extent of this practice if it occurred was not clarified but in any event, patient fees generated at the clinic were accounted for through the terms of the contracts and the fee sharing percentages applied in relation to all fees generated at the clinic.

159. The Appellant submitted that the practitioners' reputations and completion of good work was a source of referral work by patients. Again, this does not without more, indicate whether an individual practitioner is in business on his own account. Where a practitioner at the clinic attracted a high volume of patients through referrals and reputation, the practitioner was required by contract to share those fees with the Appellant in the agreed fee sharing percentages of 40%/50% respectively.

160. While other work streams may in some instances point toward a taxpayer being self-employed, the changing nature of today's labour market means that multiple work streams are no longer as indicative, particularly for those in part-time positions. Ultimately, it is the characterisation of the practitioner's working relationship with the Appellant for the relevant tax years of assessment which falls for consideration in this appeal and that characterisation is determined in accordance with the established legal tests.

161. The Appellant submitted that because the dental hygienist brought her existing book of patients from her previous practice, she was in business on her own account in her working relationship with the Appellant. Again, although a practitioner may enter into a new contract bringing with her, patient goodwill from a prior practice, the character of the new contract falls to be determined on its own terms, and not by reference to the previous practice.

162. In summary, the practitioners had no role in the management or development of the clinic as an enterprise and there was little or no opportunity for them to affect change in the policies and processes in operation at the clinic. They did not have an opportunity to compete against each other to increase client/patient base to improve their own turnover. They did not derive benefit from economies of scale nor in mitigating clinic costs or overheads. They were unable to strategically plan for increased profit due to sound management. They did not invest capital in the clinic and were not exposed to capital losses. It is clear that the practitioners were not exposed to financial risk in the same manner as a person in business on his/her own account. I find on balance that the practitioners in [redacted] Clinic, were not providing services as persons in business on their own account.

Opportunity to profit

163. As established by the Supreme Court in *Denny*, the ability to profit from one's efficiency in the performance of the work is a relevant consideration in determining whether a contract is a contract *of service* or *for services.*

164. The Appellant submitted that the practitioners had the ability to profit from their own enterprise and efficiencies depending on the effort they were willing to invest in attending as many patients per hour as possible. The Appellant also stated that the practitioners could decline to take on work which was not profitable. The Appellant contended that the practitioners were at risk and could encounter loss.

165. While the practitioners could maximise their income by seeing as many patients as possible within their contracted hours, their ability to do so was limited by the number of hours they were contracted to work and by the number of patients they could realistically and competently attend within those hours.

166. The clinic advertised online the set rates charged to patients in respect of a menu of treatments. No evidence of any practitioners charging separate rates has been identified. Thus, the practitioners had no opportunity to compete against each other to increase patient numbers.

167. The system of payment to the practitioners by the clinic guaranteed either 40%/50% of the gross fee income to them. They received an agreed percentage of fees paid by their patients and this figure could not be negative. The Respondent submitted that such a minimal ability to increase earnings did not indicate that one was employed under a contract for services.

168. I accept the Respondent's submission that that the opportunity for the practitioners to profit from their efficiencies was heavily reliant upon their contracted hours and the number of patients scheduled into those hours by the Appellant. In reality the extent to which they could optimise their profit through increased efficiencies was minimal.

Bargaining power

169. The equality or inequality of bargaining power between the parties to a contract, is another factor which may be taken into account in a contract *of* and *for* analysis.

170. In the UK Supreme Court case of *Autoclenz*, Lord Clarke at paragraph 34 stated;

'[34] The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para [92] as follows:

> *'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so … '*

[35] So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.'

171. The dental agreement provided at clause 19(iii) that: '*The Practice Owner and the Associate have participated jointly in the negotiation and preparation of this Agreement…*' however, there was no evidence that there was joint negotiation in the preparation of the agreement.

172. Three of the dentists received 40% of their patient fees while the dental hygienist and doctors received 50%. The Appellant submitted that the income sharing ratio was changed to favour a practitioner on one occasion following negotiation, which appears to be a reference to Dr. [redacted] higher fee percentage of 50%. The practitioners themselves were not called to give evidence in relation to the negotiability of the agreements or otherwise. Apart from this, there were no material differences between the terms of the dental associate agreement as between the individual dentists and the terms of the doctors' contracts as between the two doctors and the dental hygienist. In the absence of evidence from the practitioners, the standardised nature of the contracts suggest that there was minimal negotiation on behalf of individual practitioners in relation to the terms of the contracts.

173. The Appellant stated that some dentists were newly qualified and had no patients or goodwill when they commenced working at the clinic but that the dental hygienist brought patients with her from a previous practice. The Appellant stated that the dental hygienist ceased her contract with the Appellant following unsatisfactory negotiations and moved

her business to a different location. The Appellant submitted that this demonstrated that practitioners had significant bargaining power, notwithstanding that no bargain was reached.

174. The practitioners contracted by the Appellant to provide medical and dental services were highly qualified individuals. The Appellant submitted that there was no shortage of work for dentists and doctors and in view of the Appellant, the practitioners were in the stronger bargaining position because of this.

175. Arguably, individuals who are highly qualified will have a choice of options within the labour market and may exercise greater autonomy than workers who are less skilled. However, in this appeal, if the practitioners were to practice, they required a surgery premises with the necessary equipment together with staff to assist them. The Appellant was in a position to provide and did provide fully fitted dental and medical surgeries, equipment and staff to the practitioners. Through advertising and footfall (the clinic was located in a [redacted] the Appellant provided patients.

176. While the Appellant sought to acquire the services of the practitioners for his clinic, the practitioners required patients, premises, equipment, and staff to carry out their work. The practitioners were not without leverage due to their expertise, qualifications and the alternatives they may have pursued within the labour market however, the Appellant, as the person who established, owned and controlled the enterprise and as the person in a position to provide patients, premises, equipment, and staff, held the stronger bargaining position, particularly in relation to the practitioners who were newly qualified and had not yet accumulated goodwill.

Substitution and personal service

177. On the matter of substitution and personal service, the dental hygienist and doctors' contracts at clause 6 provided as follows;

> '*Service may not be personally provided by* [name of practitioner] *subject the following terms:*
>
> - *The relevant* [doctor/hygienist] *must be directly sub contracted to* [name of practitioner]
> - *The provisions of this agreement apply to sub contractor.*
> - [Name of practitioner] *provides documentary evidence of insurance cover in respect of public liability and professional indemnity on behalf of sub contractor.'*

178. The dental associate agreement at clause 5(o) provided; *'The Associate may provide and appoint a suitably qualified locum to cover any planned absences and shall notify the Practice Owner of such proposed locum arrangements.'*

179. In the recent High Court case of *Karshan (Midlands) Limited trading as Dominos Pizza v Revenue Commissioners,* Mr. Justice Tony O'Connor delivered judgment on the question of whether Dominos' delivery drivers worked under contracts *of* or *for* service(s). The position in relation to substitution in that case was that if a driver was rostered for a shift but was unable to turn up, he had an entitlement under the written agreement, to arrange for the work to be done by another of the Appellant's drivers. In that case, the driver who performed the work and who was not originally rostered would be paid for the work. Alternatively, Dominos Pizza, could arrange for another one of its drivers to perform the work.

180. In *Karshan*, O'Connor J. observed that the drivers did not hire assistants but that one driver was replaced with another driver from the Appellant's pool of drivers. The substitute driver was then paid by the Appellant and the Appellant prepared the relevant invoice. In reality, the substitute was not sub-contracted by the driver.

181. In *Denny*, the position of the shop demonstrator was that in the event she was unable to do the work herself, she was required to arrange for the work to be done by another person approved by Henry Denny & Sons (Ireland) Ltd. The shop demonstrator was found to be working under a contract of service. In *Denny*, Keane J. at page 50, made clear the relevance of this aspect as follows;'

> *The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her*.'

182. In the UK case *Weight Watchers (UK) Ltd. (UK) Ltd and Ors v HMRC*, a decision of the UK Upper Tribunal Tax and Chancery Chamber, the substitution clause required team leaders to find a '*suitably qualified replacement'* in the event that they were unavailable. In that case, Briggs J. stated;

> *'32. The analysis of mutuality of obligation not infrequently focuses upon the presence of what have come to be known as substitution clauses. In the present appeal, as will appear, the existence of such a clause underlies a main issue between the parties. Substitution clauses may affect the question whether there is a contract of employment*

in two ways. First, the right to substitute may be so framed as to enable the person promising to provide the work to fulfil that promise wholly or substantially by arranging for another person to do it on his behalf. If so, that is fatal to the requirement that the worker's obligation is one of personal service; see for example Express & Echo Publications v Tanton [1999] IRLR 367, in which the contracting driver was, if unable or unwilling to drive himself, entitled on any occasion, if he wished, to provide another suitably qualified person to do the work at his expense. He was, plainly, delivering the promised work by another person, and being paid for it himself.

33. At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person. In MacFarlane v Glasgow City Council [2001] IRLR 7, a qualified gymnastic instructor was entitled, if unable to take a particular class, to arrange for a replacement from a register of coaches retained by the Council, upon the basis that the replacement would be paid for taking the class directly by the Council, rather than by the originally appointed instructor. The Employment Appeal Tribunal had no difficulty in concluding, distinguishing Tanton, that this provision was not necessarily inconsistent with a contract of employment between the Council and the instructor.

34. The true distinction between the two types of case is that in the former the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead.

183. In *Weight Watchers (UK) and Ors v HMRC*, the UK Upper Tribunal Tax and Chancery Chamber concluded that the substitution clauses at issue in that case were not inconsistent with contracts of employment and that the leaders were employees of Weight Watchers (UK) Ltd.

184. In this appeal, clause 6 of the doctors' contracts provided that personal service was not required '*subject to the following terms: …*'. Those terms provided that the substitute would be sub-contracted directly to the relevant doctor/dental hygienist and that the original doctor would be required to provide documentary evidence of insurance cover on behalf of the substitute. These sub-clauses suggest that the originally contracted doctor/hygienist would arrange for the substitute to carry out the work on his/her behalf. However, clause 6 also provided that: '*The provisions of this agreement apply to sub contractor'.* Thus in accordance with this sub-clause, the substitute would enter into his/her own contract with the Appellant for provision of the work.

185. The dental associate agreement at clause 5(o) provided that the dentist could 'prov*ide and appoint a suitably qualified locum to cover any planned absences'* and required the dentist to '*notify the Practice Owner of such proposed locum arrangements'.* The contract was silent on whether the locum would be bound by the terms of the dental associate agreement. There is no evidence of proposals being made by any dentist in this regard as substitution never occurred.

186. The Appellant submitted that if a patient insisted on seeing a practitioner in the case of an emergency, a practitioner who was present would accommodate the patient, the fee sharing percentages appropriate to the practitioner seeing the patient would be honoured and the absent practitioner would not be paid as they had not completed the work. This accords with clause 5(e) of the dental associate agreement (which allows a dentist in the clinic to attend the patients of another dentist in the clinic on agreement of the Appellant) and with clause 6 of the dental hygienist and doctors' contracts which provided in effect, that the substitute would enter into his/her own contract with the Appellant for provision of the work.

187. The Appellant's position was that practitioners were permitted to appoint substitutes and had substitution occurred, the substitute would have been paid directly by the practitioner and not by the Appellant. While clause 6 of the doctors' contracts provided that the substitute would enter into his/her own contract with the Appellant for provision of the work, the dental associate agreement was silent on whether the locum would be bound by the terms thereof.

188. However, in practice, the practitioners at no stage engaged and paid (at cost to themselves) a substitute but instead, performed the work personally. In reality, the business responded to practitioner unavailability by cancelling and rescheduling appointments rather than by substitution.

Categorisation of employment status by the parties

189. It is established at law that minimal weight will be attributed to the categorisation given by the parties to their working relationship. Although the Appellant contended that the practitioners agreed and accepted their status as independent contractors, the Respondent submitted that the true operation and interpretation of the contract would

determine the question of whether practitioners worked under contract(s) of service or for services.

190. The recital to the dental associate agreement provided: *'The Practice Owner and the Associate are both self-employed and independent of each other. However, the Practice Owner and the Associate have agreed an arrangement set forth in this Agreement on foot of which the Associate can carry on practice as an independent practitioner at the Surgery but subject to the payment to the Practice Owner of a contribution to the overheads of the Practice Owner on terms and conditions more particularly set out herein.'*

191. The contracted dentist is described as an '*independent contractor'* in clauses 2, 10, and 13 of the dental associate agreement. Clause 5(d) refers to the dentist as being '*in practice on his own account'*.

192. The recital to the dental hygienist and doctors' contracts provided: ***'WHEREAS*** [practitioner's name] *being a self employed individual does hereby agree to provide Gynaecological services ("Services") to* [redacted] *Centre on an arms length basis under the following terms:…'* The contracts are headed '*Contract for Services*'.

193. The dental hygienist and doctors' contracts is headed '*Contract for Services*' and clause 8 of the doctors' contract and clause 9 of the dental hygienist's contract provided: '*…this contract does not confer any rights or obligations on either party except for the contract for services outlined above.'*

194. In *Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare* [1998] 1 IR 34, Murphy J. at page 53, stated; '[the provisions of the contract were] *not of decisive importance. In my view their value, if any, is marginal. These terms are included in the contract but they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties. Whether Ms. Mahon was retained under a contract of service depends essentially on the totality of the contractual relationship express or implied between her and the Appellant and not upon any statement as to the consequence of the bargain*.'

195. In *Castleisland Cattle Breeding Society Ltd v Minister for Social and Family affairs* [2004] 4 IR 150, Geoghegan J. at page 161, stated; *'There is nothing unlawful or necessarily ineffective about a company deciding to engage people on an independent contractor basis rather than on a 'servant' basis but as this court has pointed out in Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare [1998] 1 I.R. 34 and other cases, in determining whether the new contract is one of service or for services the decider must look at how the*

contract is worked out in practice as mere wording cannot determine its nature. Nevertheless the wording of a written contract still remains of great importance. It can, however, emerge in evidence that in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the expressed categorisation of the contract. '

196. In *Denny*, Keane J at page 48 stated;

'In the present case, both the appeals officer and the learned High Court judge were of the view that the fact that Ms Mahon was described in the written agreement as being employed as an 'independent contractor' was not conclusive. It is accepted that they were correct in so holding. It is correct to say that the appeals officer appears to have taken the view that the importance of the terms of the written contract was somewhat diminished by the fact that Ms Mahon wanted the job and accordingly had no option but to sign the contract. However, it is also clear from his report that he considered in some detail the actual terms of the written contract and also had regard to the manner in which the work was done by Ms Mahon.

If the appeals officer had erred in law in his construction of the written contract, then, in accordance with the principles explained by Kenny J, his decision would be liable to be set aside by the High Court. In the present case, however, it has not been shown that the appeals officer in any way misconstrued the written contract: he was, on the contrary, entirely correct in holding that he should not confine his consideration to what was contained in the written contract, but should have regard to all the circumstances of Ms Mahon's employment. Equally, the High Court judge was correct in the view she took that she should not interfere with his findings in this regard unless they were incapable of being supported by the facts or were based on an erroneous view of the law.'

197. On page 51 of the report, Keane J. continued as follows;

'The written agreement was undoubtedly drafted with understandable care with a view to ensuring, so far as possible, that Ms Mahon was regarded in law as an independent contractor. However, as I have already pointed out, although this was a factor to which the appeals officer was bound to have regard, it was by no means decisive of the issue. When he took into account all the circumstances of her employment, he was perfectly entitled to arrive at the conclusion, as he did, that she was employed under a contract of service.'

198. In *Denny*, Murphy J. on page 52 of the report stated;

The document known as the 'Demonstrators' General Terms and Conditions', which was applicable to Ms Mahon and all other demonstrators whose names were from time to time included on the panel maintained by the appellant as persons available to provide the services of a demonstrator, is reasonably lengthy but not very informative. It is clear that the panellists might have been called upon 'to demonstrate, promote, market and sell' the appellant's products at different locations but little guidance is forthcoming as to the manner in which those operations would be carried out or the skills which the panellists might possess or would be required to exercise in carrying out their functions. The document is silent as to who decides the precise form of any particular commercial activity involved….

Whether Ms Mahon was retained under a contract of service depends essentially on the totality of the contractual relationship express or implied between her and the appellants and not upon any statement as to the consequence of the bargain. Certainly the imposition of income tax and the manner of its collection falls to be determined in accordance with the appropriate legislation and the regulations made thereunder as they impinge upon the actual relationship between parties and not their statement as to how liability should arise or be discharged.

The terms and conditions governing the engagement of Ms Mahon were not 'the unique source' of the relationship between her and the appellant. I am satisfied that the appeals officer was correct in his conclusion that he was required to consider 'the facts or realities of the situation on the ground' to enable him to reach a decision on the vexed question whether the respondent was an employee or an independent contractor. In seeking to ascertain the true bargain between the parties rather than rely on the labels ascribed by them to their relationship the appeals officer was expressly and correctly following the judgment of Carroll J in In Re Sunday Tribune Ltd [1984] IR 505.'

199. In *Minister for Agriculture v Barry*, Edwards J. at paragraphs 63-64 stated;

[63] In the course of his judgment in Henry Denny & Sons (Ireland) Ltd v Minister *for Social Welfare [1998] 1 IR 34 Keane J. sought to elucidate some of the general principles that the courts have developed of particular relevance to the case then before him. It was in the course of him doing so that the oft quoted passage (which for identification purposes bears reiteration) appears. He said at p 50:-*

> *"It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an*

> *independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."*
>
> *[64] This particular passage was subsequently quoted, and relied upon, in the judgments in Tierney v An Post [2000] 1 IR 536, Castleisland Cattle Breeding v* Minister *for Social Welfare [2004] IESC 40, [2004] 4 IR 150 and Electricity Supply Board v* Minister *for Social Welfare [2006] IEHC 59, (Unreported, High Court, Gilligan J, 21st February, 2006). However, although it represents an important summary of some of general principles that the courts have developed, it cannot be said to fully encapsulate the* ratio decidendi *of Henry Denny & Sons (Ireland) Ltd v* Minister *for Social Welfare [1998] 1 IR 34. It does not do so because it omits one very important general principle developed by the courts which assumed a significant importance in that case and also, coincidentally, in Tierney v An Post, Castleisland Cattle Breeding v* Minister *for Social Welfare and Electricity Supply Board v* Minister *for Social Welfare respectively. A very important "particular fact" common to those cases, respectively, was that in all of those cases there existed a contractual document which purported to contain the expression of an agreed intention of the parties that their relationship should be governed by a contract for services. The existence of that particular fact brought into play the "general principle" that a characterisation or description as to the status of a party contained in a contract intended to govern a work relationship is not to be regarded as decisive or conclusive of the matter. That principle was uncontroversial in Henry Denny & Sons (Ireland) Ltd v* Minister *for Social Welfare [1998] 1 IR 34, having been accepted by the parties from the outset. Although it was referred to by Keane J. elsewhere in his judgment, it is not referred to in the passage under consideration. It is in fact dealt with in greater detail in the judgment of Murphy J. who points out that the principle in question was first enunciated in the judgment of Carroll J. in In re Sunday Tribune Ltd [1984] IR 505. Accordingly, the celebrated passage from the judgment of Keane J. contains only part of the* ratio *for the court's decision.*

200. There can be little doubt but that the law is clear in relation to the matter of categorisation by the parties of their employment status. Legal analysis must take into account the terms of the written contract but must focus also on the operation of the contract, the correct legal interpretation of its terms and the application of the relevant legal tests.

CONCLUSION

201. The question of whether a contract is one *of* service or *for* services is a question of law which arises in the context of taxation, social welfare and employment law.

202. In tax cases, where the question is whether persons carrying out work are to be subject to tax under Schedule E as employees, or subject to tax under Schedule D as independent contractors, one must first consider whether there is a single contract, multiple individual contracts, or an overarching umbrella contract supplemented by individual contracts (a 'hybrid' contract).

203. I have determined in this appeal that that the dental hygienist and doctors worked under a hybrid contract comprising an over-arching umbrella contract (the written contract) supplemented by multiple individual contracts for assignments of work (containing one or more days of work) and that the dentists worked under a single written contract with the Appellant which specified at clause 4.2 their hours and days of work. I have determined that mutuality of obligation is present in the dental hygienist and doctors' multiple individual contracts and in the dentists' written contracts and my reasoning in this regard is set out at paragraphs 81-120 above.

204. The next step is to ascertain whether the contracts are contracts *of service* or *for services* and the requisite legal analysis involving the tests of; control, integration, enterprise, opportunity to profit, bargaining power, substitution and categorisation of employment status is set out above. This analysis leads to the conclusion that the contracts are contracts of service and that for the relevant tax years of assessment, the dentists, the dental hygienist and the doctors were employees of [redacted] Clinic, subject to tax in accordance with Schedule E.

205. In the case of the dental hygienist and doctors, the multiple individual contracts, comprising contracts of service are taxable in accordance with section 112 TCA 1997, as contracts of employment. Section 112 does not stipulate a requirement of continuous employment. It simply taxes emoluments arising from contracts of employment within the tax year of assessment, whatever their number. In terms of tax, it is not necessary to consider whether the umbrella contract contained mutuality of obligation.

206. However, on the matter of ongoing mutual obligations, O'Connor J. in *Karshan* at paragraph 50 of the judgment set out the Court's conclusions on mutuality and stated as follows;

'The Court is not persuaded that mutuality of obligations always requires an obligation to provide work and to complete that work on an ongoing basis in the manner contended for by the appellant. "Ongoing" does not necessarily connote immediate continuation or a defined period of ongoing. There is no binding precedent to suggest that the ongoing basis between the appellant and the drivers does not meet the criteria required.'

207. In conclusion, tax under section 112 TCA 1997, is charged '*for each tax year of assessment'* on '*all salaries, fees, wages, perquisites or profits'* arising from employment '*for the year of assessment*'. The imposition of tax under section 112 is not conditional on whether a continuous period of employment can be established but on whether an '*employment of profit'* has been held or exercised at some point during the relevant tax year of assessment. Within a tax year of assessment, a taxpayer may hold more than one employment. Such employments may be concurrent, successive, part-time, full-time, temporary, permanent or occasional in nature. Section 112 subjects to income tax 'all *salaries, fees, wages, perquisites or profits'* arising from such employment(s).

DETERMINATION

208. In appeals before the Tax Appeals Commission, the onus of proof rests on the Appellant who must prove on the balance of probabilities that the assessments/estimates raised by the Respondent are incorrect. In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated: *'The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'*

209. The matter at issue in this appeal is whether dentists and doctors engaged by the Appellant were in receipt of emoluments from contracts of service, within the meaning of section 112 TCA 1997, or whether they were self-employed individuals working under contracts for services and chargeable to tax under Case I of Schedule D.

210. For the reasons set out above, I determine that the dentists, dental hygienist and doctors worked under contracts of service and are taxable in relation to the emoluments arising therefrom in accordance with section 112 TCA 1997.

211. I determine that the estimates raised by the Respondent on 18 October, 2016, in accordance with section 990 of the Taxes Consolidation Act 1997 as amended, regarding

PAYE, PRSI and USC totalling €93,593.58 in respect of the tax years of assessment 2012, 2013, 2014 and 2015, shall stand.

212. This appeal is determined in accordance with Part 40A of the Taxes Consolidation Act 1997, as amended.

COMMISSIONER LORNA GALLAGHER

5th day of July 2021

This determination has not been appealed.

APPENDIX 1 – CONTRACTS

DENTAL ASSOCIATE AGREEMENT

'THIS AGREEMENT is made on the date set forth in Part 4 of the Schedule hereto between **THE PARTY OR PARTIES** more particularly described and set forth in Part 1 of the Schedule hereto (hereinafter called "the Practice Owner") of the one part and **THE PARTY** more particularly described and set forth in Part 2 of the Schedule hereto (hereinafter called "the Associate") of the other part.

RECITALS

WHEREAS:-

The Practice Owner and the Associate are both self employed and independent of each other. However, the Practice Owner and the Associate have agreed an arrangement set forth in this Agreement on foot of which the Associate can carry on practice as an independent practitioner at the Surgery but subject to the payment to the Practice Owner of a contribution to the overheads of the Practice Owner on terms and conditions more particularly set out herein.

WHEREBY IT IS AGREED AS FOLLOWS:-

1. The Agreement shall commence on the date set forth in Part 4 of the Schedule hereto and shall continue until determined in accordance with the provisions hereof;

2. Nothing herein contained shall entitle or expose the Associate to any of the rights or liabilities of a Partner nor constitute in any way the relationship of Partnership between the
Practice Owner and the Associate, he being an Independent Contractor solely responsible for his Pay Related Social Insurance and Income Tax liabilities:

3. The Associate will faithfully and to the best of his/her skill carry on the business of dental practitioner and shall be responsible and liable for the provision of dental treatments to patients of the Practice Owner to the highest ethical and clinical standard:

4.1 The Practice Owner grants the Associate a temporary licence for the duration and term of this agreement for the sum of €1.00 (receipt of which is hereby acknowledged by the Practice Owner) to use the Surgery during Surgery opening hours (set out at 4.2 below) and the Surgery premises and equipment therein provided always that such licence is non exclusive and is for the temporary convenience of the parties only and nothing in this agreement shall constitute a tenancy in respect of the Surgery.

*4.2 The Practice Owner shall cause the Surgery to be available at the following times, except on days agreed by the parties to be holidays and the Associate shall use every reasonable endeavour to utilise the Surgery for the following times:

Monday 9.15 – 18.00
Thursday 11.15 – 20.00
Friday 9.15 – 17.00

5. During the continuance of the Agreement the Associate shall:-

a. When acting as an associate observe and conform to all regulatory requirements and professional standards of or affecting the Dental Profession;

b. Not disclose to another party save persons having lawful authority to acquire such disclosure any confidential information or information of a confidential nature of or concerning the practice or its patients or affairs;

c. Attend to all cases with all reasonable promptitude and exercise all reasonable skill in the treatment given and prescribed;

d. The Associate is in practice on his own account and shall keep and render fair and accurate accounts of all professional business fees paid and all patients attended and all other business done by him and of all monies received by him. The Associate shall maintain the associate's own business account and shall operate a policy arrangement with the Practice Owner whereby the Associate shall upon demand pay the agreed percentage of net income as set out in Part 5 of the Schedule to this Agreement received from the Associate's patients at the Surgery premises to the Practice Owner without deduction except as may be authorised by the Practice Owner or otherwise required by law. The Associate shall produce copies of his accounts to the Practice Owner upon request verifying such payments.

e. The Associate shall complete treatment plans for patients solely and exclusively under his/her own care (unless otherwise agreed with the Practice Owner) and shall not attend any of the Practice Owner's patients or of any other dentist in the practice otherwise than on the Practice Owner's behalf or on behalf of any other dentist in the practice. If the Practice Owner requests treatment of his/her patients then the Associate shall exercise proper professional skill and diligence in the rendering of his services and in such circumstances the Associate shall make and collect from patients such charges for attendance as may be prescribed/agreed with/by the Practice Owner.

f. The Practice Owner shall not place any restriction on the patients that the Associate may attend or the types of treatment that he/she may provide, provided always that the Associate shall have due regard to their professional competency.

g. The Practice Owner may introduce to the Associate patients desirous of dental advice or treatment but the Associate shall be under no obligation to accept for advice or treatment any patient so introduced and vice-versa.

h. Pay all fines levied on the Associate or in respect of the Associate's patients by the Ministers for Heath or Social and Family Affairs under any Health Scheme.

i. The Associate shall be exclusively responsible for providing remedial care for failed treatments for patients the Associate has treated;

j. Pay all of his/her laboratory fees incurred which shall be deducted from any fees payable by the Associate;

k. If appropriate register with the Department of Health under the D.T.S.S. Scheme and the D.T.B.S. Scheme if so requested by the Practice Owner;

l. Attend all practice meetings as required;

m. Treat all members if staff in a courteous and respectful manner;

n. Adhere to the Health and Safety policy of the practice (see Part 8 of this Agreement);

o. The Associate may provide and appoint a suitably qualified Locum to cover any planned absences and shall notify the Practice Owner of such proposed Locum arrangements.

6. It is hereby expressly acknowledged that all patient records and charts are the property of the treating dentist but shall be retained at the Surgery Premises and in the event of any move in the Surgery Premises the Associate shall be notified and furnished with copy records upon request. The Associate shall be provided with ready access to such records upon request and such records shall be maintained in the case of adults for a period of 8 years. In the case of children and young adults, records must be kept until the patient's 25th birthday; or their 26th birthday if the young person was 17 when they finished treatment. If a patient dies before their 18th birthday, records must be kept for eight years. The original records and charts shall be maintained and stored securely at the Surgery premises;

7. All payments and correspondence must be carried out through the Surgery address unless otherwise agreed;

8. The Surgery facilities will be available to the Associate from the time set forth in Part 6 of the Schedule hereto or such other time or times as may be agreed between the parties;

9. Practice emergency cover arrangements are set forth in Part 7 of the Schedule and the Associate will take part in these arrangements on the same basis as other members of the practice.

10. The Associate will be entitled to engage in Dental practice on his or her own account or as an independent contractor with any other person in any period outside the period spent at the Surgery provided the location of such work is more than 50 miles distance from the Surgery.

11. Associate must be registered with the Irish Dental Council and have appropriate indemnity insurance and the Associate shall furnish written evidence of such registration and the existence of such indemnifying insurance to the Practice Owner upon being called to do so.

12. Fee sharing apportionments referred to in Part 5 below will be carried out by the Associate monthly in arrears and in any event no later than by the 15th day of the following month. Copies of all relevant records and calculations will be available to both parties;

13. The Associate acknowledges that he is an independent contractor taking total clinical responsibility for all patients treated by the Associate and the Associate has no claim to any goodwill relating to patients while working with the Practice Owner. The parties agree that for good housekeeping the records relating to such patients while in the Associate's care shall be kept and stored securely in the manner set out in Clause 6 above. However, upon the termination of this Agreement all patient records and other details relating to the patients shall be transferred to the Practice Owner or to a practice member approved by the Practice Owner who shall have the responsibility of the continuing care of such patients;

Termination

14.1 Subject to 15.3 (sic) either of the parties shall be entitled to termination the Agreement;

> 14.1.1 on 90 days written notice to the other; or
> 14.1.2 in the event of a material breach by such other party of any of the provisions of this Agreement, on 5 days written notice to the other, unless (at the discretion of the non breaching party) such breach is remedied (if capable of remedy) within the period of this notice.

14.2 On termination of this agreement the Associate shall not circulate to the patients any information about the Associates' new practice arrangement. The Associate may only give such information in response to a patient's request;

14.3.1 In the event the Associate having his/her name removed from the General Register registered by the Dental Council or having his/her Certificate of Registration withdrawn by the Dental Council or having his/her certificate in practice made subject to material conditions fixed by the Dental Council then this contract for services may be terminated forthwith by notice in writing to the Associate. The Associate shall have a duty to inform the Practice Owner of any complaints made against him/her to the Dental Council and the progress of any complaints.

14.3.2 In the event of either Party to this Agreement:

- Being declared bankrupt or applying for petition against creditors; or
- Being declared a person of unsound mind; or
- Being incapable of discharging his/her duties by reason of mental disorder; or
- Being convicted of a criminal offence (other than a minor offence under the Road Traffic Acts);

Then this contract may be terminated forthwith by 5 days notice in writing to the other Party.

15. On termination of this Agreement the Associate shall not practice as a general dental practitioner within a radius of 50 miles of the Surgery premises for a period of 12 months.

16. On termination the Associate will also be required at the option of the Practice Owner to complete treatment for each patient unless otherwise agreed with the Practice Owner.

17.1 Nothing herein shall constitute this Agreement as a Partnership or Joint Venture between the Parties;

In this Agreement nothing shall be deemed to make the Associate an employee of the Practice Owner, or to make any part the agent for any other party, for any purpose whatsoever.

Dispute Resolution

18.1 If any dispute or difference arises out of or in connection with this agreement the parties shall seek to resolve the dispute or difference amicably by using an alternative dispute resolution ('ADR') practice acceptable to both parties before pursuing any other remedies available to them. If either party fails or refuses to agree to or participate in the ADR procedure in any event the dispute or difference is not to the satisfaction of both parties with [42] days after it has arisen the dispute or difference shall be referred to arbitration.

18.2 In the event of a referral to an arbitration the arbitrator shall be a signed arbitrator and be agreed upon between the parties or failing agreement to be nominated on the application of either party by the president for the time being of the Irish Dental Union in accordance with the Arbitration Act 2010.

Interpretation

19(i) All references in this agreement to masculine shall mutates mutandi refer to the feminine;

(ii) The captions to the clause in this Agreement are inserted for the convenience of reference only and shall not be considered a part of affect the construction or interpretation of this Agreement;

(iii) The Practice Owner and the Associate have participated jointly in the negotiation and preparation of this Agreement. If any ambiguity or question of intent or interpretation arises this Agreement shall be construed as if drafted, jointly by the parties and no presumptions or burden of proof shall arise favouring or disfavouring any party by virtue of the authorship of any of the provisions of this Agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement in the manner hereinafter appearing.

SCHEDULE

PART 1

THE PRACTICE OWNER

Name: [redacted]
Address: ….

PART 2

THE ASSOCIATE

Name: ….
Address: …..

PART 3

THE SURGERY PREMISES

[redacted] Clinic
[redacted]

PART 4

The date of commencement of this Agreement is the …..

PART 5

FEE SHARING STRUCTURE

The Owner shall collect all fee income in respect of patients treated by the Associate and shall remit to the Associate share of such fees which shall be calculated as follows;

(Gross Income of the Associate, Minus Laboratory fees) 40%

PART 6

SURGERY FACILITIES

The Practice Owner shall provide a functioning dental surgery fit for the purpose of the practice of dentistry. The Practice Owner shall provide nursing and reception staff.

PART 7

PRACTICE EMERGENCY PROCEDURES

Each party shall be responsible for his own patient's emergencies out of hours. By arrangement and agreement each party shall endeavour to provide emergency cover.

PART 8

HEALTH & SAFETY POLICY

As a Self employed practitioner you will be expected to apply the health and safety policies of the practice and understand your responsibility to the employees of the practice.

SIGNED, SEALED AND DELIVERED
by THE PRACTICE OWNER
in the presence of:-

SIGNED, SEALED AND DELIVERED
by THE ASSOCIATE
in the presence of:-

**[Clause 4.2 varied in terms of hours as between dentists]*

The dental hygienist and doctors' contracts* provided as follows;

CONTRACT FOR SERVICES
BETWEEN
[redacted] (GYNAECOLOGIST)
AND [redacted] CENTRE

THIS AGREEMENT is made the 30 day of November 2009
BETWEEN [redacted] (Gynaecologist) …[address] .
AND
[redacted] Centre, [redacted].

WHEREAS [redacted] being a self employed individual does hereby agree to provide Gynaecological services ("Services") to [redacted] Centre on an arms length basis under the following terms:

1. Services will be carried out at [redacted] Centre, [redacted]

2. Fee is agreed at 50% gross fees charged by Gynaecologist (less PSWHT where applicable) to the patient payable periodically on foot of relevant invoice.

3. [redacted] centre agrees to schedule appointments on instruction of Gynaecologist with regards to days.

4. Gynaecologist decides when appointments are scheduled.

5. Gynaecologist will provide copy of her own public liability and professional indemnity insurance cover

6. Service may not be personally provided by [redacted] subject the following terms:
   - The relevant gynaecologist must be directly sub contracted to [redacted]
   - The provisions of this agreement apply to sub contractor
   - [redacted] provides documentary evidence of insurance cover in respect of public liability and professional indemnity on behalf of sub contractor.

7. Apart from the premises and related fixtures and fittings the Gynaecologist will provide any ancillary equipment required.

8. Customer complaints in respect of services provided are between Gynaecologist and customer. [redacted] centre accepts no responsibility in this regard.

9. This agreement to remain in place unless terminated by means of 8 weeks notice by either party. No reason for termination is required and subject to full payment for services this contract does not confer any rights or obligations on either party except for the contract for services outlined above.'

Signed….

**[The contract of Ms. [redacted] dental hygienist contained the same terms as above, The contract of [redacted] gynaecologist, dated 20 October 2010, contained the same terms with the exception of clause 7 above.]*