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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1140/1/1/09
1141/1/1/09
1142/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 July 2010

Before:

THE HONOURABLE MR. JUSTICE ROTH
(Chairman)

MICHAEL DAVEY
DR. VINDELYN SMITH HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) HAYS PLC
(2) HAYS SPECIALIST RECRUITMENT LIMITED
(3) HAYS SPECIALIST RECRUITMENT (HOLDINGS) LIMITED

Appellants

– and –

OFFICE OF FAIR TRADING

Respondent

EDEN BROWN LIMITED

Appellant

– and –

OFFICE OF FAIR TRADING

Respondent

(1) CDI ANDERSELITE LIMITED
(2) CDI CORP.

Appellants

– and –

OFFICE OF FAIR TRADING

Respondent

HEARING
DAY TWO

APPEARANCES

Lord Pannick Q.C., Mr. Mark Brealey Q.C. and Mr. Paul Harris (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Hays Plc, Hays Specialist Recruitment Ltd and Hays Specialist Recruitment (Holdings) Ltd.

Mr. Paul Harris (instructed by Addleshaw Goddard LLP) and Mr. Mark Clough Q.C. (of Addleshaw Goddard LLP) appeared on behalf of Eden Brown Ltd.

Ms Ronit Kreisberger (instructed by Blake Laphorn) appeared on behalf of CDI AndersElite and CDI Corp.

Mr. David Unterhalter S.C. and Ms Maya Lester and Mr. Alan Bates and Mr. Gerard Rothschild (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

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1 THE CHAIRMAN: Yes, Mr. Unterhalter? You are still under oath, Mr. Venables.

2 Mr. PAUL VENABLES, Recalled

3 Cross-examined by Mr. UNTERHALTER, (Continued)

4 Q Mr. Venables, would you turn to NCB 1, if you could get out that volume of the record?

5 There is a response that Hays put up to the statement of objection, and I would refer you in
6 particular under tab 2, at p.315, at para. 4.54.

7 THE CHAIRMAN: Just to be clear, this is part of Hays' response to the statement of objection?

8 MR. UNTERHALTER: That is so. Mr. Venables, the reason that is set out at 4.54 as to why the
9 accounts are presented in the form that they are concerning temporary workers is, as you
10 will see:

11 "Employment law requires that Hays (like other recruitment agencies) pay
12 temporary workers irrespective of whether Hays has been paid by its customer.
13 Thus Hays stands in the position of a statutory guarantor of payment, and it is for
14 this reason that Hays considers that it should include temporary workers' salaries
15 in its gross revenues."

16 You will see that similar reasoning is deployed in para. 4.55. I want to put to you, Mr.
17 Venables, that when this first issue first arose in the response that Hays made that was the
18 reason that was relied upon for the way in which these matters are dealt with in your
19 accounts?

20 A That is one point. I think we covered yesterday there were a number of principles which I
21 then covered in my witness statement, so you are right in this paragraph it only mentions
22 talks to credit control, or the credit risk, but as I went through yesterday, when we disclose
23 items under an agency arrangement we still have that credit risk, it is just that we have a
24 specific disclosed agency arrangement, so this is one of the factors and I clearly covered this
25 in my witness statement.

26 THE CHAIRMAN: The question was, Mr. Venables, that when this was first raised in Hays'
27 response to the statement of objections, this was the one reason put forward?

28 A I can't explain why at that point this was only one reason. This was not my witness
29 statement so I wouldn't have gone through every line including the detail I've done in the
30 two witness statements I've submitted. All I can say is our accounts have always been
31 consistent. It has been when we have a disclosed agency arrangement that we only include
32 the net fees both in turnover, sorry, our commission both in turnover and in net fees, and I
33 think we went through the various principles yesterday we use in determining that policy.

1 MR. UNTERHALTER: Mr. Venables, I am just going to give you a last opportunity to deal with
2 this. You will accept then that the reason that Hays gave when this matter was put in the
3 statement of objection is something based upon the credit risk effectively that arises from
4 the statutory obligation to pay temporary workers. That is the reason given?

5 A In this statement our accounts have always been consistent, which is what I sign off.

6 THE CHAIRMAN: I think you are only being asked about this statement, we have your evidence
7 yesterday.

8 A What I can't do, this has just been raised, I don't know whether anything else is raised in
9 here. What I can say is I have always been of the same view and that is how I've done the
10 accounts in my four years as Group Finance Director.

11 MR. UNTERHALTER: Right, let us then look, shall we, at your first witness statement, which
12 you will find in the witness statements bundle CB3 under tab 1. If you will look at p.17 and
13 para. 51?

14 A Yes.

15 Q Let us see what you say there:

16 "Having regard to IAS 18, as well as the legal form of Hays' contractual
17 arrangements, when exercising my professional judgment in preparing Hays'
18 consolidated accounts, I have taken the view that in most cases Hays is acting as a
19 principal when it supplies temporary workers (who are not employees of Hays) and
20 is responsible for handling the wages of those workers. It is for this reason that I
21 have included the wages of temporary workers as part of Hays' 'Turnover' in its
22 statutory accounts, even though . . ."

23 – you contend –

24 ". . . Hays derives no economic benefit from those wages, which effectively pass
25 through Hays' accounts."

26 So in your first witness statement what you rely upon is IAS 18, and the contractual form
27 arrangements?

28 A And if you go to para. 50, which is the one above ----

29 Q I wonder if we could just rest with 51 for the moment. By all means, I will give you an
30 opportunity to come to 50.

31 A It says "Having regard to IAS 18" and we discussed that yesterday IAS 18 has a number of
32 principles, and one of the ones in it wasn't that you had to have disclosed an agency
33 arrangement. As I explained at the time we were accounting under FRS 5. The Accounting

1 Standards Board issued a pronouncement which said FRS 5 is consistent with IAS 18, and
2 that is what is covered in the last part of para. 50.

3 Q You see the oddity of this statement in 51, Mr. Venables, is that there is nothing in IAS 18,
4 as you told us yesterday, until the very recent example that was added in 2009, which Mr.
5 Hall refers to but from 2006 until 2009 nothing about IAS 18 dealt with the disclosed
6 agency relationship, so I am wondering, when you say: "Having regard to IAS 18" what
7 was there about IAS 18 that formed the reason for the treatment that you gave to the
8 accounts, and the judgment you made as to the principal relationship?

9 A When we determine our accounting, you have to look at all of the Standards and, as I
10 covered yesterday, I think comprehensively, there is FRS 5, there is IAS 18 – you are
11 correct – but at the same time the Accounting Standards Board issued a press release which
12 said that the two are consistent, and then they gave Guidance which said they are not
13 expecting companies to change their policy as a result.

14 Q So in fact, had you been accurate in 51 you would have said not "Having regard to IAS 18
15 ..." but "Having regard to the fact that we were continuing to apply the Guidance from FRS
16 5 because IAS 18 did not refer to principal/agency relationships and their disclosure, I made
17 the judgment ..." that would have been correct?

18 A No, I think I could have expanded the end of para. 50 to have specifically stated the press
19 release occurred at the time. When that press release was issued, I wasn't with Hays, it was
20 before my time, but our Group Finance Controller, Simon Gray was, and he was also here
21 unfortunately when the original statement of objections came out. It was that statement that
22 came out that was very clear, and in talking to Simon and we discussed with Deloitte at the
23 time: did IAS 18 specifically mean that we had to change our accounting policy, and
24 Deloitte raised both as to the statement which had come out from the Accounting Standards
25 Board, and gave clarity that this had been raised between them and the Accounting
26 Standards Board on behalf of other clients. So, if I've got the exact wording of this and the
27 exact word - if I'm not particularly clear, then I apologise - I think if you take the bottom of
28 para. 50 and this, and the way I described yesterday, and, actually, if you look at the
29 statements themselves and the press release it is pretty clear. I am back to: if it was solely
30 credit risk that led to this, then when we had the disclosed agency arrangements we would
31 still have treated those as principals. That is a material sum in our accounts. We
32 specifically, throughout, consistently, over both my time as Group Finance Director and
33 before, always excluded that from our turnover because we have disclosed an agency

1 arrangement. So, the substance of our policy has been driven by that. I apologise if the
2 wording in here is not ----

3 Q Mr. Venables, our time is very short and I wonder if it would be just possible to try and
4 answer the question succinctly, if you could.

5 A I think we covered this fully yesterday.

6 Q Mr. Venables, what you say in para. 51, in addition, is that as well as the legal form of
7 Hays' contractual arrangements -- That is another factor which you took into account for the
8 purposes of reaching your judgment. Correct?

9 A Yes.

10 Q I want to put to you that it is in fact not just a matter of form because the overriding
11 requirement of the accounting standards is that you have regard to the substance of the
12 relationships. Correct?

13 A That's correct. As I covered yesterday, that's why we do a fully comprehensive disclosure.
14 We show both turnover and net fees on the face of our income statement. We show in Note
15 6 to the accounts 75 per cent of turnover is the remuneration of temporary workers. It is all
16 of those things put together that you have to have when you determine whether your
17 accounts are a true and fair view. It's not based on one line on one page of the accounts.

18 Q So, I want to put to you then, finally, on the score that what we have is credit risk; we have
19 the disclosure -- or, the non-disclosure of the agency relationship; we have what you call
20 here the form of the contracts, but in fact you are required to have regard to the substance of
21 it. All of these things led you to reach the professional judgment that you did.

22 A That is clearly incorrect and has been covered in several parts of our witness statement. We
23 do not have responsibility for delivering the labour service.

24 THE CHAIRMAN: Mr. Venables, try, please, to keep your answers short. All that is being put
25 to you is: are these the matters to which you had regard in taking the view that Hays is
26 acting as a principal? You say here -- IAS18. You have explained that. I quite understand
27 that. The legal form of Hays' contractual arrangements. It has been put to you that it is a
28 bit more than legal form - it is substance as well.

29 A And it's not substance and there are a number of ----

30 Q It is not substance?

31 A No, and there are a number of factors ----

32 Q You only have regard to the legal form - not to the substance. I just want to be clear about
33 this.

34 A Well, no ----

1 Q What you say in your witness statement is 'the legal form of Hays' contractual
2 arrangements'. That is your wording. Just clarify for us. Is that what you mean?

3 A We're back to the point I made yesterday. We've got 30,000 customers. We've got about
4 20,000 contracts. We have to have a consistent accounting policy, that we can apply
5 globally. We can't have, kind of, inconsistency between that. But, actually, if we looked at
6 the various factors when we're acting as a principal and where we're disclosing our
7 accounts as principal, there are two clear factors supporting that. There is the absence of an
8 agency arrangement and there is the credit risk, as counsel has said. Then there are a
9 number of other factors which, actually, in most currencies are not of substantive form in
10 our contracts, as I think we covered in the substance yesterday.

11 MR. UNTERHALTER: I want to put to you, Mr. Venables, that in making the determination as
12 to principal or agency, you are required to look at the substance of the contractual
13 relationships.

14 A And I'm back to -- We have ----

15 Q Do you accept that as a matter of the accounting standard that that is correct?

16 A I can't quote the exact word in the accounting standard. What I can say ----

17 Q Is it broadly correct?

18 A Yes. And the way you get to that and the way you sign the accounts is to make sure that the
19 accounts give a true and fair disclosure of the financial position and activities of the
20 business. As we stated yesterday, in all of the disclosures I give in Hays' accounts - and I
21 was the first finance director to sign off on those - we give full regard, and we show, for
22 example, specifically in the note to our accounts that included in our turnover is the
23 temporary wages and commission of other agencies for which we receive no fee at all. So,
24 a reader can see that there are clear pass through amounts, and then in Note 6 to the
25 accounts we clearly show that 75 per cent is the remuneration of temporary workers. It is
26 all of that together which enables (1) me to sign off the accounts, but not just me, but for
27 Deloitte, our auditors, to sign off on our accounts.

28 Q If I could then take you to your second witness statement in CB3, tab 5? Turn to para. 41
29 on p.85. Here you have another run at the same proposition You say,

30 "Whilst credit risk is without question a relevant consideration in assessing
31 whether for accounting purposes a company is acting as a principal or agent, in his
32 Expert Report ... Mr. Hall considers it is to be only a weak indicator".

33 But, it is your professional judgment that matters. I want to put to you, Mr. Venables, and I
34 need not ask the question -- I want to put to you that in the sequence of statements made by

1 Hays, and in your first witness statement, it is clear that in your professional judgment and,
2 indeed, in the accounting standard itself, credit risk is not a weak indicator; it is a factor to
3 be taken into account, and it was taken into account, and it formed one of the grounds upon
4 which you formed the judgment that you did.

5 A It is a factor, and, as I clearly state in my para. 42, in the worst recession certainly in my
6 living memory - and I'm forty-eight - in this period, in all that time, Hays has lost less than
7 1 per cent of our total net fees due to bad debt. So, yes, it's a gross risk. It is clearly
8 included. Because of temporary legislation we have to pay the temp and if we don't receive
9 money from our client, then it's our liability. But, the net risk, which is in the end what
10 you also have to take into account in determining your accounts suggests that we don't have
11 a substantive credit risk.

12 Q I am not going to take you back to what you own auditors have said on this point. I think
13 we raised that yesterday.

14 A No. That's my witness statement.

15 Q Let us not retrace what we have done already. Just *a propos* the question of risk, did I
16 understand you yesterday to be saying that the risks that attach to temporary and permanent
17 -- the provision of temporary or permanent workers were very much the same?

18 A I don't know. What I said was that 95 per cent of the service we provide is identical. I don't
19 know whether I said that.

20 Q Would you accept that in fact the risks are different?

21 A The primary risk that we face as Hays is that our consultants provide their service with due
22 care. That goes through nearly all of our contracts and goes through a large part of the work
23 that I do. Clearly, that care is that our consultant, whether they provide a permanent
24 candidate or a temporary candidate, has done the appropriate work. They have exercised
25 their judgment. They have met the candidates. They have looked at their CVs. They have
26 taken references, if that's what our client has asked of us. That's our primary risk in our
27 contracts.

28 Q Yes. But, the risk - and it is a statutory risk, as you have acknowledged - where you are
29 bound to pay the temporary workers irrespective of whether you are paid or not, is a
30 distinctive risk that is applicable to temporary workers. Correct?

31 A Well, yes. We have credit risk in all of our contracts because clearly we have got the same
32 risk in permanent as in temporary invoices - whether our client will pay or not. But, clearly,
33 because of the legislative requirement that we pay the temp effectively before we receive

1 payment from our clients, then clearly we have a greater credit risk on a temporary
2 placement.

3 Q What I think you referred to as 'contractual risk'.

4 A Clearly we've got -- Yes, under the legislation we have a risk to pay the temp, yes.

5 Q Yes. But, it is an accrued risk. Would you have a look at NCB4, Volume 1, page 141. We
6 are back in your 2009 financial statement and annual report. You will see that at p.141,
7 under the heading 'Contractual Risk', more or less below the middle of that paragraph, it
8 says, "The placing of temporary workers generally brings greater risk for the organisation
9 than permanent placements. Then you say:

10 "Wherever possible our contracts include provisions placing the responsibility for
11 supervision and control of the temporary worker with the client excluding any
12 consequential loss in limiting the Group's aggregate liability under the contract."

13 So two points there, Mr. Venables: (i) there is greater risk that attaches to temporary
14 placement, correct?

15 A Yes.

16 Q And secondly, you seek to shift that risk, at least to the extent that you can by way of
17 placing supervision responsibilities on your client but not apparently invariably so?

18 A No, and that's where I review all commercial contracts that do not meet our standard terms
19 and conditions, and in the UK I can confirm that more than 95 per cent of our contracts
20 have clear supervision and control clauses.

21 Q In other words, according to you 5 per cent you are involved in supervising?

22 A No. That is a completely separate point. You are talking about what a contractual clause
23 might be in our contract. We do not supervise any temps in any contracts. We do not have
24 people at the locations of our clients. As we discussed later, we are a recruitment company,
25 95 per cent of our services are the same whether it is permanent or temporary. Clearly, in
26 the event of a temporary worker they go on to the site of our client, they work under their
27 direction, supervision and control and they are managed by them. In an ideal world, Sir, I
28 have a clause which states that, but actually to my knowledge there has never been any case
29 law where a recruitment company has lost on a supervision, direction and control and
30 certainly in our 40 years of history in the UK we have never lost a case like that. I do not
31 think a case has been brought. We certainly never had a settlement in that position.

32 Q All right, so you seek to pass off this risk contractually, you do not always succeed, but you
33 say "practically you never supervise"?

34 A Yes.

1 Q Can we go then to another topic, briefly, which concerns the contracts that were provided to
2 Mr. Hall as representative contracts for his consideration, and you state in your second
3 witness statement, I believe that you were satisfied they were representative, is that correct?

4 A Yes.

5 Q You looked at them before they were sent to Mr. Hall, is that so?

6 A Yes, I mean more than 75 per cent of our contracts are just on standard terms and
7 conditions, we looked at those yesterday. Clearly when we deal with some larger clients
8 there is a lot more management information requirement, and they can ----

9 Q Let us pause there for a moment, shall we? You will accept that you in fact did not ----

10 A Where am I going to, sorry?

11 Q Well let me put the question first, you do not need to see every document to answer every
12 question. When you provided those seven contracts to Mr. Hall you did not apparently
13 include your standard agreements?

14 A We did not because they are very straight forward, they are very clauses in contracts. The
15 seven we provided from large customers where there are more complex clauses, they are
16 longer contracts.

17 Q I find that, I must say, a very odd answer, Mr. Venables, because when you are trying to
18 provide representative samples of contracts it would seem the most obvious contract to
19 provide is your basic contract and then look to such bespoke contracts as might represent
20 the rest of the universe?

21 A I think our bespoke contracts are so clear that there are no issues that increase our potential
22 liability in any substantive way. If we misread the instructions at the time ----

23 Q It is not a matter of your instructions, the question is you were trying to give a
24 representative sample of agreements and for one species of agreement, or one class you did
25 not choose to give, Mr. Hall, the most basic, which covers a not insignificant part of your
26 contract?

27 A I cannot explain why that was the case. What I can say is those contracts never come across
28 my desk, because they are within our standard terms and contracts, and the only ones that
29 come across to me we give delegated authorities to all of our global legal teams. If the
30 clauses in the contract are in line with that it does not come to my desk. If any of them are
31 outside of that it comes to my desk, so our standard ones are within that, so if we should
32 have also given those then ----

1 THE CHAIRMAN: If you are asking an expert for the purpose of litigation to comment on the
2 relations you are in or your contracting basis with your clients, would it not be a good idea
3 for him to see what constitutes 75 per cent of your client base?

4 A Sir, he may have done, I am not clear of all of the work that ----

5 Q It would be a good idea, would it not?

6 A Yes, of course.

7 MR. UNTERHALTER: If we could just have a look very briefly at the contracts you did provide.
8 If you would go to CB4, which is where we will find Mr. Hall's report under tab 1. If you
9 look at p.42, under para. 4.1.4, you will see that there are six contracts listed there, but the
10 first category I think contains two contracts because one is with Taylor Woodrow and the
11 other is with Vinci, do you see that, so there are seven in all?

12 A Yes.

13 Q Let us just deal with contracts 2(ii), 3(iii) and 5(v). These are the arrangements that you
14 referred to in respect of HPPS arrangements, that is in respect of VAT exempt clients?

15 A I would need to look at the front of the contract.

16 Q Well please do so and satisfy yourself that that is so, but you will see, for example, that the
17 [Client] contract is one that is at NCB 4, at p.532, so if you would go to NCB 4, vol.1 you
18 will see that the party to this arrangement is Hays and Hays Personnel Payroll Services. As
19 a matter of interest, Mr. Venables, do you not know which of these contracts in fact was
20 concluded with HPPS of the seven?

21 A Without looking at the contracts the answer will be "no", on the front of the contract it is
22 clear.

23 Q That is a very odd answer, Mr. Venables, because when you were considering these
24 contracts for the purposes of how representative they were, why would you give contracts
25 which were HPPS contracts as peculiarly representative of the universe?

26 A Evelyn Stars is in charge of our legal team in the UK. She was asked to give a cross section
27 of contracts. HPPS was clearly one of the items where our accounting is slightly different,
28 so we gave that contract.

29 Q So you cannot tell us now which of the seven in fact are HPPS contracts ----

30 A If we go to them, yes.

31 Q Could you at the time?

32 A Yes, because I would have looked and I'd see it on the front page.

33 Q So let us be clear, you deliberately chose HPPS contracts in your so-called representative
34 sample?

1 A No, we made sure it included an HPPS contract in it, yes, because it is a large proportion of
2 our turnover.

3 Q Did I hear you say “a HPPS contract”?

4 A No, I said “HPPS contracts”, contracts. Again, I am sorry, I can’t remember what I agreed
5 to be selected, what is probably a year or 18 months ago no, I’d have to look through each
6 of the contracts.

7 THE CHAIRMAN: Tell us now, without looking at these what would you think is a
8 representative sample of seven? How many would be HPPS?

9 A It would be one or two. It is certainly the level of fees, they tend to be large contracts,
10 because they are with either the investment banks, which is one of these cases or very large
11 charities, so it is a reasonable portion of our UK net fees.

12 MR. UNTERHALTER: So these are the contracts where the client was seeking to take advantage
13 of the VAT exempt status, was that correct. ?

14 A Yes.

15 Q Am I correct in saying, because certainly Deloitte appeared to confirm this, that these were
16 contracts that were generally applicable to the financial and IT sectors and not to the
17 construction sector?

18 A [Client] clearly is ----

19 Q Well they are more generally ----

20 A Without going through them there will be quite a lot of housing associations and trusts, yes.

21 Q Ordinarily that is the case. So you are selecting HPPS agreements even though they are not
22 applicable to the construction sector, with which the relevant turnover question was
23 concerned?

24 A I apologise, without going back recollecting a year, all of our global turnover, including all
25 of our UK turnover has been clearly used in determining the potential fine, so these are
26 representative contracts of our UK turnover.

27 Q Just remind us, how much of your UK turnover is made up of HPPS?

28 A Sorry, of our UK turnover, none. Of our UK net fees at that time certainly it will have
29 been 10 or 15 per cent.

30 Q 10 or 15 per cent.?

31 A It will almost the whole of our banking practice, and a large part of our accounting finance
32 practice.

33 Q But not your construction practice?

34 A No.

1 Q All right. I want to put it to you, to try and cut through this if we can, that the [Client]
2 contract, the [Client] contract and the [Client] Trust contract are HPPS contracts. Would
3 you accept that?

4 A Clearly I can look at the front page, but I assume that is so.

5 Q You can come back to me if you think we have mischaracterised that in any way. It is our
6 best sense of this. In respect of the Parc contracts, these are rather particular contracts
7 because they deal with Parc as a neutral vendor and intermediary, correct?

8 A Yes.

9 Q Which is with an innovation in the market and it occurs from time to time, it is not the
10 standard arrangement, correct?

11 A Actually at the moment it is quite a large part, so yes.

12 Q Well at the time were you concerned for this to be representative at the time that the
13 turnover is being calculated?

14 A The turnover is calculated in 2008/09, so at that point, yes, this was a large – the neutral
15 vendor type contracts is at least, in the UK it must be again 15 per cent of our turnover.

16 Q And in respect of construction?

17 A Well, I am guessing but a similar sort of amount, because Commensura is a very large
18 player in this market, and I assess it at 20 per cent, I don't know without ----

19 Q All right, so we have two contracts of the seven that are in respect of the neutral vendor
20 arrangements, and in respect of the [Client] contract, which is item 4(iv), that is also a
21 neutral vendor arrangement as far as I understand. Do you know?

22 A I don't without re-reading it, no.

23 Q It is at 1008 in the vol. 2 of NCB 4.

24 THE CHAIRMAN: 1008 is the [Client] contract.

25 MR. UNTERHALTER: This appears to be a situation where it is a master vendor agreement, can
26 you tell us ----

27 THE CHAIRMAN: Where is it?

28 MR. UNTERHALTER: It is at the end of vol.1.

29 THE CHAIRMAN: I think it is p.867 of NCB 1.

30 MR. UNTERHALTER: [Client] is at 729.

31 THE CHAIRMAN: There is one at p.867.

32 MR. UNTERHALTER: I am told it starts at 729.

33 THE CHAIRMAN: Yes, it does. It has many, many parts.

34 A There are tender submissions.

1 MR. UNTERHALTER: But it does appear there too that this is a neutral vendor arrangement, am
2 I right?

3 A I don't think so.

4 THE CHAIRMAN: If you look at p.867?

5 A Yes, but I think, if I may, we are managing this contract so as part of this we will be
6 providing temporary workers to the authority and we will also be managing other agencies
7 on their behalf. So they may have categorised it when they sent out the tender submission
8 as neutral vendor, we will have come back with a solution which says: "We can both recruit
9 people directly for you under the Hays' brands, and we can also manage other suppliers for
10 you." Then at the same time Commensura or somebody else may well come in and say
11 "We will just do the neutral vendor part and do it all".

12 Q Are you speaking from knowledge or are making this up as you go?

13 A No, every contract globally that goes outside our standard terms and conditions comes
14 across my desk. Every morning when I get to work I go through the new ones that have
15 come in, and therefore I know exactly the type of recruitment services that we provide, and
16 substantively as I said before, 95 per cent of what we do in permanent to temporary
17 recruitment is exactly the same. Clearly, where there is a temporary contract clients are
18 trying to make sure that they both (a) avoid employment risks, that is important to them,
19 that is why they are taking temps; and (b) they will want a lot of management information
20 and there are certain procedures set out to make sure that they, the client do not trip up in
21 any way, for example the employment risk, which is why the contracts are quite long.

22 Q Let us now review what we have. We have two neutral vendor arrangements under "1", we
23 have three HPPS arrangements, we have the [Client] arrangement which contains neutral
24 vendor provisions, though you say that is not how it was carried out, and then ----?

25 A No, I didn't say that ----

26 THE CHAIRMAN: I think Mr. Venables said that although [Client] put that in in its invitation to
27 tender the actual contract was not on that.

28 A We do not do neutral vendor on our own, Sir, because we would never make enough money
29 out of it. We are not here just to manage a contract. We provide, so we will have provided
30 at least 40 per cent of the workers normally under this type of contract, but at the same time
31 where our client wants certain skills that we cannot provide we will manage the other
32 agencies on their behalf.

33 MR. UNTERHALTER: Then you have put in the [Client] contract, any particular reason for that?

34 MR. BREALEY: Can I just make one point?

1 THE CHAIRMAN: Yes.

2 MR. BREALEY: These customer names are confidential so if Mr. Unterhalter could, when he is
3 referring to the contracts ----

4 MR. UNTERHALTER: Sorry.

5 MR. BREALEY: We have had a few mentions.

6 MR. UNTERHALTER: I do apologise.

7 THE CHAIRMAN: We shall direct that the names be deleted from the transcript. You can refer
8 to them, Mr. Unterhalter, as the contract in “para.(vi)”.

9 MR. UNTERHALTER: I shall do, I am very sorry I should have noted that. (To the witness):
10 You have then got the contract under item (vi), is there any particular reason why you did
11 that?

12 A Why [Client] was included in here as it is probably from the legal contractual form, from
13 the actual words in the contract, it is probably one of the most onerous contracts I have
14 seen. So when Evelyn was tasked with coming up with a cross-section of our contracts she
15 came up with one of the ones that that has lots of tortuous clauses, but again, the substance
16 of what we are doing – if I try to describe this another way around, because I have not
17 answered it well enough. We have 3,800 employees in the UK business, and we have two
18 dedicated parts of our business that deal with managing all temp queries and follow-on
19 discussions with our clients. We have less than 60 people who work in those two areas, and
20 that covers all of the payrolling, a helpdesk which deals with all temp queries, both from the
21 temp workers and from our clients. Clearly, each individual contract will have some
22 contract managers, and we probably have about 30 of those across our business. So out of
23 3,800 employees, we have 3,700 working on permanent and temporary recruitment, finding
24 people, and we have about 100 who are working on some specific additional tasks that are
25 necessary to manage a temp contract efficiently on behalf of our client, there is no
26 substantive difference in the services we provide.

27 Q Mr. Venables, what I want to put to you is that if one looks at the selection that you have
28 taken here, in fact in the different categories you have actually chosen contracts which are
29 either complex, HPPS contracts, or ones involving a neutral vendor, and [Client] seems to
30 be the only one which is not a special class of case. Do you want to comment on that?

31 A [Client] was, you know, a large contract. Whilst the [Client] may be HPPS there will be
32 about ten clauses in that -- I think it’s a 141-page contract. All of the other sections of that
33 contract will deal with the recruitment services that we provide: our requirements, what we
34 have to do to meet permanent recruitment and what we have to do to manage temporary

1 recruitment. So, you know, this is a representative sample of our contracts. What I can
2 confirm - on the basis that globally I look at every contract that excludes -- goes above our
3 standard terms and conditions - is that the sorts of clauses in here - and I covered it in an
4 attachment to my witness statement are representative and again demonstrate and support
5 the fact that the essence of our business, which is what we do, is that we find good people.
6 We don't deliver projects.

7 THE CHAIRMAN: When you say it is a representative sample, these are all specific *ad hoc*
8 contracts with particular clients.

9 A But the nature of those ----

10 Q That is right, is it not?

11 A The nature of these covers -- I mean, [Client] is ----

12 MR. UNTERHALTER: You are not supposed to mention them.

13 A Sorry. Whilst it's one of the ones I've seen, it's probably one of the more extreme parts
14 where the contractual form lists a number of issues in it. It still has supervision and control.
15 It has all those clauses. Those are standard. Clearly, the difficulty I had at the time was that
16 we've got 20,000 contracts, and we've probably got about 1,000 which will be of this sort
17 of length and complexity.

18 THE CHAIRMAN: But you said 75 per cent are on standard terms.

19 A Our standard terms and conditions, yes.

20 Q So, a representative sample of all your contracts would include at least one with the
21 standard terms.

22 A I agree. It should have been included in here. I'm not sure when it was included in the
23 process. I know it was added at some point.

24 MR. UNTERHALTER: Late in the day. Let us go to ----

25 A That must be four months ago.

26 Q Let us then look at NCB4, Volume 1. At the beginning of that volume you will see there is
27 the IAS 18 standard which deals with revenue. You can see that at p.1. This is the standard
28 that now governs your accounting; is that correct?

29 A Again, I think we've been through this. In accordance with FRS5 and the pronouncements
30 given by the Accounting Standards Board, yes.

31 Q Yes. But, in the treatment of revenue other than this principal/agency issue which we have
32 already debated extensively, this is the governing norm in respect of revenue.

33 A Correct.

34 Q Now, there are various definitions. I want to take you to para. 8 at p.6. It says,

1 “Revenue includes only the gross inflows of economic benefits received and
2 receivable by the entity on its own account”.

3 Do you see that?

4 A Yeah. We covered this when we started our accounting policies, almost right at the start of
5 the session. That’s what that says.

6 THE CHAIRMAN: I do not think you have been asked a question yet.

7 MR. UNTERHALTER: I understand your zeal. Let us just look at that. That is what the
8 accounting standard says and speaks to, which is the ‘gross inflows of economic benefits’. I
9 want you to look, if you would, at para. 18 on p.9. It says,

10 “Revenue is recognised only when it is probable that the economic benefits
11 associated with the transaction will flow to the entity”.

12 I want to put to you that though you keep saying in your witness statements, and have
13 repeated again before the Tribunal that there is no economic benefit that flows from the
14 consideration received in respect of the wages of temporary workers, but that is simply not
15 so because you have reflected as turnover in your accounts these items, and they must be
16 economic benefits or you could not account for them as turnover.

17 A No, that’s incorrect. As we went through, I have to look at the whole of IAS18 - not just the
18 specific paragraph, but the whole of it -- how many pages that is. I have to look at FRS5.
19 Then we have the specific Guidance in the Accounting Standards Board release which said,
20 “And the two are consistent” and you have to look at all parts. As we’ve clearly set out in
21 our accounting policy, whether we treat something as principal or agency has been driven
22 by, “Do we have a specific agency arrangement?” I have to make sure as a Group Finance
23 Director that our accounts are consistent. I have more than 30,000 customers and I have to
24 make sure that’s the case. When I sign my true and fair view that revenue is a reflection of
25 the economic benefit, I have on the face of my income statement turnover and net fees, and
26 I have a clearly set out accounting policy that we went through yesterday, and I have a
27 reconciliation in Note 6 to my accounts which clearly sets out that 75 per cent of my
28 turnover is remuneration of temporary workers. If I was asked a specific question which is,
29 “Right. No other Guidance at all. No FRS5”. Just, “What’s the economic benefit you get?
30 Put that in your turnover”. It would be net fees. I have to look at the whole of the
31 accounting standards. Therefore I make sure that there is sufficient disclosure that anybody
32 that goes to it can look at it. Again, other than in our accounts, no shareholder or analyst has
33 ever asked me about this issue. A shareholder has to determine what is the economic value
34 and substance of your business because they have got to buy your shares. They ask me

1 about net fees. In our annual report we show net fees ninety-nine times and we show
2 turnover three times.

3 THE CHAIRMAN: Mr. Unterhalter, I think we have covered this aspect. I am a little concerned
4 about the time.

5 MR. UNTERHALTER: I have literally one more question to ask. That is this, Mr. Venables:
6 We have heard your account about reading the entire standard and all the judgments that
7 need to be made. But, once, as you have, you have made the judgment that this is a
8 principal relationship, you then have to be certain that what flows is an economic benefit,
9 and if you were not certain of that you could not reflect it as turnover.

10 A Again, that is not true.

11 Q It is self-evident, I would have thought.

12 A It is not. When I do my judgment I have to make sure there is adequate disclosure in our
13 accounts. Note 6 clearly shows that 75 per cent of our turnover -- 75 per cent of our
14 turnover is remuneration of temporary workers. We then set out in our turnover policy --
15 We do not just put the first paragraph you took me to yesterday. We describe each aspect of
16 the turnover that goes through. In fact, the only change we are looking at for this financial
17 year is to then break that out. So, that is clearly shown in the note then shown - the
18 monetary amount of each element. The economic substance of what recruitment
19 companies do is why we're called recruitment companies. We find people on behalf of our
20 clients. That is substantially the same whether it's perm or temp. So, that's why I gave you
21 that numerical example yesterday - because in turnover a temp is seven to eight times the
22 amount of a permanent recruitment because of the accounting standard, but in net fees
23 they're exactly the same. That's the substance of our accounting.

24 Q I have no further questions.

25 Re-examined by Mr. BREALEY

26 Q Just a few questions and then it is all over. Can you go please to NCB4, and go to the
27 accounts. Volume 1, p.137. Do you have a transcript? Go to p.68 of that transcript bundle.
28 Mr. Unterhalter asked you a question. I am looking at p.137 of your financial review. He
29 asked you a question about the last paragraph of p.137. Just refresh your memory as to
30 what you said, and then I will ask you a question or two.

31 A The one that starts from 'the relative resilience --'?

32 Q Read the last paragraph of p.137. (Pause whilst read): Why are you referring to a decrease
33 in net fees by 7 per cent? What does it mean?

1 A That's the commission that we've earned off the actual transaction. So, as we've gone
2 through the value we derive is the commission that we earn for providing our service and
3 our net fees has gone down by 7 per cent.

4 Q You say in the next sentence,
5 "This represented a volume decrease of 6 per cent and a 10 basis point decrease in
6 the underlying temporary margin to 16.8 per cent".
7 Now, just taking the first bit first -- Why is that representing a volume decrease of 6 per
8 cent?

9 A Well, you can calculate methodologically, both whether it was at a turnover level, which the
10 readers aren't interested in, or the net fees level -- how much of a decrease in our
11 commission has been due to a reduction in the amount of temporaries we have at work, and
12 how much in our net fees has been reduction to the margin that we earn.

13 Q What is meant by 'margin to 16.8 per cent'? What do you actually mean?

14 A The underlying temporary margin takes the commission that we earn on the temporary
15 worker and divides it both by the commission that we earn and the remuneration of the
16 temporary worker. So, it is, if you like, the margin we make on the temporary worker.
17 Effectively, it's the amount that we are receiving from our clients for the service we've
18 provided.

19 Q Is that the reason that you are using turnover there - the remuneration of ----

20 A We have to show clearly in the box that if somebody wants to check that calculation
21 mathematically they can collect. It is always one of the things that they're interested in in
22 reviewing how we're doing in the temp market place - you know, what are our net fees?
23 We show our net fees by temporary and permanent below. It shows a mix of the business.
24 There's a lot of focus on the mix of our business because it's very different, whether we're
25 in a boom or whether we're in a recession. So, we fully disclose that. So, the reader of the
26 accounts can determine how well we've performed and they compare that performance
27 against our competitors.

28 Q I have no further questions.

29 THE CHAIRMAN: Mr. Venables, can I just try and understand how it works in very basic
30 terms? If you have a contract for supply - and I am thinking in the construction industry - to
31 a big construction project of temporary workers - fifty building labourers for seven weeks.
32 In Week 4 two of them do not show up. I imagine, with all the contracts you have around
33 the country, this does happen.

34 A There'll be sickness and there'll be those sorts of things, yes.

1 Q Sickness or just absenteeism.

2 A Or they'll have found a better job elsewhere, through another agency elsewhere I'm afraid.

3 That's the nature of our business.

4 Q If that happens, I am trying to understand then what transpires. The client would

5 presumably ring you and say, "Look, we've got a problem. Johnson and Smith haven't

6 turned up". Then you would try and find them someone else?

7 A Yeah. If you think about it, we're not gonna earn any commission. The temps are not going

8 to get paid for service. They only get paid when they turn up for work. And then it's really

9 dependent on the client because of course the client might just be telling us they haven't

10 turned up, i.e. "We're not gonna pay for them", or they might be saying, "They haven't

11 turned up. We still have the same amount of work that needs to be done. Can you find

12 somebody else". They might be telling us as well, "They haven't turned up, and they didn't

13 turn up for one day three weeks ago. Actually we'd be quite glad if they didn't turn up

14 again. Can you find another worker to come and do the work?" Again, that's not a large

15 part of our business - where we're dealing with labourers. That's less than 5 per cent of

16 what we do. We generally work in the white collar part. But, clearly, in a construction

17 project -- The nature of the construction projects we've put in here is -- You know, it's

18 rarely one agency that's being dealt with. There's lots of agencies. Clearly when that

19 discussion comes, they'll say, "And have you got any other problems? Can you provide

20 any additional workers?" That's our job.

21 Q Yes. One seizes the opportunity. Yes. If they say, "They have not turned up and it

22 happened a few weeks ago. In fact, we're fed up with them", it would be you, would it not,

23 who would then terminate the arrangement with the defaulting worker?

24 A Yeah.

25 Q It would not be the client who would write to the worker and say, "You're no longer

26 required". You would have to do it. Just listen for a moment. It causes great problems with

27 the transcribing when we speak over each other. The poor transcribers have to try and

28 disentangle two voices. What I am trying to understand is that it would be Hays that would

29 write to Bloggs and say, "Look, your performance has not been satisfactory. The client

30 does not want you back. We are ending this arrangement, this contract".

31 A Yeah. The client would call us. We would contact the temp. We would say, "The client

32 has ended the assignment". We are back to, the temp only goes there for as long as the

33 client wants us. Generally the client has a good relationship with the temp. They'll tell the

34 temp the work's finishing on a Friday and one way or another we'll find out about it in the

1 discussions that we have. Clearly, if somebody hasn't done a good job - and that's one out
2 of a hundred - then, yes, we'll get contacted and then, yes, we'll speak to the temp.

3 Q Yes.

4 A That's part of the administrative function our Help Desk will do as part of what they
5 normally do.

6 Q The Help Desk is only for temps, is it?

7 A We have a dedicated Temp Help Desk because, clearly, our temps are gonna get paid on a
8 weekly basis. So, it leads to most of the queries.

9 Q If you go to your first witness statement in CB3, tab 1, in that statement at para. 60 you give
10 an explanation of how a client might require fifty workers but you have only got twenty you
11 can supply and you source the remaining thirty from other agencies. Are you able to give
12 any idea what proportion of your turnover is done in that way - where you are sourcing
13 from other agencies?

14 A We're certainly one of the largest clients of some other agencies. On net fees it's clearly
15 zero because we haven't made any commission, but in gross turnover it will be -- In fact, in
16 this financial year -- We've just closed our books to the end of June. So, that's the easiest
17 way for me to answer. We have £300 million worth of turnover -- £320 million worth of
18 turnover in our UK business. That effectively goes -- Another agency finds a temp. The
19 other agency then, through us -- The temp then is assigned to the client. What the client is
20 asking us to do is provide our own temps, manage the other agencies for them, and to
21 provide some management information which will give an analysis of all the costs they're
22 incurring - because whether you're a construction company or whether you're an IT
23 company, you want to know how much money's being spent. So, £320 million of our
24 turnover has absolutely nothing to do with Hays, but because we're not acting as a disclosed
25 agency. We include this in gross turnover. Of all of the areas in Martin Hall's report, this is
26 certainly the greyest. In fact, Robert Walters and Comensura, in the same business as ours,
27 actually exclude this from ----

28 Q £320 million out of ----

29 A UK turnover this year will be about -- It's got to be about £2 billion. Between £1.8 billion
30 and £2 billion.

31 Q Thank you. When you refer here in the text at para. 60 to having twenty on its books, can
32 you just explain what you mean by 'having twenty on its books'?

33 A Yes. We'll go on to our own database and that will be a combination of some temps that
34 may have previously worked with us, some temps that have registered -- the nature of the

1 temp business is that it changes very frequently from week to week. So, every week we'll
2 do, you know, a number of interviews with prospective individuals. So, if we get an
3 assignment in, clearly our aim is to fill as many of these jobs as possible. It's the only way
4 we make any money. So, we try to fill as many as possible. So, our books on this
5 standpoint is we would go to our database. We would also go through to -- If you're
6 managing a large temp contract you always know there's going to be people coming up to
7 an end of an assignment or that there'll be a standard amount of churn. So, we may have a
8 client and we're always looking for those. In this case we can fill twenty ourselves and
9 we're then dealing with other agencies. If I give an example without mentioning a name --
10 You know, we deal with a very large UK bank and we do all of their recruitment for them,
11 and there are some areas where we do not have the skills and expertise in our business, we
12 use other agencies on their behalf. Clearly why we do this, Sir, is that we hope to increase
13 our skills over time to be able to do more of the business. So when we receive the money
14 from our clients we then pass it all through, we have to pass it all through within three
15 working days to the other agency, that amount will include the remuneration of the
16 temporary worker that the other agency will pay and also the commission that the other
17 agency has earned. We will earn a very small margin, it normally works out at something
18 like [Confidential] per cent.

19 THE CHAIRMAN: All I was getting at was just the idea of the 20 on its books and I think you
20 were saying it is people who have recently worked with you and people who have
21 registered?

22 A Yes, we receive 150,000 CVs every month, probably a few more in the current economic
23 climate, and we will have a good 5,000/10,000 people registering with us on a weekly basis.

24 Q In your second witness statement at tab 5, p.83, have you got it?

25 A Yes.

26 Q Paragraph 33, in the second sentence you say: "Unlike many other industries, particularly
27 manufacturing industries, Hays does not have an inventory or 'bench' of temporary workers
28 which it can call upon ..."?

29 A Yes.

30 Q Is the distinction you are making between not having a 'bench' but having people on your
31 books that you are not paying them?

32 A Yes.

33 Q You will have them registered, you will have the database of them but they are not paid
34 for ----

1 A We have never paid a temp, certainly in my four years to my knowledge, and certainly the
2 last 10 years, we have never paid a temp unless they are working on paid work by our
3 clients.

4 Q Yes, I understand.

5 A Last year, Sir, we did 170,000 temp assignments– in fact, the 170,000 was in the UK – none
6 of those are our employees, they do not sit in our offices ----

7 THE CHAIRMAN: Yes, I understand. Thank you. Anything arising out of that? Thank you
8 very much, Mr. Venables, you are released and free to go.

9 (The witness withdrew)

10 MISS KREISBERGER: We call Mr. Ballou, of CDI next.

11 Mr. ROGER H. BALLOU, Sworn

12 Examined by Miss KREISBERGER

13 Q Mr. Ballou, you should have a bundle there marked “CB3” if I could ask you to take that
14 up, and if you could turn to tab 14 of the bundle? Mr. Ballou, is that your witness statement
15 there?

16 A Yes, it is.

17 Q Could I ask you to turn to the back page, p.145? Mr. Ballou, is that your signature there?

18 A It is.

19 Q Could you just confirm for the Tribunal that the facts and the matters stated in your witness
20 statement are true to the best of your knowledge and belief?

21 A That’s true.

22 Q Thank you, Mr. Ballou, Mr. Unterhalter will now have some questions for you.

23 Cross-examined by Mr. UNTERHALTER

24 Q Mr. Ballou, I wonder whether I could ask you to find the following bundle, NCB 4, vol. 3,
25 and if you would turn in that bundle, just so you will see where we are it commences at
26 2329, but if you turn the page to 2330, this is CDI’s form 10K disclosure, which is CDI’s
27 Annual Report for the year 2008. Perhaps you will just confirm that for us?

28 A It certainly appears to be.

29 Q Yes. I wanted to take you to some of the descriptions in this document of the business, and
30 that commences at p.2339 of this volume, and you read under “Staffing Services”, which is
31 one of the categories of business that sounds at least translated into the terminology that has
32 been used in this Tribunal to the provision of temporary workers, is that correct?

33 A Our staffing services category actually includes two things, standard temporary workers but
34 also managed services which Mr. Venables was describing earlier.

1 Q How would you distinguish those two? What is the variant fostered by the managed
2 services?

3 A Okay, in staffing services we recruit temporaries to orders that we get from clients. In
4 managed services we provide the ancillary services as he describes somewhere where we
5 provide management reporting, or potentially manage other vendors who work with us in
6 filling the jobs.

7 Q I understand, but perhaps for simplicity – we can elaborate if necessary – we can take the
8 standard case, which is the provision of the temporary worker to the client. You describe
9 under the “Staffing Services” and this is in the second column at 2339:
10 “Staffing services include assigning the company’s skilled engineering,
11 information technology, project ...” etc “... to work at a customer’s location under
12 the supervision of customer personnel on a contractual basis for assignments that
13 could range from several months to over one year.”

14 So what the language clearly indicates is that these are your personnel, the company’s
15 personnel who you are placing with your clients for them to discharge services over a
16 period of time. Is that a fair sense of what you have put here?

17 A You could read it that way, but they are not really our personnel except during the period of
18 time when we have an assignment from the client, so we never have personnel there sitting
19 in abatement waiting for a client, we always go recruit them at the time, so during the
20 period of an assignment they are our personnel.

21 Q I am not sure that there is any source of difference on this point. The fact is that you hire
22 these temporary workers, and you then make them available as your personnel for that
23 period of time to the client to discharge services in terms of your contract with the client?

24 A As an intermediary between ourselves and the client, absolutely.

25 Q When you say an “intermediary”, there is no contractual relationship between the client and
26 the temporary worker, you are providing the temporary worker?

27 A As an intermediary we have a contract with both sides.

28 Q Well it is this word “intermediary”, just so we are clear, as a matter of contract you contract,
29 again we are concerned here with the UK business, but you contract with the temporary
30 worker?

31 A Correct.

32 Q And you have obligations to the temporary worker, and quite separately you then have a
33 contract with the client, and you have obligations under that contract, is that correct?

34 A That’s correct.

1 Q We can see, if you just turn over the page to 2340, you distinguish professional
2 services. “Professional services include search, recruitment and permanent
3 placement of technical, professional and managerial personnel ...”

4 and services to franchisees. Now, that is a distinct service from the one that you have
5 described under “Staffing Services” is that correct?

6 A Certainly the sales of new franchises and the services provided to franchisees are a separate
7 service.

8 Q Let us put those out of contention, in its central sense of professional services respectively,
9 searching, recruiting and placing different categories of personnel for the client to actually
10 take them on and employ them?

11 A They are identical to the contract staffing, or temporary staffing services.

12 Q Well that is certainly not what appears from ----?

13 A In terms of the function of what we do.

14 Q Let us again be clear and precise. You are demarcating a separate category of services, and
15 you are here using very different language to describe it, in the sense that here you are
16 searching and seeking out the correct person to proffer to a client to see whether that client
17 wishes to employ them or not? That’s the nature of what the professional services are?

18 A And it’s also the nature of the contract services. We use the same recruiting personnel, the
19 same inventory management systems, the same database search and the same references to
20 identify candidates for a temporary or professional jobs as we categorise them in the United
21 States; here it would be for contract or permanent. We use the exact same procedures, the
22 same recruitment personnel in most cases and we recruit out of a shared database to identify
23 the candidates we provide to clients. Now, the client can then choose to employ them as a
24 temporary, as a permanent or as a temp to perm, we are indifferent between those because
25 of the client. Often times we’ll see what starts as a contract search turn into a permanent
26 hire, so it’s identical processes using the same people.

27 Q I can understand you when you say you may search out the candidates by using similar
28 means, and seek to determine their suitability by similar means, but the arrangements that
29 are put into place differ, as we have already discussed, because in the one case, that is with
30 temporary workers you are undertaking obligations to the client in respect of the provision
31 of those workers, whereas in the case of permanent staff once the client is willing to employ
32 them that is the end of your obligation and you are then just entitled to your fee. Is that not
33 correct?

1 A With a slight variation - I would say that the provision of our basic service and recruitment
2 is identical in both cases and our obligation to the client of having diligence in our search
3 process is identical in both cases. We do have to provide ancillary services under the law in
4 the contract area where we provide payrolling services.

5 Q Mr. Ballou, I want to get a clear answer from you on this point, which is you do not deny, as
6 I understand it, that in the case of temporary workers, unlike the case of permanent
7 placements, you are taking on obligations to provide, over a period of time, and you are also
8 undertaking the obligation to pay the worker irrespective of whether you are paid by your
9 client?

10 A Correct. We have to pay the worker, that is the main obligation we take on, but we do pay
11 the worker on a temporary basis. The supervision of the worker is the client's, the work
12 product liability is the client's, none of those things are different between permanent and
13 contract, but we do payroll them and we do take on that obligation.

14 Q Indeed, if you are not paid by your client, then nothing changes about your obligation to the
15 temporary worker?

16 A No. They would be unemployed as of the day that occurred but up until that date they
17 would be paid by us and we would take the credit exposure.

18 Q When you say "they would be unemployed from that date", I do not follow you?

19 A The date a client does not pay for a temporary worker we don't employ the temporary
20 worker.

21 Q Well your obligation ----?

22 A For the prior pay is ours.

23 Q Let us be clear, your obligation is to provide that worker to the client?

24 A Correct.

25 Q If the client does not pay you your fee plus what is due in respect of the worker you may
26 well want to take contractual remedies to terminate that arrangement, but until you do so
27 you continue to be obliged to provide the worker and you continue to be obliged to pay that
28 worker?

29 A Absolutely correct, no argument there.

30 Q That entails, at least from a business point of view, a different kind of credit risk?

31 A It's slightly different exposure. I don't think from a business point of view it's a different
32 credit risk, we take losses on permanent placements where we do not get paid, and we take
33 losses on contract workers where we do not get paid. So the nature of the credit relationship

1 is no different. It has a longer duration in the contract side and is subject to potentially
2 more disputes, but the nature from a business perspective of the credit exposure is identical.

3 Q Well let us just look at that. In the case of the temporary worker you are providing over a
4 period of time, that may be a few months, it may be a year or more, is that correct?

5 A That's correct.

6 Q The consequence of that is that you are hiring temporary workers to provide that contract on
7 a particular basis and if you are not paid then there is risk exposure by reason of the
8 agreements that you have entered into with the client?

9 A Absolutely correct, just as on a permanent placement I've got risk exposure if the client
10 doesn't pay me there.

11 Q But it is slightly different, because in the case of a permanent placement you offer the
12 candidate for consideration, the client either accepts or not and the liability of the client to
13 pay crystallises at that moment that they accept the person into their employ. Different is a
14 contract that spreads over a period of time, and that is why, as you probably heard because
15 you may well have been here, certainly Hays recognises that there are not just different risks
16 that arise, but somewhat greater risks that arise in respect of temporary workers?

17 A I was answering your specific question about the business nature of the relationship, you did
18 specifically say "business nature" and the business nature is identical.

19 Q Well come back to the proposition that I have just raised which is that ----

20 A The exposure tends to be greater because of the duration of time, absolutely, I don't
21 disagree with that.

22 Q Indeed. There is also, and perhaps I could just briefly refer you to p.2342 where, under the
23 "Services" you refer here to a distinction between the provision ----

24 A I'm sorry, is this in the "Anders" section?

25 Q I am sorry, it is 2342 under "CDI AndersElite" it says "Services" in that second column. It
26 speaks about: "Anders provides temporary workers at jobsites" and "Anders contracts for
27 the temporary workers' services either with the individual workers directly ..." and it deals
28 with those matters and in effect what is pointed out here is that this is what you are
29 providing by way of these services whereas you say: "Additionally, Anders recruits
30 candidates to meet the permanent placement requirements of its customers." So there seems
31 to be a distinction that you draw here between the provision of temporary workers, and the
32 recruitment of permanent workers. Does that reflect these contractual differences that we
33 have discussed?

1 A The distinction we are drawing there is trying to just define for the reader, and again this is
2 a financial disclosure document and you will see that we reveal also that we do project
3 outsourcing, but the nature of the services is somewhat different in certain respects, and the
4 respect that they are different in the UK, just like in the US, is that we do provide a
5 payrolling service incrementally to our recruitment services. Recruitment services are
6 identical.

7 Q I do not want to backtrack, we have dealt with the differences, but in essence here again you
8 are making some play of the distinction between provision and recruitment, and that seems
9 to reflect both the different contractual relationships and also something about the different
10 risk that attaches to the temporary worker provision?

11 A Yes, I wouldn't say anything different than I said previously which is that the recruitment
12 function is identical, we do have to provide payrolling to the contract workers because of
13 the duration it does entail slightly greater risk.

14 Q Indeed, the question of risk is one of the matters that you do refer to in your accounts, where
15 on p.2346 in the second column on that page, you say in the third paragraph:
16 *“The failure of customers to pay amounts owed to CDI could cause the Company*
17 *to experience significant losses.”*

18 You are effectively reflecting the fact that there are risks that attach to these relationships, is
19 that correct?

20 A Yes.

21 Q Rather like other companies it does appear that you account on a principal basis for the
22 provision of temporary workers, is that correct?

23 A I would only say the terms “principal” and “agent” as used here are somewhat different, we
24 don't use those terms in the US, so I'm not completely clear.

25 Q Can I seek to indicate how we are using them, and you can apply the requisite translation
26 into your terms?

27 A Sure.

28 Q But in effect, what is being said is that your company enters into a relationship with the
29 client where it has a contractual relationship and it owes obligations to the client to you and
30 you are not acting as an agent for the temporary worker. So, as we have already discussed,
31 you contract with the client, you contract separately with the temporary worker, you are not
32 acting in that relationship as an agent simply receiving monies in order to pass them over to
33 the temporary worker?

1 A Let me be as clear as I can. Again, I don't understand the definition of "agent" that go
2 behind that as you are using it. What I would say is that it would be clear on how we serve
3 the client and the worker. We have a contract with the client, we have a contract with the
4 worker, we have an obligation to pay the worker and we bill the client, and it occurs in that
5 order. We then get the money from the client, and we use it to offset the pay we have paid
6 to the worker, and then we make our commission on the remainder.

7 Q Yes, but the result of that is that when you compute turnover for the purposes of your
8 accounts you are including in the computation of turnover the entire fee that you receive for
9 that client, and that would reflect the fact, and does reflect the fact that you treat that as a
10 principal to principal relationship?

11 A What it reflects in the US, and I'm pretty sure in the UK in our terms is that under
12 accounting rules, and in the US we use GAAP instead of IFRS, but under GAAP rules there
13 are a series of tests you have to review, and our accounting staff has reviewed those where
14 there are outside accountants, and is determined that the correct reporting methodology for
15 us, and it is a judgment, but our judgment is that the correct methodology is to report
16 turnover.

17 Q Yes, and in so doing you are accounting for those receipts on a principal basis, in other
18 words the usual basis under the accounting standards, I am not certain how much you are a
19 party to these Decisions, but in essence under the standards you have to make a
20 determination as to whether you are receiving these monies as principal and, if you are, then
21 you account for them as turnover, and that is what you have done in your accounts?

22 A Yes, the terms used in the US are slightly different, but the essence is that we have made the
23 determination, it is judgment that under GAAP we have to account for them, gross turnover
24 and then report separately the margin.

25 Q Indeed, and that judgment is that one that you have been party to?

26 A I'm not aware of it, I've not been party to it, it's done between our CFO staff, our controller
27 staff and the external accounting staff.

28 Q Yes. Do you have any sense of the reasons that support that treatment as principal in your
29 accounts?

30 A Not at a level that I feel competent testifying as an expert on it no.

31 Q I see. It is the case though, and I think I can be relatively brief about this, that in your
32 accounts year after year that is the treatment that is given to these matters?

33 A Absolutely.

1 Q You have not changed your accounting policy, you do not intend to change your accounting
2 policy, is that correct?

3 A That's correct.

4 Q Indeed, if you were to do so you would have to have a significant restatement of your
5 accounts and you have no intention of doing that?

6 A Yes, I don't think we have an argument on that point.

7 Q Could I, again hopefully briefly, take you to your accounts, which you will find in NCB 4,
8 vol 2. These are your 2008 accounts, they commence at 1805, tab 4. If you look at 1816
9 you will see there, there is a definition of "turnover", and it refers to:

10 "Turnover comprises fees for the supply of services of the company's engineers,
11 designers, draughtsmen and others, as well as placement fees, net of value added
12 tax. Income for the provision of permanent staff is recognised when the position
13 of employment is accepted by the candidate."

14 So this conception of turnover is very much along the lines that we have already debated
15 and I think agreed with one another?

16 A Yes, I hope we weren't debating, I think we're okay on that.

17 Q Very good. Then there are references, and again we might be able to deal with this very
18 briefly, but in your accounts, when you are dealing with the performance for the year, do
19 you accept that you will refer to turnover as one of the matters relevant to the performance
20 of the company?

21 A It is a matter relevant to the turnover of the company, however, one of the reasons we break
22 out outsourcing versus permanent versus contract services or temporary services is that they
23 do have vastly different profitability characteristics, and as an example in permanent
24 placement that is our highest margin business and it is the one with the highest returns. I
25 know that's not relevant to the case here but I'm just trying to describe why we break them
26 out differently because even though they all go into turnover under the accounting rules
27 they do have very different business dynamics and characteristics and for the ease of the
28 investment community we break them out separately. So our most profitable would be
29 professional services, next most profitable would be outsourcing, and the least profitable for
30 us is temporary or contract services.

31 Q So there are differing margins that are earned from different parts of the business?

32 A Correct, but they are all part of turnover, and we do talk to turnover as well as to the
33 characteristics of each.

1 Q And again we do not need to dwell on this because I think again we are in agreement, but if
2 you would just, whilst we are here look at 1808?

3 A Yes.

4 Q Under the “Principal activity and business review” you will see in the second last
5 paragraph: “Revenues and profits declined in 2008 as a result of the global downturn ...”
6 and in other reports you have had good years, and you will say things effectively that the
7 Group has continued to grow both its revenue and profits. It is a standard way of looking at
8 one of the matrices as to how well or badly the company is doing?

9 A That’s correct.

10 MR. UNTERHALTER: I have no further questions for Mr. Ballou.

11 THE CHAIRMAN: Any re-examination?

12 Re-examined by Miss KREISBERGER

13 Q Mr. Ballou, you mentioned the payroll services that the company provides. Can you give
14 the Tribunal an indication of what that means? What sort of infrastructure does the
15 company have in place to provide those?

16 A We have seven clerical employees, we’ve outsourced it to India and the seven clerical
17 employees working in India provide the payrolling services for the contractors we have out.
18 It costs some tens of thousands of pounds. I’m not sure of the exact number, but it’s in the
19 tens of thousands of pounds.

20 Q That is across how many contracts? A ball park figure?

21 A Hundreds of contracts. You know, 500 or 600 contracts.

22 Q Thank you, Mr. Ballou. I have no further questions.

23 THE CHAIRMAN: Of those seven employees, is that because you are dealing with the UK or
24 UK and US?

25 A That’s for the UK. In the US I believe we have another ----

26 Q That is fine. (After a pause): Thank you very much, Mr. Ballou.

27 (The witness withdrew)

28 ADAM HERRON, Sworn

29 Examined by Mr. HARRIS

30 Q Mr. Herron, can you please turn to tab 11? Do you recognise that as a copy of the witness
31 statement given in these proceedings?

32 A I do.

33 Q If you turn several pages to the back of the tab, to p.123, do you recognise that as a copy of
34 your signature?

1 A Yes, it is.

2 Q Have you re-read the statement recently?

3 A Yes, I have.

4 Q Are the contents true to the best of your knowledge and belief?

5 A Yes, they are.

6 Q Do you have any corrections or additions to make.

7 A No, I don't.

8 Cross-examined by Mr. UNTERHALTER

9 Q Mr. Herron, just so that we can understand what it is that you can talk to and what you
10 cannot, you describe yourself as the Chief Operating Officer of Eden Brown; is that correct?

11 A That is correct.

12 Q Do you have responsibility for formulating accounting policies and matters of that sort, or
13 are those matters we should deal with with Mr. Sterling?

14 A Yeah. I don't have that responsibility.

15 Q Could you just very briefly tell us what responsibilities you do have so we can be clear what
16 we should put to you and what we should not.

17 A My background, as I started out, is a recruitment consultant. So, it's very much the
18 operational side of the business - the day-to-day recruitment activity that goes on within the
19 business.

20 Q I see. Now, you have wanted to claim in your witness statement that there are really very
21 few differences between permanent and temporary placements. Is that still your essential
22 position?

23 A Yes, that's correct, yes.

24 Q I want to point out to you matters which are ones we have spoken to. We have spoken to a
25 number of witnesses, but perhaps there will be little difference between us on the score. So,
26 let me just briefly raise them with you. In the standard case - and I know you raise a number
27 of other examples - where one deals with a temporary worker you - that is, Eden Brown -
28 enters into an agreement with the client (a separate agreement) and then you quite
29 independently enter into an arrangement with the temporary worker to provide that
30 temporary worker over a period of time to the client; is that correct?

31 A That's correct. We have a separate agreement with the client and with the temporary
32 worker.

1 Q Am I also correct in saying that the periods of time over which you might be required to
2 supply those workers may vary, but it can be a number of months - perhaps even a year or
3 so; is that correct?

4 A It does vary greatly, yes.

5 Q In circumstances such as the construction industry, for example, where it is very much
6 concerned with project-based work -- Am I right?

7 A That's typical, yes.

8 Q So, often a construction firm will want to assemble a variety of personnel to service a
9 particular contract. Would that be one of the ways in which you might seek to assist a
10 construction company?

11 A Yeah. Typically they'd go to a number of agencies to secure a number of temporary
12 workers, yes.

13 Q To the extent that you could provide, you would, over a period of time in respect of that
14 project; is that right?

15 A That often happens, yes.

16 Q So, if in the course of that contract there is a problem with a particular worker - that worker
17 perhaps is not to the right standard or becomes ill, or a variety of things that happen - your
18 obligation is to ensure that those workers that you have contracted to supply to the company
19 are provided; is that correct?

20 A No, that's not the way it works.

21 Q Tell us how it works.

22 A You know, it can be that if someone stops a job for whatever reason, you know, the client
23 may inform us and ask us to replace him with someone else. It may be that the first we hear
24 of it is that our temporary worker has finished and the client's already got someone from
25 another agency. So, you know, one of a number of different things can happen.

26 Q But one of the things that can happen - and if the construction company wishes to hold you
27 to your agreement - is that you must provide the person to do that job because that is what
28 you have contracted for.

29 A No. In our terms we have no obligation to provide a person ... to the client ----

30 THE CHAIRMAN: An obligation to ----?

31 A To continually fill a position.

32 MR. UNTERHALTER: So, are you saying that all your temporary placements are simply based
33 upon an identified individual - never, "We will provide a number of workers with particular
34 competencies to fulfil the number of jobs that you require"?

1 A Yeah. Typically a client would give us a vacancy and we would try and match someone --
2 to introduce someone suitable for that role. But, there's no obligation that they then will be
3 there for the duration of that role. The temporary worker could hand their notice in or the
4 client could give them notice.

5 Q Let us just be clear. The client cannot give them notice because the client has no
6 contractual relationship with the worker. You have that relationship.

7 A Typically what happens - literally almost on every occasion - is that the client would give
8 notice directly to the temporary worker or the temporary worker would give notice directly
9 to the client.

10 Q Can we just try and concentrate for a moment on what it is that you are providing? What
11 service are you, Eden Brown, providing in respect of temporary workers? You are
12 undertaking to provide workers of certain competencies for a period of time to your client;
13 is that correct?

14 A The service we're providing - and our terms are pretty clear on this - is an introduction of
15 someone who's suitable for a role.

16 Q Yes. But, it does not end simply on the introduction. In the case of the temporary worker
17 you are obliged to provide that worker over the period that you have contracted for. That is
18 what your contracts provide for.

19 A No. On a temporary worker we make the introduction and then we provide payroll services
20 for the duration of that contract.

21 Q Mr. Herron, let us be clear. The difference between a situation where you provide a
22 permanent worker is that you propose the worker and the client either accepts that person or
23 not and employs them, or not, as they wish; is that correct?

24 A That's correct. It's the client's choice.

25 Q Now, in the case of temporary workers the client does not employ the person. Do you
26 accept that?

27 A That's correct, yes; they do not .

28 Q You employ the person.

29 A We don't have employment rights.

30 Q You procure their services.

31 A We introduce people to clients.

32 Q Do you or do you not have -- Are you acting as an employment business, or not?

33 A We are, yes. That's the legal form that we are, but the reality is - and what our terms state -
34 that we're just making an introduction. I can refer you to the relevant parts in our terms.

1 Q Mr. Herron, you are accepting, are you not, that you are acting as an employment business?
2 That carries certain legal consequences. You are aware of that?

3 A Yes, indeed. You know, the legal form is that we are acting as an employment business.

4 Q It is not a matter of legal form. It is a matter of legal obligation. Once you are acting as an
5 employment business you cannot act as an agent.

6 MR. HARRIS: Sir, I do have some reservations about this. This seems to be putting a legal
7 proposition to the lay witness. I am slightly concerned about that.

8 THE CHAIRMAN: I think it is because the witness has said that, "In reality we just perform
9 introductions". Mr. Unterhalter is exploring whether that is in reality what they do.

10 MR. HARRIS: I accept that entirely. But, the question which was just put was, "Because you are
11 an employment business, therefore that has certain legal consequences". I paraphrase, but
12 that was the gist of the question. It may assist. Mr. Herron said a moment ago that he
13 could explain this by reference to the terms and conditions. They are in the bundle, Sir. If
14 you would like the reference?

15 THE CHAIRMAN: It may be that Mr. Unterhalter will come to that. If you could frame the
16 question, without reference to the legal form, to what that entails -- the consequence?

17 MR. UNTERHALTER: (To the witness): You accept that when you provide temporary workers
18 you are acting as an employment business and not an agency?

19 A We do state that in our contracts.

20 Q That has certain entailments as to what you may and may not do. Do you understand that?

21 THE CHAIRMAN: Can you give examples specifically?

22 MR. UNTERHALTER: Yes, Sir. (To the witness): In the case of a permanent worker you go to
23 the employer quite clearly as an agent to say, "Here is somebody you may wish to employ.
24 We offer them to you for your consideration and your employment of that person". You are
25 acting in that example as an agent. Correct?

26 A Yes, I agree.

27 Q That is standardly how these matters are approached when you are dealing with permanent
28 placements.

29 A I agree.

30 Q When it comes to temporary workers you are an employment business - not an agency. The
31 consequence of that is that if you are going to provide these workers you have to enter into a
32 contract with the worker so as to provide that worker to your client. Do you accept that?

1 A Well, we introduce the temporary worker to the client and then what our contracts clearly
2 state is that the temporary worker provides their services to our client. You know, we
3 provide a payroll service. The legal obligation we have is to pay the temporary workers.
4 THE CHAIRMAN: You enter into a contract with the temporary worker.
5 A That's correct, yes.
6 Q You do not do that with a permanent worker.
7 A That's correct.
8 MR. UNTERHALTER: Your obligation is to pay the temporary worker and the temporary
9 worker does something for you in exchange for the monies that you pay them.
10 A No. Our contracts are very clear - that the temporary worker provides services to the end
11 user client.
12 Q Just let us be clear. You are not paying the worker for nothing. The worker, under the
13 contract with you, is providing you with services so that you can then provide them to your
14 client - otherwise there is no point in this arrangement. You are then just acting as an agent.
15 A No. What our contracts are very clear on is that the temporary workers are providing the
16 services to the client, and then for the hours they have done and the hours that the clients
17 approve we then pass the money on to the temporary workers for the hours they've
18 provided for the client. Now, as I said, our terms are very clear on this. The terms state
19 that, you know, the client pays us and that is a sum of money that is the wages for the
20 temporary worker and the commission that we receive for the work, and it's the hours that
21 they're paid for -- the hours they've done on behalf of the clients.
22 Q Mr. Herron, if your client does not pay you are you obliged to pay the temporary worker?
23 A Legally we are obliged to, yes.
24 Q Yes, indeed.
25 A It's a very rare situation.
26 Q Well, rare or not ----
27 THE CHAIRMAN: It would be quite significant if a construction company went into liquidation
28 and had not paid you for the last week, and your temporary workers had been working that
29 week. You would have to carry the cost, would you not?
30 A The theoretical risk is here, absolutely. The reality -- I think in my witness statement we
31 refer to figures -- an annual payroll worth £8 million. It was about £10,000 worth.
32 Something like that.

1 MR. UNTERHALTER: You may be in the fortunate position where you are not always exposed
2 to the risk in the sense of the risk materialising. But, that the risk is there is undoubtedly the
3 case.

4 A Yes, I agree - theoretically.

5 THE CHAIRMAN: Do you insure against it?

6 A I don't believe we have credit risk insurance, no. I think it's quite an expensive thing to get.

7 MR. UNTERHALTER: Just to conclude on this point -- Whether or not the client has -- at what
8 point the client agrees with you to take on a particular temporary worker. The fact is that
9 you are obliged to pay the temporary worker and I want to suggest to you that that can only
10 make sense in a principal-to-principal relationship if the worker is making their services
11 available to you to deploy with a particular client. There cannot be any other basis for it.

12 A The way I view it is that the service the temporary worker provides to us is that they give us
13 the ability to introduce them to a client. Then, as I say, our terms and contracts are very
14 clear that the temporary workers then provide their services to the end user client.

15 Q But it is not just an introduction. The fact is that once you have taken them on, in the sense
16 that you are obliged to pay them, you are only doing that because they are making their
17 services available to you.

18 THE CHAIRMAN: I do not follow this. Why does it have to be that they are making their
19 services available to Eden Brown? Eden Brown can undertake to pay them for making their
20 services available to Eden Brown's client. Obviously it is paying them for something. That
21 is clear. But, it does not follow just because Eden Brown is paying them that the worker is
22 agreeing to provide his or her services to Eden Brown. It could be for providing the
23 services to Eden Brown's clients.

24 MR. UNTERHALTER: It could - but the question is: What is the obligation under the agreement
25 that you are undertaking to the client?

26 A Once we've introduced a temporary worker to the client the only services we then provide
27 to the client are the payroll services.

28 Q Are you not required then to carry on ensuring that this temporary worker continues to be
29 provided over the lifetime of the contract?

30 A No, we are not.

31 Q Perhaps we should go to your agreement. Perhaps you can point out where in your
32 agreement that is stipulated for. I am not certain where this agreement is now to be found?

1 A Without looking at it, I can probably answer your question. I don't think the terms will
2 cover every situation that doesn't happen, if that makes sense. What the terms don't contain
3 is any obligation on us of the nature you've just described.

4 Q Perhaps you would just identify for us in the agreement what you rely upon for the notion
5 that your obligation is simply to introduce and nothing more.

6 A Right near the start actually. If you look under 'Definitions', the first definition which is
7 'employer/You', the last part of that little paragraph is -- this is us talking about our client.
8 "to which we introduce a candidate or who engages the services of a candidate". What that
9 is saying is that our service is that we introduce a candidate and that the end user client then
10 engages the services of that candidate.

11 Q I am sorry?

12 A Under 'Definitions', the first one is 'Employer/You'. The last line.

13 THE CHAIRMAN: You cover both permanent and temporary staff.

14 A That's correct, yes.

15 MR. UNTERHALTER: So, you simply make no distinction in your agreement between the
16 services that you are providing for permanent and temporary ----

17 THE CHAIRMAN: Section 1 is permanent. Section 2 is temporary.

18 A The definitions at the start cover everything. Yes, that is my position - you know, we make
19 no differentiation between temporary and permanent. The service we provide is an
20 introduction.

21 MR. UNTERHALTER: Would you turn to NCB2, tab 9. This is your agreement with the
22 temporary worker; is that right?

23 A The PAYE temporary worker, correct.

24 MR. UNTERHALTER: Let us look at what is agreed. At the foot of the page,
25 "It is agreed that we may, from time to time send you a Proposal. If you accept
26 the Proposal you shall provide us with the services".
27 The services are defined as 'services specified in an Assignment for the client at the
28 Contract Site for the Assignment Term'. So, it certainly appears from this leg of the
29 transaction that the temporary worker is providing you with the services for you then to
30 assign them to the client for the purposes of discharging your contract with the client.

31 A What that sentence, "If you accept the Proposal you shall provide us with the Services --"
32 What that is basically saying is -- If you look slightly above where 'Proposal' is defined --
33 It's a 'request by us for you to --' So, this is us talking to the temporary worker. This is 'a
34 request by us for you to provide Services to a Client in the form set out in Schedule 1'. So,

1 what that statement there is saying -- It's kind of what I said before - that, you know, the
2 temporary worker gives us the ability to make an introduction for them to then provide their
3 services to the client.

4 MR. UNTERHALTER: Yes. But, all that that is saying is that you have received a request from a
5 client and what you are now doing is entering into an agreement where the temporary
6 worker is agreeing that the worker will provide you with the services so that you can assign
7 them in due course.

8 A No. As I said, the temporary worker gives us the ability to make an introduction. So, if
9 they accept -- That's the understanding that we use.

10 MR. UNTERHALTER: No. No. No. Let us just deal with the contract and what it says. You
11 are here procuring services from a temporary worker. It is made plain here.

12 A Yeah, it says if they accept the proposal -- and the proposal is that they provide services to
13 the client.

14 MR. UNTERHALTER: No. No. No. Let us just go through this again. "We may from time to
15 time send you a Proposal." Now, the proposal is "a request from us to you to provide
16 Services to a Client".

17 A Correct.

18 MR. UNTERHALTER: Yes. So, you would have received a request from a client in order to
19 provide a temporary worker. The worker is then providing services to you so that you can
20 meet the proposal that the client has put to you.

21 A No. It says under 'Proposal' that the temporary worker is to provide services to a client.
22 The paragraph you are talking about - "It is agreed that --" If you look at the very last
23 sentence, "The date of this agreement is deemed to be the earlier of the date you sign this
24 agreement or the date upon which you first provide services to a client". For me, it is very
25 clear that it is all about the temporary worker providing services to the end user client.

26 MR. UNTERHALTER: I want to simply put it to you that the nature of this agreement is that you
27 are necessarily acting to procure services and become obliged to pay for those services, and
28 then you will supply them in due course under the terms of the proposal to the client.

29 A I think that the terms are very clear a number of times - it's about the temporary worker
30 providing services to a client. You know, the previous page, p.244, the cover sheet -- the
31 heading page -- "Important Note to the Temporary Worker". That paragraph contains, "If
32 you sign the agreement or provide your services to a client". Right from the outset it is
33 clear that it's about the temporary worker providing their services to a client. Back on
34 p.245 there are a number of instances. You know, the "Client Agreement" is defined as

1 “the provision of services by the Worker”. ‘End User’ is ‘whose premises the Services are
2 performed at”. “Assignment” is “a Proposal which is accepted by you either by formal
3 confirmation of your acceptance or by commencement of the Services”. You know, it’s all
4 about the temporary worker providing services directly to the end user client.

5 MR. UNTERHALTER: Can I refer you to p.247 within tab 9 in the same agreement? Clause 3.

6 At 3(d) it is said,

7 “You shall not discuss with the Client or End User either your rates of pay with
8 us, or any other terms of your engagement with us other than strictly as required
9 for the proper objectives of the Services”.

10 So, there seems to be clear disconnect that you are seeking to put in place in respect of what
11 you are paying the client. Is that correct?

12 A The purpose of this clause is what I would kind of term as a comfort clause for our clients.
13 There’s often issues -- well, there can be issues where different temporary workers are
14 performing similar roles and it gets talked about, what rates people are on, and if they’re on
15 different rates it can cause an issue. So, you know, as I say, it’s a kind of comfort clause
16 for our client so that, you know, there’s no discussion around rates - those type of things -
17 that could lead to those issues.

18 Q Is it not actually a comfort clause for you because what you are striking out here is the
19 independent relationship that you have with the worker and a different relationship is struck
20 with the client where you negotiate over the rates? You are not wanting the one to affect
21 the other.

22 A Typically we’re very transparent with the rates of pay and charge. You know, a good
23 proportion of our business now is 100 per cent transparent because of the way it’s managed.
24 You know, the vendor management systems -- That sort of set-up.

25 Q I want to suggest to you that you would not have a clause of this kind if you were really
26 going to permit the free-flow of information between the client and the worker for the
27 purposes of the rates at which they are going to be paid. You want to keep some distance
28 on that because it affects your negotiating position.

29 A No. As I said, this clause is about instructing the temporary worker - that this contract is for
30 - to not discuss their rates of pay that could lead to potential issues of comparability.

31 THE CHAIRMAN: It does not say, “You must not discuss with any other temporary worker --“
32 It says, “You must not discuss with the client”.

33 A Well, you know, if a temporary worker is in a position - They might be working alongside a
34 permanent member of staff who’s part of that client. You know, again, people compare the

1 salary with an hourly rate. You know, I've seen a number of times where that can lead to
2 issues.

3 MR. UNTERHALTER: Would you have a look at Clause 4(b) on p.248? It says there that,
4 "You acknowledge and agree that: because unauthorised absence or absences due
5 to sickness may result in a breach of obligations which we owe to the Client,
6 during an Assignment you shall notify us as soon as possible and by 9.00 a.m. on
7 each day of any absence and give the best indication you are able to of any likely
8 period of absence".

9 What are these obligations that you owe during the period of the contract?

10 A There are no obligations that are reflected in our terms with our client. Really, again, what
11 we're trying to achieve through this clause is that a good service is provided and that it's
12 highlighted to the temporary worker that if they are going to be absent, then they need to
13 inform, you know, the relevant people that they are going to be absent. You know, if that
14 doesn't happen there is no obligation in our terms with our client that mean -- you know,
15 that's placed upon us.

16 THE CHAIRMAN: When you say 'may result in a breach of obligations which we owe to the
17 Client' are you saying that is not right?

18 A Yeah. There is no obligation to the client.

19 Q So, it is not correct.

20 A Yeah.

21 MR. UNTERHALTER: Mr. Herron, what I want to suggest to you is that it is entirely correct in
22 that what this indicates is that you do have obligations to the client and those are the very
23 obligations which we have been debating - which is that you are obliged to the client to
24 provide this worker and you do not want to have a situation where there are absences and
25 the like which will compromise the obligations that you owe - otherwise, why would you
26 put this? You do not put provisions in an agreement for no purpose.

27 A The reality is ----

28 THE CHAIRMAN: Some people do, but ---- (Laughter)

29 A The reality is, as I said, that we want a good service to be provided, but the reality is that we
30 have no obligations. You know, often a temporary worker will be absent and we won't
31 even be aware of that situation. They'll have informed the client. They'll have spoken to
32 the person that's line-managing them, that's supervising them. But we'll be completely
33 oblivious to the situation. No-one bothers to tell us.

1 MR. UNTERHALTER: They may not practically tell you, but the point is that this is something
2 that you want to avoid because otherwise you are not providing the level of service that is
3 required by the client.

4 A You know, we put it in there because we want to highlight the fact and we want the
5 temporary workers to treat it seriously, but the basic fact of the matter is that we don't have
6 any obligations to our clients if that person doesn't attend work.

7 THE CHAIRMAN: Why do you want the temporary worker to notify you?

8 A We'd rather know -- we'd rather have it highlighted to the temporary worker that if they're
9 going to be absent they need to tell us, if they haven't already told the client because ----

10 Q Why should they be telling you?

11 A Well, I suppose it's because we are the ones that have got the contract for services with
12 them. As I say, the reality of the situation is that, you know, the temporary worker will just
13 tell their line manager that they're gonna be absent.

14 MR. UNTERHALTER: I am not following you, Mr. Herron. If all that is entailed by these
15 temporary placements is that you introduce the worker and then for the rest it is up to your
16 clients to decide what to do with this worker, why would you care at all? According to you,
17 you have no ongoing concern or obligation in respect of the provision of services by that
18 worker to the company?

19 A But our desire is that a good service is provided and absence without explanation is not part
20 of a good service, so we would rather that it's highlighted to the temporary worker that if
21 they are going to be absent then we would like them to tell us so that we can ensure that the
22 client is aware.

23 THE CHAIRMAN: Why do you not tell them to tell the client?

24 A I am not sure of the original thinking behind the drafting, I can only comment on the reality
25 of the situation, what you have just said is what happens, basically, the temporary workers
26 do tell the client and we rarely know about it.

27 MR. UNTERHALTER: Tell me, Mr. Herron, are your clients aware of the fact that, according to
28 you, you owe no ongoing obligations to provide these workers over the period of the
29 contract?

30 A The clients see the terms which we have with them which state that they are responsible for
31 the supervision, the control, the quality of work. There is a one week notice period typically
32 in a contract. If the temporary worker resigns and gives a week's notice, then there is no
33 obligation to the client beyond that.

1 Q Do your contracts provide for a period of time over which they will run, that is as between
2 yourself and the client?

3 A It varies, at times they do. Yes, if someone wants to book a temp for a day or a week then
4 typically the contract would have a start and an end date on it.

5 Q But assuming they want the temp for a period of time the contract will stipulate for that?

6 A If there is a known set period of time, then typically it would say the period of time, yes,
7 otherwise it would be an ongoing contract.

8 Q It is really that that I have been trying to get to with you. If it is a contract that is to be of
9 application for a period of time, it is over that period of time, I want to suggest to you, that
10 your company has obligations to the client. Otherwise, there would be no point, it would all
11 end at the time you introduce the client?

12 A Let's say for example a client wanted a temporary worker for three months but after one
13 month that temporary worker handed their notice in and left, we have no obligation to them
14 to find another temporary worker to cover the remaining two months of that contract period.

15 Q You have made that point, I am putting to you the standard case where a client comes to
16 you and says: "I want five temporary workers to man a construction project for a period of
17 six months", and you are contracting with them on the basis that those workers will be
18 provided over the period that they are required, that is what you have said occurs from time
19 to time?

20 A I'm sorry, I don't remember speaking of that sort of specific situation. It's not something
21 that typically happens with us. Our business really is kind of one-off placements. I believe
22 our average number of temporary workers with a client across our whole client base is two,
23 we don't tend to supply large quantities of contractors to individual clients.

24 Q Again, if I could refer you back to tab 9, it is the same agreement we are in, it is clause 1(a)
25 on p.247:

26 "1. You shall:

27 (a) in your capacity as a PAYE temporary worker provide the Services
28 professionally promptly and efficiently and in good faith using your own skill and
29 expertise and with due care to the best standard during the Work Time throughout
30 the Assignment . . ."

31 And the work time is the work time specified in the assignment, so you are taking on the
32 worker for the purpose of that worker being provided over a period of time, and that seems
33 to be intrinsic to these sorts of relationships?

1 A The initial intention would be that the client wants someone for a certain period of time and
2 we try to introduce someone who can work for that period of time but the reality is that if
3 the temporary worker resigns, hands their notice in, they are not obliged to see through to
4 the end of what was originally determined to be the contract period.

5 Q Let us just see what you are contracting for in the first place, we will come to how the
6 notice is given. The contract that you enter into with the worker is for the worker to render
7 services over a period of time, and that is what will be done when you provide that worker
8 to the client over the period of time?

9 A Sure, the contracts are drawn up that we introduce someone and they'll provide their
10 services for an anticipated period of time.

11 Q What I am putting to you here is that you enter into the contract with the worker for the
12 purposes of a period and that is the period that you will provide this person to the client, that
13 is the back to back nature of these relationships, is it not?

14 A As I say, the intention is often that it will be for a certain period of time, yes.

15 Q One of the other things that you say in your witness statement is that there is no ability to
16 bargain over rates, is that correct?

17 A Typically for a particular role a client will have a rate in mind that they are looking to pay,
18 and different temporary workers will have rates that they are looking to achieve for pay, and
19 the determination of where the rate ends up is where the client and temporary worker are
20 prepared to compromise. We have the ability to effect our commission in between. As I
21 say in my statement it has become more and more common now that even our commission
22 we do not have control over, more often now our commission is a fixed price per hour as
23 well.

24 Q I am trying to understand that because the fact is you are doing the negotiation with the
25 client as to a rate which has two components to it, one a commission and secondly the
26 amount that a temporary worker can be provided for. That is what you are having the
27 negotiation with the client over, is that not correct?

28 A Well we act as a go-between between the client and the temporary worker as to what each
29 of them are looking to pay or receive.

30 Q But you are not acting as an agent, you cannot be, because the legislation says otherwise.
31 What you are doing is you are entering into a negotiation with the client as to what you will
32 provide the worker for and there is a rate, and that rate is made up of different parts, but it is
33 a rate for the provision of that worker, is that not correct?

34 A Yes, but we cannot dictate what the temporary worker will work for, that is driven by them.

1 Q I understand that you will have a separate negotiation with the temporary worker to try and
2 determine what you can get the temporary worker for, what you think is a saleable rate for
3 that worker, clearly that is true, but when you go into the negotiation with a client you are
4 going in to determine a rate and the rate includes both the component attributable to the
5 worker and your commission and that is the rate that you will bargain with, with the client.
6 Is that not the case?

7 A No, typically the client will know what rate they want to pay and the client will dictate that
8 rate.

9 Q Sorry, say that again, I beg your pardon?

10 A Typically the client will dictate the rate that they want to pay.

11 Q But that is a question, as I think you say in your statement, of supply and demand in
12 circumstances where there is a scarcity of particular categories of skills then it will be a
13 negotiation and it depends what the market will yield up?

14 A It's the temporary workers on the one hand with what they are prepared to work for and it's
15 the clients on the other hand and what they are prepared to pay.

16 Q And it is your margin that you are wanting to procure. What I am putting to you is that you
17 have a sense of what you can procure temporary workers for, you have an idea of what rate
18 you want to earn, and you put those two together and you go in to negotiate the best you can
19 to get to the highest figure you can from the client. Is that not what happens?

20 A As I said, the client will typically dictate what they want to pay. We can't get the client to
21 pay more.

22 Q Perhaps the laws of supply and demand do not work in your industry, but ----

23 A As I say, what is becoming more and more common now in a decent proportion of our
24 business is that even our commission we cannot negotiate over, that is fixed as well.

25 Q Can I refer you to the last provision in this agreement, which is at 247, and it is under 3(f),
26 this is under "what you must not do":

27 "during an Assignment other than for sickness take any periods of absence or
28 leave without our prior agreement and in the case of leave entitlement (please also
29 see clause 4) without having submitted a leave request form in accordance with
30 Eden Brown procedures."

31 Again, this is just another indication that the worker must come to you and seek Eden
32 Brown's permission and regularise their position with you not with the client, which, just to
33 make the point indicates that this is an ongoing relationship that you have with the worker
34 and the management of that worker over the lifetime of the agreement?

1 A My response is really the same as on the previous point, that we are trying to enforce good
2 practice, and a good level of service, but the reality is that the temporary worker will
3 communicate directly with their line manager, the client over these sorts of matters.

4 Q You may say that is the reality, but if that is the reality why do you have these things in
5 your contract? I want to suggest that these contracts are formulated precisely because they
6 deal with the relationship that you have over a period of time for the provision of these
7 workers to your clients and that is why you necessarily have to regulate these matters?

8 A I am sorry, I keep coming back to the same point that we are trying to enforce good
9 practice, but the reality is that that is not what happens.

10 Q It is not so much a matter of good practice, you are trying to ensure that you are able to
11 meet your obligations to your client, that is why these matters have to be dealt with and are
12 dealt with within your relationship with the worker?

13 A But as you will see, tab 7, the terms we have with our clients, we don't have obligations for
14 those kind of matters with our clients.

15 Q If you did not have obligations with your client, or to your client then you would not need to
16 have these arrangements with your workers, and what this shows is that because you have
17 these arrangements with the temporary workers, that you take on under this agreement, it is
18 indicative of the consequent obligations that you need to fulfil vis-à-vis your client?

19 A We simply don't have those obligations with our clients in our terms and conditions.

20 MR. UNTERHALTER: I have no further questions.

21 THE CHAIRMAN: May I just, while we are on the contract that you have open, look at clause 8,
22 that is on p.248, it is about termination? If the temporary worker wants to end the
23 arrangement, you ask them, indeed you oblige them, to give you written notice, do you not?

24 A That's what it states, correct.

25 Q That is what you want to happen? They may not always do it, but that is what you would
26 like?

27 A It's another one of those situations where it's not what happens, the reality is that temporary
28 workers inform their line managers when they want to leave.

29 Q You would like them to give you written notice because you are putting that in the contract?

30 A It would be better from our point of view if we were properly informed about it because it
31 would save the situations where the first we know about it is several days after they have
32 resigned when the client tells us.

33 Q So you are telling them what they should do, people do not always carry out their contracts,
34 of course, but what they should do is give you written notice?

1 A That's what it states, correct.

2 Q Because that is what you want to happen?

3 A Yes, in an ideal world it's good practice for the temporary worker to resign to the manager
4 that they have been reporting to but it would be great if they also communicated that to us
5 officially as well.

6 Q In fact, you do not tell them that they should indicate that they are resigning to the line
7 manager, all you say is "you may terminate only if a notice to terminate is given to us",
8 indeed, you have put in a notice period. That is what you would like to happen, is it not?
9 Presumably that is why you put it there?

10 A We know they are going to inform their line manager of their resignation, that is what
11 always happens and, yes, it would be good if they would also communicate that to us
12 officially.

13 Q If, say, you provide 30 temporary workers for a building or engineering project, and on
14 week three one of them does not show up for work, and does not show up for work the next
15 day, presumably the client rings you up and says: "Mr. Jones hasn't turned up, and it's the
16 second time this has happened", and you would then have to terminate the contract with Mr.
17 Jones?

18 A Unfortunately we have never had that situation where we have supplied that sort of volume
19 of people, but if a temporary worker went AWOL then the client may well ask us to locate
20 the person and if they don't want them to come back inform them of that, yes, that's
21 possible.

22 Q It would have to be you that ends the contract with the worker, the client could not do it?

23 A If the client is not able to because the person has not turned up then yes, that's correct.

24 Q You would have to terminate it, if you do not terminate it you continue to be obliged to
25 pay?

26 A Not if the person isn't turning up for work, we only pay them for the work the services they
27 provide.

28 Q They might be in breach?

29 A Yes.

30 Q And, indeed, we have in clause 10 provisions about how you terminate and so on?

31 A Yes.

32 Re-examined by Mr. HARRIS

33 Q Mr. Herron, just a couple of brief matters. Can you take your standard terms and conditions
34 of business with the clients, that is NCB2 tab 7 and you identified in the "Definitions"

1 section the definition of “employer” and, in particular, the final passage within that
2 definition, do you recall that?

3 A I do.

4 Q Can you also have regard to the definition below that of “Candidate” and just read that to
5 yourself?

6 A “A person introduced by us with a view to your engagement of them as a permanent
7 employee, temp or contractor.”

8 Q Do you have any comment on that?

9 A Well only that I think throughout the definitions it’s very consistent that our service is the
10 introduction and the temporary worker is then engaged with or providing services to the end
11 user client. It similarly mentions that under “Contractor” “Temp”, “Assignment” it’s very
12 consistent.

13 Q So taking another one of these, you have just given “Temp”, what part of that supports the
14 point you have just made, if any?

15 A It’s a very similar description. It says: “A PAYE candidate or contractor introduced by us
16 and engaged by you on an Assignment.”

17 Q Thank you. Now, Mr. Herron, you were asked both by Mr. Unterhalter and by the learned
18 Judge about situations in which either a temp does not show up, or situations in which a
19 temp’s assignment is terminated. Do you recall those questions?

20 A I do.

21 Q My question to you is, if either a temp worker starts not showing up for a particular client,
22 or his or her assignment is terminated for any reason does that provide Eden Brown with
23 any form of business opportunity?

24 A If there is a need to refill that vacancy we would like the opportunity to do so, yes.

25 Q Is that of any relevance to you in wanting to find out whether they have or have not shown
26 up or whether they are or not terminated?

27 A That is a key thing from our point of view. We want to know when these things have
28 happened, because we will need to move quickly to replace the person, because if not one of
29 our competitors will be straight in there, we know that.

30 MR. HARRIS: Thank you, Mr. Herron, I have no further questions, unless the Tribunal have
31 any?

32 THE CHAIRMAN: Two matters, Mr. Herron. The bundle which has your witness statement in
33 it, CB 3, which you were taken to, if you go in that bundle to tab 10?

34 A Yes.

1 Q You see there is a witness statement from Ian Wolter who is your executive chairman?
2 A Right.
3 Q And over the page, p.118, paras. 7 to 9, and some of the names are confidential, Mr. Wolter
4 talks about Eden Brown offering to the Recruitment and Employment Confederation the
5 opportunity to run free training sessions for other companies, do you see that?
6 A I do.
7 Q He says in para. 9, he refers to some letters and emails of June 2009, and he says: "We are
8 currently waiting for the REC to confirm dates for the sessions and we have already lined
9 up an authoritative external speaker." That was a statement made in November 2009. Have
10 any sessions taken place?
11 A No, they have not, the REC are very much in control of that situation. I don't know the
12 exact ins and outs but we are still waiting for them basically to come back in terms of when
13 it can be organised.
14 Q You have not actually provided any yet?
15 A No, hopefully somewhere in these bundles there are copies of the communication where the
16 REC are keen to do it but it's not something they've still taken up as yet. We're still keen
17 to provide it, we've made that clear.
18 Q So a year has passed now?
19 A Yes.
20 Q Nothing has happened?
21 A That's right.
22 Q The only other matter I want to ask is generally the way Eden Brown operates in supplying
23 temporary workers, particularly in the construction field, and you have a lot of experience in
24 the recruitment field, do you see this as particularly different from the way your competitors
25 operate regarding the arrangements for the supply of temporary workers, and so on?
26 A Not that I am aware of. I think in the construction field unfortunately most of our business
27 is one-offs, I know that some of our large competitors do supply bigger contracts, that type
28 of thing, we are not at that level in the construction field unfortunately, so it is fairly
29 standard as far as I'm aware
30 THE CHAIRMAN: Anything arising.
31 MR. HARRIS: Very briefly, Sir.
32 Further re-examined by Mr. HARRIS
33 Q I think I got your word down in respect of the offer to the REC, we are still "keen" to
34 provide that training, was that what you said?

1 A Absolutely.
2 Q And can you actually provide that training at the REC before the REC permit you to come
3 on a particular date?
4 A No.
5 Q And have the REC yet provided you with a date and location upon which to provide the
6 training that you are still keen to provide?
7 A No, that's kind of where it's at, at the moment, we are waiting for that.

8 MR. HARRIS: Thank you, Mr. Herron.
9 THE CHAIRMAN: Thank you very much, Mr. Herron, you are released.

10 (The witness withdrew)

11 MR. HARRIS: (NO MICROPHONE) My next witness is Mr. Sterling, just whilst he is making
12 his way to the stand, there is one question that I will need to put to him in chief, and it was
13 the subject matter of a confidential letter that was disseminated last week, and I have copies
14 to hand it up to the Tribunal just so it is to hand and for the referendaires. (Same handed) I
15 would just make the point whilst this is being handed around – perhaps if the witness could
16 also be handed one – that this is very much subject to the confidentiality ring, and that is
17 why it has this cover sheet.

18 THE CHAIRMAN: Yes, so we have to be very careful.

19 MR. HARRIS: So whoever does get a copy must be a signed-up member of the confidentiality
20 ring.

21 Mr. MICHAEL STERLING, Sworn
22 Examined by Mr. HARRIS

23 Q Mr. Sterling, good afternoon, can you locate, please, CB3, the witness statement file, and
24 turn to tab 8? Do you recognise that as a copy of your first witness statement in this matter?

25 A I do.

26 Q And on the final page, is that a copy of your signature?

27 A It is.

28 Q And are the contents of that first witness statement true to the best of your knowledge and
29 belief?

30 A They are.

31 Q Can you also please turn to tab 9, the next tab, do you recognise that as a copy of your
32 second witness statement?

33 A I do.

34 Q On the second page is that also a copy of your signature?

1 A It is.

2 Q Subject to the one point that I am going to raise with you in para.7 is this true to the best of
3 your knowledge and belief.

4 A It is.

5 Q Turning to para. 7 you will see that there is some confidential numbers and percentages
6 identified in that para.7 based on what you describe as “forecasting”, do you see those?

7 A Yes.

8 Q And have you had the opportunity since the signature of that statement in November 2009
9 to, if you like, update your forecast based upon further work?

10 A Yes, we have.

11 Q Is that update contained in a copy of the confidential letter that you had before you from
12 Addleshaw Goddard on 22nd July ----

13 A It is.

14 Q Can you confirm that the figures, the confidential figures set out in this letter effectively
15 update the contents of para.7 of your second witness statement?

16 A They do.

17 Q And are those figures true and accurate to the best of your knowledge and belief.

18 A They are.

19 MR. HARRIS: I am grateful. Sir, I have no further questions.

20 THE CHAIRMAN: Thank you.

21 Cross-examined by Mr. UNTERHALTER:

22 Q Mr. Sterling, could I ask you to locate bundle NCB 3, vol.2 and turn to p.732, these are your
23 financial statements for 2007, is that correct?

24 A Yes, that’s right.

25 Q If I could ask you in the first place to look at p.735, you will see under “Business Review”
26 that you say:

27 “During the course of the year the group turnover grew in total by 30%. This
28 growth was primarily attributable to growth in the Matrix vendor management
29 service ...”

30 A That’s right.

31 Q Do you accept that in your reports turnover is one of the matters that are referred to when
32 you are asking readers to judge the performance of the business?

33 A One of them, yes.

34 Q One of them?

1 A Yes.

2 Q And would you accept that when there were references, and I am sure we can avoid going
3 through the accounts unless you wish to do so, there are numbers of occasions where under
4 this business review, whether there is growth or decline, there is reference to turnover and
5 therefore it seems to reflect something about the size of the undertaking and whether it is
6 growing or declining?

7 A I do make a reference to turnover, yes.

8 Q When it comes to the question as to how to account for temporary workers, which obviously
9 lies at the heart of some of the matters we are here concerned with, in your accounts you do
10 account for them on a principal basis, is that correct?

11 A We've accounted for them under FRS 5 and in respect of the presentation we fall under the
12 rebuttable presumption that we account as principal under that standard, so, yes, they are
13 under

14 Q That, though, is but one of the matters that is relevant for making this determination, is that
15 not correct?

16 A Yes.

17 Q No doubt you would, in formulating your policy, have taken account of all the matters that
18 are relevant to this, including credit risk ----

19 A Yes.

20 Q Is that a matter that is relevant to this determination in your mind?

21 A It is, yes.

22 Q As I see from FRS5, one of the questions that is raised there is the performance of the
23 service which is relevant to the determination of whether there is a principal relationship, or
24 not.

25 A Yes, that is correct.

26 Q That, presumably, flows from the fact that, amongst other things, there is a legal regime
27 which requires that in respect of the provision of temporary workers you act as principal.

28 A That is a factor, yes.

29 Q Presumably you would also have considered the substance of your arrangements with your
30 clients and temporary workers.

31 A I did.

32 Q Yes. That, too, would have contributed to the overall determination of the principal
33 relationship.

1 A I should point out that it is a very fine judgment in our case as to the agency/principal
2 relationship. I think we heard from Mr. Herron's testimony that there are elements of our
3 relationship - for example, with the temporary worker - which would suggest a principal
4 relationship, but there are equally very strong elements in our relationship with the client
5 that would suggest that it is not a principal basis and that there are strong agency elements
6 with respect to our relationship with our clients. So, in our case it becomes a matter of very
7 fine judgment as to which it is.

8 Q But, fine or not, the judgment has been made. It is one that you have not varied from.

9 A At this stage, yes, that's correct.

10 Q You have no intention of varying it?

11 A I made the point in my witness statement that I believe we could present our financial
12 statements on an agency basis. Now, that is because it is such a fine judgment as to which
13 one we are - either principal or agency - particularly with respect to the client as opposed to
14 the worker. It is something which is under consideration at the moment as to whether it
15 would be better presentation for us to present it on an agency basis.

16 Q But though it is a question of judgment it is ultimately one which you have to make, am I
17 correct?

18 A Yes, that's right.

19 Q You cannot have a situation where it is both. It is a binary choice. You must decide it is
20 one thing or another.

21 A I think it's not correct to suggest there's a right or a wrong answer necessarily because it is
22 quite a fine judgment. There is a stronger element of principal relationship with our
23 temporary worker than there is with our client. So, you are balancing scales. There are
24 other factors that I would take into account in deciding on my presentation - such as the fact
25 that the presentation as it is is consistent with prior years and comparable with the rest of
26 the industry. So, weighing up those factors, and particularly having regard to consistency, I
27 came out on the side that it would be fair presentation to retain the presentation on a
28 principal basis. But, I do stand by the statement I made - that it would actually fairly
29 present it to disclose it on an agency basis.

30 Q In other words, you could form a different judgment, but you have not.

31 A That's correct - in the past.

32 Q In the past you have not. You may look at it again, but as matters now stand your accounts
33 are being prepared in accordance with how they have historically been prepared.

1 A I can't speculate on the current set of accounts because they're not complete. So, the
2 presentation is currently under consideration.

3 Q I see. Have you raised these matters with your board?

4 A At this stage I have not raised them with the board directly, no. Again, we are still in the
5 process. The detailed work of our audit is complete, but we are still in the process of
6 finalising the presentation of our statements.

7 Q In years past have you raised these matters with your external auditors?

8 A I discussed the presentation with our external auditors. In the process of completing the
9 audit there is very limited discussion around this point. But, when I raised it with our
10 external auditors at the time, which was Tenon Audit Ltd. who signed the audit report on
11 these statements, as to the significance of the discussion, their comment was that it was not
12 particularly significant either way. That was actually the comment that they made. Now, in
13 terms of the extent to which fair presentation is achieved, and whether we present on a
14 principal basis or an agency basis, I think you can achieve fair presentation with either
15 presentation. I think largely outside this courtroom it's not seen to be a matter of
16 significance - hence the comment from our auditors at the time.

17 Q But, in fact, if you were to -- Let us assume you took a different view and you were to
18 change the presentation, there are material sums that are involved in the calculation of
19 turnover. In other words, it would be a material revision.

20 A I don't actually agree it would be a material revision. It is first and foremost not -- You are
21 not changing any amounts. So, the reference in the standard to 'material mis-statement'
22 refers to amounts. What you're changing is terminology and the use of the terminology
23 would be explained in a note to the financial statements.

24 Q You would be eliminating a figure for turnover. So, turnover would now stand for what net
25 fee stands in your accounts.

26 A You would not eliminate the figure. You would disclose the same figure that is currently
27 described as turnover. You would describe it as gross value of transactions. You would
28 describe your net fee figure as turnover.

29 Q In other words, what you are saying is that it would still figure in your accounts. You
30 would just give it a different description.

31 A Yes, actually, yes.

32 Q Therefore, you would say now of turnover that because you now have come to the
33 conclusion that it is principally agency rather than, in the main, a principal relationship, you
34 would deal with it differently. Coming back to this question of the binary choice, though

1 the judgment has to be made - and you have said it is a fine Decision to make, as it were.
2 The fact is, nevertheless, that when you say there is not a right or a wrong answer, it is a
3 judgment that has to be made and you have to accept that you have made the best answer
4 that you can make. In other words, in that sense it is the right answer.

5 A I accept that I made the judgments at the time. I remain uncomfortable with the suggestion
6 that there is a right answer because you are not required to -- There is no standard that says
7 that your accounting presentation has to be right. It has to be fairly presented. Again, I
8 make the point that either presentation fairly presents.

9 Q I do not know that there is much difference between us on this point. In making the
10 determination as to what fairly presents it is a question of judgment. There is no difference
11 between us on that. But, you have to come down in one place or another, and when you do
12 so, that is your best judgment of the matter at the time.

13 A The judgment of the matter at the time, yes.

14 Q Yes. Would you bear with me for one moment? (After a pause): I just need to obtain an
15 instruction on one point. (After a pause): I have no further questions.

16 Re-examined by Mr. HARRIS

17 Q Mr. Sterling, you were asked a question by reference to the business review section of the
18 Eden Brown annual accounts - the fact that you referred to group turnover. Do you recall
19 that question?

20 A Yes, indeed.

21 Q You were asked: Is that metric or turnover measure a reflection -- I think the exact wording
22 was something to do with the size of the business.

23 A Yes.

24 Q You said it is one of the thing that is relevant to readers.

25 A Yes, that's right.

26 Q What degree of importance or lack of importance would you ascribe to that measure as
27 compared to other measures of the performance of your business?

28 A The gross turnover figure is of very little importance in assessing the business itself and
29 consequently is barely used by users anyway. I am familiar with Mr. Shepperd's statement,
30 for example, which suggests that it is irrelevant. In our own situation we don't report our
31 accounts publicly, but in the situations where our accounts have been used by various
32 parties - notably by investors, including those who invested in our company - no reference
33 at all was made to the gross turnover figure.

1 Q Thank you. You were asked some questions, just towards the end of Mr. Unterhalter's
2 questioning about material revisions and re-statements. Do you recall those?

3 A Yes, that's right.

4 Q As I got down your answer, you said words to the effect of, "The amounts would be the
5 same, but the terminology might be different if you exercise your fine judgment in a
6 different way".

7 A Correct.

8 Q Are you aware of any instances in the field of recruitment in which recruitment agents have
9 revised the manner in which they present the same numbers?

10 A Indeed, I believe Robert Walters was disclosed in the trial bundles as an illustration where
11 an agency changed its accounting policy.

12 Q Perhaps I could just take you to that? I believe you have had an opportunity to read the
13 experts' reports, have you not?

14 A Yes, I have.

15 Q If you could turn to CB4, tab 2. Do you see that this is the supplemental expert report by
16 Mr. Martin Hall? You understand him to be the expert witness called by Hays.

17 A Yes.

18 Q If you could turn in that report please to p.147 of the bundle? Do you see half-way down
19 the heading 'Example 2 - Robert Walters plc'?

20 A Yes, I do.

21 Q Is that the recruitment agency to which you were just referring?

22 A That's right.

23 Q Have you had a chance to read paras 3.4.8 to 3.4.13 over the page?

24 A Yes, I have.

25 Q Do not read them out, but just cast your eye over them again, just to refresh your memory.
26 (After a pause): Having just refreshed your memory, how does this example bear upon the
27 point you were just making about other recruitment agencies exercising their fine judgment
28 in a different way? Perhaps you could just expand upon that?

29 A It's exactly the same point. Two different accountants, for example, having regard to the
30 circumstances under which one of our businesses trades can come to a judgment that a
31 company is acting as a principal or as agent. In this case Robert Walters have considered
32 what they do -- the way they do business and said, "It would be fair to say that we are acting
33 as agent" and they have changed their presentation accordingly.

34 Q Precisely in what manner have they changed their presentation?

1 A It's given rise to a re-statement of turnover. But, in effect, I think as I pointed out, there is a
2 change to the turnover number and to the cost of sales number, as they call it, and a net
3 change of zero, if you like, in the statements itself.

4 Q Where exactly are you looking?

5 A 3.4.11.

6 Q The figure? The table?

7 A Yes.

8 Q So, you are saying that because of the way they have chosen to re-state their accounts, as
9 you understand it, the gross turnover number -- Is that the top line?

10 A Yes, that's right.

11 Q That has been re-stated downwards. What? Is that in an amount of £78 million?

12 A That's right.

13 Q £78,540,000.

14 A That's right.

15 Q You were saying that one number remains identical?

16 A Well, the gross profit figure, as they describe it, is unchanged. So, that would be equivalent
17 to the net fees figure. So, in effect, there is fundamentally no change to the actual numbers
18 that come out of the bottom of the income statement. In effect it's a change of zero, but it's
19 a different description applied, if you like.

20 Q I see. On your understanding, does that mean that they have materially made an error -- or
21 made a material error in the manner that they formerly presented it?

22 A Not at all. They have arrived at a different judgment as to how best to present the affairs of
23 the company and have made a prior period adjustment -- they have made a re-statement of
24 the prior period figure.

25 Q They have made a different exercise of judgment in respect of, what, the same set of facts or
26 a different set of facts?

27 A In respect of the same set of facts as regards the way that they trade,

28 Q In one period compared to another; is that right?

29 A Correct. That's right.

30 Q I see. Sir, I have no further questions.

31 THE CHAIRMAN: We have no questions. Thank you very much, Mr. Sterling.

32 (The witness withdrew)

33 MR. BREALEY: Sir, it is Mr. Hall, the expert, next.

34 THE CHAIRMAN: Was there not another witness from CDI?

1 MISS KREISBERGER: I am told by Mr. Unterhalter that he is no longer called for cross-
2 examination.

3 THE CHAIRMAN: That is right, is it, Mr. Unterhalter?

4 MR. UNTERHALTER: I did indicate that to my learned friend. There is one point that I need to
5 get an instruction on. I do not think it is going to change that position at all. I need, if I
6 may, just to have a moment to take that instruction.

7 THE CHAIRMAN: We will break now in any event. If it turns out that there is one point that
8 you need to clarify, then that can be done at ten to two. Can I also just mention, Miss
9 Kreisberger - and it does not have to be done by calling a witness - that it would certainly
10 help me (and I have not had a chance to discuss it with my colleagues) -- I had some
11 difficulty - and it may well be my failing - just following through one of the schedules. It is
12 in Mr. Mitchell's statement, at tab 12 of CB3. On p.132, para. 34 he refers to the two
13 schedules produced by Mr. Siwicki - one relating to candidates for maintenance and the
14 other relating to existing civil engineering structures in the rail industry. I could find the
15 first one - which is SS1 to Mr. Siwicki's statement. I could not find the other one. If you
16 could, at some convenient point, give me the reference to that -- They support the two
17 figures that are then in the table above.

18 MISS KREISBERGER: Yes, Sir. It may be that it found its way into the non-core bundle, but
19 we will check that. It was certainly annexed to the witness statement. We will check that.

20 THE CHAIRMAN: I know they are not controversial, those figures, but it just would help me
21 follow them through.

22 (Adjourned for a short time)

23 THE CHAIRMAN: Miss Kreisberger?

24 MISS KREISBERGER: Sir, we are very grateful to you for bringing this to our attention. There
25 is provision in the bundle for this document, which is called SS2, the second exhibit to Mr.
26 Siwicki's statement. That is at tab 15 of NCB3, Volume 2. Unfortunately, the wrong
27 document has been placed at that tab. That is where it goes. We have located the correct
28 document to go in at tab 15. It is being copied this afternoon and should go in the bundles
29 this afternoon.

30 THE CHAIRMAN: The one that is there ----

31 MISS KREISBERGER: -- is not the right one. We are grateful for that and apologise for the
32 error.

33 THE CHAIRMAN: On that basis, Mr. Unterhalter, is that right - you are not seeking to cross-
34 examine Mr. Mitchell?

1 MR. UNTERHALTER: No. Just to clarify, we are not.

2 THE CHAIRMAN: So, that concludes the evidence of fact. We now move to the expert
3 evidence. So that we are sure about this, can I just clarify? As I understand it, now what is
4 confidential – apart from, obviously, certain figures – on the contracts is the name of the
5 client, when one is dealing with particular contracts, but not the terms of the contract other
6 than, obviously, the commission rate. That is right, is it?

7 MR. BREALEY: I agree.

8 THE CHAIRMAN: We have seen, of course, the joint statement, as I mentioned at the outset.
9 As I also mentioned at the outset, we do feel that quite a lot is covered in the experts'
10 reports that really goes beyond expert evidence and is more in the way of submission or
11 views on issues we have to decide. From the joint statement is really Point 2.2.1 where we
12 think the accountancy opinion evidence is particularly relevant - that is, whether Hays could
13 have accounted for all its arrangements in respect of temporary workers on an agency basis.
14 That is the matter of accountancy opinion, and there we think the evidence may be relevant.
15 But, some of the other matters covered, we think really is not so relevant for us. That may,
16 I hope, help to concentrate the cross-examination.

17 Mr. MARTIN HALL, Sworn

18 Examined by Mr. BREALEY

19 Q Mr. Hall, there should be a bundle, CB4 before you, which has the experts' reports in it. Go
20 to tab 1, to begin with. Locate the report there. Go to the end of that document, p.63 of
21 your report. Do you see the signature?

22 A Yes, that's my signature.

23 Q Thank you. tab 2, p.188. Page 66 of your report - is that your signature?

24 A Yes, it is.

25 Q Then, at the end there should have been inserted the joint report, dated 23rd July. If you go
26 to p.10 of ten there, do you see your signature there?

27 A That is my signature.

28 Q Could you confirm to the Tribunal therefore that the opinions expressed in the two reports
29 and in the joint statement are true and correct to the best of your knowledge and belief?

30 A Yes, that's true.

31 Cross-examined by Mr. UNTERHALTER

32 Q Mr. Hall, you accept, I am sure, and your reports reflect, that the relevant accounting
33 framework that a company such as Hays would have regard to is the relevant framework

1 within which to determine whether certain relationships are properly characterised as
2 principal or agency relationships; is that correct?

3 A In relation to Hays, it now prepares its accounts under International Accounting Standards.
4 They provide Guidance as to principal or agency relationships.

5 Q That would naturally be where they would look in order to make these determinations.

6 A They would look at the accounting Guidance and they would look at the transactions that
7 they are seeking to account for to decide how to reflect them in their accounts.

8 THE CHAIRMAN: Mr. Hall, if you could keep your voice up, although there is a microphone,
9 that is for the tape and it does not actually amplify your voice. The people at the back of the
10 room I think have trouble hearing you.

11 MR. UNTERHALTER: These accounting standards, and those that are applicable to Hays,
12 develop over time. Correct?

13 A That is correct, yes.

14 Q So, for example, would you confirm that the FRS5 standard and the Application Note G
15 became an application in November 2003?

16 A Application Note G updated FRS5 which came out some time earlier. That's correct.

17 Q Yes. So, if you are then situated in 2003, before the update you would have regard to FRS5
18 unamended. Thereafter you would look at it in its amended form.

19 A That's true. One may also have regard to standards issued by other standard-setting bodies.

20 Q Yes. But there are policies and as far as Hays was concerned at a certain point it counted
21 under the Guidance of FRS5. That was its policy.

22 A When it was preparing its accounts under UK GAAP it would follow FRS5. If FRS5 was
23 silent on a particular point it might have regard to other standards.

24 Q Yes. Then it was, as I understand it, in 2005 that Hays adopted the IFRS standard; is that
25 correct?

26 A I believe that's correct, yes.

27 Q Yes. Now, at that stage the IAS18 standard in respect of the determination of revenue did
28 not refer to these principal/agency questions as to how properly to determine that matter, is
29 that correct?

30 A It didn't include what was subsequently added in 2009 as a series of indicators which were
31 added at that point to provide extra Guidance.

32 Q And that is why we heard from Mr. Venables this morning, perhaps yesterday, that during
33 that period, as a result of a note that was received, they simply accounted on a historical
34 basis as they had under FRS 5 and the note G that had previously guided their accounting?

1 A I think Mr. Venables' evidence was that they had previously accounted for certain
2 transactions on a principal basis on the basis that there was no disclosed agency, and that
3 they continued to follow that practice under IAS 18 on the basis that the Standards Board
4 had said there was no expectation that there would be a change of accounting practice
5 following the issue of IAS 18.

6 Q Yes because at that stage IAS 18 did not have an applicable norm within its compass that
7 was helpful on this question?

8 A It did not spell out the various indicators to the extent it does today.

9 Q Correct, and that came about in April 2009 when, as you set out in the agreed statement you
10 set out the contents of this example 21 which then gives indicators in respect of
11 principal/agency relationships, is that correct?

12 A Indicators were formally released in April 2009.

13 Q Just to identify it, that is in the agreed statement on p.2 of that statement?

14 A Yes, it is point (b) on that page.

15 Q The result of that is that after April 2009 that would become the applicable standard that one
16 would have regard to if one was governed by IFRS as your accounting framework, is that
17 correct?

18 A It would form part of the Guidance that one would have regard to when preparing accounts.
19 As I said, in the absence of Guidance under IAS 18 it would have been correct for users to
20 have had regard to other statements issued by other preparers of standards, and I am
21 thinking in particular of the US Standard EITF 99-19.

22 Q You, yourself, have pointed to examples where certain companies have changed their
23 treatment of certain items responsively to changes in the accounting standards, such as
24 Robert Walters, for example?

25 A Robert Walters changed the way in which it has accounted for a substantial part of its
26 contracts, having previously considered them to be on a principal basis they changed the
27 accounting to reflect an agency basis.

28 Q Yes, but it was doing so for a particular reason and that was in response to the FRS 5
29 clarification under Application Note G?

30 A Its timing coincided with that and I think if I actually set out the note to Robert Walters'
31 account in my second report so we can see that if you wish.

32 Q Yes, but as I understand it, and you will tell me if I am wrong in that regard, that what they
33 were doing is looking at the amendment to FRS 5 by way of the addition of Application

1 Note G, and saying “Applying that standard we now think we should make a change to the
2 way that we present our accounts”?

3 A The presentation changed, its actions were the same but the presentation changed, having
4 considered additional information provided under the Guidance.

5 Q And we know, for example, from Mr. Ballou’s testimony earlier today that even under the
6 US standards the accounting treatment that at least his company gives to these transactions
7 is fundamentally a principal one, even under the Guidance of their standards?

8 A The Guidance provided by the US standards is very similar to the Guidance provided by
9 IAS 18.

10 Q So I think the issue that I need you to answer for us is it is not a question of simply looking
11 at a set of standards and bundling them all up together, and asking the question that you do
12 ask, which is: “Could you have presented these accounts in a different way?” The true issue
13 is given where Hays was situated at a particular point in time, and given the standards that it
14 followed at that time, what was the accounting treatment that it could have made? Is that not
15 in fact the correct way of looking at the problem?

16 A I believe that is the way I have looked at the problem.

17 Q Well it is not certainly clear to me in your expert reports that that is how you do it. In other
18 words, would you tell us either by reference to your report or, if you wish to now
19 independently of it, year by year from 2003 onwards, at what point do you say under the
20 relevant standard the change could have been made? Where do you identify for us under
21 the applicable standards at various points in time why you come to a particular view?
22 Perhaps you could just show us in your report where you do that?

23 A What I have done in the first report is to look at the requirements under IAS 18 as it now
24 stands, and to apply that standard to my interpretation of the various contracts that exist, and
25 that I have looked at and to determine whether they should be accounted for on an agency
26 basis. I think it is important to note that what the Guidance note does is set out further
27 Guidance, it is not that consideration of those points was not relevant before, it is just that
28 they are now codified in the Guidance notes, so I can say the position I have reached on the
29 standard now would have been the same as the position I would have reached in earlier
30 periods. The Guidance in IAS 18 now is not materially different to the Guidance that was
31 provided in EITF 99-19 previously, which is the American standard, to which it would have
32 been relevant to have regard in the absence of the further Guidance in IAS 18.

33 Q I am not sure that I entirely follow your answer. There was a particular period when Hays
34 was subject to a distinct set of standards, FRS 5 and the application under Note G. That

1 would have been the appropriate framework after November 2003 in which to assess this
2 question, is that correct?

3 A It is correct, and I think it is important to remember that all of these standards are essentially
4 saying the same thing. They use different words but they are all saying essentially the same
5 thing.

6 Q Well they are not. For example, we know that under IAS 18 until its recent development
7 with the example it did not in fact elucidate these matters at all?

8 A But if one looks at the commentary leading up to the preparation of this note it essentially
9 is all about FRS 5 Application Note G, EITF 99-19 and it is bringing those together. It is
10 saying they all essentially are consistent, it is just bringing those together and producing this
11 further Guidance via IAS because IAS previously did not provide this additional Guidance,
12 which one could find elsewhere.

13 Q Well you could, but that just points to the fact that the proper approach to the task that you
14 have set yourself is to situate the company within the scheme of the relevant standards at the
15 relevant time and then ask your question, and I want to suggest to you, as I have already,
16 that is not your approach. Your approach is, as it were, a synthetic one that simply says:
17 “Let me look at a variety of standards, the US standard, the IAS standard, the FRS standard,
18 and let me just make a determination by reference to these standards, synthetically, as to
19 whether I can say that the accounts could have been expressed differently” and I am
20 suggesting that that is not the correct approach?

21 A I wouldn't agree that that is what I've done. I have looked at IAS 18 at a particular point in
22 time with the Guidance, but essentially all that Guidance does is draws upon what was
23 available from other standards to which one could reasonably have had reference at the time
24 pre-2009.

25 Q I invite you to point to where in your report you deal with this on a periodised basis? In
26 other words, where you explain, where you situate Hays at a point in time under the
27 particular Guidance that was of particular relevance to it. Just show us where you do that?

28 A What I have done in section 4 is to set out the relevant considerations at 4.2, there are each
29 of the indicators under the various standards, so there is a table at 4-1 which provides a
30 comparison after various indicators under each of IAS 18, FRS 5 and EITF 99-19, which is
31 the US Guidance. The column IAS 18 reflects the April 2009 Guidance note. The FRS 5
32 and the EITF 99-19 columns will reflect the Guidance that was there for some time
33 previously and, as you will see, there is a commonality of indicators between each of those
34 three standards, and what I did was in section 4, to go through each of those indicators by

1 reference to the various contracts and reach a view as to why I felt it was either an agency
2 or a principal arrangement. If “synthesise” is the right word I’m not sure, but I think there
3 is a commonality between all of these standards.

4 Q Well there are certainly common features to them, but just to take one example, when IAS
5 18 did not offer Guidance on this matter, the default position that was adopted by Hays was
6 to go back to UK GAAP not to refer to the US standard. Factually, is that correct?

7 A Well International Accounting Standards allows a user of International Accounting
8 Standards to look at standards issued by other standard setting Bodies and decide which one
9 is relevant in the circumstances.

10 Q Mr. Venables made it clear to us where he defaulted to by reference to the notification that
11 he told us he received, so in the period prior to the further clarification of the IAS standard
12 he sought Guidance from UK GAAP?

13 A He maintained the position under UK GAAP that they had already maintained, which was
14 to adopt principal accounting where there was no disclosed agency.

15 THE CHAIRMAN: Just to be clear, in your table, figure 4-1, the column IAS 18, that is IAS 18
16 as amended in April 2009?

17 A Yes, Sir, with the additional Guidance.

18 MR. UNTERHALTER: So if we look at your table, for example, IAS 18, one of the topics
19 referred to is “discloses that it is acting as an agent”, and your notation is “not applicable”?

20 A That’s correct, it’s not a factor under IAS 18.

21 Q Exactly, and therefore because there are differences, you may say differences of emphasis,
22 but there are differences in the way these standards express these matters and the way they
23 tabulate the factors, the point that I am putting to you, Mr. Hall, is that the proper approach
24 for you to have taken was to consider where Hays was at different points, what policies it
25 considered itself to be bound by or refer to for the purposes of making these determinations,
26 and express your opinion against that chronological applicable normative framework?

27 A The approach I took was to look at the indicators, as I say, there was a great deal of
28 commonality between them, I accept there are some differences, but I don’t think my
29 answer will change, even if I had done, as you suggest, because I am essentially looking at
30 all the indicators here for each of the standards though, as I say, with a great deal of
31 commonality between them.

32 Q The point goes a little bit further than simply what were the applicable standards, and how
33 would one make this judgment at different points in time, because the key feature of this
34 case is that Hays, in fact, did make those determinations and made them year after year and

1 did so expressly under the Guidance that was then applicable at the time. Therefore, one
2 would have imagined that your approach would be to begin with that they have made those
3 judgments, and were those judgments right or wrong under the applicable standards? If
4 there is no reason to think they were wrong, then they are the outcome of a proper
5 deliberative process by the company. Do you accept that that was the case?

6 A I accept that the company has prepared its financial statements. Mr. Venables has explained
7 how they were prepared. I was asked to consider the various contracts and to determine
8 whether, in my view they could have been accounted for on a net fees basis. I do not
9 dissent from the view that the company prepared and had its accounts audited, and Mr.
10 Venables has explained the basis for that and the basis upon which he considered they
11 present a true and fair view.

12 Q How far did you go into with Mr. Venables, the basis upon which he formed the views he
13 and, at earlier points, other colleagues, and indeed the board, and ultimately Deloitte, how
14 they came to form the views that they did in reaching the judgments that they did?

15 A I have discussed this with Mr. Venables, and the discussions I have had with Mr. Venables
16 are consistent with what he says in his witness statement.

17 Q Well he says, as you no doubt heard this morning, quite a number of different things in
18 different witness statements at different times?

19 A I think you need to help me with that, sir, I'm not quite sure what you mean.

20 Q Were you here this morning for his cross-examination?

21 A I was but that's rather a wide-ranging point.

22 Q Well, you may recall that the first approach to this matter that was taken by Hays in their
23 response to the statement of objections was to indicate that they accounted on a principal
24 basis essentially because of the credit risk that was being taken?

25 A I heard Mr. Venables say that he didn't believe that was the case and I think he said it
26 wasn't his witness statement, and it certainly wasn't consistent with his witness statement.

27 Q It was certainly the position that was taken by Hays, and I would have thought as an expert
28 you would want to know why the representation is being made in the first place on the basis
29 that the reason that supported this judgment was credit risk. Was that a matter that you
30 raised?

31 A I don't think I had any part in preparing Hays' submission.

32 Q You were given all the documents to consider in making your judgment?

1 A My view as regards credit risk was it clearly is not the determinative factor because there
2 are arrangements in which Hays has no credit risk where it accounts for principal, so it was
3 pretty clear to me that it was not determinative.

4 Q Mr. Hall, I am trying to ask you a different question, which is I am trying to ask you what
5 you did to ascertain how Hays had itself approached this matter and how it had formed the
6 judgments that it did?

7 A I had discussions with Mr. Venables, those discussions are now reflected in his witness
8 statement.

9 Q Did you know, for example, that Hays in its response to the statement of objection, we can
10 turn it up if you will, but I put it to Mr. Venables this morning – perhaps I will just read it to
11 you, if you want me to turn it up I will. It says:

12 “Employment law requires that Hays, like other recruitment agencies, pays
13 temporary workers irrespective of whether Hays has been paid by its customers,
14 thus Hays stands in the position of a statutory guarantor of payment and it is for
15 this reason that Hays considers that it should include temporary workers’ salaries
16 in its gross revenues.”

17 That is the reason that they offer. At a bare minimum I think after the questioning that we
18 had of Mr. Venables on the score, he accepted that that was at least one of the factors that
19 was relevant to the judgment formed, and I think you would accept that?

20 A I would under IAS 18, the existence of credit risk is a factor.

21 Q And it was a factor for Hays?

22 A A factor, I think Mr. Venables said it was a factor, yes. Sorry to repeat myself, it clearly
23 wasn’t the determinative factor, because there are a number of instances where Hays bears
24 no credit risk but it does account for things on a principal basis, and there are instances
25 where it accounts for things on an agency basis where it does have credit risk, so I think it is
26 clearly not the determinative factor.

27 Q Clearly this is a judgment that requires you to take into account both the variety of
28 transactions a company engages in and the different factors that might be applicable to the
29 business judged in the round to come to a proper judgment. I think everyone is agreed upon
30 that and I would think you would be too?

31 A I am sorry, I’m not quite sure I understand the point, could you repeat that, please?

32 Q In forming this judgment you need to look at the varieties of transactions that the company
33 engages in and their different permutations?

34 A Yes.

1 Q You then consider the various factors that would be applicable to making agency or
2 principal determinations and then you reach a judgment, and that is what Mr. Venables did?

3 A I think Mr. Venables explained why the accounts are presented in the way they are. It was
4 carried over from when UK GAAP was used, the disclosed agency contracts are treated as a
5 principal or an agency basis and that treatment has been carried through on the grounds that
6 there are I think 30,000 contracts was the number he used.

7 Q That is not the only thing he looked at, as we know from his witness statement and as we
8 have just discussed, credit risk is one instance, and the legal form of the contracts he says
9 was another question, and then he deals with the issue of disclosed agency or not, these are
10 all factors that were taken into account on his version of the matter in forming the judgment
11 that he did. Do you accept that?

12 A Yes.

13 Q Would you also accept, Mr. Hall, that an over arching consideration in respect of how you
14 reach these judgments is that you must judge substance rather than form?

15 A And I believe that that is what I have done in reaching my view, yes.

16 Q So Mr. Venables and others who advised him making this Decision had to engage in the
17 same exercise, they could not simply look at form, they had to make a determination in
18 respect of what, as a matter of substance these agreements allowed for?

19 A I think Mr. Venables explained this morning he was of the view that the overall truth and
20 fairness of the accounts is what needed to be representative of substance, and he feels that
21 with the agreements accounted for in the way they are, with the disclosures that are made,
22 that those accounts reflect the true and fair position.

23 Q Yes, but it is not just that you reached the ultimate conclusion that the accounts are a fair
24 reflection but in thinking about the factors relevant to making that judgment you have to
25 examine the agreement as to their substance, that is one of the things that you must look at?

26 A I would agree, one has to look at the agreements as to their substance.

27 Q And that is what you have done?

28 A That is what I have done, yes.

29 Q And so again, when we think about how you have approached this question, what you have
30 not apparently done is to situate yourself within the scheme of how Hays was reaching these
31 judgments, and then to say: "Is there any reason why I can criticise these judgments, and
32 suggest that they are wrong in any way?" I do not understand you to do any of that?

33 A I put myself in the position of knowing what the relevant standards were at the time,
34 knowing there was a commonality across all of these standards and applying my own

1 professional judgment as to how I would account for them, understanding how the business
2 operates, that is what I've done.

3 Q But is that not, with respect to you and those who have instructed you, simply to ask the
4 wrong question? The question is not whether you as an expert could reach that judgment,
5 the question is whether the judgment that was reached by Hays and its advisers was in any
6 way wrong and just to be clear I do not understand you to say that it was?

7 A I didn't say it was wrong, I would repeat what Mr. Sterling said this morning, I think it's a
8 finely balanced judgment, having considered the various factors, my view is that my
9 judgement would come down on the side of a net fee accounting.

10 Q But that is not in a sense the issue, because those who are in charge of the business, and
11 who are charged with making that judgment have decided otherwise. Is that not really the
12 fundamental question that has to be taken into account?

13 A I think that's for others to decide. My view is that there is an alternative basis of
14 presentation.

15 THE CHAIRMAN: The question that Mr. Hall considered was the question he was asked to
16 consider, which is: could Hays, consistently with GAAP, have chosen to report net fees as
17 turnover in its statutory accounts? He was not asked to consider whether they were wrong
18 in what they did, but whether it could have been done consistently with GAAP that way.

19 MR. UNTERHALTER: What I am exploring is the limitations of the exercise that was put to Mr.
20 Hall.

21 THE CHAIRMAN: I think the experts agreed that it is not that the accounts are wrong or
22 misleading.

23 MR. UNTERHALTER: The issue that I am wanting to explore with you, Mr. Hall, is this, that
24 the judgment that you are asked to make is as the appropriate director within Hays and those
25 who advise Hays is the judgment that has been made in any way subject to correction, and
26 you say "no, that is not the case". All you say is that in your view, had you been situated in
27 the way that they were you would have come out in a different place. Is that what you are
28 saying?

29 A Yes, it is.

30 Q All right. Would that have been true at every single point in the chronology of standards
31 that we have been through?

32 A I believe so, yes.

33 Q Let us understand what you take to be, unlike Mr. Venables, and everyone else, what do you
34 take to be determinative of that point?

1 A Would you like to go through each of the indicators?

2 Q Just in general terms, just give us your sense – you say it is a finely balanced judgment, but
3 you come down in a different place to where Hays has come down?

4 A The way I have reached my view is to go through each of the indicators that I say are
5 relevant to a consideration of principal versus agent, and we can go through those if you
6 wish. It really starts on p.44 of my first report and following, but the first indicator is
7 responsibility for providing the goods or services, and then within that there are three
8 considerations, I think, that the entity is responsible for the performance of the services, the
9 entity is involved in the determination of the service specification, and the entity has
10 discretion in supplier selection. Those will all be indicators of a principal relationship, and
11 my view, having read the evidence and having reviewed the contracts is that Hays does not
12 have primary responsibility for providing the services here, principally the services that are
13 provided by the temporary worker – I am not sure if I am allowed to refer to the confidential
14 paragraphs here, but 4.3.7 the text within that is indicative of the general situation whereby
15 Hays engages to provide services of supplying, finding and engaging temporary workers,
16 and the temporary workers then provide services to the client.

17 Q We will come to the agreement and how properly to analyse the agreement, but you are, as
18 it were, wanting to make your judgment on your reading of the contract, is that correct?

19 A And my understanding of the evidence from Mr. Venables, as to how the business operates.

20 Q One of the puzzling features of the relationship between your testimony and that of Mr.
21 Venables is that Mr. Venables says that he refers to the views that you now say you can
22 form, and you seem to refer to the views that he has formed and yet the views that he has
23 formed historically actually point to the opposite of the ones that you are now speaking for?

24 A Sorry, could you just take me to where I refer to that? I do form a different view to the view
25 taken in the accounts, and I was just explaining why, and we have been through the first
26 indicator, there are a number of others as we go through, but in my view each of those
27 indicators, with the exception of credit risk, they all point towards an agency relationship.

28 Q Yes, I think what I am asking you is what is informing your view on that first indicator, just
29 to take that as an example is, first, your reading of the agreement and, secondly, your sense
30 from Mr. Venables as to how that relationship was implemented in reality?

31 A Those are the two principal inputs in reaching my Decision, yes.

32 Q The curiosity though is that you are referring, at least as to the second of those, to the very
33 person who has reached a different judgment and that seems to be a rather odd way of
34 approaching your task?

1 A I was asked to approach it independently and provide my view as to how I would see the
2 accounting for this and that is what I have done.

3 Q In a sense it is not an independent task because you can only go about your job - at least in
4 part - by having reference to the way in which Mr. Venables and others like him understand
5 their business and understand the way in which their contracts work.

6 A As I said, I have relied on the evidence of Mr. Venables. Mr. Venables has explained the
7 reasons as to why the accounts are prepared in the way they are. I have approached it from
8 a slightly different perspective and looked at each contract and gone through those to
9 determine whether I think it's an agency or a principal basis.

10 Q Yes. But, the overlap is this: that you are being informed by a person who has reached a
11 different judgment on the matter and yet you are referring to them in part to inform what
12 judgment you should reach of the matter.

13 THE CHAIRMAN: I think Mr. Hall is saying that he relied on Mr. Venables to understand how
14 the business worked - not for Mr. Venables' judgment on the principal/agency point. You
15 could not really approach this just by reading contracts. You have to have some discussion
16 with the people running the business to get an appreciation of what goes on.

17 MR. UNTERHALTER: Yes.

18 THE CHAIRMAN: That is my understanding.

19 A That's correct, Sir.

20 MR. UNTERHALTER: (To the witness): The proposition that I am putting to you is that you
21 would, in reaching the judgment that you have been asked to reach naturally give, I would
22 have thought, some deference to the kinds of judgments that have been made by the
23 company.

24 A I'm aware of the judgments that have been made by the company, but I was asked to reach
25 my own independent view, and that's what I've done.

26 Q I see. Can I ask you this then: did you speak to Deloitte about these matters?

27 A I have been in meetings with Deloitte. I'm not sure what I can say about those. Those were
28 meeting at which the Hays legal team were present.

29 Q I do not want you to breach any privileged occasion at all. I am asking you what you sought
30 out by way of any Guidance from Deloitte because we have a letter - a couple of letters
31 from Deloitte, but those letters, other than clarifying the HPPS arrangements and the
32 treatment of those under the accounts, do not deal with the points that you are now asked to
33 opine.

1 A I didn't approach Deloitte personally. I believe that clarification was sought because Mr.
2 Allen had suggested the accounts were incorrect. I think that's probably all I can say on the
3 matter.

4 Q Let me ask you the question again: Deloitte has explained how certain of the agreements
5 were dealt with in the accounts and what the rationale for it was. We do not need to go into
6 that now. But, did you ever raise with Deloitte, who, as it were, are a reference point for the
7 determinations that are made on this agency/principal relationship, how they saw the matter
8 and how they came to advise on that matter for the purpose of the presentation of the
9 accounts?

10 A I didn't approach Deloitte direct to ask that question.

11 Q Did you not think that that might be a useful thing to do?

12 A I was instructed to consider contracts, the evidence, and to reach my own view.

13 Q You did not think that was then useful ----

14 A In a perfect world, it may be useful. But, I suspect Deloitte would clearly emphasise their
15 reasons for reaching the views they did. I didn't do that.

16 Q Can we look then at the agreement that you did examine? You were given a sample - what
17 was said to be a representative sample of seven agreements. Can we turn to your statement
18 at para. 4.1.4. You received these seven agreements and you analysed them as to the
19 various matters that you say struck you about them in Appendix 3.1, which is at p.89 of this
20 bundle, Appendix 3 to your report; is that correct?

21 A Yes. I had set out what I considered to be the relevant indicators. I then considered the
22 contracts in relation to those various indicators.

23 Q How far did you go to determine whether these contracts were, or were not, representative
24 or did you just rely on Hays for that purpose?

25 A Given the number of contracts, I relied on Hays for that purpose. I think these were
26 supposed to be representative of contracts as a whole, but in particular large customer
27 contracts.

28 Q So, you knew that there were perhaps lower value contracts that were subject to standard
29 terms?

30 A Yes. If I can think back as to why these types of contracts were selected, it was probably
31 because in respect of construction contracts, many of the construction contracts would be
32 these type of open book contracts for the supply of larger numbers of people. So, these
33 were more relevant, I guess, in the context of that.

34 THE CHAIRMAN: Did you do the selection?

1 A I didn't, Sir, no.

2 Q So, when you say 'thinking back to why they were selected' -- Were you involved in the
3 selection?

4 A I wasn't at all, no.

5 Q So, you are hypothesising as to why Hays might have chosen these.

6 A I am, but I am thinking back to discussions that I had at the time, Sir, as to -- I can't be more
7 precise than that, I am afraid.

8 MR. UNTERHALTER: Let me ask you: I think, as I understand what you are saying, you
9 received these contracts and you understood them to represent higher value contracts.

10 A Yes.

11 Q Presumably then you knew at the time that there were other contracts of a lower order of
12 value.

13 A Spot contracts, yes.

14 Q Or just standard contracts. In other words, not bespoke contracts, as I think Mr. Venables
15 now calls them.

16 A Was I aware? I'm sure I must've been aware, yes.

17 Q Did you make any inquiries as to what percentage of the business that I done was
18 represented by the standard agreements?

19 A I didn't, no.

20 Q At least in your first report you do not make reference to the standard agreement.

21 A No. I reviewed the standard agreements in my second report, and they don't change my
22 views.

23 Q No. I know you do not. But, at the moment we are just located in your first report. You
24 simply knew of them, but made no reference to them. Is that what we must understand?

25 A I was given a sample of contracts to review. I was informed they were representative.
26 These are the contracts upon which I formed my views.

27 Q I see. So, if they were not representative then you would have to consider again what the
28 overall scheme of the contracts are that Hays entered into.

29 A I would need to look at another representative sample.

30 Q Yes. Can we just look at some of these contracts - firstly, by [client].

31 THE CHAIRMAN: The position is, Mr. Hall, that apart from the names the terms can be
32 discussed.

33 A Yes, Sir.

1 MR. UNTERHALTER: If we look at the category under (i) on p.42 that deals with a neutral
2 vendor arrangement.

3 A Yes. Parc is arranging for the supply of staff using neutral vendors.

4 Q Did you make any inquiries as to whether there are specific modalities applicable to neutral
5 vendors as opposed to other kinds of arrangements?

6 A When you say 'modality', could you explain?

7 Q What I mean is that where a neutral vendor is used, how that differs from the position where
8 other arrangements are made where there is no neutral vendor.

9 A I'm not quite sure I understand the question. I reviewed those two particular contracts to
10 see whether in my view they were agency or principal.

11 Q Yes. But, surely, what one wants to know is: are there some specific features of this
12 agreement which might be different from other ways in which Hays does its business? Here
13 you have the intercession of a neutral vendor which is not what is always the case in Hays'
14 arrangements. Correct?

15 A I think this is exactly to the point. The point of Hays' business is that it has a number of
16 different types of arrangements which come together to form its turnover. Here is a neutral
17 vendor arrangement. We have other arrangements here where Hays accounts for the one on
18 an agency basis because HPPS is involved as a payroll agency and then we have other
19 arrangements here where, if we can call them more plain vanilla supply of temporary
20 workers. But, it is a cross-section of all of the types of business that make up Hays'
21 turnover.

22 Q The question is, the more variety there is of the arrangements, the more one needs to be
23 careful as to whether what you are saying is simply the same arrangement throughout is in
24 fact the same. In other words, if you have peculiar features to a particular arrangement,
25 then one has got to be careful about extrapolating it over the universe as a whole.

26 A I would accept that, yes.

27 Q I think the Parc agreement is one which you pay particular attention to and seem to think is
28 symptomatic of the kinds of agreements that Hays enters into. Is that right?

29 A I think what I've done in Section 4.3 and onwards is to look at the various indicators by
30 reference primarily to the Parc agreement, but then, at the end of each section, to look at the
31 other agreements to see whether my view is in any way changed by looking at the other
32 agreements. So, for example, at para. 4.3.12 what I say there is that I've looked at the other
33 agreements to see if it changes my views as to, in this case, whether Hays is responsible for
34 the ultimate performance of the services of the temporary worker, and having looked at

1 those other contracts that are listed at 4.1.4(a) my view is unaffected. So, I don't quit agree
2 with the way you put it there, sir.

3 Q What you are doing, just so that we understand the exercise - is that you are looking at the
4 first agreement under (i). You are then comparing it to your assessment of the other
5 agreements captured in (ii) to (vi) and you are saying, "Well, I don't see particularly
6 significant differences between these. Therefore I come to the same conclusion.

7 A No. No. No. That is exactly wrong. What I've done is to look, in this case, at the Parc
8 contract, look at the indicators, and form a view as to whether I think it's a principal or
9 agency indicator, and I have then done the same exercise for the other contracts, and
10 consider each of those as to whether I reach the same view. So, I haven't said, "Are they
11 the same as the Parc agreement". That's not what I've done at all.

12 Q So, you have looked at each one of them and you have made an assessment on the terms of
13 each of those agreements, taken separately.

14 A Yes.

15 Q All right. Let us look at one or two of these agreements. In respect of (ii), (iii) and (v) on
16 p.43, would you agree that these are all HPPS arrangements?

17 A I believe they are, yes.

18 Q Yes. Those were specific arrangements that were put in place to deal with the VAT exempt
19 clients.

20 A Yes.

21 Q The very matter that Deloitte refers to in their letter.

22 A One of the matters, yes.

23 Q Where the very way in which it was structured, quite deliberately, in order to take
24 advantage of this exemption, was to create an agency relationship. That was the whole
25 point of it. Deloitte explained that that is why there was a buying agency relationship as
26 between HPPS and the client.

27 A I think if one looks at the terms of these agreements and the terms of other agreements, they
28 are essentially the same. It is simply the disclosure of the buying agency relationship that
29 differs. Hays are really doing the same thing under each of the agreements.

30 Q You said your methodology was to look at each on its own terms. So, that is what I am
31 doing with you. I am looking at each category of agreement on its own terms.

32 A Yes.

33 Q My first question to you is to say, "Well, in respect of the HPPS arrangements [which are
34 the three that we have identified] those were deliberately structured on the basis that there

1 would be an agency relationship”. That was in order to give an advantage to the VAT
2 exempt client.

3 A Yes. There was a disclosed agency arrangement. There was an advantage to the VAT
4 exempt client. Hays accounted for these arrangements on an agency basis. My point is that
5 substantively the services provided by Hays under those arrangements are the same as under
6 non-VAT exempt arrangements.

7 Q It seems a slightly odd approach to take that you would look at arrangements which are
8 deliberately set up to reflect agency and are treated as agency by Hays, and then say, “Ah,
9 well, that is indicative of the kinds of relationships that exist in respect of other contracts
10 where they are not so set up”. It does not seem to be a very interesting or fair test.

11 A Well, I was asked to reach a view on the basis of the contracts provided to me as to whether
12 I thought that they should be accounted for on an agency or principal basis. You know,
13 there’s a chance - unlikely - that I could’ve looked at them and said, “Well, I think it should
14 be on a principal basis”. But, I didn’t reach that view.

15 Q It would be an odd view to come to, but perhaps you could given that the structure was
16 intended to have an agency consequence, precisely to enjoy the advantage of that for the
17 VAT exempt clients.

18 A I believe it was structured in that way to provide a benefit for VAT exempt clients and it
19 also fulfilled the accounting requirements for being accounted for on an agency basis.

20 Q Can I ask you as to that -- The account that is given of this by Deloitte is to say that it can
21 be set up on an agency basis because HPPS is a buying agent.

22 A I think it is not HPPS.

23 Q Sorry. I mean the subsidiary company of Hays. But, as I have understood - and I think this
24 is Mr. Allen’ view, and perhaps you could give us your own on this score - the accounting
25 standards only refer to a selling agent and not to a buying agent. Is that correct?

26 A I think Deloitte make a fair point: that the accounting standard is slightly wider than that. It
27 could be taken as being a buying agent. I would agree with that. Also, Mr. Allen’s
28 objection, I think, here is that there was no disclosure of the selling agency arrangement,
29 whereas the evidence, I believe, from Mr. Venables, and as I have repeated in my report, is
30 that the selling agency arrangement was disclosed to the temporary workers.

31 Q But as a supplying agency relationship - not a selling agency relationship.

32 A Mr. Allen’s objection, I think, is that there was no disclosure of selling agency, whereas I
33 believe it was disclosed.

1 Q Perhaps it is not worth spending time on this point, but the fact is that if the way in which
2 the agency was intended to operate was as a buying agency, how could it be disclosed as a
3 selling agency?

4 A Well, the standard, if one considers it as an agency relationship existing in the context of the
5 company here, Hays, acting as an intermediary. So, that could be as an agent for the buyer
6 or as an agent for the seller. It talks about an intermediary relationship.

7 Q All right. Can we then go to the agreement at (i) on p.42? You will find that at NCB4,
8 Volume 1. The agreement commences at p.498. Where we see the definition of the
9 services at p.500, at the top, it reads, “‘Services’ means the services which at the date of this
10 Agreement the parties have agreed the Supplier shall supply to [the intermediary] as set out
11 in or pursuant to this agreement”.

12 There we know that the neutral vendor is simply acting for the client. So, one might as well
13 read the client’s name where you see Parc. Do you agree with that?

14 A I don’t think it’s for me to interpret this agreement.

15 THE CHAIRMAN: Can I just clarify? The fact that it is with this particular entity I thought was
16 not confidential. It has been mentioned a couple of times. I thought it was the client’s
17 name that is confidential. Is that right?

18 MR. BREALEY: That is right.

19 THE CHAIRMAN: So, there is no problem about referring to Parc. It is the client.

20 MR. UNTERHALTER: That will perhaps help exposition.

21 MR. BREALEY: I thought the witness was being asked a legal question rather than an
22 accountancy one.

23 MR. UNTERHALTER: I wanted to ask you on that score, Mr. Hall: You say, ‘I’m being asked a
24 legal question’ -- You are hesitant about answering questions as to what these various terms
25 in the agreement may or may not mean, and what consequence they have. But, that is
26 exactly the exercise that you engaged in.

27 A I have engaged in a review of the contracts to determine whether I think agency or principal
28 relationship applies for accounting purposes. I think you were asking me a question as to
29 whether I could substitute one name for another in a legal agreement which seems to me to
30 be slightly different.

31 Q I am at a loss to understand what the difference between these exercises is. If you are trying
32 to answer a question as to whether upon a full consideration of this agreement it gives rise
33 to a principal or an agency relationship one would have thought that that is pre-eminently a

1 question for lawyers in the first place, and that accountants would generally defer on that
2 question to legal advice.

3 A Well, as we know, accountants draw up sets of accounts and accountants have to interpret
4 agreements in doing so. That's what I have been doing here.

5 Q Then you cannot be concerned that you are being asked to interpret the agreement. May I
6 just state the proposition? It is somewhat important. Either you do feel free to interpret
7 these agreements and reach conclusions and consider those conclusions should be ones that
8 the Tribunal would have regard to, or you say, "No, these are not matters that you, Mr. Hall,
9 can comment on because they are really for others". Which of these is it?

10 A I think, Sir, as I have said, I was asked to consider the agreements, consider what
11 accounting would flow from these agreements in the context of my understanding of Hays'
12 business. That is one thing. Being asked whether I can simply substitute a name or a word
13 in the agreement for another word seems to me to be slightly different, but I will try and
14 answer your question again, if I can.

15 THE CHAIRMAN: As I understand it, you considered these agreements to reach a view as to
16 whether under these agreements there lies a primary responsibility for the supply of the
17 goods or services.

18 A Yes, Sir, that's true.

19 Q So you were then, as I understand it, looking at the terms of the agreements and reaching a
20 conclusion.

21 A Yes, I was, absolutely.

22 Q And where responsibility for this primarily lies.

23 A Yes, Sir, and I am very happy with that. It was just the question that was asked was: Could
24 I substitute one name for another? I am not wishing to be difficult, but ----

25 MR. UNTERHALTER: I know. (After a pause): The point about the substitution which you
26 feel caution about answering though goes to the very heart of what you are being asked to
27 consider, which is: Who is obliged to render these services and are they being obliged to
28 render them as a principal or an agent. So, when I asked you to consider the meaning of
29 'services', it means 'the services which at the date of the agreement the parties have agreed
30 the supplier shall supply to Parc', and you have got to look at that; you have got to have
31 some consideration as to who Parc is in the scheme of these arrangements and you have got
32 to ask yourself whether, when you interpret this agreement, that means that Hays, in this
33 instance, is rendering the service as a principal or not. You can only do that by a proper

1 interpretation of the language that you see there and what it means. How else do you go
2 about this?

3 A I believe, at para. 4.3.7 of my report and onwards, that is the exercise I have done - to
4 consider the relevant aspects of the agreement as they relate to services to determine who, in
5 my view, is responsible for providing the two types of service: the service offered by Hays;
6 and the service provided by the temporary worker. I believe that is what I have done.

7 Q All right. Let us then look at this agreement in its totality. Which particular provisions of
8 this agreement do you rely upon for reaching the agency conclusion?

9 A I would, in particular, refer to para. 4.3.7 of my report. Section 3 of the Parc agreement – at
10 NCB4, volume 1, p.500.

11 Q No doubt 3.5 is a provision which perhaps you consider to be relevant?

12 A And 3.3.

13 Q And 3.3. You would, I am sure, accept that you need to interpret this in the context of the
14 totality of the agreement.

15 A Yes, I would.

16 Q When you look at 4.1, for example, “The Supplier shall invoice the company with its
17 charges --“ Where would you find those charges and the basis upon which those charges
18 are made?

19 A It is Schedule 2 to the Parc agreement at p.510.

20 Q Yes. What we see there is that the charges appear to be done on an all-in basis. They are
21 broken down into their various components, but it says that there is a pay rate that is
22 determined and the charges are chargeable in respect of periods where the contractor’s
23 services have been provided in accordance with the charge agreed between Parc and the
24 supplier. In other words, is that not somewhat indicative to you of what is happening here -
25 which is that there is a relationship over a period of time where the services are being
26 supplied and then they are being billed by the supplier? What is a supplier, after all?

27 A The arrangement is that the temporary worker completes the timesheet. That timesheet is
28 approved. That then forms the basis for the charge upon which Hays earns a pre-
29 determined mark-up. A pre-determined fee is one of the indicators of an agency
30 arrangement.

31 Q But in fact what is agreed in advance is that there is a scale of charges which has different
32 components and it is the supplier that will be invoicing on this basis for the totality of all the
33 items that are reflected in this schedule.

1 A The example that is given here is that the elements, as you put it, are the pay rate, national
2 insurance total costs, to which is added a 20 per cent mark-up, which is Hays charge for
3 supplying the worker and for managing the payroll. So, as I say, it's a pre-determined
4 charge which, again, is an indicator of an agency arrangement.

5 Q Except, as you said in that sentence you have just committed yourself to, you say that Hays
6 supplies the worker over the period for a stipulated charge and invoices on the basis of that
7 as a totality. It is, as it were, a service rendered through the worker to the client.

8 A The two charges are together. That is clear. But, it is clear to the client what element of
9 those charges relates to Hays' charge for its services and what element relates to the
10 temporary worker for its services.

11 Q But in terms of the legal obligations here, it is Hays that is making the charge. It is
12 invoicing the client. It is doing so as, one would have thought, a principal, and has to do so.

13 A It is invoicing for the wages of the temporary worker. It is responsible for paying those
14 wages. That's clear. So, it has to invoice the client for those wages.

15 Q But as a matter of law, Hays cannot act as an agent.

16 A I will leave that to others, sir, but as a matter of accounting the substance is that there are
17 two services here. One is being provided by Hays and one is being provided by the
18 temporary worker, which is clear from the agreement.

19 Q Mr. Hall, you cannot just leave it here. The question is that this agreement is situated within
20 a scheme of statutory obligations that Hays has. Just to be clear on that point, is Hays
21 acting as an employment business in this agreement?

22 A I believe that's correct.

23 Q If that is so, it can only act as a matter of law as a principal, it cannot act as an agent?

24 A Well as a matter of accounting I believe one has to look to the indicators to determine
25 whether it is an agency or a principal relationship, and there are other instances where Hays
26 acts as a recruitment business where it accounts for things on an agency basis.

27 Q The issue here, I think you have to accept that if you are going to offer an interpretive
28 argument, as you appear to be doing, you have to understand this arrangement in the light of
29 what Hays is doing as an employment business, and once that is so it defines the nature of
30 Hays' statutory obligations as a principal not an agent. Now, where in your consideration
31 do you weigh that in the balance?

32 A Well, as I say, I have looked at the indicators relative to the various agreements, and I have
33 reached a view based upon those.

1 Q But that is just repeating as a formula, I am asking you when you came to your conclusion
2 about the Parc agreement and the way it was structured and the relevant context in which
3 this arrangement was entered into, where in your consideration do you pay regard to the
4 statutory obligations that Hays has in this situation?

5 A I think I can probably do no better than say I have looked at the substance of the
6 arrangements over the legal form.

7 THE CHAIRMAN: From the point of view of applying this indicator under the accounting
8 standards, and it is an indicator, this one, that is in all three of the accounting standards you
9 have looked at, is a statutory regime which dictates the nature of the legal relations a
10 business can have with its customers, is that relevant, or not?

11 A I think, Sir, if the substance of the relationship differs from the legal form then I would say
12 the substance should prevail.

13 Q It is not a question of legal form, the statutory regime dictates what responsibilities the
14 business must have?

15 A Legally it cannot be an agency if I understand correctly.

16 Q And is that relevant or irrelevant applying this indicator?

17 A I wouldn't go as far as to say it is irrelevant, Sir, but I think the substance of the transaction
18 is more relevant when considering the accounting. I think we see that in other instances
19 where other employment businesses have accounted for transactions on an agency basis.

20 MR. UNTERHALTER: Mr. Hall, I want you to keep this Parc agreement open if you would, but
21 reach for another volume, which is NCB4, vol.2. If you would look at 1731 these are the
22 Standard Terms of Business which are current. If you begin by considering p.1735, what is
23 said in the first column, it identifies the parties, Hays on the one hand, and the client, and
24 then it says:

25 "The parties hereby agree to the introduction and supply by the Employment
26 Business to the Client of the temporary worker named in the Engagement Letter . .
27 . to provide the services identified in the Engagement Letter."

28 I want to suggest to you that ordinary reading of that language would indicate that it is a
29 supply arrangement, and it is one in terms of which there are only two parties and Hays is
30 supplying via the employment business, which is statutory language - correct?

31 A Yes.

32 Q -- to the client, it is ". . .the introduction and supply by the Employment Business to the
33 Client of the temporary worker", so the temporary worker is what is supplied by Hays, that
34 is the language?

1 A This agreement refers under (1) to an “Employment Agency”, it is the worker who provides
2 the service to the client, which is what the agreement refers to, this talks about the
3 “Employment Agency”.

4 Q As I understood it, you wanted to deal with the substance of the provisions that are referred
5 to. What is there about this that suggests any ambiguity?

6 A No, sorry, you made the point about employment business, “business” being a statutory
7 definition, this agreement does not refer to employment business, it refers to employment
8 agency.

9 Q Are you suggesting that these are terms in respect of the supply of temporary workers that
10 are somehow agency relationships, because it is perfectly clear that these are arrangements
11 which fall within the statutory scheme where you would be required to deal with the worker
12 on a principal to principal basis, as a matter of the Statute.

13 THE CHAIRMAN: I think Mr. Hall is simply drawing attention that in para. (1) at the top Hays
14 is referred to as an “Employment Agency”.

15 MR. UNTERHALTER: I take that, but Mr. Hall, what I am putting to you is when you start
16 studying the obligations that are being assumed by, let us be neutral and say “Hays” in this
17 instance, I am asking you to look at that provision and tell me how you can interpret it in
18 such a way as to suggest that some how Hays is acting in an agency capacity?

19 A Because I think it comes back to what Mr. Sterling said this morning, it may be taken that
20 these types of agreements may be viewed more as a principal relationship with the worker,
21 but when one looks at the agreements with the client it seems clear to me that there are two
22 types of service being provided, and it is the service being provided by the worker that gives
23 rise, I think, to the agency relationship.

24 Q Mr. Sterling very fairly indicated that at least in respect of his business the contracts were
25 styled as to relationship between his company and the client, rather more along agency
26 lines, but in respect of the relationship with the temporary worker along principal to
27 principal lines, and that is why he came to certain conclusions. But this agreement bears no
28 relationship to the way in which that agreement is styled as to the relationship between the
29 company and the client, because again if you are going to go down this road, and I am not
30 sure that an accountant should be going down this road, but if you wish to do so then you
31 have to explain to the Tribunal why it is that on this language you can come to the
32 conclusion of agency, because it is not indicated?

33 A I come to the conclusion of agency on the basis of my review of the Parc contract, for
34 example, because under that agreement it is clear to me that Hays is not responsible for the

1 provision of the services by the worker. The worker is responsible for the provision of
2 those services because Hays has no role in controlling the worker.

3 Q That is why I asked you to keep the Parc agreement open, but if you would go back to it at
4 501 and 3.5, just tell me how it is that you can read the language that you see in 3.5, which
5 is that:

6 “Contractors are engaged by the Client, via Parc and the Supplier on a Contract
7 for Services.”

8 - which seems to be the language that you have wanted to rely upon to suggest agency. Tell
9 me how that language compares to what you find at 1735, cast in very different terms?

10 A Why do you say that is different, sir? “Contractors are engaged by the Client, via Parc and
11 the Supplier on a Contract for Services”.

12 Q Yes. As I have understood your argument in respect of the Parc arrangement, you are
13 saying contractors are engaged by the client, and that for you is what suggests agency?

14 A No, what suggests agency to me is that the contractor is responsible for provision of his/her
15 services not Hays.

16 Q Yes, and I understand that is how you reach the construction you do, though we would
17 submit on a full understanding of the agreement that is not the correct conclusion, but I can
18 understand on that particular language that you could consider there were some agency
19 elements in 3.5. I am asking you to compare that with the language at 1735 because it does
20 not seem to be comparable language and the plain meaning seems to be rather different?

21 A I must admit, sir, I am not following you at all. 3.5 says the “Contractors are engaged by
22 the Client, via Parc and the Supplier on a Contract for Services”.

23 Q Yes, in other words, just to translate, the worker is engaged by the client, the temporary
24 worker “is engaged by the client via Parc and Hays”, so the “via Parc and Hays” suggests
25 an intermediary relationship for Hays. I can understand how you can reach that conclusion
26 in respect of Parc, what I cannot understand is how you can read that language over to the
27 language which we see at 1735?

28 A One cannot deny the contractual arrangement between the temporary worker and Hays,
29 what drives the accounting for me is that Hays is not responsible for the provision of the
30 service.

31 Q But that begs the very question that you are having to answer. The question that you have
32 to answer is: Does Hays have an obligation to supply? That is the question you are trying to
33 answer, and you can derive an answer by looking at the language which is the exercise we

1 are engaged upon, and an ordinary reading of the provisions at 1735 suggests a principal
2 relationship not an agency relationship.?

3 A I disagree because ----

4 Q But why?

5 A Because if one goes back to the Parc agreement ----

6 Q No, no, no ----

7 THE CHAIRMAN: I think what is being put, Mr. Hall, is that you have reached a conclusion on
8 the Parc agreement and you have explained that. You are now being asked to look at the
9 standard terms and saying whatever might be the position on the Parc agreement, is not this
10 agreement, given that you have been analysing the terms of the agreement somewhat
11 differently, the same reasoning you have identified in the Parc agreement, be applied to
12 these clauses, and if so how do you do that?

13 A This agreement, Sir, seems to me the temporary worker agrees to provide themselves, to
14 then provide services to the client, in this case Parc or its ultimate client. It is then under the
15 Parc agreement that the temporary worker then provides services to Parc's client.

16 Q I think this agreement, the standard terms does not involve Parc at all?

17 A No, Sir, this is the agreement that gives rise to the obligation to pay wages to the temporary
18 worker by Hays.

19 Q This is a agreement between Hays and its clients, this is not the agreement between Hays
20 and the temporary worker.

21 A I beg your parson, Sir, sorry.

22 Q This is the standard agreement ----

23 A Yes, I beg your pardon.

24 Q -- between Hays and client where you have no Parc, no neutral vendor and so on, which was
25 not one of the seven you were given, we know why. Therefore you did not consider it in
26 your first report, because you had not been given it, so you could not be expected to
27 consider it. But now that you have it you are being asked to look at it and on that
28 agreement it is being put to you the same analysis does not apply because the wording is
29 rather different, that is the proposition put to you?

30 A I was speaking at cross purposes, I thought I was looking at a different agreement, I do
31 apologise. I think again under this agreement ----

32 MR. UNTERHALTER: The temporary worker agreement, so we can be clear.

1 A I beg your pardon, 1735, the temporary worker is providing the services, and there will be
2 an engagement letter setting out what those services are. Hays is not responsible for
3 providing those services, it is the temporary worker who is providing the services.

4 Q Mr. Hall, you are reaching those conclusions without having regard to the language which
5 defines the obligations of the parties, and what I am asking you to explain, if you can, if you
6 are not simply applying the construction of Parc across to this agreement without further
7 reflection and I understand you are not, then you have to explain how you can reach the
8 conclusion on clause (2) that you do, and I have yet to hear that explanation from you?

9 A I believe under this agreement the services to be provided by the temporary worker are
10 separate from the service provided by Hays for which it receives its fee.

11 Q Just pass the language and just show me how you derive that from (2)?

12 A Because the temporary worker----

13 Q Which words are you referring to or relying upon?

14 A The temporary worker is providing services identified in the engagement letter, Hays
15 doesn't provide the services provided by the temporary worker. The temporary worker, if
16 it's a plumber will be providing plumbing services, that's what we set out in the
17 engagement letter.

18 Q Who is the subject of this sentence?

19 A The subject?

20 Q "The parties hereby agree to the introduction and supply. . ." by whom? "By the
21 Employment Business . . .", which is Hays?

22 A Yes.

23 Q ". . .to the client"?

24 A Yes.

25 Q So that is the supply relationship that is being set up. What is the subject matter that is going
26 to be supplied? It is the temporary worker named in the engagement letter to provide the
27 services identified.

28 A But the temporary worker then provides the services to the client.

29 THE CHAIRMAN: Well I think we are going around in circles.

30 MR. UNTERHALTER: Indeed, there is no agency attributable for the purposes of obligation
31 here, but perhaps ----

32 THE CHAIRMAN: Can I just ask you, Mr. Hall, when you have to consider as an accountant
33 this indicator which is raised by the standards, namely, who has the primary responsibility
34 for providing the goods or services to the customer, and the provision of goods and services

1 is governed by quite complicated contracts, they are full of detailed clauses drafted by
2 lawyers. As an accountant would you sometimes say to the company: "I'd like the help of
3 your lawyers to understand and to advise me who has the primary responsibility under this
4 contract" or would you, yourself, as an accountant, say "No, I will form a view"?

5 A I think on some occasions, Sir, legal advice might well be appropriate, yes.

6 Q In analysing these contracts did you have the help of legal advice?

7 A No, Sir.

8 MR. UNTERHALTER: Could I ask you then to look at the contract that is reflected on p.43 of
9 your report, you will find that at NCB 4, vol. 1 commencing at p.729.

10 THE CHAIRMAN: NCB 4, vol.1, p.729, exhibit 13, Agreement between Hays and Client.

11 MR. UNTERHALTER: And this is the agreement, is it not, Mr. Hall, that you were examining
12 under (iv) on p.43 of your report?

13 A Yes.

14 Q There are a number of features of this agreement that we would ask you to have regard to,
15 look at p.733, it defines the services and just to be clear Hays, for the purposes of this
16 agreement is the contractor, as you will see at the top of p.732, do you see that?

17 A Yes.

18 Q Now, the services to be performed by the contractor, and include the recruitment and supply
19 of permanent staff and management of supply of temporary staff by the contractor to the
20 client pursuant to these conditions. So one sees that in the one case there is a simple supply,
21 and then there is a management of the supply in respect of temporary staff, marking out
22 seemingly a difference for the purposes of the definition of services. Did you have regard
23 to that?

24 A Yes, I have looked at this, yes.

25 Q Did that signify for you in any way?

26 A Well to answer your question as to what I considered, it is on the reference 97 of CB4,
27 where I looked at the various indicators and the references to the agreement, so ----

28 Q We are now in the agreement and I am asking you what feature of this agreement suggested
29 to you "agency"? Let us just look at the services under clause 3.3 at p.734:

30 "The Contractor shall manage the supply of Temporary Workers as and when
31 required by the [Client] and provide recruitment services in respect of permanent
32 staff."

33 Again marking out distinctions between permanent and temporary, and speaking in regard
34 to temporary of the managing of the supply of those workers?

1 A Yes, “finding”, “matching”, “engaging” temporary workers.

2 Q But that is your reasoning, that is not the language?

3 A We are supplying temporary workers, but we are not supplying the services provided by the
4 temporary workers.

5 Q I want to suggest to you that again you are begging the very question that has to be
6 answered, which is when the contractor undertakes the obligation to supply the temporary
7 workers to the client, is it doing so as a principal or as an agent? And I want to suggest to
8 you again that the language here is strongly indicative of a principal relationship?

9 A I believe from an accounting perspective it is the fact that the temporary worker supplies,
10 the services the temporary worker supplies involve an agency agreement for accounting
11 purposes.

12 Q But that is just a construction that you keep repeating without regard to the language that is
13 used in the contract which is our principal guide to the true relationship that subsists
14 between the parties?

15 A But the test under the accounting rules is responsibility for performance of the services, and
16 Hays is not responsible for performance of the services to be delivered by the temporary
17 worker.

18 Q But let us look at clause 4.1: “The Contractor will be responsible for managing the supply
19 of Temporary Workers to the [Client]”. I want to put to you, Mr. Hall, it is hard to see a
20 clearer relationship where it is managing that supply of those workers that constitutes a
21 principal undertaking that is being made?

22 A Again, I have to respectfully disagree. My reading of this, and my understanding of this is
23 that Hays receives its net fee for finding these temporary workers, and providing them to the
24 client. The temporary workers then provide the service and Hays has no hand in providing
25 that service.

26 Q Again, it is just an *a priori* construct that you keep repeating without regard to the actual
27 language and the actual obligations because, at the end of the day, if this contract is sued
28 upon, the question is: who has the obligation to do what, do you agree?

29 A Yes, and Hays has the obligation to provide workers if they are requested by the client.

30 Q No, it has the responsibility “. . .to manage the supply of Temporary Workers to the [Client]
31 and if it stopped doing so it would be in breach of its obligations.

32 A But it has no obligation for that temporary worker then to provide the rest of the service.
33 Hays gets its fee for managing that supply, it doesn’t get a fee for what the temporary
34 worker then does.

1 Q Again, that is just your construct.

2 THE CHAIRMAN: I think we have the division between you.

3 MR. UNTERHALTER: Indeed. I think the larger point here, Mr. Hall, is what you are being, as
4 it were, drawn into, is an exercise where your judgments as to how properly to read
5 contracts turns out to be the decisive criterion for what you call the accounting judgment
6 that you are forming?

7 A I think it is an element of that as well as an understanding of how the business works based
8 on Mr. Venables' evidence.

9 Q We heard what Mr. Venables has to say and you cannot improve on what he has and has not
10 said, that is as it is and we cannot really take that any further. Can I then just ask you one or
11 two other questions? I was somewhat puzzled to read in your statement of matters agreed
12 upon and not ----

13 THE CHAIRMAN: Are you moving away from the factors that were considered?

14 MR. UNTERHALTER: I am going to touch on one or two other points, but we do not need those
15 volumes.

16 THE CHAIRMAN: We do not need the contracts, but the various indicators of agency in section
17 4?

18 MR. UNTERHALTER: I am going to come back to them, yes. (To the witness): One of the
19 subjects that you deal with at p.9 of the agreed statement is this question of scale and
20 magnitude of the business. I wanted to ask you about that, because as I understand your
21 position, it is reflected at 5.2.2:

22 "Mr. Hall does not agree with Mr. Allen's comment that turnover is the true
23 measure of scale and magnitude of a business, meaning a business in general."
24 I am curious as to this language, meaning "a business in general". Are you saying that as a
25 general matter it is not the case that one would have regard to turnover for the purposes of
26 assessing the size of a business?

27 A I think my issue is with the word "the", I think it is "a" measure, but I don't think it is
28 necessarily "the" measure.

29 Q So we can agree then it is one of the ways in which one can determine the size of a
30 business?

31 A In general, not in this case.

32 Q Let us deal with generalities first. For example, under the Companies Act, whether a
33 company is of small, medium or large size, and its consequent reporting obligations and the
34 like is, at least on one indicator, a question of turnover, is it not?

1 A For the purposes of preparation of accounts it is one of the indicators, yes.

2 Q So just to be clear what you are saying, you are saying in general it may be one indicator of
3 size, but it is not an indicator of size here?

4 A For example if one had a property company one would not look at turnover, you would look
5 at net assets, for example.

6 Q But we have been through an exercise with a number of witnesses and we heard some of
7 them this morning but in all the annual reports that we have reviewed, and I assume you
8 have reviewed, when it comes to the performance of the company there is invariably a
9 mention of turnover. Again, perfectly fairly, a number of witnesses have said to us, Mr.
10 Ballou was one of them this morning, it is an indication of the size of these kinds of
11 companies – not the only one but an indication of size?

12 A It is a number that is referred to for various reasons, I am aware of the evidence of Mr.
13 Shepperd as to the relevance of turnover in this industry and I think Mr. Allen and I have
14 agreed because of the particular facets of this business the mix of business and so on it is
15 not a particularly helpful indicator. In fact, in my second report I do point out that I think
16 there are two companies which actually refer to turnover as not being a key performance
17 indicator of KPI, they talk about their net fees or gross profit as being a KPI, but it is
18 referred to.

19 Q It is referred to and it is referred to specifically time and again, year in year out as a
20 reflection of the performance of the company. It says “we are doing well, or badly”, “we
21 have grown or not grown in relation to turnover”?

22 A I haven’t looked at all the companies here. I have looked at Hays’ accounts, Hays’ accounts
23 overwhelmingly refer to net fees, turnover does figure in those accounts.

24 Q Again, if it is a matter of counting heads we would have to agree, but the point is that it is
25 included as an item when the question of the scale, how big or small the entity is – is it
26 growing? Is it shrinking? Turnover is used as a criterion?

27 A But I am not sure it is included in those terms, it is referred to on occasions, and we need to
28 look at each occasion as to why it is referred to. I’m not sure it’s referred to in those terms.
29 The evidence I think has been pretty clear, to me anyway, that net fees is the measure of the
30 scale and magnitude of the businesses in this industry, certainly that is the evidence I’ve
31 heard.

32 Q It has certainly been referred to as an indicator of performance, that is clear, but again I do
33 not want, because I do not think it would be a sensible use of your time and that of the

1 Tribunal -- However, let me just take you to one as an example. Go to NCB4, Volume 1.
2 If you go to p.137 here we have an example of Mr. Venables' report. He says,

3 "The performance of the Group has been impacted by deteriorating conditions in
4 all markets, particularly in the second half of the year. Group turnover decreased
5 by 4 per cent, net fees by 15 per cent".

6 Then you will see the treatment further in the last paragraph at p.137 where there is further
7 reference to 'the volume decrease of the business'. That is related to margins. We have had
8 that debate with Mr. Venables about the relationship between turnover and margin.

9 A Mr. Venables is talking about net fees in that last paragraph. He is saying that the net fees
10 are impacted both by a decrease in the number of people that are being placed, which is the
11 volume, and also the reduction in the margin, the margin being the commission rate,
12 effectively, that Hays is able to achieve on its business.

13 Q In respect of the margin for temporary workers, the whole turnover would be taken account
14 of, as reflected in the accounts, divided by the net fee.

15 A No, that's not true. That's not true.

16 Q Why is that not true?

17 A There is a note at the bottom here, which is the three asterisk note at the bottom. What that
18 effectively is saying is that one has to make adjustments to the turnover figure in this table
19 to reach the underlying temporary margin numbers.

20 Q What adjustments are being made?

21 A I believe what's happened is that the VAT exemption has been taken away now, and so I
22 think the number that Mr. Venables has given me is about £250 million of turnover which
23 has been added to the top line without any increase in net fees. So, the percentage of
24 margin would be -- If you calculate it just based on fees received divided by turnover, then
25 that margin would change materially because of adding more top line without any
26 substantive change to the business. But, it is not using that figure anyway.

27 Q The point is that that is an adjustment because of the different treatment after the VAT
28 exempt client's changed status. That is true. You have to take account of that. But, in
29 terms of the basic calculus of the margin, that is simply the net fees divided by the turnover.

30 A No. It's net fees divided by turnover giving rise to net fees, if I can put it that way.

31 Q Again, I do not want to get stuck. I am not sure that this is sufficiently important. Do you
32 know which turnover figure is being utilised for the purposes of deriving that margin?

33 A It is not apparent from this table. One has to calculate it, and I don't have that calculation.
34 But, it is not that figure there, sir.

1 Q But the bigger point is just that the kind of reference you see at the top of p.137 to turnover
2 as some indication of performance is very much symptomatic of what one reads in these
3 reports and those of other agencies of this kind.

4 A I think sporadic references to turnover, yes. Constant and detailed references to net fees,
5 which is what all of this page talks about, much more so. And, as I say, there are examples
6 in my report of other companies not referring to turnover, but referring to gross margin or
7 net fees as a realistic usable KPI, as well as the evidence of Mr. Shepperd.

8 Q Could you look at p.321? This is something that I took Mr. Venables to. It deals with the
9 relationship between statutory changes in respect of holiday entitlement and the impact on
10 margin. You will see it reflected in the first column at the top. Do you want to read that?

11 A If I may. (Pause whilst read): I have read that.

12 Q That, again, seems to indicate that what is happening is that Hays is going to incur certain
13 obligations by reason of a change to legislation in respect of holiday entitlement which they
14 may not be able to recoup from the clients, and consequently their margins are going to be
15 affected. Does that not also suggest to you a principal relationship rather than an agency
16 relationship?

17 A Not really, no. The key test under the accounting standard is whether we can influence the
18 price that is paid. The price all comes from the customer. So, the fact that our margin
19 might be squeezed slightly if we can't pass it on - of course -- as I think you pointed out to
20 Mr. Venables yesterday, there are some clauses in some contracts which enable Hays to
21 pass on changes as a result of legislative changes.

22 Q Yes. But, not invariably.

23 A I'm not sure invariably, but it doesn't suggest to me a principal relationship, no.

24 Q You are saying it does not do so because Hays is not in a position to determine the price at
25 which the service is provided. But, I do not follow that. That is the subject of negotiation
26 between Hays and the customer.

27 A As I understand it, the client tells Hays what they are prepared to pay in a certain situation.
28 Hays then tries to find the worker to satisfy that requirement while earning its margin.

29 Q Why do you have that understanding of the way in which negotiations take place?

30 A That's been the evidence that I've had.

31 Q I see. Well, if I were to say to you that in fact very often what the client wants is a rate for
32 the job -- a rate for the supply of the temporary workers, an all-in rate, and negotiation is
33 entered into in respect of that rate, and, depending on what each party can get to in those
34 negotiations a figure is struck in respect -- The worker is not party to those negotiations.

1 A As I understand it, the client has a rate it is prepared to pay. Hays will have a rate card
2 which determines the margin it is prepared to accept. If Hays can find a worker to fulfil
3 that position and earn a rate that it's prepared to accept, then it will supply the worker.

4 Q Why do you understand that it is entirely a question of the power on the part of the client to
5 determine this matter? Where does that come from?

6 A The evidence that I've heard from Mr. Venables principally.

7 Q One of the circumstances that was investigated by my client in respect of the cartel
8 behaviour that is the subject matter of their investigation was that in the construction
9 industry at the relevant time there was a great shortage of supplier in respect of skilled
10 workers for the construction sector. Now, in that situation why would you suppose for a
11 moment that the client can simply dictate the rate. It is, as in any situation, a question of
12 supply and demand that is dictating this, is it not.

13 MR. BREALEY: I am sorry to interrupt. If Mr. Unterhalter is going to put that question he has
14 got to show something in the Decision which proves that. One just cannot have something
15 up-in-the-air like this and then expect the witness to comment on it.

16 MR. UNTERHALTER: That is easily done. (To the witness): Would you look at the Decision at
17 CB1 at p.38, para. 2.125. I assume you have read the Decision?

18 A I did. I have not read it recently, but I have read it before.

19 Q It says,

20 "On the basis of evidence gathered by the OFT during its investigation, it appears
21 that over the last decade the construction industry ha experienced serious skill
22 shortages, and this was particularly pronounced at or around the time of the
23 Margin Protection Initiative. It appears that a number of initiatives have been put
24 in place to address this.

25 For contractors, skill shortages can have serious consequences ----"

26 Then it explains what those are. I do not want you to opine specifically on that ----

27 THE CHAIRMAN: Also perhaps the last sentence of para 2.126.

28 MR. UNTERHALTER: Yes.

29 "Shortages in skilled labour put recruitment agencies in a strong position, which
30 contributed to an increase in fees."

31 I am just making the ordinary observation to you which is that the skewed notion that
32 somehow or another Hays, and others like them, are simply price takers -- There is no a
33 priori reason to suppose that that is the case. They are market players, like anyone else.

1 They will negotiate within the scheme of supply and demand that is applicable to their
2 particular part of the market.

3 A I am sure a client will have regard to what it understands to be market rates which will be
4 affected by the status of supply and demand in the market. Hays then has to find a worker
5 who will take on that role for the amount the client wishes to pay, having regard to those
6 market conditions, and having regard to whether Hays will earn a margin that it finds
7 acceptable.

8 Q All that I am putting to you is that it is not a one-sided arrangement. There is a negotiation
9 that takes place. The client is trying to get the lowest possible rate. Hays will be seeking to
10 get the best and highest possible rate. They will arrive at an answer. That does not show
11 you, as you are seeking to suggest, that somehow or another the price is wholly determined
12 by the client. Where does that come from?

13 A I'm not sure I said that I said the client will try and get a worker for what it considers to be
14 its view of a market price. It is then Hays who will try and find that worker and at the same
15 time, within the amount of money that the client wishes to spend, it will seek to recover its
16 acceptable margin.

17 Q You keep saying this, but the fact is that if a client came along to Hays and said, "I am only
18 willing to pay £5 per hour for a skilled architect", it does not matter how many times they
19 might say that, the answer would come back and say, "I'm sorry. We can't find skilled
20 architects at £5 per hour". A negotiation would follow to the point where given the relevant
21 overall conditions of supply and demand in relation to skills and their relative scarcity, they
22 would come to a figure. That is a negotiation between two parties, principal to principal,
23 like any other contract.

24 A My understanding is that Hays, in those situations may go back to the client and say, "If you
25 want a skilled architect you might have to think about £20 per hour", but it would not be
26 able to dictate the price to the client. The client would then have to say what it was
27 prepared to pay -- whether it was prepared to move to £20 per hour.

28 Q That seems to reflect the ordinary bargaining that takes place in most contractual situations.

29 A I don't see that as bargaining. It's not Hays asking for something. It's Hays indicating to
30 the client what they may have to pay.

31 Q I must say I remain entirely unclear as to why you think there is something distinctive about
32 the bargaining that takes place in this situation from the bargaining that takes place in any
33 number of other contracts where parties have to find each other, depending on their relative

1 strengths and weaknesses and arrive at a price. That happens every single day as an
2 ordinary incident of commerce.

3 A Hays is acting as an intermediary for the temporary worker. It is the temporary worker who
4 is looking to achieve £20 per hour.

5 Q That is, again, your assumption. You keep coming back to ----

6 A It's my understanding of the way the business works, sir.

7 MR. BREALEY: Again, I am really, really sorry. Mr. Unterhalter keeps on making these points.
8 Mr. Hall has said he has read the evidence. I can take him in re-examination, but really this
9 is just unacceptable to put to the witness things that may or may not exist; bargaining
10 power, when it is actually in the unchallenged evidence, for example, of Mr. Jellicoe; it is in
11 the witness statement of Mr. Venables which deals with all these matters. What should be
12 happening is that Mr. Unterhalter should put these matters to the witness by reference to the
13 relevant parts in the witness statements rather than making just generalised assertions which
14 are not true.

15 THE CHAIRMAN: I do not know if it is true or not, but if we are going to go in detail down this
16 route I think you will need to put the witness statements to Mr. Hall. I am not sure it is
17 really very profitable. Time is marching on.

18 MR. UNTERHALTER: No. Indeed.

19 THE CHAIRMAN: You are dealing with one narrow aspect of this.

20 MR. UNTERHALTER: (To the witness): Can I come to the question of risk, which is one of the
21 other indicators? I think that at the outset you indicated that it is a factor, but in your
22 conception I think you would indicate that it is a weak indicator. Is that your position?

23 A Do you mean credit risk, sir?

24 Q Credit risk, yes.

25 A I think it is an indicator. I think it is relevant to understand that under EITF 99-19, which is
26 the US standard, it was viewed as a weaker indicator. I would also note that under IAS18
27 the Guidance notes leading up to the change to IAS18 said that the standard setters did not
28 intend to attach the relative strengths to the various indicators, but certainly in my view it
29 would be a weaker indicator.

30 Q Can we just dissect those different positions? One is that under US standard there was a
31 particular position taken as to what sort of an indicator credit risk is. That is not the
32 applicable standard that applies to Hays and has not applied to it throughout the relevant
33 period that we are concerned with. Correct?

1 A I wouldn't necessarily agree with that for the reasons I've set out in my report. If Guidance
2 is available from another standard setting body - international accounting standards - then I
3 need to have regard to that standard. EITF 99-19 was extant during the period prior to the
4 Guidance note from IAS18 being provided.

5 Q I am not following. At least from November 2003 onwards this matter was governed at
6 least in respect of Hays by FRS5. Then there was the note in respect of Note G, which was
7 the November 2003 Guidance that existed as at that date. So, I can't understand why one
8 would have reference to a US standard when Hays had adopted a policy of applying the UK
9 GAAP standard, which was captured by Note G under FRS5,

10 A Which talks about credit risk being an indicator.

11 Q An indicator. Exactly.

12 A. The International Accounting Standards say you can have a look at whichever standards
13 you wish. You can look at EITF 99-19. You can look at FRS5. It is simply that one gets
14 some additional Guidance from the US standard.

15 Q So that we do not delay unduly on this -- At the relevant time, which was from November
16 2003, it was FRS5 and Note G to that standard that was applied by Hays for the purposes of
17 its accounting treatment.

18 A At that time, sir, yes.

19 Q That is why time matters, as we have discussed. Now, under that standard it was a factor
20 amongst others to consider.

21 A Correct.

22 Q Yes. Now, when we look at the accounting treatment of this - and could I in that regard ask
23 you to turn up NCB4, Volume 1, p.141 - there is a treatment of the question of risk by Hays.
24 It is divided into customer credit risk and what is described as contractual risk. Just so that
25 you can orientate yourself, there is customer credit risk and then there is what is described
26 as contractual risk. If you read more or less three-quarters of the way down under
27 'Contractual Risk' it says,

28 "The placing of temporary workers generally brings greater risk for the
29 organisation than permanent placements ... Wherever possible our contracts
30 include provisions placing the responsibility for supervision and control of the
31 temporary worker with the client".

32 That is a matter I debated briefly with Mr. Venables. I wanted to refer you to the first part
33 of that sentence which is that in Hays' conception firstly there is a distinction between the

1 risk that attaches to permanent placements and those that attach to the provision of
2 temporary workers.

3 A Yes.

4 Q You agree with that.

5 A Hays assumes credit risk with the provision of temporary workers.

6 Q A greater risk.

7 A A greater credit risk, yes.

8 Q That comes about, as the legislation requires and as the agreements are structured, where it
9 is acting as an employment business it is required to pay the workers irrespective of
10 whether it has been paid by the client.

11 A That's correct.

12 Q That is the distinctive feature, as it were, of the placement of temporary workers.

13 A It assumes credit risk in those situations. It also assumes credit risk in the HPPS situations
14 where it accounts for the relationships on an agency basis. So, both have the same credit
15 risk in that Hays is obliged to pay the temporary worker, but they are accounted for in
16 different ways. I see credit risk as not being the determinative factor.

17 Q On that score could I ask you to have a look again, since you raise the issue of an HPPS
18 arrangement, at NCB4, Volume 2? If you look at p.1738, at Clause 3.1 you will see that
19 these are the terms of business for the introduction and supply of temporary workers to
20 VAT exempt clients, which is what the HPPS situation is concerned with. Correct?

21 A Yes.

22 Q Look at Clause 3.1. You will see,
23 "The client acknowledges and agrees that it shall be responsible for the
24 remuneration of the temporary worker".

25 So you rely upon HPPS arrangements as somehow being indicative of this question of risk
26 being a weak indicator, but in fact those are distinctive relationships that are formed for
27 very particular reasons - to enjoy the VAT exemption. On other words, it is not typical of
28 the agreement where there is clearly an obligation that rests upon Hays to pay the worker as
29 an employment business, and it assumes risk in doing so. Do you have a comment on that?

30 A Sorry. My understanding is under the HPPS agreements as they were, Hays is exposed to
31 credit risk.

32 Q I am just reading what the agreement says.

33 A Could we go to Exhibit 16 and Exhibit 7 of my first report, please? Exhibit 7 is NCB4,
34 Volume 1, p.477. Clause 4.1, the last sentence.

1 “The employment business [here being Hays] shall pay the temporary worker in
2 the event HPPS fails to do so for any reason.”

3 So Hays has a credit risk under these arrangements.

4 Q I am not certain how one reconciles that portion of the agreement with what seems to be the
5 standard term in respect of which the client seems to be undertaking this obligation.

6 A I think in most of these agreements, sir, the client undertakes to pay the temporary worker,
7 but ultimately the responsibility rests with Hays if the client doesn't pay. That's what this
8 agreement is saying.

9 THE CHAIRMAN: If there is a failure to reconcile them, that is not really a question which Mr.
10 Hall can be expected to answer.

11 MR. UNTERHALTER: Indeed.

12 THE CHAIRMAN: Mr. Davey is suggesting that it may be the statutory responsibility is on Hays
13 to pay, but no doubt that can be looked into.

14 MR. UNTERHALTER: Perhaps I can just make a general point to you on this score, Mr. Hall,
15 which is this: that the HPPS arrangements are peculiarly tailored to take advantage of a
16 particular exemption and they are not particularly helpful in testing the generality of
17 agency/ principal issues which you have been asked to consider and give an expert view on.

18 A From an accounting perspective I'm not sure I would agree with that. I think they've
19 outlined here that credit risk is not a key indicator for Hays in determining how it accounts
20 for its arrangements.

21 Q We would differ with you on that.

22 MR. BREALEY: Sir, the other reference that Mr. Hall asked to see is Exhibit 16. Lest the
23 Tribunal wants to know, that is to be found at NCB4, Volume 2, beginning at p.1107. The
24 clause he cites in his Footnote 102 is at p.1108 - Clause 4.1.

25 MR. UNTERHALTER: Mr. Hall, I wonder, just while we are dealing with this question of credit
26 risk, which I think we are in agreement is an indicator, and I have taken you to the relevant
27 provisions of the annual report as to what Hays makes of that for the purposes of its
28 business, are you in agreement with the proposition that it is the existence of the risk rather
29 than the likelihood of it materialising that is relevant from an accounting perspective?

30 A That would be the primary factor, it might also be considered as to the extent to which it
31 could be mitigated, but the existence, I would agree, is the primary factor.

32 Q And that is consistent, and I do not need you to turn this up, with the Deloitte view which
33 says:

1 “The ability for HSRL to potentially mitigate risk through contractual remedies
2 can be differentiated from HSRL having no exposure to the risk.”

3 In other words, it distinguishes these two categories, exposure to risk and risk mitigation.
4 Would you agree that it is essentially the exposure issue that is relevant for making the
5 principal/agency determination?

6 A I think one would consider both but the primary point would be the existence.

7 Q Do you know of any businesses of the kind that Hays is involved in in the supply of
8 temporary workers that does account on an agency basis?

9 A Yes.

10 Q Such as?

11 A There are I think three examples referred to – companies like Hays, you mean?

12 Q Companies like Hays that supply temporary workers?

13 A There are three referred to in my report. There is the example we have heard about Robert
14 Walters.

15 Q Is that across the board that they made a change?

16 A No, they made a change in respect of certain arrangements, as I understand it, Comensura is
17 one that accounts only on an agency basis and, forgive me, I’ve forgotten the name of the
18 other company, but there is a further company referred to in my supplemental report.

19 Q Would it be fair to say, looking across the industry as a whole, that the great majority of the
20 agencies that you have examined do report on a principal basis?

21 A I think Mr. Allen identified 20 companies, not included Comensura. 18 of the companies
22 account for everything on a gross basis, two account for an element of their business on an
23 agency basis net, and Comensura, which is a further company, accounts only on a net basis.

24 Q But would I be right in saying that you and Mr. Allen are more or less in accord that
25 generally speaking within this industry reporting takes place on a principal basis?

26 A I think the numbers in the accounts speak for themselves.

27 THE CHAIRMAN: Mr. Unterhalter, can I ask about how much longer you will be?

28 MR. UNTERHALTER: I am not going to be very much longer, what I did want to ask for is an
29 opportunity to speak to my expert overnight, and I will mop this up very quickly in 10 or 15
30 minutes at most tomorrow morning.

31 THE CHAIRMAN: An alternative would be – Mr. Hall has been in the witness box for a while –
32 that we take a 10 minute break now, and we could sit until 5, there may be some re-
33 examination, we may have some questions. Would that then enable us to complete Mr.
34 Hall’s evidence today, do you think?

1 MR. UNTERHALTER: We are entirely in your hands.

2 THE CHAIRMAN: Would that have that result? We do not want to sit until 5 if it is unlikely to
3 do so. I think it is desirable that Mr. Brealey should have access to Mr. Hall to prepare for
4 the cross-examination of Mr. Allen tomorrow, and if you hold him over then he will not, so
5 I am not very keen on that.

6 MR. UNTERHALTER: No, I would not want to do that. Perhaps if we could have 10 minutes I
7 could see.

8 THE CHAIRMAN: We will take a 10 minute break and we are able to sit until 5 today. We will
9 come back at quarter past.

10 (Short break)

11 MR. UNTERHALTER: Thank you. Mr. Hall, given the views that you have expressed to the
12 Tribunal both in your reports and in the course of your evidence, if you were today in Mr.
13 Venables' position, can you indicate to us at what point in the sequence from 2000 more or
14 less you would believe that you would have given a different treatment to the accounts? Is
15 there a particular point?

16 A Based on my understanding of the contracts and the business being essentially the same
17 throughout the period I'm not sure I focused on a particular year, for all of those years I
18 would suggest different treatment would have been acceptable.

19 Q So in other words, under the different standards as they applied over that period at each
20 stage you would have reached a different judgment to the one that Mr. Venables would?

21 A As I explained I think there is such a commonality between the various standards that which
22 ever standard I was looking at I would reach the same view as I expressed in my report.
23 The net fees would be an acceptable basis, based on my judgment.

24 Q If you were now in Mr. Venables' position you would want to restate the position in respect
25 of the accounts, we move now from what is hypothetical to the practical position that you
26 would then find yourself in which is that now clothed with Mr. Venables' position you
27 would be wanting to restate the accounts going all the way back?

28 A I think it follows from the views I have expressed that I would choose to present the
29 accounts in a different way to that in which they have been presented before, and I think
30 there would be an element of restatement of that presentation, typically one only restates the
31 prior year.

32 Q And that would then have to be predicated on the fact that there had been a mistake that was
33 made?

1 A I don't think it is a mistake, I think it is, as was discussed with Mr. Sterling this morning, it
2 is this question of fine judgment. My judgment is that they could be treated in a particular
3 way.

4 Q But for the purposes of when restatements are possible, you are now in Mr. Venables'
5 position, under what terms could a restatement take place? Would it not have to be that
6 there had been a mistaken judgment that had been formed that now served to be corrected?

7 A I do not think so, I think just a different judgment has been taken over the set of
8 circumstances that apply. We have seen Robert Walters' example where Robert Walters
9 have re-assessed the way in which they wish to account for certain transactions.

10 Q I wonder whether I could ask you under the standard that does apply to Hays, since that is
11 the standard that you would have to have regard to for the purposes of making such a
12 Decision, what you would rely upon for the purposes of making a restatement, because it is
13 IAS 8 which is the relevant standard for that purpose?

14 A Yes.

15 Q Tell us in terms of that standard on what basis such a restatement would take place?

16 A IAS 8 talks about, I think, changes of accounting estimates, or correction of – sorry we
17 should look at IAS 8 ----

18 Q We can do that, if you look at NCB 4, vol.3, and you will see it is at 2014 – it begins a little
19 earlier at 2007.

20 A On 2012 the heading there talks about “Voluntary changes in accounting policies and
21 corrections of prior period errors.”

22 Q Yes, but what are the grounds that would allow this? Fundamental error?

23 A This standard eliminates fundamental errors, so it does not distinguish between fundamental
24 or other errors, that is on p.2013.

25 Q Yes, but put simply what would be required would be to say that there had been a mistake?

26 A I think what would be required is to say that the person looking at it now had formed a
27 different view as to the way in which it should be presented and then the accounts would be
28 presented such as to show net fees as turnover, and to restate the prior year on the same
29 basis.

30 Q But that necessarily entails that if you are going to apply the standard, that you have to
31 grapple with the fact that that amounts to an error, because that is the ground upon which a
32 restatement takes place?

33 A It is not a change of accounting policy, it is the change of a way in which a policy is
34 applied.

1 Q Exactly, and that is an error?

2 A Which leaves you with the error, but I would argue that “error” I think is an unfortunate
3 word, it is a determination that something is treated in a different way, it is a matter of fine
4 judgment, as Mr. Sterling put it, and I would agree with that.

5 Q Yes, but that is what the standard requires and yet you tell the Tribunal that there was not an
6 error?

7 A I don’t believe there has been an error.

8 Q So placed in Mr. Venables’ position you would say that there is an error, but you do not say
9 that there is one?

10 A No, what I have said in my report is I don’t question Mr. Venables’ judgment. It’s a
11 question of fine judgment and he has reached his view. I would reach a different view if I
12 were in that position. I don’t say Mr. Venables has made an error, he clearly doesn’t believe
13 he’s made an error, he will keep on accounting for things in the way he has done.

14 Q But in his position, in other words, if you took over from Mr. Venables you would have to
15 say he was in error on your judgment and that a restatement should take place.

16 THE CHAIRMAN: Why does that apply, that he would have to say there was an error?

17 MR. UNTERHALTER: Well because in Mr. Hall’s view a different judgment is required here.

18 THE CHAIRMAN: He says that is the better view and so he would change the policy if he were
19 now in Mr. Venables’ shoes because in his judgment that is the better view, but he is not
20 saying that the other view is erroneous. Why does saying that this is the better view, where
21 it is a matter of fine judgment, mean that the other view is in error?

22 MR. UNTERHALTER: As I understand the standard it is not a change of policy but a change of
23 judgment under the policy. I think Mr. Hall, and I are in agreement with that one.

24 A It is a change in the way the policy is applied, but I think “error” is an unfortunate word, it
25 is a question of judgment and one person can have one view, and I think another person can
26 have an equally perfectly validly held view, and there is common ground between me and
27 Mr. Venables, and Mr. Sterling on that.

28 Q I think, at least as I understand it, there are some accounting standards where you can
29 permissibly choose to come to one view or another within the scheme of the standard, but
30 here is a situation where you have to reach a view and if you do reach that view, however
31 finely balanced you may claim it to be then you have to conclude that the other view was in
32 error?

1 A I don't believe that is right. I think that we have the example of Robert Walters who had
2 reached a view on the way in which they would treat some of their contracts on a principal
3 basis, they then changed that view without expressing that it was an error.

4 Q That was because the accounting standard changed?

5 A They had some additional clarification but it is essentially the same accounting, the same
6 transactions they just changed the way they dealt with it.

7 THE CHAIRMAN: This would not constitute a change in accounting policy then?

8 A No, Sir.

9 MR. UNTERHALTER: I have no further questions, Mr. Hall.

10 THE CHAIRMAN: Yes, Mr. Brealey.

11 MR. BREALEY: I have no re-examination, Sir.

12 MR. DAVEY: Mr. Hall, perhaps you could help me, in your first statement at para. 4.4 you talk
13 "Exposure to Inventory Risk".

14 THE CHAIRMAN: Page 51.

15 MR. DAVEY: You concluded that there was no inventory risk, and I can follow you so far, but
16 then in the next subparagraph you say:
17 "Given that Hays is not exposed to inventory risk this indicator suggests that it is acting as
18 an agent."
19 and that, I must say, I did not follow. I would have thought if there was no risk then it just
20 did not apply at all. Perhaps you could explain where I have gone wrong?

21 A I think the absence of inventory risk indicates an agency relationship, sir, but I think you are
22 right here, It is questionable whether inventory risk – I was trying to be fair and consider
23 whether inventory risk actually existed here, it is more relevant in situations where one is
24 considering the supply of goods rather than the supply of services, but I was trying to
25 impute some meaning to it in this situation.

26 THE CHAIRMAN: If there is no inventory risk at all in this situation then this factor just does
27 not apply one way or the other?

28 A That is one way of looking at it, Sir, yes.

29 MR. DAVEY: Thank you, Mr. Hall, that relieves me of my mind a little.

30 THE CHAIRMAN: Can I just ask you again for some clarification, you draw later in your report
31 analogies with some other sectors, this is your section 4.9, starting at p.58, you considered
32 department stores and timber agents. Department stores – you are dealing with stores you
33 have concessions within the stores, I think?

34 A Yes.

1 Q And you say that the department stores you have been looking at they recognise
2 commission income as turnover, and you have reviewed the report, House of Fraser,
3 Harrods, Debenhams. In 4.9.6 you say:

4 "All three of these companies disclose both 'gross transaction value' and
5 'turnover' figures (with gross transaction value being the higher figure) ..."

6 As I understand it 'turnover' is just commission income in those reports and 'gross
7 transaction value' is total sales including sales made by the concessionaire?

8 A Yes, Sir, within a department store there will be a mixture of sales, some will derive from
9 the store's own activities, and some from the concessionaires, so 'turnover' would include
10 turnover from its own activities where it sells the goods and also the commission it earns
11 from the concessionaires, whereas the gross transaction value adds in the value of the sales
12 made by the concessionaires, so that gives a greater sense of the overall level of business
13 conducted through the stores.

14 Q Is that why you say in 4.9.7 that the ". . .gross transaction value provides a guide to the
15 value of the overall activity of the group"?

16 A Yes, it is the inverse to the situation with the recruitment company, Sir, where the
17 department stores are keen to give an indication of the overall throughput, if I can put it that
18 way through their businesses so they show this higher figure showing the total volume, if
19 you like, of all the business that passes through the department store, whereas Hays
20 discloses net fees as what it considers to be the true measure of its business – extra
21 disclosure.

22 Q We found Hays discloses both, it emphasises net fees and the department stores disclose
23 both, so both these categories disclose both. I was just looking at the fact that you say the
24 gross transaction value provides a guide to the value of the overall activity of the group, but
25 insofar as its sales made by the concessionaire, it is not actually income of the ----

26 A No. I am quoting from the accounts, sir, as to why they make that disclosure, but, you are
27 right. In terms of what is received by the department store itself is the commission from the
28 concessionaire.

29 Q Yes. But, both of these are, you say, relevant in assessing performance.

30 A It is the concept of a company wishing to give some extra disclosure in its accounts which
31 provides the reader with a better understanding of the business. So, here the department
32 stores say, "Well, we provide the gross transaction value because that helps to understand
33 the value of the overall activity" and Hays will provide the net fees because it says that
34 provides a better understanding of our business than the figure we disclose as turnover.

1 Q I see. Any questions arising out of that?

2 MR. BREALEY: Yes, sir, briefly on behalf of Hays. Mr. Hall, you were just asked some

3 questions about inventory risk. Do you recall those?

4 A Yes, sir.

5 Q In particular, you were referred to Section 4.4 on p.51 of your first report. You say at para.

6 4.4.3,

7 “Given that Hays is not exposed to inventory risk, this indicator suggests that it is

8 acting as an agent”.

9 Do you see that?

10 A Yes, I do.

11 Q Am I right in saying that if there is inventory risk it points to there being a principal

12 relationship because there is an exposure to the input that sits in the inventory and that

13 principal may not be able to sell on, or at least may not be able to sell them on for some

14 time, and that is the exposure.

15 A That is as described in para. 4.4.2, yes.

16 Q Do you regard Hays as having an inventory or any analogue, or similar feature?

17 A No.

18 Q In particular, were you present this morning when Mr. Venables gave evidence about not

19 having in his witness statement what he called a bench of candidates?

20 A I was.

21 Q Do you recall him saying that he, as Hays, does not have any liability to pay the candidates

22 before he has found an assignment upon which to place them?

23 A I understood that was his evidence, yes.

24 Q So, it would be fair to say that there is no inventory or analogue of an inventory in the

25 position of Hays that would point towards a principal relationship.

26 A That’s why I say in 4.4.2 in the case of Hays’ business there does not appear to be an

27 inventory risk.

28 Q Is that why you come to the conclusion that this factor, if it points anywhere points towards

29 agency?

30 A If it points anywhere it points towards agency - certainly not to principal, yeah.

31 Q Right. So, on that basis, just to be clear, because you had some questions about this from

32 the Tribunal, are you saying that this indicator of principal/agency “exposure to inventory

33 risk” is utterly irrelevant to your consideration of the evidence you were asked to give, or

34 that it has some relevance?

1 A I think limited relevance. I don't see that there is any inventory risk here, but if I try and
2 impute some meaning to it in this context, then there is none. So, it could only ever point
3 towards an agency relationship. It could never point towards a principal relationship in this
4 circumstance.

5 Q Thank you. I have no further questions.

6 THE CHAIRMAN: Thank you very much.

7 (The witness withdrew)

8 THE CHAIRMAN: We shall adjourn until 10.30 tomorrow when you will be calling Mr. Allen;
9 is that right?

10 MR. UNTERHALTER: Indeed, yes. Can I detain the Tribunal for one moment? Just as to what
11 allocation the Tribunal has in mind in respect of submissions? We have allocated the total
12 time. I am not clear whether the Tribunal had a sense as to how that should be divided?

13 THE CHAIRMAN: On the basis that submissions will start at two o'clock tomorrow, with Mr.
14 Allen in the morning, we have not gone into a detailed breakdown of how the appellants
15 will share out the time, other than making a point about Eden Brown having its fair share of
16 thirty minutes on gross turnover. I would have thought - and we can consider it further
17 tomorrow, Mr. Unterhalter - that you should certainly have, I would have thought three
18 hours worked in for you, and that that should fit with that timetable. Perhaps you can put
19 your heads together to do the breakdown. When it was all to be in one day it was two and a
20 half hours. When it was all to be starting rather earlier tomorrow morning, the appellants
21 had factored in I think three and a half hours for the OFT. Given the timetable we have
22 adopted of four and a half days, it seems to me that three hours is probably appropriate for
23 the OFT and that that should be fair for everyone.

24 MR. BREALEY: On that basis the OFT would start some time in the morning on Thursday.
25 Subject to the Tribunal's direction, the appellants have tentatively agreed to address the
26 Tribunal on an issue basis as it is set out here. So, Lord Pannick is going to kick off with
27 MDT. It may well be that we get into seriousness tomorrow, and then we will go into net
28 fees on Thursday morning.

29 THE CHAIRMAN: I think an issue basis is definitely the most helpful. Thank you very much.

30 (Adjourned until 10.30 on Wednesday, 28th July, 2010)

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