Neutral Citation Number: **[2023] EWHC 749 (Ch)**

Case No: BL-2021-000121

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Rolls Building
Fetter Lane
London, EC4A 1NL

31 March 2023

Before:

MR JUSTICE RICHARDS

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Between:

(1) MERCY GLOBAL CONSULT LTD
(IN LIQUIDATION)

Claimant

- and –

(1) MR ABAYOMI ADEGBUYI-JACKSON
(2) MR ALAIN LUDOVIC BOISDUR
(3) MR MICHAEL OSEMWEGIE
(4) MR ABAYOMI AYANKUNLE OLUNLADE
(5) MRS GIFT ENOCH
(6) MRS FUNMILAYO OJUOLAPE ADEGBUYI-JACKSON
(7) CORNERSTONE GLOBAL SYSTEM UK LTD
(8) MERCY GLOBAL PROPERTIES SOLUTIONS LTD
(9) DOMINION PAYROLL SOLUTIONS LTD
(10) OLUGBENGA TITUS JONES SOMADE
(11) OJUOLAPE ARCADE LTD
(12) ADEKANMI (ALSO KNOWN AS KANMI) OLAOLU ADEDIRE
(13) DMO CONSULTANCY & ACCOUNTING SERVICES LTD
(14) PURPOSE IP CONSULT LTD
(15) HANSTAL CONSULTING LIMITED

Defendants

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Andrew Hitchmough KC and Clara Johnson (instructed by **Wedlake Bell LLP**) for the **Claimant**
Robert Venables KC and **Juliette Levy** (instructed by **Estate & Corporate Solicitors**) for the **First Defendant**
Juliette Levy (instructed by **Estate & Corporate Solicitors**) for the **Third, Fourth, Sixth to Eleventh and Thirteenth to Fifteenth Defendants**
The other **Defendants** did not appear and were not represented.

Hearing dates: 16 to 17 March 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down remotely at 10am on 31 March 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Richards:

1. This is my judgment on two applications:

    i) the applications (the "Amendment Application") of D1, D7 and D8 (the "Applicants") to amend their filed Defences to include a defence (the "VAT Defence") that the claimant company ("Mercy") made supplies that were exempt from VAT by virtue of Items 1 and/or 4 of Group 7 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"); and

    ii) the "Preliminary Issue Application" that the VAT Defence be tried as a preliminary issue. It is agreed that the Preliminary Issue Application does not arise unless the Amendment Application is allowed.

2. Other Defendants wish to adopt the VAT Defence. For various reasons not material to this judgment, they do not need any permission to amend existing pleadings in order to do so.

BACKGROUND TO THE APPLICATIONS

3. Mercy was incorporated in 2011. It employed a number of employees who I will describe as "healthcare professionals", recognising that this is both a broad, and therefore somewhat imprecise, term and also that it is something of a simplification since not all of Mercy's employees were healthcare professionals.

4. At all material times, D1 was Mercy's sole shareholder. The Applicants assert that until it went into liquidation, Mercy's business involved the following steps and contractual arrangements. These facts are not necessarily agreed but I will assume them as true for the purposes of this judgment.

    i) Mercy engaged healthcare professionals such as doctors and nurses as its employees and entered into contracts of service with those employees.

    ii) Mercy seconded the services of its employees to recruitment agencies ("Secondees") and had a contractual relationship with those Secondees.

    iii) The Secondees in turn sub-seconded the services of Mercy's employees to "End Users", in most cases an NHS Trust. The Secondees had a contractual relationship with these End Users.

    iv) When sub-seconded to End Users, Mercy's employees provided services consisting of "medical care" or "care or medical or surgical treatment" (terms that have particular resonance for VAT purposes as will be seen below) by acting as healthcare professionals.

    v) Mercy did not control the services provided by healthcare professionals that it employed. Thus, when providing their "medical care" or "care or medical or surgical treatment", Mercy's employees discharged their professional duties within the framework set by the End Users.

vi) Mercy's secondment of employees to Secondees and Secondees' sub-secondments to End Users were on a "back-to-back" basis so that, in particular:

a) Mercy would not second an employee to a Secondee unless the Secondee would in turn sub-second the employee to an End User.

b) Mercy seconded its employees to Secondees as healthcare professionals. Secondees, in turn sub-seconded the employees to End Users as healthcare professionals. End Users did not require Mercy's employees to perform duties other than those of a healthcare professional.

vii) Mercy charged Secondees a fee for the provision of a particular employee. Mercy would also charge a "commission" to its employees consisting of a flat-rate weekly amount which Mercy justified by the fact that it provided certain administrative and payroll services.

viii) On receipt of a fee from a Secondee, Mercy would deduct PAYE and employees' national insurance contributions ("NIC"), would retain its commission, and would pay the balance over to the employee concerned.

5. At the time it was carrying out this business, Mercy thought (the Applicants say mistakenly) that at least some of the supplies that it made described in paragraphs 4 above were standard-rated for VAT purposes, except to the extent that the Nursing Agency Concession (described below) applied.

6. Mercy entered into "self-billing arrangements" with some Secondees under which those Secondees prepared invoices in the name of, and on behalf of, Mercy and then sent those self-billed invoices to Mercy, often with payment. Therefore, to the extent that invoices were prepared at the time that showed Mercy as making standard-rated supplies to Secondees, those invoices were in many cases "self-billed" invoices prepared by the Secondees themselves, rather than traditional VAT invoices that Mercy itself prepared and sent to Secondees.

7. HMRC carried out an investigation into Mercy's activities which culminated in it making assessments (the "Assessments") on Mercy for under-declared VAT totalling some £21 million.

8. In these proceedings, Mercy alleges that this under-declared VAT was the subject of a significant VAT fraud perpetrated between at least 2015 and 2020, through the agency of D1. The VAT fraud is said to consist simply of Mercy charging Secondees VAT and, save for small sums, not accounting to HMRC for that VAT, hence the under-declaration resulting in the Assessments.

9. Mercy alleges that the VAT was misappropriated by D1, with the assistance of D6 (D1's wife), D10 (who was the de jure director of D9 and is D1's half brother) and each of D7, D8, D9, D11, D13, D14 and D15 (the "corporate defendants"). Mercy seeks equitable compensation against D1 for fraudulent breach of duty and proprietary remedies in respect of sums he has received. It makes proprietary claims against D6 and the corporate defendants (as well as claims for equitable

compensation for their dishonest assistance). Mercy also brings a claim for unlawful means conspiracy against D1 and D6.

10. By the VAT Defence, the Applicants seek to establish that Mercy's supplies were exempt from VAT by virtue of Items 1 and/or 4 of Group 7 of Schedule 9 of VATA. Accordingly, they seek to argue that Mercy does not owe HMRC the £21 million claimed by the Assessments. In the absence of any obligation to pay VAT to HMRC, the Applicants argue that there can be no VAT fraud of the kind that Mercy alleges.

THE AMENDMENT APPLICATION

The test to be applied in deciding whether to give permission

11. It is common ground that the Applicants need the permission of the court under CPR 17.1(b) in order to amend their Defence.

12. I will not seek to provide a comprehensive list of factors that need to be taken into account whenever a litigant asks the court for permission to amend a statement of case. In the circumstances of this case, the following factors are relevant:

    i) I am asked to exercise a judicial discretion given to me under CPR. It follows that the overriding objective is of central importance. At heart, I need to exercise my discretion judicially, striking a balance between injustice to the Applicants if the amendment is refused and injustice to other parties to the litigation, and litigants in general, if the amendment is permitted.

    ii) The "lateness" or otherwise of the amendments is not a consideration in this case since Mercy does not seek to argue that the amendments proposed are "late" in any sense that is relevant to the Amendment Application.

    iii) It is appropriate to consider whether the proposed amendments either i) introduce a new defence or, alternatively, ii) provide amplification of an existing "line" of defence or further particulars of an existing pleaded defence (see the judgment of HHJ Eyre QC (as he then was) in *Scott v Singh* [2020] EWHC 1714 (Comm) at [19] and [21]. If the amendments fall within category i), I should consider whether the new defence pleaded has a reasonable prospect of success. However, if the amendments fall into category ii), the defence is going to be considered at trial anyway even if the amendment is not permitted. Therefore, in that case a consideration of prospects of success will provide less of a guide to the proper exercise of my discretion since that is a matter best left to trial.

    iv) To the extent that a consideration of prospects of success is relevant, the correct approach is to proceed by analogy to the test that is applied on an application for summary judgment (see *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [16] to 17] per Popplewell LJ). Moreover, if as Mercy submits, there is no realistic prospect of the VAT Defence succeeding as a matter of law in the light of the judgment of the

> Court of Appeal in *Mainpay Ltd v HMRC* [2023] STC 30 ("*Mainpay*"), then I would be under a duty to refuse to permit the amendments that constitute the VAT Defence. If the Applicants wish to argue that *Mainpay* was wrongly decided in the Court of Appeal that argument could be addressed in the context of an appeal against the order refusing the Amendment Application (see *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 840 at [10] to [11]).

13. A related consideration is Mercy's argument that the proposed amendments involve the Applicants withdrawing an admission that was made in the Defence. CPR 14.1(5) provides that the permission of the court is needed to amend or withdraw any admission. That issue obviously overlaps with that identified in 12.iii) above since if the Applicants are withdrawing an admission it is correspondingly more likely that they are making a new defence rather than providing further amplification of an existing defence. However, even if it is concluded that the proposed amendments simply provide amplification of an existing line of defence, it would still be relevant to consider prospects of success in order to decide whether the Applicants should be permitted to withdraw any admission.

The nature of the amendments proposed

14. The amendments that the Applicants propose are set out in the draft amended defence provided just before the hearing the ("Amended Defence"). Those amendments must be considered in the light of the existing pleadings namely the Particulars of Claim as re-re-amended and dated 7 December 2022 (the "RAPC") and the unamended defence served on 28 April 2021 (the "Defence").

15. The Applicants submit that in the Defence they already "unequivocally denied" that VAT was chargeable on the supplies made by Mercy. They rely on paragraphs 2 and 6(a) to (h) of their existing Defence. By contrast, Mercy argues that the Applicants have admitted in the Defence that Mercy was, as a matter of law, subject to VAT on supplies that it made. Mercy asserts that Paragraphs 6(a) to (h) of the Defence contain a limited averment that by an extra-statutory concession known as the "Nursing Agency Concession", HMRC agreed not to collect some of the VAT that was properly due on Mercy's supplies.

16. Testing these rival arguments involves an examination of the way in which the Defence and the Amended Defence respond to various allegations pleaded in the RAPC.

<u>Relevant assertions in the RAPC</u>

17. By paragraph 2 of the RAPC, Mercy pleaded as follows:

> *2. Mercy operated as an 'umbrella company', principally or exclusively in the field of healthcare. Its business involved, amongst other things, the supply of services to recruitment agencies which is chargeable to VAT.*

18. By paragraph 30 of the RAPC, Mercy pleads that:

> *30. Mercy's business involved, amongst other things:*
>
> *(a) A supply of services to the recruitment agencies which is chargeable to VAT;*
>
> *(b) Mercy becoming liable to account to HMRC for VAT charged to its customers.*

19. By paragraph 31 of the RAPC, Mercy pleaded that Mercy through D1, who was described as its "controlling mind", perpetrated a "labour supply fraud" on HMRC that consisted of charging Secondees VAT but failing to account to HMRC for that tax.

The position as set out in the Defence

20. Paragraph 6 of the Defence responds to paragraph 2 of the Particulars of Claim. Much of paragraph 6 set out a narrative description of how Mercy's business was said to operate and I will focus only on those parts of paragraph 6 that have some bearing on VAT issues.

21. Paragraphs 6(f) of the Defence pleaded the presence of the commission charged to employees and the arrangements by which employees were paid after deduction of PAYE, NIC and the commission that are summarised in paragraphs 4.vii) and 4.viii) above.

22. Paragraph 6(g) pleads that Mercy at first understood its tax position to be as follows:

> *Mercy deemed the commission it charged for payroll services to all its candidates as being its global income and not the total sums it received from the agencies. Mercy deemed the former to be income for VAT purposes which applied to all sums received from agencies for the payroll services it performed, whether they included VAT or not.*

23. This paragraph is not, perhaps, written in the language that a specialist tax lawyer would use. However, its meaning is tolerably clear. It includes an assertion that Mercy thought that the only consideration it was receiving for VAT purposes was the "commission" that its employees paid to it. It is not said why Mercy was supposed to hold that belief, although there is an inference from paragraph 6(f) that it was because Mercy was simply passing on the entirety of the sums that it received from recruitment agencies (less PAYE and NIC) to the health professionals concerned and was retaining only the "commission".

24. Paragraphs 6(h) and 6(i) set out a narrative that suggests Mercy came to believe that the treatment summarised in paragraph 23, including the VAT treatment, was not entirely correct and explain steps that Mercy sought to take, and did take, to remedy the situation. These paragraphs provide an unpromising starting point for an argument that the Applicants had "unequivocally denied" that supplies Mercy made were chargeable to VAT since, if they had done so, it might be queried why reference was made to Mercy's attempts to correct its VAT reporting procedures. Nevertheless, the Applicants' Defence has to be read as a whole.

25. The Applicants place particular reliance on paragraph 6(e) of the Defence:

> *(e) If the Nursing Agency Concession applied [a hyperlink was provided to an HMRC document containing that concession] no VAT was payable for services supplied by, for example doctors, nurses, health professionals etc. Mercy's invoices in the circumstances would not charge VAT, nor would self-billing invoices charge VAT. This accounted for approximately half of Mercy's business;*

26. The Applicants emphasise paragraph 31 of the Defence that responds to Paragraph 30 of the Particulars of Claim as follows:

> *31. Paragraph 30 of the Particulars of Claim is admitted, subject to the First Defendant's above comments in this document to paragraph 2 of the Particulars of Claim.*

27. The Applicants also rely on paragraph 2 of the Defence which reads:

> *Save as is hereinafter expressed to be admitted or expressed to be not admitted, each and every allegation set out in the Particulars of Claim is denied.*

28. Putting all of those aspects of the Defence together, the Applicants argue that they had denied in the Defence that VAT was chargeable on Mercy's supplies. They reason as follows:

    i) Paragraphs 6(a) to (h) contain no admission that VAT was chargeable, not least because paragraph 6(e) stated that the Nursing Agency Concession operated so as to reduce the amount of VAT that Mercy had to pay. In the absence of an admission, paragraph 2 of the Defence provides that paragraphs 6(a) to (h) should be read as a denial of the assertion in paragraph 2 of the RAPC that Mercy's supplies were "chargeable to VAT".

    ii) Paragraph 31 of the Defence cannot be an admission either since it contains the important words of qualification to the effect that any admission is "subject to" paragraph 2 of the Defence. Even if paragraph 31 is seen as some kind of an admission, that admission is equivocal given the "subject to" proviso. In the absence of a clear and unequivocal admission, paragraph 2 of the Defence provides that the allegations in paragraph 30 of the RAPC are denied.

29. I reject the Applicants' argument which I consider to be at odds with the clear meaning of the Defence. Paragraph 31 of the Defence was an admission. That is why it uses the word "admitted". It was not a complete admission that all of Mercy's supplies were chargeable to VAT or that all of the supplies that were chargeable to VAT resulted in an obligation to pay cash by way of VAT to HMRC. That was because the Applicants pleaded in paragraph 6(e) that the Nursing Agency Concession applied to around half of Mercy's business. However, the Applicants acknowledged in paragraph 6(e) that the Nursing Agency Concession did not apply to all of Mercy's business. The whole thrust of paragraphs 6(a) to (h) of the Defence is that the Applicants realised that, to the extent the Nursing Agency Concession did not apply, Mercy was making taxable

supplies for VAT purposes but had made genuine mistakes in the computation of its resulting VAT liability.

30. The Applicants referred in their skeleton argument to four cases of what they submitted to be quite clear examples of unequivocal admissions said to be distinguishable from paragraph 31 of the Defence. I do not consider that reasoning by reference to the facts of other cases advances the debate greatly. When the Defence is read as a whole, the Applicants had made a clear admission, albeit not an admission that extended to the totality of the allegation made in paragraph 30 of the RAPC. Paragraph 2 of the Defence does not result in that admission being converted into a denial.

31. The Applicants have a related argument. They argue that on any view paragraph 6(e) of the Defence pleaded that Mercy had no obligation to account for VAT as regards half of its business because of the Nursing Agency Concession. In the Amended Defence, the Applicants seek to plead that none of Mercy's business involved the making of taxable supplies because of black-letter statutory provisions relating to VAT exemption. That, they argue, is a difference of degree rather than of kind. I will return to that argument after considering relevant aspects of the Amended Defence.

The position set out in the Amended Defence

32. By a new definition set out in paragraph 4 of the Amended Defence an assessment is defined as "unlawful" if, even if it is validly made in the exercise of HMRC's powers, it seeks to charge VAT that either is not due as a matter of black-letter statutory provisions or that HMRC should not be assessing in accordance with its public law duties. This definition highlights the two-pronged approach that the Applicants seek to follow in the Amended Defence of arguing that VAT is not due because of either black-letter statutory provisions or the operation of the Nursing Agency Concession.

33. Paragraph 6(a) of the Amended Defence states that a majority in value of Mercy's supplies were exempt by virtue of Item 1 and/or Item 4 of Group 7 of Schedule 9 to VATA. That, therefore, is a pleading as to the operation of black-letter statutory provisions. Particulars are given of the supplies.

34. Paragraph 6(c) of the Amended Defence pleads that, to the extent not exempt, certain of Mercy's supplies fell within the Nursing Agency Concession with the result that Mercy was entitled to treat them as if they were exempt supplies. Paragraph 6(c) also avers that all of the Assessments were "unlawful" within the meaning set out above.

35. The first sentence of paragraph 31 of the Amended Defence appears, superficially, to retain the limited admissions that I have summarised in paragraph 29 above. However, the suggestion that any admission is made by paragraph 31 is removed by the remaining words of the amended paragraph which are as follows:

> *In particular, it is denied that all the supplies of services made to "the recruitment agencies" (by which is understood, the Secondees or*

> *some of them) were chargeable to VAT and that Mercy became liable to account to HMRC for VAT charged to its customers when such VAT was not in fact exigible, whether as a matter of law or on account of the operation of the Nursing Concession.*

Conclusion on whether the amendments plead a new defence

36. As I have explained in paragraph 29 above, the Applicants admitted that Mercy's supplies were subject to VAT to the extent that they were not covered by the Nursing Agency Concession. That admission was withdrawn in the Amended Defence, and replaced with a denial that any VAT was chargeable on its supplies. That in itself provides a clear suggestion that the Amended Defence is a new defence rather than an amplification of an existing defence.

37. That conclusion is only reinforced by examining the difference between the Applicants' position as set out in the Amended Defence and that set out in the Defence. In the Defence, only the Nursing Agency Concession was said to prevent Mercy's supplies from being subject to VAT. By contrast, in the Amended Defence, it is said that black-letter statutory provisions prevent any VAT from being due. I acknowledge that there has already been significant correspondence between Mercy's liquidators and the Applicants on the scope of the Nursing Agency Concession, including by way of answers to Part 18 requests. However, I do not accept that the VAT Defence is different only in degree, rather than in kind, from its existing defence. The Nursing Agency Concession is set out in a relatively short document. Establishing whether it applied would largely involve a focus on self-contained factual matters, such as the type of healthcare professionals that Mercy was seconding to a particular Secondee. By contrast, the assertion that Mercy's supplies were exempt under black-letter statute law invites a completely different examination as to how the law should be applied that takes into account both domestic law and EU law authorities.

38. The Applicants seek to escape from this conclusion by pointing out that they were not obliged to plead matters of law in their Defence or Amended Defence. However, that does not answer the point. There is no prohibition in CPR on the pleading matters of law. The defence the Applicants now seek to put forward depends on propositions of technical VAT law which need to be pleaded if the Applicants' case is to be intelligible. The Applicants' case remains new just as much if it depends on previously unpleaded propositions of law as it would if it depended on previously unpleaded propositions of fact.

39. My conclusion is not altered by the fact that, in paragraph 32 of the Defence, the Applicants denied that Mercy participated in any "labour supply fraud". That denial did not carry with it any necessary implication that Mercy's supplies were exempt from VAT as a matter of black-letter statute law.

40. I therefore conclude that the VAT Defence does involve the pleading of a new defence rather than simply an amplification of an existing line of defence with the result that it is necessary to consider the VAT Defence's prospects of success.

Prospects of success

UK and EU law statutory provisions

41. By s4 of VATA, VAT is chargeable on "taxable supplies". A taxable supply is defined as any supply of goods or services made in the United Kingdom other than an exempt supply.

42. Section 31 of VATA provides for supplies of goods or services specified in Schedule 9 to be exempt. Schedule 9 is divided into "Groups". Group 7 covers "health and welfare" and provides, so far as material, for the following supplies to be exempt:

> ***GROUP 7— HEALTH AND WELFARE***
>
> *Item No.*
>
> *1 The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—*
>
> > *(a) the register of medical practitioners...;*
> >
> > *(b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians;*
> >
> > *(c) the register kept under the Health Professions Order 2001;*
> >
> > *(ca) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1993;*
> >
> > *(cb) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994*
> >
> > *(d) the register of qualified nurses, midwives and nursing associates maintained under article 5 of the Nursing and Midwifery Order 2001*

43. The Notes to Group 7, which form an integral part of it and affect its construction, provide, so far as material as follows:

> *Notes:*
>
> *…*
>
> *Paragraphs (a) to (d) of item 1 and paragraphs (a) and (b) of item 2 include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled*

44. Item 4 also provides for a VAT exemption of potential relevance in the following terms:

> *4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state-regulated institution.*

45. The statutory provisions set out above were enacted to implement EU law set out in Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the VAT Directive"). Article 132 of the VAT Directive provides so far as material as follows:

> *1. Member States shall exempt the following transactions:*
>
> ...
>
> > *(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;*
> >
> > *(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned*

The technical arguments underpinning the VAT Defence

46. The Applicants' analysis is, in summary, as follows:

    i) They argue that there is no distinction between a "supply of staff" and a "supply of the services performed by those staff" for the purposes of Items 1 and 4 of Group 7. The Applicants acknowledge that such a distinction has been made in other cases (for example in *Customs & Excise v Reed Personnel Services Ltd* [1995] STC 598) but that was for a different purpose and therefore the distinction has no bearing on the availability or otherwise of the VAT Defence.

    ii) For the purposes of Items 1 and 4 of Group 7, the character of the supplies that Mercy made was the same as the character of the services that the relevant employees provided.

    iii) Therefore, to fall within Item 1, read together with Note 2, all that was required was that Mercy should have seconded the services of employees falling within paragraphs (a) to (d) of Item 1, in order that those employees should provide "medical care".

    iv) In a similar vein, Mercy's services would fall within Item 4 to the extent that it was seconding healthcare professionals. Those healthcare professionals would all be providing "care" even if they were not necessarily providing "medical or surgical treatment" and would be doing so on behalf of their employer, Mercy. Item 4 does not impose any

> condition as regards the person to whom Mercy made its supplies. Therefore, the requirements of Item 4 are satisfied in circumstances where Mercy made its supplies to a Secondee, just as much as if Mercy made its supplies to an NHS Trust.

47. During the hearing, the Applicants acknowledged a potential counter argument to that summarised at paragraph 46.iv). It is possible that the closing words of Item 4 require the "care" (and not just the goods referred to in Item 4) to be provided in a "hospital or state-regulated institution". However, they argued that such an interpretation would not necessarily be fatal to the Applicants' analysis and certainly would not cause their analysis to cease to be sufficiently arguable to justify the refusal of the Amendment Application.

48. Also central to the Applicants' analysis is the proposition that UK domestic law in Items 1 and 4 of Group 7 extends the scope of VAT exemption more widely than is provided for in Article 132 of the VAT Directive. Article 132(1)(b) provides for exemption to extend to hospital and medical care and closely related activities undertaken by "bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law". No such precondition appears in Items 1 and 4 of Group 7.

49. The Applicants acknowledge that, on a superficial reading, *Mainpay* might be said to reach conclusions that are inconsistent with their arguments set out in paragraph 46 above. However, the Court of Appeal in *Mainpay* did not focus on the difference between the scope of the exemption contained in UK domestic law and that set out in Article 132 of the Directive for the simple reason that neither litigant before it had identified that difference. Moreover, the Court of Appeal proceeded on the basis of a flawed assumption, not argued for by the parties, that there was a distinction between a supply of staff and a supply of services for the purposes of Items 1 and 4 of Group 7. These flawed assumptions, in the Applicants' submission, prevent *Mainpay* from setting out any binding propositions of law on the scope of the UK domestic exemption in Items 1 and 4 of Group 7.

Conclusion on prospects of success

50. Because the Applicants rely on the argument set out in paragraph 49, the parties' arguments before me proceeded somewhat at cross-purposes. The Applicants sought to support their analysis by reference to textual and other indications in the relevant provisions of VATA. They also invoked the principle of fiscal neutrality arguing that, if Mercy's supplies were standard-rated and not exempt, its activities would give rise to unjustifiable additional "sticking tax" that would not be present if supplies were made direct to a hospital (whether in the public or private sector). Mercy did not engage with much of the detail of the Applicants' submissions because Mercy submits that the Applicants' arguments have conclusively been rejected in *Mainpay*. For their part, the Applicants said relatively little about *Mainpay* (although Mr Venables KC did make some submissions on it in his oral reply) because they submit it provides no binding guide to the interpretation of the relevant VAT provisions.

51. I mean no disrespect to Mr Venables' skilful and engaging submissions by not dealing with all of the points that he raised. Rather, because I have come to the clear conclusion that *Mainpay* does determine that the VAT Defence has no realistic prospect of success, I will focus on providing reasons for that conclusion.

52. Mainpay was an umbrella company with a business similar to that of Mercy. It employed between 50 and 100 doctors. It supplied its doctors to an intermediary company, an agency referred to as "A&E", who in turn contracted with various NHS trusts. The issue was whether Mainpay's supplies to A&E were exempt under Item 1 of Group 7 to Schedule 9 of VATA. The parties were, by the time of the Court of Appeal proceedings, agreed that Item 4 added nothing to the analysis (see [8] of *Mainpay*).

53. Whipple LJ gave the judgment of the court. It can be seen from [43] of her judgment that Mainpay's arguments were strikingly similar to those of the Applicants set out in paragraph 46 above. Significantly, Mainpay was arguing that the medical exemption extended to a person who was "facilitating medical services provided by another". Mainpay's argument was based on paragraph 27 of the judgment of the Court of Justice of the European Union ("CJEU") in *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Köperschaften I in Berlin* (Case C-141/00). Mr Venables accepted in his oral submissions that the Court of Appeal was correct to reject the argument based on *Kügler* which involved a misreading of paragraph 27 of the CJEU's judgment. However, the Court of Appeal did not just reject Mainpay's interpretation of paragraph 27 of *Kügler*. Rather, at [57], the Court of Appeal rejected the central proposition on which the VAT Defence relies saying:

> *57. These cases make clear that there is a distinction between supplies of staff on the one hand, and supplies of services comprising what the staff actually do, on the other. HMRC based its decision on that distinction. The FTT considered Mainpay's appeal by addressing that distinction. That remains a valid distinction in determining this appeal.*

54. The Applicants argue that the conclusion set out at [57] of *Mainpay* and the reasoning that leads up to it are not part of the binding *ratio* of the judgment. They submit that, at [41] of her judgment, Whipple LJ stated that the arguments before the Court of Appeal were "essentially the same as the grounds argued before the [Upper Tribunal]". The decision of the Upper Tribunal, in turn, was largely concerned with the question whether the First-tier Tribunal, had been correct to decide the appeal by considering the extent to which Mainpay had "control" of employees it seconded to A&E. Therefore, argue the Applicants, the Court of Appeal could not have heard argument on any distinction between "supplies of staff" and "supplies of services comprising what the staff actually do" with the result that paragraphs [51] to [57] of Whipple LJ's judgment are not binding because they deal with matters not raised in argument by the parties.

55. I do not accept the broad proposition for which the Applicants argue in paragraph 54 above. Points not argued for by a party are perfectly capable of giving rise to binding statements of authority. As Buxton LJ said at [38] of *Regina (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955:

> *… there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption.*

I am, however, prepared to accept a more limited form of the Applicants' submission which is summarised at [33] of *Kadhim*. A subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that earlier court. The distinction, therefore, is between mere assumption on the one hand and consideration by the court (whether or not prompted by the parties' arguments) on the other. Since this rule involves some departure from the strict rule of precedent, it is to be applied only in the most obvious of cases and with great care ([38] of *Kadhim*).

56. I do not accept that the conclusion set out at [57] of *Mainpay* was reached otherwise than with the benefit of argument from the parties. At [43] of *Mainpay*, the Court of Appeal noted that Mainpay's arguments had "shifted". Paragraph [82] of *Mainpay* shows that, for the first time in the Court of Appeal, Mainpay had raised precisely the argument on which the Applicants rely namely that Mercy's services "were the same as and were constituted by the services provided by the consultants". Moreover, paragraph [82] shows that the Court of Appeal rejected this argument because:

> *…it wrongly conflates a supply of staff with a supply of the services provided by those staff but these are conceptually distinct types of supply (see paras [51] -[57] above).*

57. Therefore, paragraphs [51] to [57] of *Mainpay* were not simply the Court of Appeal's musings, ungrounded in any arguments raised by the parties. In any event, the Court of Appeal was not merely "assuming" the existence of a distinction between a supply of staff and a supply of the services provided by those staff. On the contrary, the Court of Appeal expressly determined that there was such a distinction. This conclusion represented an integral part of the Court's reasoning that led to the rejection of an argument that Mainpay had raised in the context of Item 1 of Group 7 that was identical to the Applicants' central argument on which the VAT Defence relies.

58. I can now deal briefly with other points that the Applicants have raised in support of their contention that *Mainpay* does not dispose of the VAT Defence.

59. I do not regard it as significant that *Mainpay* concerns only Item 1 of Group 7 and does not deal with Item 4. *Mainpay* is concerned with identifying whether Mainpay's supplies consisted of "the provision of medical care" for the purposes of Item 1, as Mr Hitchmough KC correctly observed on behalf of Mercy. The Court of Appeal's conclusion was that the mere supply of staff who could themselves provide medical care was not enough. I see no realistic prospect of the Applicants successfully arguing that, when attention turns to Item 4, a different approach would be applied to the interpretation of the phrase "the provision of care or medical or surgical treatment".

60. I will not express any conclusion on whether, as the Applicants argue, domestic law does confer a wider exemption in Items 1 and 4 of Group 7 than does Article

132 of the VAT Directive. The wider exemption for which the Applicants argue is said to arise because UK domestic law does not, by contrast with Article 132, provide that medical care is exempt only if undertaken "bodies governed by public law, or under social conditions comparable with those applicable to bodies governed by public law". To the extent that is a point of distinction, it can have no bearing on the interpretation of the scope of the phrases "the provision of medical care" or "the provision of care for medical or surgical treatment" in the circumstances of this appeal which has now been determined by the Court of Appeal in *Mainpay*.

Disposition of the Amendment Application

61. I have borne well in mind the importance of not engaging in "mini trials" on applications to amend the pleadings. However, I consider that the VAT Defence raises a new defence which has no realistic prospect of success given the Court of Appeal's judgment in *Mainpay*. I will not, therefore, give the Applicants permission to amend their defence so as to argue that Mercy's supplies fell within the exemptions set out in Item 1 and Item 4 of Group 7.

62. It does not follow from this that I am refusing the Applicants permission to make any of the amendments proposed in the Amended Defence. Some of those proposed amendments relate to the Nursing Agency Concession and some involve relatively insignificant tidying-up or clarification. I hope the parties will be able to agree, in the light of this judgment, those amendments that should be permitted and those that should not.

THE PRELIMINARY ISSUE

63. Given my conclusion on the Amendment Application, it is not necessary for me to decide the Preliminary Issue Application. However, since I have heard full argument on it, I will explain how I would have decided that application had it been necessary.

64. The parties agree that the court's case management powers set out in CPR 3.1(2)(i) permit an issue to be designated as a preliminary issue and tried separately.

65. They also agree on the parameters within which the discretion should be exercised. In *McLoughlin v Jones* [2001] EWCA Civ 1743 at [66] David Steele J gave the following guidance:

> *(a). Only issues which are decisive or potentially decisive should be identified; (b) The questions should usually be questions of law. (c) They should be decided on the basis of an agreed schedule of facts. (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal. (e) Any order should be made by the court following a case management conference.*

66. I have also been greatly assisted by the list of potentially relevant considerations that Neuberger J (as he then was) set out in *Steele v Steele* [2001] CP Rep 106.

67. The Applicants' argument in support of the Preliminary Issue Application is relatively straightforward. As matters stand, this dispute is listed for a 12-day trial in a window commencing on 13 November 2023. The Applicants argue that, if Mercy's supplies are exempt from VAT, then the need for such a lengthy and expensive trial will be obviated since in that case, there could have been no VAT fraud of the kind that Mercy alleges. Moreover, they argue, the VAT Defence can be determined as a short point of law without the need for any determination of disputed questions of fact. Overall, they argue, the determination of a preliminary issue offers the prospect of significant savings in terms of time and costs should the VAT Defence be determined in the favour of the Defendants.

68. Mercy makes three broad objections:

    i) It argues that, even if the VAT Defence succeeds, the effect of paragraphs 5(2) and 5(3) of Schedule 11 of VATA is that Mercy would remain indebted to HMRC for the amount described as "VAT" in self-billing invoices that Mercy's customers generated. Therefore, the fraud to which it claims the Defendants were party would operate in precisely the same way whether or not Mercy's supplies were standard-rated for VAT purposes.

    ii) It argues that, in any event, the savings in terms of time would not be as significant as the Applicants suggest. Even putting to one side the point made in paragraph i) above, it would be necessary to make findings that deal with the applicability of Schedule 11. For example, it will be necessary to determine the proportion of Mercy's business that was invoiced under self-billing arrangements, whether, in those cases where Mercy issued the invoice, it added VAT, the number of candidates that Mercy placed in the healthcare sector and the extent to which those candidates provided services in a hospital setting.

    iii) It argues that the trial of a preliminary issue will impact the current trial date. It is unlikely that the court could accommodate a three-day trial of a preliminary issue before the hearing listed in November. It submits that the court should not allow the November trial date to be lost when, for the reasons set out above, the preliminary issue is unlikely to bring the proceedings to an end.

The Schedule 11 issue

Relevant statutory provisions

69. Section 58 of VATA provides for Schedule 11 to have effect with respect to the administration, collection and enforcement of VAT.

70. Paragraph 2A of Schedule 11 provides that regulations may require a taxable person supplying goods or services to provide an invoice (referred to in the legislation as a "VAT invoice").

71. Regulation 13 of the Value Added Tax Regulations 1995 (the "VAT Regulations") sets out requirements relating to VAT invoices. Where a person registered for VAT (described in Regulation 13 as "P") makes a taxable supply

in the UK to a taxable person, Regulation 13 requires P to provide the taxable person in question with a VAT invoice. Regulation 13 applies only where the supply is taxable. Accordingly, P is under no obligation to provide a VAT invoice on making an exempt supply.

72. Paragraph 2B of Schedule 11 varies the obligation on a taxable person to provide a VAT invoice when self-billing arrangements are in place. Paragraph 2B of Schedule 11 provides so far as material as follows:

> *2B(1) This paragraph applies where a taxable person provides to himself a document (a "self-billed invoice") that purports to be a VAT invoice in respect of a supply of goods or services to him by another taxable person.*
>
> *(2) Subject to compliance with such conditions as may be—*
>
> *(a) prescribed,*
>
> *(b) specified in a notice published by the Commissioners, or*
>
> *(c)imposed in a particular case in accordance with regulations,*
>
> *a self-billed invoice shall be treated as the VAT invoice required by regulations under paragraph 2A above to be provided by the supplier.*

73. Regulation 13 of the VAT Regulations sets out conditions that must be met for a self-billed invoice to be treated as a VAT invoice. Significantly, there has to be a prior agreement between the supplier of goods and services and the recipient which authorises the recipient to produce self-billed invoices. A supplier cannot, therefore, be bound by self-billed invoices issued by a customer without specific contractual agreement.

74. Regulation 13(3F) provides that, for the purposes of specific provisions of the VAT Regulations, a self-billed invoice is not to be treated as issued by the supplier. None of the specific provisions listed is relevant in the circumstances of this case, but Regulation 13(3F) sets out the clear implication that, except for the purposes of those specific provisions, a self-billed invoice <u>is</u> to be treated as issued by the supplier.

75. Paragraphs 5(2) and 5(3) of Schedule 11 provide, so far as material, as follows:

> *(2) Where an invoice shows a supply of goods or services as taking place with VAT chargeable on it, there shall be recoverable from the person who issued the invoice an amount equal to that which is shown on the invoice as VAT or, if VAT is not separately shown, to so much of the total amount shown as payable as is to be taken as representing VAT on the supply.*
>
> *(3) Sub-paragraph (2) above applies whether or not –*
>
> *(a) The invoice is a VAT invoice …; or*

> *(b) The supply shown on the invoice actually takes place, or the amount shown as VAT, or any amount of VAT, is or was chargeable on the supply; or*
>
> *(c) The person issuing the invoice is a taxable person;*
>
> *and any sum recoverable from a person under the sub-paragraph shall, if it is in any case VAT be recoverable as such and shall otherwise be recoverable as a debt due to the Crown.*

The parties' competing analyses

76. Mercy argues that once these provisions are stitched together, the result is as follows:

    i) The Secondees were taxable persons. When they operated self-billing arrangements, the invoices that they issued were, by paragraph 2B(2) of Schedule 11, read together with Regulation 13(3F) of the VAT Regulations, treated as if they were VAT invoices issued by Mercy.

    ii) Paragraph 5(2) and 5(3) then operated so as to make Mercy liable to pay the amount described as VAT on those self-billed invoices to HMRC as a debt due to the Crown.

    iii) The "labour supply fraud" alleged in the RAPC consisted of Mercy becoming liable to account to HMRC for VAT, charging Secondees VAT but never actually accounting to HMRC for the VAT that had been charged to its customers. That fraud would be present in exactly the same way if Mercy's obligation was to account to HMRC for a "Crown debt" as it would have been if it had an actual liability to account to HMRC for VAT proper.

    iv) Therefore, determining as a preliminary issue whether Mercy had an obligation to HMRC to account for VAT proper would achieve no benefits in terms of efficiency as it would have no effect on the overall outcome of Mercy's claim.

77. The Applicants argue that Mercy's analysis breaks down at the first stage. Paragraph 2B(2) of Schedule 11 provides only that the self-billed invoices are treated as if they were "the VAT invoice required by [Regulation 13 of the VAT Regulations]". However, if the Applicants succeed in establishing that Mercy's supplies were exempt from VAT, no VAT invoice was required by Regulation 13 and so the deeming set out in paragraph 2B(2) is of no effect. More generally, they argue that paragraph 2B(2) does not extend to treating the self-billed invoices as being issued by Mercy so as to trigger the operation of paragraph 5(2) of Schedule 11.

78. I do not consider it necessary to make a binding determination as to whether Mercy's analysis of the statutory provisions is correct or not. My task is more limited. Looking at matters today, I need to address the likelihood or otherwise of the Applicants' proposed preliminary issue being decisive. If there is a strong possibility that, even if the Applicants are successful in establishing that Mercy's supplies are exempt from VAT, it would still be necessary to hold a trial to

establish whether the alleged fraud was perpetrated or not, that would point against allowing the Preliminary Issue Application.

79. In my judgment Mercy has the better of the argument on the "Crown debt" point set out above. Pursuant to self-billing agreements between Mercy and Secondees, Secondees issued self-billing invoices that described Mercy's supplies as being subject to VAT. Those documents "purported to be" VAT invoices thereby engaging the provisions of paragraph 2B(1) of Schedule 11. Since the parties were operating on the hypothesis that the supplies were taxable (hence the self-billed invoice showing VAT is due) the better reading of paragraph 2B(2) is that the self-billed invoice is treated as the VAT invoice that would be needed under that hypothesis.

80. I acknowledge the possibility of a contrary argument. It could be said that the more limited purpose of paragraph 2B(2) is to ensure that suppliers entering into a self-billing arrangement with a customer do not commit a technical breach of their own obligation to deliver a VAT invoice. On that analysis, paragraph 2B(2) simply ensures that the issue of the self-billed invoice "franks" the supplier's obligation to issue a separate VAT invoice proper and there is no need for any such "franking" to take place if, after the event, it is determined that the supplies were VAT-exempt so that no VAT invoice was ever required.

81. The reason I prefer Mercy's argument is because Regulation 13(3F) suggests that the issue of a self-billed invoice is to have the wider effect set out in paragraph 79 above rather than the more narrow effect set out in paragraph 80. Regulation 13(3F) "switches off" the treatment of a self-billed invoice as being issued by the supplier for certain specified purposes. That suggests that the drafter of the VAT Regulations was looking beyond a concern to ensure that the supplier is to be treated as having complied with the obligation to issue a VAT invoice and addressing more broadly the effect for both supplier and customer of the document that has been issued.

82. It is also, in my judgment, significant that Regulation 13(3F) indicates that a self-billed invoice is to be treated as issued by the supplier without linking that treatment expressly to the document's deemed status as a VAT invoice. That is consistent with an intention for Regulation 13(3F) to ensure that self-billed invoices are capable of giving rise to Crown debts just like other documents that are not VAT invoices. If a supplier made a VAT-exempt supply but issued a document to its customer showing VAT as due in respect of that supply, then the document would not actually be a VAT invoice because it referenced a supply that was exempt. Nevertheless, paragraph 5(2) of Schedule 11 would provide that the VAT shown as due in the document would be recoverable from the supplier as a Crown debt. It is not obvious why the supplier should be able to avoid this consequence by requesting a customer, with whom self-billing arrangements are in place, to issue a self-billed invoice showing VAT as due. I acknowledge that this interpretation would mean that the actions of a supplier's customer can determine whether the supplier incurs a Crown debt or not. However, that is not a terribly surprising conclusion since self-billing necessarily results in customer-generated documents having an impact on the supplier's VAT position. Moreover, as I have noted, self-billing arrangements are not possible unless the supplier contractually authorises them.

83. The Applicants argued that, even if amounts shown on self-billed invoices were recoverable from Mercy as Crown debts, that was far from an obvious point. Therefore, they argue, if Mercy's supplies were VAT exempt there is no realistic prospect of Mercy showing that the Applicants wrongly retained sums that should have been used to satisfy Crown debts of which they could scarcely have been aware. That may well be a point that would need to be considered at trial in the light of the Applicants' knowledge and understanding of the VAT position at the time. However, it is impossible for me to express any conclusion at this stage as to how that point would fare at trial. I therefore regard it as little relevance to the exercise of my discretion in relation to the Preliminary Issue Application.

84. In his oral submissions, Mr Venables argued that parts of Schedule 11 could be contrary to EU law. Again, I do not need to determine this issue conclusively. Since the argument based on EU law was not really developed before me, I simply conclude that the prospect of parts of Schedule 11 being contrary to EU law is of little weight when deciding how I should exercise that discretion.

85. My conclusion on the Schedule 11 issue is that it is more likely than not that, even if the Applicants successfully argued at a preliminary issue hearing that Mercy's supplies were exempt from VAT, there would still need to be a trial on the merits of the claims. I cannot be certain of this, but it seems to me to be a strong likelihood based on the arguments put before me. This factor points against allowing the Preliminary Issue Application.

Other relevant factors and conclusion

86. All parties seemed agreed that a hearing of the preliminary issue would last for around three days. They also agree that such a hearing could not be fixed in good time before the trial listed for November 2023 with the result that ordering a preliminary issue would cause that trial date to be lost.

87. The Applicants seek to blame Mercy for this state of affairs, arguing that Mercy has been slow to articulate its objections to the Amendment Application. I have reviewed some of the correspondence between the parties relating to the application. That correspondence suggests that there were some twists and turns. It did take a while for Mercy's objections to coalesce around the proposition that the VAT Defence was bad as a matter of law, rather than insufficiently grounded in evidence of fact. However, I will not conclude that Mercy should shoulder all, or even most, of the blame for that state of affairs. Ultimately, the Court of Appeal gave judgment in *Mainpay* just over three months ago in December 2022. Both parties would have known that this case was pending and that it would have considerable significance in determining the likely prospects of success of the VAT Defence. In practice, whatever the twists and turns in correspondence between the parties, it was always likely to be necessary to digest the judgment of the Court of Appeal in *Mainpay* before the Amendment Application could be determined. I am not satisfied that Mercy's actions have led to any material incremental loss of time.

88. I do not consider that the considerations set out in paragraph 68.ii) are of much weight. However, looking at matters today, I am of the view that even if the Applicants succeeded in establishing the VAT Defence as a preliminary issue,

there would still be a significant likelihood that a substantive trial on the merits would still be necessary. That is a significant likelihood, not a certainty. However, the price payable for the prospect of avoiding a substantive trial on the merits would be the definite loss of the trial listed for November this year. In my judgment, that price is too high. Accordingly, even if I had allowed the Amendment Application, I would have declined to direct the determination of the VAT Defence as a preliminary issue.

DISPOSITION

89. My decision on the Amendment Application is as set out in paragraphs 61 and 62. It is not necessary to determine the Preliminary Issue Application. However, had it been necessary I would have refused that application. I would invite the parties to agree the terms of an order giving effect to this judgment.