APPROVED

AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 719
Record No. 2023/16MCA

BETWEEN/

RYANAIR DAC

APPELLANT

-AND-

AIDAN REDDY (IN HIS CAPACITY AS APPEALS OFFICER), THE CHIEF APPEALS OFFICER AND THE MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

-AND-

PAUL CLEMENTS, REDSBERRY MANAGEMENT SERVICES LIMITED AND CONTRACTING PLUS CONSULTANTS LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 26th day of November 2024

INTRODUCTION

Preliminary

1. This appeal concerns the insurability status, for the purposes of the Social Welfare Act 2005, as amended ("the 2005 Act"), of the first named notice party ("Mr. Clements") in the period between 15th February 2010 to 30th April 2014 (1st May 2014), during which time Mr. Clements piloted scheduled aeroplane flights for the Appellant ("Ryanair").

2. Two different decisions on this question, five years apart, were made by the first named respondent ("the Appeals Officer"):

   - first, on 17th May 2016, in a decision which was communicated to the second named notice party ("Redsberry") by way of a letter from Mr. Mark O'Connor HEO of the Social Welfare Appeals Office dated 8th July 2016, the Appeals Officer decided that Mr. Clements was employed by Redsberry and consequently was insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A, provided that the total reckonable earnings were €38 or more a week, for the period 15th February 2010 to 30th April 2014 (1st May 2014) (and that if his earnings were less than this figure during this period, then PRSI Class J applied);

   - second, some years later, on foot of representations from Redsberry, the Appeals Officer decided that he had jurisdiction under section 317 of the 2005 Act to re-examine his first decision. On 12th July 2021, he decided that his first decision dated 17th May 2016/8th July 2016 was erroneous in light of what he interpreted to

be new evidence and facts which, in his view, established that Mr. Clements was an employee of Ryanair during the requisite period from 15th February 2010 to 30th April 2014 and consequently was insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A, provided total reckonable earnings were €38 or more a week, for the period 15th February 2010 to 30th April 2024 (1st May 2014) (and that if his earnings were less than this figure during this period, then PRSI Class J applied). This (second) decision was upheld on appeal by the second named respondent ("the Chief Appeals Officer") in her decision dated 15th December 2022.

3. The positions of the parties can be briefly described as follows:

(i) The respondents support the rationale (which underpinned the second decision of the Appeals Officer (upheld by the Chief Appeals Officer)) that during the requisite period between 2010 to 2014 (i) there was an *implied contract* between Ryanair and Mr. Clements and (ii) that Brookfield Aviation International Ltd ("Brookfield") were acting in an *agency* capacity for Ryanair and as a result Ryanair and (not Redsberry) were now deemed to be liable for the requisite Social Welfare contributions.

(ii) For its part, Ryanair maintains that Mr. Clements was a director and shareholder of Redsberry which provided his services as a pilot to Brookfield, who made available a pool of pilots to Ryanair in relation to its *scheduled flights*. By so doing, Ryanair contends that it engaged with a '*managed service company*' model where Brookfield provided a pool of pilots to it and these

pilots in turn operated as proprietary directors of service and were therefore self-employed and treated as such for the purposes of tax deductibility and taxation. One of those pilots was Mr. Clements. By way of general example, this model allowed an individual pilot to receive approximately 85% of the remuneration that he or she was being paid after tax.

4. Martin Hayden SC and Eoin O'Shea BL appeared for Ryanair. Cathy Maguire SC and Caroline Carney BL appeared for the State Respondents.

5. Neither Mr. Clements nor the other notice parties participated in this appeal.

6. In summary, therefore, the context and central issue in this statutory appeal relates: (a) to Mr. Clements' position as a pilot flying *scheduled flights* for Ryanair in the period between 15th February 2010 to 30th April 2014 (1st May 2014); and (b) (leaving aside the three preliminary procedural objections raised by the respondents) whether or not it was reasonable for the Appeals Officer to infer from the documentary and oral evidence adduced that there was an implied contract and an agency arrangement which together meant that Ryanair employed, and was responsible for the insurability of Mr. Clements under the 2005 Act, during this four year period.

CHRONOLOGY & FACTS

7. The relevant chronology and facts are as follows:

DATE	
January 2003 – November 2007	Paul Clements is employed by HMRC for approximately 5 years; latterly as a criminal investigator.
29th June 2009	Paul Clements emailed his Curriculum Vitae to Ryanair Talent Recruitment for Ryanair Cadet Assessment.
28th August 2009	Oxford Aviation Academy, with whom Paul Clements had been training between 2007 and 2009, submitted his CV to Ryanair.
12th October 2009	Paul Clements received an invitation to a Ryanair Cadet Assessment.
14th October 2009	Paul Clements attended Ryanair Cadet Assessment and the following week, Ryanair Recruitment informed him that he had passed the assessment and could expect to be contacted by Brookfield.
22nd October 2009	Brookfield emailed Paul Clements stating that it was in the position to offer him a contract.
27th October 2009	Brookfield emailed Paul Clements a standard contract between Brookfield, "TBA Limited" and Paul Clements, signed by David George, Marketing Director of Brookfield together with other documents.
Unknown Date after 27th	Contract between Brookfield, Redsberry and Paul Clements,

October 2009	signed by David George, Marketing Director of Brookfield, a representative of Redsberry Management Services Limited and Paul Clements.
1st November 2009	Paul Clements emailed CXC, one of the four accountancy firms specified in the documents supplied by Brookfield.
2nd November 2009	CXC responded to Paul Clements and provided him with an information pack.
3rd November 2009	Paul Clements received a telephone call from CXC and a follow up email.
12th November 2009	Paul Clements completed a CXC terms and conditions document: • CXC emailed Paul Clements confirming receipt of the completed terms and conditions document; and informing him that he would be registered as a Company Director and that his services would be provided through Redsberry. CXC advised that they had been in touch with Brookfield and had provided them with the limited company details; • CXC emailed Paul Clements informing him that he was required to sign the Brookfield authorisation form and return it to CXC and that they would send it to Brookfield on his behalf; • Paul Clements signed the Brookfield authorisation form; • The Companies' Register shows Paul Clements

	registered as a Director with Redsberry from this date.
18th November 2009	Paul Clements signed the consent page for B10 submission to the Companies Registration office.
24th November 2009	CAE Centre Amsterdam B.V. emailed Paul Clements confirming his start date for the Ryanair B737-800TQ Course as 15th February 2020.
16th December 2009	A second B10 consent page appears to be signed by Paul Clements. (In Book 5.1 Exhibits, page 116, there is a B10 consent form signed by Paul Clements dated 16th December 2009).
15th February 2010	Paul Clements commenced his Ryanair Boeing 737-800 Type Rating Course.
21st May 2010	CAE Centre Amsterdam B.V. raised an invoice to Redsberry for PC Type Rating Course.
August 2010	Paul Clements commences as First Officer on Ryanair aircraft.
2nd March 2014	Paul Clements emailed Brookfield, copying Ryanair, tendering his resignation with his last day being 1st May 2014.
13th March 2014	Paul Clements tendered his resignation as a Director of Redsberry with effect from 1st May 2014. Paul Clements' last day flying on Ryanair aircraft (specific date unknown).
22nd April 2014	Paul Clements sought a determination from the Scope Section in the Department of Social Protection on the insurability of his employment.

15th May 2014	B10 Confirmation of Change of Directors from the Companies Registration Office in relation to the determination of Paul Clements' relationship with Redsberry.
23rd January 2015	A Social Welfare inspector wrote to Ryanair notifying it of an intention to visit Ryanair's Corporate Head Office and enclosing an insurability questionnaire (INS1 Form).
26th February 2015	Ryanair asserted that Paul Clements had never been employed by Ryanair and that their records showed that he had been engaged through Brookfield. Ryanair informed the Social Welfare Inspector that her queries should be directed to Brookfield and provided contact details for Brookfield.
25th August 2015	A Deciding Officer in the Scope Section of the Department found that Paul Clements was in insurable employment with Redsberry and was insurable as a Class A contributor for social insurance purposes.
14th September 2015	Paul Clements appealed the decision of the Deciding Officer and contended that he had been an employee of Ryanair. Additional information was supplied by Paul Clements on 29th October 2015.
17th May 2016 (communicated on 8th July 2016)	Paul Clements' appeal was disallowed. The decision of the Appeal's Officer determined that Paul Clements was in insurable employment with Redsberry and was insurable as a Class A contributor for social insurance purposes.
19th July 2016	The Appeals Officer decided to review his decision under Section 317 of the Social Welfare (Consolidation) Act 2005,

	as amended and for the purpose of that review considered that an oral hearing was appropriate.
28th July 2016	Redsberry applies for leave to apply for judicial review seeking: i. An Order of certiorari quashing the decision of Mark O'Connor HEO in relation to the Appeal of Paul Clements dated 8th July 2016; and ii. A Declaration that the decision of Mark O'Connor dated 8th July 2016 disallowing the Appeal of Paul Clements and classifying him as a PRSI Class A employee was invalid.
29th July 2016	High Court Order granting leave to judicial review is perfected on 6th October 2016 and an Order was made "*strike out final*".
18th October 2016	Letter from Social Welfare Appeals Office to Redsberry confirming willingness to schedule an oral hearing to determine if there is new evidence that might warrant a revision of the decision of 8th July 2016.
22nd February 2017	Oral hearing – did not progress beyond a consideration of how to proceed and was adjourned to allow consideration of issues raised during opening arguments. Paul Clements' Counsel argued for the inclusion of Ryanair.
27th February 2017	Decision of the Appeals Officer – no decision made and the case was remitted back to the Department of Social Protection. The hearing did not proceed beyond a

	consideration of how to proceed and it was adjourned to allow Aidan Reddy in his capacity as Appeals Officer the time to consider submissions made by both parties: "*The decision that the Department of Social Protection communicated to Paul Clements on 25th August 2015 did not include any determination on the status of Mr. Clements' relationship with Ryanair. Therefore, it has been remitted back to the Department of Social Protection to fully determine the question, as asked. Appeal proceedings can be reconvened if necessary, after this matter has been fully determined in the first instance by the Department of Social Protection.*"
24th March 2017	Letter from Aidan Reddy in his capacity as Appeals Officer to Ryanair. This letter confirmed that the Department of Social Protection had not issued an amended decision but that the Deciding Officer had decided that Paul Clements was employed by Redsberry and was not an employee of Ryanair Limited. The letter also stated that this Appeal was a re-hearing of a question referred under Section 311 of the Social Welfare Consolidation Act 2005 and that the decision taken by the Department of Social Protection was irrelevant to the Appeals Officer who has come to their own decision based on the evidence/materials available to him.
28th March 2017	Letter from Aidan Reddy (Appeals Officer) to Ryanair enclosing 29 documents and offering Ryanair an opportunity

	to be represented throughout the Appeal's process.
5th April 2017	Letter from MDP to Aidan Reddy (Appeals Officer) expressing serious concerns about how matters had progressed to date and seeking further information and confirmation.
2nd June 2017	Submissions filed on behalf of Ryanair.
14th September 2017	A number of oral hearings took place before the Appeals Officer and transcripts of these oral hearings were available to the Appeals Officer, the Chief Appeals Officer and this court. The hearing before the Appeals Officer took place over 8 days on the following dates: • 14th September 2017; • 14th December 2017; • 24th April 2018; • 4th December 2018; • 10th April 2019; • 4th February 2020; • 20th May 2021; and • 21st May 2021.
21st May 2020	Judicial Review proceedings were instituted by Ryanair concerning the process before the Appeals Officer. Ryanair sought an Order of *certiorari* on the basis that the Appeals Officer had refused Ryanair leave to cross-examine witnesses on behalf of Redsberry, CXC and Paul Clements, had refused

	Ryanair leave to introduce witness evidence and refused Ryanair and the other parties liberty to make submissions at the conclusion of evidence on the legal and factual matters which had arisen. Ryanair sought an Order requiring the Appeals Officer to permit it to cross-examine witnesses, adduce witness evidence and make submissions at the conclusion of the Appeal.
23rd February 2021	The Judicial Review proceedings were struck out on the basis of a settlement agreement having been reached. The terms of settlement provided for the format and duration of the resumed hearing, the examination and cross-examination of witnesses, closing statements at the end of the hearing and written submissions following the conclusion of evidence. The Respondents (Aidan Reddy, the Appeals Officer), the Chief Appeals Officer and the Minister for Social Protection made a contribution to Ryanair's costs.
12th July 2021	The decision was made by the Appeals Officer (Aidan Reddy) revising the decision of 8th July 2016. The Appeals Officer determined that Paul Clements was an employee of Ryanair and was insurable at PRSI Class A.
15th July 2021	Ryanair was notified of the decision of the Appeals Officer.
5th August 2021	Ryanair submitted a request for a review of the Appeals Officer's decision by the Chief Appeals Officer.
15th December 2022	The decision of the Chief Appeals Officer was made determining that the Appeals Officer had not erred in relation

	to the law or the facts and declining to revise the decision of the Appeal's Officer.
21st December 2022	Ryanair was notified of the decision of the Chief Appeals Officer.
17th January 2023	The originating Notice of Motion grounding the Affidavit of Richard Higgins was filed on behalf of Ryanair.
21st July 2023	Statement of Grounds of Opposition and Grounding Affidavit of Elaine Quinn filed on behalf of the Respondents (Aidan Reddy in his capacity as Appeals Officer, the Chief Appeals Officer, and the Minister for Social Protection).
22nd September 2023	Replying Affidavit of Richard Higgins filed on behalf of Ryanair.
22nd September 2023	Replying Affidavit of Leanne Kiernan, filed on behalf of Ryanair.
8th November 2023	Proceedings listed for hearing for 3 days on 7th May 2024.
7th May 2024	Day 1 of the hearing before this court.
8th May 2024	Day 2 of the hearing before this court.
9th May 2024	Day 3 of the hearing before this court.
30th May 2024	Day 4 of the hearing before this court.
26th November 2024	Judgment delivered.

SCOPE OF JURISDICTION ON THIS APPEAL

8. Section 327 of the 2005 Act provides that any person who is dissatisfied with: (a) the decision of an appeals officer; or (b) the revised decision of the Chief Appeals Officer, on any question, may appeal that decision or revised decision, as the case may be, to the High Court on any question of law.

9. The scope of a similar jurisdiction dealing with a statutory appeal, to that which arises in this case, was set out by Kenny J. in *Mara (Inspector of Taxes) v Hummingbird Ltd* [1982] I.L.R.M. 421 (which concerned a case stated from the Income Tax Appeal Commissioners on the appropriate tax to be paid arising from a commercial transaction) at page 426, as follows:

> "*These findings on primary facts should not be set aside by the Courts unless there was no evidence whatever to support them. The Commissioner then goes on, in the Case Stated, to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the Court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of*

the law, they should be set aside. If, however, they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw".

10. A similar approach is found in *Ó' Culacháin v McMullan Brothers Ltd* [1995] 2 I.R. 217, *MacCarthaigh v Cablelink Ltd* [2003] 4 I.R. 510, *Nationwide Controlled Parking Systems Limited v Revenue Commissioners* [2021] IECA 150, *Premier Periclase Ltd v Commissioner of Valuation* [1999] IEHC 8 and *Hay v O' Grady* [1992] 1 I.R. 210.

11. In *The Revenue Commissioners v Karshan Midlands Ltd T/A Domino's Pizza* [2023] IESC 25 ("*Karshan*"), Murray J., at paragraph 258 of his judgment referred, for example, to "*the frequently repeated description of the function of the High Court in an appeal by way of case stated as recited in Mara (Inspector of Taxes) v Hummingbird Ltd (which neither party in this appeal sought to either dispute or refine), there is no basis on which these findings could be upset*".

12. I also have regard to the deference, identified by a well-established line of authority, to be shown to the respondents in this statutory appeal: see, for example, the decision of McKechnie J. in *Deely v Information Commissioner* [2001] 1 I.R. 439 and the decision of the Supreme Court in *Fitzgibbon v The Law Society* [2015] 1 I.R. 516.

13. In *Deely v The Information Commissioner* [2001] 3 I.R. 439, the High Court (McKechnie J.) stated as follows:

> "*There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-*
>
> *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
>
> *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
>
> *(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
>
> *(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision*".

14. In *Fitzgibbon v Law Society of Ireland* [2015] 1 I.R. 516 at page 559, Clarke J. (as he then was) referred to the decision of McKechnie J. in *Deely v The Information Commissioner* [2001] 3 I.R. 439 and observed as follows:

> "*In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. Thus, there may be an error of law in the determination of the*

first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision maker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the Court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)".

15. In *Attorney General v Davis* [2018] 2 I.R. 357, at paragraph 53, the Supreme Court (McKechnie J.) was satisfied that, subject to context, a statutory right of appeal on a point of law would (if its wording did not otherwise prescribe) include the following: errors of law as generally understood, to include those referred to in *Fitzgibbon v The Law Society of Ireland*; errors such as would give rise to judicial review (including illegality, irrationality, defective or no reasoning, procedural errors of some significance, *etc.*); errors in the exercise of discretion which are plainly wrong (notwithstanding the latitude inherent in the exercise of such discretionary power) and errors of fact. In further elaborating on errors of fact, at paragraph 54 of his judgment, McKechnie J. expressly referred to ('drew on') *Fitzgibbon v The Law Society of Ireland* (and the authorities referred to in that judgment) and his own judgment in *Deely v Information Commissioner*, in identifying the following (non-exhaustive) principles when considering *what issues of fact may be regarded as issues of law*:

"*(1) Findings of primary fact where there is no evidence to support them;*

(2) Findings of primary fact which no reasonable decision-making body could make; and

(3) Inferences or conclusions:-

- Which are unsustainable by reason of any one or more of the matters listed above;

- Which could not follow or be deducible from the primary findings as made; or

- Which are based on an incorrect interpretation of documents."

16. Leaving aside the procedural objections raised by the respondents, which are addressed immediately below, two of the central findings in this statutory appeal concern the *inferences* drawn by the Appeals Officer in his revised decision of 12th July 2021 that: (a) Brookfield acted in an *agency* capacity for Ryanair; and (b) there was, in the early course of the dealings between the parties, an *implied employment contract* established as between Ryanair and Mr. Clements.

17. Therefore, I have to consider whether these inferences as so found were, or were not, such that no reasonable decision making body could draw and whether or not they were based on the correct interpretation of documents or an erroneous view of the law.

PRELIMINARY OBJECTIONS

18. The respondents have raised the following interlinked preliminary procedural objections to Ryanair's entitlement to initiate this appeal:

- the first procedural objection contends that the appeal is incorrectly constituted and that it should have been instituted by way of Special Summons pursuant to Order 90[1] of the Rules of the Superior Courts 1986 as amended ("RSC 1986") and not by originating notice of motion pursuant to O. 84C of the RSC 1986;
- the second procedural objection raises two 'time points': (i) the appeal brought by Ryanair in these proceedings which issued on 17th January 2023 against the Appeal Officer's decision dated 12th July 2021 is out of time by approximately 18 months; (ii) (without prejudice and/or subject to the third preliminary

[1] O. 90 of the RSC 1986 provides:

"*The Social Welfare (Consolidation) Act 1981*

1. Every appeal under the Social Welfare (Consolidation) Act 1981, Section 299 or Section 300(4) shall be brought by Special Summons.

2. The summons shall be entitled in the matter of the said Act on the application of the person bringing the appeal, and shall state the decision of the appeals officer appealed against and the grounds of appeal.

3. The summons shall be served on the Minister for Social Welfare and on all parties to the decision of the appeals officer.

4. The summons shall be issued within twenty-one days of the date on which notice of the decision of the appeals officer was given to the party appealing; provided that the time within which the summons may be issued may be extended on application ex parte at any time within six weeks from the date on which notice of the decision of the appeals officer was given to the party desirous of appealing.

5. Any question referred to the decision of the High Court by the Chief Appeals Officer under section 299 of the said Act shall be brought by special summons, entitled in the matter of the said Act, on the application of the Chief Appeals Officer. The summons shall state concisely the question referred for the decision of the Court and shall be served on all parties to the application to the appeals officer.

6. No costs shall be allowed of any proceedings under this Order unless the Court shall by special order allow such costs."

objection, addressed below) the appeal against the Chief Appeals Officer's decision dated 15th December 2022 is out of time by approximately 4 weeks, Ryanair having been notified by the Chief Appeals Officer of her decision on 21st December 2022;

- the third preliminary objection contends that Ryanair is not entitled to appeal against the Chief Appeals Officer's decision because the Social Welfare Consolidation Act 2005 does not provide for an appeal to the High Court from *a refusal* of the Chief Appeal's Officer to *revise* a decision of the Appeal's Officer.

19. Section 327 of the 2005 Act is the statutory successor to sections 299 and 300(4) of the Social Welfare (Consolidation) Act 1981 (as amended) which are the two provisions referred to O. 90 of the RSC 1986. Whilst I am of the view that the correct procedure under the RSC 1986 to appeal the decision of the Appeals Officer was to apply pursuant to O. 90 of the RSC 1986 rather than O. 84C of the RSC 1986, having regard to O. 124 of the RSC 1986[2] – and: (i) the nature and extent of the breach of the RSC 1986; (ii) whether the breach has caused prejudice to the other parties to these proceedings; and (iii) the purpose which the particular rule which has been breached was intended to achieve (*Hosford v Ireland* [2021] IEHC 133 per Simons J. at

[2] O. 124 of the RSC 1986 provides:

"*(1) Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.*

(2) No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.

(3) Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."

paragraph 24) – I do not believe that the adoption of the incorrect procedure *per se* constitutes sufficient grounds for dismissing consideration of this appeal *in limine*. Whilst at paragraph 16 of the respondents' legal submissions, it is submitted that the "[r]*espondents have suffered prejudice because Ryanair was permitted to file this appeal without seeking an extension of time*" and therefore "*these proceedings should be struck out on that basis*", the respondents have not averred to any prejudice arising from the decision of Ryanair to proceed pursuant to O. 84C of the RSC 1986. The Affidavit of Ms. Elaine Quinn, Chief Appeals Officer, sworn on 19th July 2023, rather, refers (at paragraph 4) to this appeal concerning "*a long-running dispute relating to the insurability status of … Paul Clements*".

20. Further, and whereas I agree with that part of the submissions on behalf of the respondents which contend that on its face, the appeal by Ryanair against the decision of the Appeals Officer dated 12th July 2021 and the decision of the Chief Appeals Officer dated 15th December 2022 were not made within the time prescribed by O. 90 of the RSC 1986, I consider, for the following reasons, that Ryanair should be granted an extension of time to appeal the decision of the Appeals Officer dated 12th July, 2021.

21. Insofar as the appeal before me is concerned, section 327 of the 2005 Act provides for appeals to the High Court. Any person who is dissatisfied with (a) the decision of an appeals officer, or (b) the revised decision of the Chief Appeals Officer, on any question, may appeal that decision or revised decision, as the case may be, to the High Court on any question of law.

22. By virtue of section 318 of the 2005 Act, the Chief Appeals Officer may, at any time, revise any decision of an Appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts.

23. Similar chronological circumstances which transpired in this case appear to have been canvassed in the judgment of the Supreme Court in *Petecel v Minister for Social Protection* [2020] IESC 25, where O'Malley J. held as follows at paragraphs 54 and 55 of the judgment:

> "*(54) A person who is dissatisfied may appeal a decision of an appeals officer or a revised decision of the Chief Appeals Officer to the High Court on "any question of law" (s.327).*
>
> *Accordingly, the statutory appeal does not appear to be available against a refusal by the Chief Appeals Officer to revise a decision – a fact noted by this Court in Castleisland Cattle Breeding Society v Minister for Social and Family Affairs [2004] 4 I.R. 150.*
>
> ***However, in those circumstances it appears to be possible to appeal the decision of the appeals officer – see Meagher v. Minister for Social Protection [2015] 2 I.R. 633. A restriction on the right of appeal to the High Court, which appeared to exclude decisions that were to be regarded as final and conclusive pursuant to s.320, was deleted by s.16 of the Social Welfare (Miscellaneous Provisions) Act 2010. That provision also introduced a right of appeal to the High***

Court by the Minister against either a revised decision or a refusal to revise by the Chief Appeals Officer.[3]

(55) It is relevant to note here that the Social Welfare Appeals Office was described in correspondence to the appellant from the Disability Allowance section as operating independently of the Department of Social Protection. However, the legislation expressly states that the Chief Appeals Officer and the appeals officers are officers of the Minister (s.304 of the Act of 2005, as amended by s.22 of the Social Welfare (Miscellaneous Provisions) Act 2010), and that they hold office during the pleasure of the Minister.

Although they are bound to act judicially (see Minister for Social, Community and Family Affairs v. Scanlon [2001] I.R. 64), and the appeal system has been described as "robust and independent" (by Baker J. in M.D. v. Minister for Social Protection [2016] IEHC 70) it is not disputed in these proceedings that the officials are not exercising judicial functions but are dealing with the administration of the statutory social welfare code. They do not constitute a "tribunal" for the purpose of referring questions of EU law to the Court of Justice for preliminary ruling (under Article 267 of the Treaty on the Functioning of the European Union)".

24. Albeit in the context of O. 84C of the RSC 1986, in *Mocanu v Chief Appeals Officer* [2023] IECA 176, the Court of Appeal (Donnelly J., Ní Raifeartaigh J. and Allen J., with judgment given by Allen J.) at paragraph 39 adopted the criteria adumbrated by

[3] Emphasis added by me in this judgment.

the High Court (Baker J.) in *Keon v Gibbs* [2015] IEHC 812 as to the circumstances where an extension of time would be granted pursuant to O. 84C:

> "*(a) the reason for the delay and whether a justifiable and sufficient excuse has been shown noting too that in general, and having regard to the test enunciated in Eire Continental Trading Company Ltd v Clonmel Foods Ltd, and considered also by the Supreme Court in S v Minister for Justice, that a fault on the part of a legal adviser is not generally regarded as a sufficient excuse or reason for a failure;*
>
> *(b) the length of the delay, noting that a short delay can relatively easily be excused;*
>
> *(c) there is no express requirement that an intending appellant should have formed the intention to appeal within the relevant time, but this can be a factor;*
>
> *(d) whether the appeal is arguable, or to put it in the negative, whether the attempt to engage the appellate process is arguably vexatious, frivolous or oppressive to the other party; and*
>
> *(f) whether the extension of time is likely to cause prejudice to the other party, which can include litigation prejudice, where the passage of time has resulted in the loss of evidence or witnesses, but also a more general prejudice that an extension of time delays the conclusion of litigation and prevents the winning party from recovering on foot of the judgment or order, and circumstances where an appeal may be merely tactical, or is unlikely to succeed*".

25. In considering the issue of delay in this case, there was a seventeen-month lapse of time for the Chief Appeal's Officer to make her decision. On 5th August 2021, Ryanair submitted a request for a review of the Appeals Officer's revised decision issued on 12th July 2021, which was notified to Ryanair on 15th July 2021. It was not, however, until 17 months later – on 15th December 2022 – that the decision of the Chief Appeals Officer, determining that the Appeals Officer had not erred in relation to the law or the facts and *declining to revise* the decision of the Appeal's Officer, was made. Ryanair was notified of the Chief Appeal's Officer's decision on 21st December 2022. The appeal against both decisions was made by originating Notice of Motion on 17th January 2023 grounded on the Affidavit of Richard Higgins sworn on 16th January 2023 and both of these documents were filed on behalf of Ryanair. Insofar as the criteria in *Keon v Gibbs* are concerned, Ryanair's purported direct challenge to the Chief Appeals Officer Ryanair was 21 days late (pursuant to O. 84C of the RSC 1986) or 4 weeks late (pursuant to O. 90 of the RSC 1986). With the Christmas period considered, either default period was negligible compared to the 17 months it took the Chief Appeals Officer to make his decision. As stated above (in paragraph 20) in the circumstances, therefore, I consider that Ryanair should be granted an extension of time to appeal the decision of the Appeals Officer dated 12th July 2021.

26. Further, and in relation to the (second and) third objections, in *Petecel v Minister for Social Protection* [2020] IESC 25, the Supreme Court (O'Malley J.) held, by reference to *Castleisland Cattle Breeding Society v Minister for Social and Family* Affairs [2004] 4 I.R. 150, that the statutory appeal in the 2005 Act did not appear to be available against *a refusal* by the Chief Appeals Officer *to revise* a decision but

that in such circumstances, referring to the decision in *Meagher v Minister for Social Protection* [2015] IESC 4; [2015] 2 I.R. 633, it appears possible to appeal the decision of the Appeals Officer. That reflects the circumstances of this case also.

27. In *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] 4 I.R. 150, under the then applicable legislation, a social welfare deciding officer decided that a former employee, a cattle inseminator, was an independent contractor; on appeal, an Appeals Officer found that he was employed under a contract of service which was upheld by the Chief Appeals Officer; the company appealed both the Appeals Officer's initial decision and its affirmation by the Chief Appeals Officer; the High Court (O'Donovan J.) allowed the appeal, finding that the decision of the Appeals Officer was erroneous because certain facts regarding the contract between the appellant company and the former employee had been ignored in her determination and because of this "*the decision of the Chief Appeals Officer was vitiated*" and on appeal, the Supreme Court dismissed the appeal and allowed the notice to vary.

28. In *Meagher v Minister for Social Protection,* for example, Mr. Meagher had been seeking a half-state contributory pension and was required to demonstrate that he had made PRSI contributions for a period of 260 contribution weeks. His initial application was refused by a Deciding Officer in May 2011 and his appeal to an Appeals Officer was refused on 23rd April 2012. As set out by the Supreme Court (McKechnie J.) in *Meagher v Minister for Social Protection* [2015] 2 I.R. 633, pp. 637-638, the "*Chief Appeals Officer was asked to revisit the decision, but she declined to so do. Accordingly, an application was made to the High Court*

challenging the validity of the determination by the Appeals Officer. This procedural process of appeal to the High Court is provided for by s.327 of the Act of 2005. In effect, it is a statutory appeal on a point of law. No point has been taken in either court as to the scope or parameters of such appeal. Therefore, issues which have frequently been aired in this respect, do not arise for consideration. Likewise, this appeal proceeded in this court in exactly the same way as it had been argued in the High Court". (Insofar as the comments of McKechnie J. are concerned about the 'scope' or 'parameters' of an appeal under section 327 of the 2005 Act, I have addressed that issue earlier in this judgment. As indicated, the parties were largely in agreement on that issue and on the principles which are required to be applied on a statutory appeal involving a point of law).

29. In *Murphy v Chief Appeals Officer* [2021] IEHC 455, the High Court (Simons J.) identified the following remedies under the 2005 Act, noting that there did not appear to be any requirement to exhaust the right of review to the Chief Appeals Officer first, before embarking upon a statutory appeal to the High Court:

> "*(i) An appeals officer may at any time revise any decision of an appeals officer where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given (section 317* [of the 2005 Act]*). Although not expressly stated, the sense of this provision seems to be that the revision is to be carried*

out by a different appeals officer than the one who made the original decision.[4]

(ii) The chief appeals officer may, at any time, revise any decision of an appeals officer, where it appears to the chief appeals officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts (section 318 [of the 2005 Act]*). If the chief appeals officer exercises his or her power to revise a decision, there is a right of appeal thereafter to the High Court (section 327of the 2005 Act). There is no right of appeal against a refusal by the chief appeals officer to revise a decision. See Petecel v. Minister for Social Protection [2020] IESC 41 (at paragraph 54).*

(iii) Any person who is dissatisfied with the decision of an appeals officer may appeal that decision to the High Court on any question of law (section 327 of the 2005 Act). Perhaps surprisingly, there does not appear to be any requirement to exhaust the right of review to the chief appeals officer first, before embarking upon a statutory appeal to the High Court".

30. Whilst, the position, therefore, is that according to section 327A of the 2005 Act, the only person who can appeal against *a refusal to revise a decision* is the Minister for Social Protection, section 320 of the 2005 Act provides that a decision by an Appeals Officer on a question is conclusive, subject to sections 317, 318 and 327 of the 2005 Act.

[4] That did not occur in this case. Mr. Reddy made the initial decision on 17th May 2016 *and* the revised decision on 12th July 2021.

31. In *Little v The Chief Appeals Officer & Or*s [2023] IESC 25, the Supreme Court unanimously found (in the judgment of Woulfe J.), upholding the decision of the High Court (Owens J.) that the power of revision in section 317(1)(a) of the 2005 Act operated only where the "*new evidence or new facts*" relied upon by a claimant disclosed an entitlement to the relief "*at the time*" of the decision it is sought to revise. The Appeals Officer may only revise a decision where it appears that the decision "*was*" (*i.e.*, in the past tense) erroneous in light of new evidence or new facts and thus any new evidence or new facts must relate back to the original decision as to eligibility.

32. In so determining, Woulfe J. had regard to the legislative history of the 2005 Act and the amendment to section 317 in 2013 in order to remove the ability of an appeals officer to revise a decision where there has been a change of circumstances which must now trigger a new claim for benefit rather than the revision of an earlier claim. Woulfe J. also referred to the decision of the Supreme Court in *A, B & C (a Minor) v The Minister for Foreign Affairs and Trade* [2023] I.L.R.M. 335 to the effect that a must thus ascertain the meaning of a legislative provision by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision, but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words.

33. If the Chief Appeals Officer does *not* revise a decision by an Appeals Officer (which is what occurred in the appeal before me), that decision, *i.e.*, the decision of the Appeals Officer remains conclusive unless and until the High Court sets it aside.

34. This matter was also addressed by the High Court (Owens J.) in *LA v The Chief Appeals Officer, The Social Welfare Appeals Office & The Minister for Social Protection* [2024] IEHC 187 at paragraphs 61 to 64, as follows:

> "*(60) The legislative history of s.327 of the 2005 Act is relevant. This section is identical to s.271 of the Social Welfare (Consolidation) Act 1993 (the 1993 Act). It was enacted in the knowledge of an observation of Geoghegan J., delivering the judgment of the Supreme Court in Castleisland Cattle Breeding Society Ltd v. Minister for Social and Family Affairs [2004] 4 I.R. 150 ([2004] IESC 40) at 156-157, para. 14., that s.271 of the 1993 Act did not permit an appeal to the High Court on a question of law against a refusal by the Chief Appeals Officer to revise a decision of an appeals officer.*
>
> *(61)Where the Chief Appeals Officer revises a decision of an appeals officer in exercise of power under s.318 of the 2005 Act, the Minister may be dissatisfied with the outcome. The Social Welfare (Miscellaneous Provisions) Act 2010 inserted section 327A into the 2005 Act to provide for this. This provision permits the Minister to appeal to the High Court on a question of law against a decision of the Chief Appeals Officer to revise or to refuse to revise a decision of an appeals officer.*
>
> *(62) Section 320 of the 2005 Act provides that a decision by an appeals officer on a question is conclusive, subject to ss.317, 318 and*

327 of that Act. So, if the Chief Appeals Officer does not revise a decision by an appeals officer, that decision remains conclusive unless and until the High Court sets it aside.

(63) The statutory right of appeal by a dissatisfied claimant is always against a decision of an appeals officer; not against a decision of the Chief Appeals Officer not to revise that decision: see s.327(a) and (b) of the 2005 Act. Any decision of the Chief Appeals Officer not to revise a decision is irrelevant where the statutory right of appeal is exercised. For an example of how this rule operates in practice see Meagher v. The Minister for Social Protection [2015] 2 I.R. 633 ([2015] IESC 4) at 637 para. [4] …

(64) It follows that the term "appeals officer" in s.327(a) of the 2005 Act is not intended to refer to the Chief Appeals Officer".

35. It is against this legal landscape that the decision of the Chief Appeals Officer (Ms. Joan Gordon) dated 15th December 2022 must be viewed. It was titled as a "*Review of Appeals Officer's decision in accordance with section 318 of the Social Welfare Consolidation Act 2005*". It stated that it was a review "*being undertaken in accordance with Section 318 of the Social Welfare Consolidation Act 2005 which provides that the Chief Appeals Officer may revise any decision of an Appeals Officer where it appears to her that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts. My role therefore is a revising role rather than another avenue of appeal.*"

36. The (62 page) review addressed the following matters: background, the grounds for review, a summary of submissions including those made on behalf of Redsberry and Contracting Plus Consultants Ltd, the Scope Section in the Department of Social Protection, lawyers on behalf of Mr. Clements, further submissions from lawyers on behalf of Ryanair, submissions arising from the judgment of the Court of Appeal in *Karshan (Midlands limited) t/a Dominos Pizza v The Revenue Commissioners* [2022] IECA 124, the nature of the review under section 318 of the 2005 Act before setting out her conclusion and summary/overall conclusion.

37. On the question of agency, the conclusion of the Chief Appeals Officer, first, at page 43 of her report, was that "*Ryanair's submission is premised on the understanding that the Appeals Officer determined that Brookfield was an agent of Ryanair within the meaning of the Employment Agency Act 1971. I am satisfied that the Appeals Officer has not so determined but rather has concluded that Brookfield was an agent, as in acting on behalf of, Ryanair. It was open to the Appeals Officer to draw this inference from the evidence and no error of fact and or law has been identified such that the decision of the Appeals Officer should be revised*" and, second, at page 49 of her report was that "*The Appeals Officer has clearly pointed to the evidence and sources of evidence he relied upon in coming to a conclusion that Brookfield was acting on behalf of Ryanair. All of the evidence he relied upon in coming to a conclusion that Brookfield was acting on behalf of Ryanair. All of the evidence he relied upon in coming to this conclusion was tested in the course of the appeal process. As previously outlined, Appeals Officers, in making determinations, are entitled to draw inferences from the evidence placed before them. It is not shown that*

the inference the Appeals Officer has drawn from the evidence made available to him (that Brookfield Aviation was acting on behalf of Ryanair) is unreasonable based on the evidence presented/adduced".

38. In response to the argument made on behalf of Ryanair, recorded at page 49 of the review, that "*It was factually incorrect to find an intention to create legal relations between Ryanair and Mr. Clements at the time when Mr. Clements submitted his CV to and was invited to attend for a Ryanair Cadet Assessment by Ryanair Recruitment, as at pages 60 and 61 of Mr. Reddy's decision*", the Chief Appeals Officer states that "*The Appeals Officer has, again, pointed to the evidence he relied on in determining this to be an established fact, for purposes of determining the legislative question before him. I do not consider that his conclusion, that there was an intention to create legal relations, is so unreasonable that no reasonable person could have come to that conclusion based on the evidence and I, therefore, do not consider that the Appeals Officer has erred in fact or law in his conclusion.*"

39. In response to the argument made on behalf of Ryanair that there was no implied contract between Ryanair and Mr. Clements, the Chief Appeals Officer concludes at page 45 of her review that "*The Appeals Officer was not prevented from determining that a contract may be implied and it was open to him to draw inferences from the evidence presented and adduced. For the reasons I have outlined above I do not agree with Ryanair's submission that even if common law permitted the presence of an implied contract, that assumption has been replaced by statutory provisions. I therefore do not consider that the Appeals Officer erred in fact or in law such that the decision of the Appeals Officer should be revised.*"

40. Ultimately, at page 62 of her report, the Appeals Officer determines that "*For the reasons I have outlined in the Review I am satisfied that the Appeals Officer has not erred in relation to the law or the facts in the manner submitted by Ryanair and in those circumstances I must decline to revise the decision of the Appeals Officer.*"

41. As set above, the legal effect of the Chief Appeals Officer deciding *not* to revise a decision of an Appeals Officer is that the decision of the Appeals Officer remains conclusive unless and until the High Court sets it aside.

42. In the circumstances, I refuse the preliminary objections made on behalf of the respondents and grant Ryanair an extension of time to appeal the Appeal Officer's decision which I shall now address in the next part of this judgment.

THE QUESTION OF INSURABLE EMPLOYMENT

Overview

43. Ryanair's appeal was grounded in the Affidavit of Richard Higgins sworn on 16th January 2023, who is the Chief Financial Officer of Malta Air, a wholly owned subsidiary of Ryanair Holdings plc and formerly Head of Financial Risk & Compliance of Ryanair DAC and Head of Operational Finance of Ryanair plc.

44. As addressed in the first part of this judgment, the application comprised an originating notice of motion issued in the matter of section 237 of the 2005 Act and sought various reliefs under O. 84C of the RSC 1986 and O. 52, r. 5 of the RSC 1986.

Ms. Leanne Kiernan solicitor of Fieldfisher LLP Solicitors on behalf of Ryanair swore a number of affidavits dealing with the service of the proceedings on the respective parties' solicitors.

45. A Statement of Opposition on behalf of all of the respondents, which included the preliminary objections addressed earlier in this judgment, was dated 19th July 2023. This was verified by the Affidavit of Ms. Elaine Quinn, Chief Appeals Officer with the Social Welfare Appeals Office, which was sworn on 19th July 2023. In addition to addressing certain matters which Ms. Quinn stated had been omitted from Mr. Higgins' Affidavit, Ms. Quinn exhibited additional documentation including documentary evidence shared with all parties, but either not included or partially included, in the exhibit Book 5.1, RH 1, Core Booklet and correspondence with the Appeals Officer regarding the process not included in Booklet 4, Exhibit RH1.

46. Importantly, Ms. Quinn also exhibited the first decision or determination of the Appeals Officer (Mr. Aidan Reddy) dated 17th May 2016 which was communicated, for example, to Redsberry, by way of a letter dated 8th July 2016 from Mr. Mark O'Connor HEO of the Social Welfare Appeals Office.

47. Mr. Higgins swore a replying Affidavit on 22nd September 2023 in which he deals, *inter alia*, with the format of the proceedings, the position of the notice parties to the proceedings, and the substantive matters arising in the appeal in connection with the insurability of Mr. Clements. He exhibits further correspondence confirming that the notice parties would not be taking an active part in this appeal.

48. Ms. Kiernan also swore a further Affidavit on 21st September 2023 setting out her interaction with the Central Office of the High Court and also addressing the matters the subject of the preliminary objections as to whether the proceedings should have been issued pursuant to O. 84C or O. 90 of the RSC 1986.

49. Whilst I refer to particular documents and certain extracts of the oral hearings (outlined earlier under 'Chronology & Facts') throughout this judgment, approximately 92 documents comprising 387 pages of documentary evidence adduced at the appeal hearings were set out in a 'Core Booklet' (exhibited in Mr. Higgins' Affidavit) which addressed, *inter alia*, the contractual matrix, financial documents relating to Mr. Clements (under the sub-heading 'Paul Clements Tax'), the correspondence arising from the initial request for an insurability decision by Mr. Clements dated 22nd April 2014 (under the sub-heading 'Request for Insurability'), the Appeals Officer 2017 and Miscellaneous (Ryanair Pilot Group (RPG) Press Release dated 31st May 2013).

50. In addition, Mr. Higgins exhibited the decision of the Appeals Officer dated 12th July 2021, the decision of the Chief Appeals Officer, Ms. Joan Gordon dated 15th December 2022 (which Mr. Higgins confirms was received by Ryanair's solicitors on 21st December 2022), the written submissions made by all of the parties to the Appeals Officer and the Chief Appeals Officer, the transcripts of the oral hearings before the Appeals Officer, the correspondence between the parties and copies of the documentary evidence adduced at the oral hearings which was exhibited in the Mr. Higgins' Affidavit.

51. This was helpfully set out in an Index divided into a number of booklets, including Booklet 1 (the decisions of the Appeals Officer and the Chief Appeals Officer); Booklets 2:1 and 2:2 (transcripts of the oral hearings referred to earlier); Booklet 3:1 (submissions made to the Appeals Officer (on behalf of (A) Mr. Clements (B) Redsberry (C) Contracting Plus); Booklet 3:2 Submissions made to the Appeals Officer (D Ryanair); Booklet 4: Booklet of correspondence with the Appeals Officer regarding the process; Booklet 5:1 ((A) documentary evidence adduced at the appeal hearings comprising the 'Core Booklet' and documents referred in the immediate preceding paragraph); Booklet 5:2 (further documentary evidence adduced at the appeal hearing including (B) Accountant's Booklet and (C) Revenue Documents); Booklet 5.3 (further documentary evidence adduced at the appeal hearing including (D) Oireachtas documents (E) tax and accounts documents (F) CRO documents; and Booklet 6 (supplemental material provided to the Appeals Officer post hearing; correspondence with the Chief Appeals Officer, Statement of Grounds filed in Ryanair's successful judicial review application dated 21st May 2020 (as amended) and the High Court Order dated 25th May 2020).

The Appeals Officer's decision dated 12th July 2021

52. Before setting out and assessing the inferences which the Appeals Officer drew from the oral and documentary evidence which was before him, it is apposite to note the structure of his report and determination of 12th July 2021:

- At page 1, the Appeals Officer sets out his Revised Decision and refers to the relevant governing Social Welfare Legislation;

- From pages 3 to 8 the Appeals Officer refers to the Preliminary Issue: Statutory Interpretation of section 317 of the 2005 Act and Appeals Officer's jurisdiction under this section;

- From pages 8 to 10, the Appeals Officer sets out the Background Information up to the decision which was communicated on 8th July 2016;

- At page 10, the Appeals Officer refers to Reasons for re-examining the decision communicated on 8th July 2016 under section 317(1)(a) of the 2005 Act, from pages 10 to 11, the Appeals Officer deals with Evidence considered and established facts determined from the Re-examination Process, at pages 11 to 19 he refers to the 'Circumstances from initial communications to cessation of service delivery and termination of relationships', at pages 19 to 35 he refers to Relationships during the period when services were delivered, at pages 35 to 37 the Appeals Officer deals with Cessation of Relationships, at pages 37 to 38 he deals with New Evidence or New Facts, at pages 38 to 40 the Appeals Officer addresses the issue of Self-employment or Employment or Director's Fee Income.

- The Appeals Officer, at pages 42 to 48, sets out criteria extrapolated from an Employment Status Group set up under the Programme for Prosperity and Fairness (updated in 2007) and an Expert Group appointed by the Oireachtas to provide a definition of a self-employed person, and at page 48 he sets out the Conclusion from indicators/criteria in the Code of Practice.

- Having initially referred to these matters at pages 40 to 41 of his report dated 12th July 2001, from pages 49 to 68 the Appeals Officer deals with (1) the test of Mutuality of Obligation (at pages 49 to 62), (2) the Control Test (at pages 63 to 65), (3) the Integration Test (at page 66), (4) the test of Economic Reality (at pages 66 to 67) and Conclusion & Decision (at pages 67 to 68).

53. Under the subheading "*Relationships during the period when services were delivered*" (from pages 19 to 35), at page 25 of his report and decision dated 12th July 2021, the Appeals Officer determines that the following were the established facts from the available evidence (as set out in his report):

> "*I have determined the following as established facts from the available evidence as referenced above: (a) Mr. Clements had undergone a Ryanair Cadet Assessment and had been provided with a contract, by BAIL* [Brookfield][5], *setting out core terms upon which he would have the opportunity to pilot Ryanair planes before he became a director and shareholder with RMS* [Redsberry]. *(b) He was guided to CXC by BAIL* [Brookfield] *and was informed that he was obliged to set up his taxation arrangements in Ireland. (c) He personally received the BAIL* [Brookfield] *contract document from BAIL* [Brookfield] *before he had any relationship with CXC and RMS* [Redsberry]. *This BAIL* [Brookfield] *contract contained the terms upon which he would deliver services as a pilot, including the rates paid for this service. BAIL* [Brookfield] *guided him as to the steps that had to be taken in order for this contract to be completed. (d)*

[5] When quoting extracts from the report of the Appeals Officer I have 'added' in square brackets the short-hand references to the persons or bodies referenced in this judgment.

CXC provided guidance, informing Mr. Clements that the contract he had received from BAIL [Brookfield] *would be signed by CXC on his behalf once he agreed to the terms and conditions of the contract with CXC. (e) The contention that RMS* [Redsberry] *exercised absolutely no control over Mr. Clements is inconsistent with the expressed terms in the CXC terms and conditions contract which required Mr. Clement to adopt the role of a "specialist" employed by RMS* [Redsberry]*, in the capacity of a director and shareholder and to agree to be under the direction and control of third parties (term 6) and to abide by the terms and conditions of the various contracts which RMS* [Redsberry] *would sign with agencies and clients on his behalf, with his permission (term 13) combined with the terms RMS* [Redsberry] *agreed in the BAIL* [Brookfield] *contract which include the obligations for RMS* [Redsberry] *to procure that Mr. Clements shall perform the work assigned (term 5(a)) and that he will operate in accordance with his scheduling guidelines of the hirer (term 1(e)). (f) Mr. Clements, who had been guided by BAIL* [Brookfield] *(in the cover letter commencing "Dear Pilot" issued on 27th October 2009) to sign and return his contract at page 8, as the "AESP Representative" inadvertently signed the contract on page 8 on behalf of the EC. (g) For the purposes of income tax and PRSI, CXC assisted Mr. Clements to make returns to Irish Revenue, as a self-employed owner director (proprietary director) in a limited company, the company being RMS* [Redsberry]*. This return was made on the basis that he was declared to be an owner director in his own business in*

Ireland and he was declared to have been paid by way of director's emolument. His PRSI contributions were returned at PRSI Class S on this basis."

54. Later at page 30 of his report and decision dated 12th July 2021, the Appeals Officer determines that the following were the established facts from the evidence that he had heard:

"*(a) Mr. Clements did not decide where he worked and that this was decided by Ryanair, who determined his base and determined any change of base. (b) Mr. Clements did not decide when he worked. This was also decided by Ryanair and communicated to him via roster information he accessed every week on the Ryanair Crew Dock System. Mr. Clements was notified of his roster and flew his rostered hours, as notified on the Ryanair Crew Dock System. (c) He was fully included on Ryanair's work rosters, such that he worked each year around the ballpark of 850 block hours, which BAIL* [Brookfield] *had informed him he was likely to work each year in the FAQ document issued on 27th October 2007 (see page 54, core book of evidence). He worked eleven months in each calendar year as per the BAIL* [Brookfield] *contract requirement (see page 39 core book of evidence, under "Engagement", term 1(b) whereby it agreed that the EC (RMS)* [Redsberry] *will ensure that the "company representative" (Mr. Clements) will be available to perform work for eleven of twelve months in the year from April to March for each calendar year this contract remains in force. He did not negotiate his rate of pay, this*

was presented to him in the BAIL [Brookfield] *contract dated 27th October 2009*".

55. The reasoning, conclusions reached and inferences made by Appeals Officer in his decision of 12th July 2021 are summarised under the subheading "*Conclusion and Decision*" (at pages 67 and 68 of the report) as follows:

"*Conclusion and Decision*

My conclusion is that Mr. Clements entered into relationships with CXC Consultants Exchange (CXC) and Redsberry Management Services Limited (RMS) [Redsberry], *as steps in accordance with terms set for him by Brookfield Aviation International Limited (BAIL)* [Brookfield], *on behalf of Ryanair DAC* [Ryanair], *in order to avail of the opportunity of piloting Ryanair planes.*

He had submitted a request directly to Ryanair, to be employed to pilot Ryanair planes. Ryanair, in response to his request, fully assessed him for suitability to join Ryanair as a pilot. Ryanair then, being satisfied that he met its requirements for a Ryanair pilot, authorised BAIL [Brookfield] *to contact him with the terms of a contract whereby he could pilot Ryanair planes and receive payment for doing so. BAIL* [Brookfield] *was an agent of Ryanair in this process. The terms of the contract offered by BAIL* [Brookfield], *on Ryanair's behalf, in addition to those set out in the BAIL* [Brookfield] *Contract number 8051, included steps that Mr. Clements was required to take which included contacting an accountancy firm,*

which firm would then connect him with a limited company and then offer his services to BAIL [Brookfield]*, operating through this limited company structure and he was also required to set up his taxation arrangements in Ireland.*

I have concluded that the function of RMS [Redsberry] *in this process was to provide a management company structure (or the appearance that Mr. Clements was operating his business through a management company structure). For taxation purposes, a person who is the beneficial owner of or has control and access of 15% of the shares in a company is considered a proprietary director and is subject to self-assessment for tax purposes and is not entitled to a tax credit.*

However, for insurability purposes, where a proprietary director owns or controls less than 15% of the shares in a company then his/her full circumstances must be examined, in order to determine his/her correct insurability. The legislative authority for this examination is provided by statute, in the Social Welfare Acts, to Deciding Officers in the Department of Social Protection in the first instance and Appeals Officers in the Social Welfare Appeals Office, under Appeal.

Mr. Clements, in annual returns submitted to the Irish Revenue Commissioners, was declared to be a proprietary director who owned/controlled 16.67% of RMS [Redsberry] *issued shares and it*

was declared that his gross income was derived from an Irish Proprietary Directorship and that he was paid by way of director's emoluments. He was returned for insurability at PRSI Class S.

This was without a full examination of his presenting circumstances having been conducted by a Deciding Officer in [the] *Scope section of the Department of Social Welfare.*

Now, having examined Mr. Clements full circumstances during the period 2010 to April 2014, having considered within this examination as to whether he was paid or entitled to be paid director's fees, or alternatively, whether his director insurability was in relation to a director's remuneration from RMS [Redsberry] *for work in his business, I have determined as follows in this regard for the purposes of the correct insurability of the income he earned:-*

(1) The income he earned was not by way of director's fees from RMS [Redsberry] *as, although he was registered as a director with RMS, he was not fulfilling any of the duties of a director. He was not involved in any management decisions in relation to the business of RMS* [Redsberry].

(2) The income he earned, for insurability purposes was not an income earned from his own business. RMS [Redsberry] *was not his business. His business was as a pilot flying planes and RMS's* [Redsberry's] *business was management and consultancy, as*

declared on the form completed on its' behalf with the Department of Social Protection, in its' Articles an Memorandum of Association, through its' own evidence and as contended by Mr. Clement in his evidence. His income was not earned in a capacity as a proprietary director with RMS [Redsberry].

I have decided, having established Mr. Clements' connections with Ryanair and Brookfield Aviation International Limited [Brookfield] *and the nature of those connections, prior to him becoming a director of RMS* [Redsberry]*, having considered RMS's* [Redsberry's] *Certificate of Incorporation and its purpose and having carefully considered the full circumstances through which services were delivered, that although the terms of Mr. Clements contract with CXC and RMS's* [Redsberry's] *contract with BAIL* [Brookfield]*, when combined, infer that RMS* [Redsberry] *may have been acting in the position of an employment agent for Mr. Clements, the reality of Mr. Clements' presenting circumstances is that Ryanair had already put before him a Contract of Employment, one of the terms put before him being to operate through the structure of a limited company.*

I have concluded that there was an implied contract between Mr. Clements and Ryanair and the nature of this contract was a contract of service. Mr. Clements was a servant and Ryanair a master in the relationship that existed between them when he piloted Ryanair

planes and Ryanair paid for this service during the period from 15th February 2010 to 30th April 2014.

Therefore, I have decided, upon re-examination, based on new evidence that had not previously been before me, that Paul Clements was an employee of Ryanair DAC during the period from 15th February 2010 to 30th April 2014. He was insurable under the Social Welfare Acts for all Benefits and Pensions and PRSI Class A, provided his total reckonable earnings were €38.00 or more per week. If his earnings were less than €38.00 then PRSI Class J applies."

Appeals Officer

Date: 12th July 2021".

56. In this appeal, I am required to apply the law as it stands now and the most recent restatement of the correct approach to be followed is the decision of the Supreme Court in *Karshan*.[6]

[6] The facts in the appeal before me (and the governing legal position) can be contrasted from that which applied, for example, in *Dacas v Brook Street Bureau (UK) Ltd (CA)* [2004] ICR 1437 where the issue concerned a lady who was a cleaner at a council-run hostel who was involved in unfair dismissal proceedings. The UK Court of Appeal held that Mrs. Dacas was not an employee of the employment agency that had organised the position as the contract between Mrs. Dacas and the employment agency in question was not a contract of service and lacked the necessary minimum level of mutual obligation but held that the tribunal was wrong to hold that Mrs. Dacas was not employed by the council and had failed to address the possibility that there was an implied contract of service as between Mrs. Dacas and the council. In *James v Greenwich LBC* [2008] EWCA Civ 35 the Court of Appeal held that the plaintiff in that case was not an employee of the council. Mummery LJ referred to the main authorities in this area including *Cable & Wireless plc v Muscat* [2006] ICR 975 and distinguished the decision in *Dacas v Brook Street Bureau (UK) Ltd* observing *inter alia* at paragraph 47 of his

57. The point of principle addressed in *Karshan* related to the factors to be considered when classifying a person's employment status for income tax purposes. The context was whether pizza delivery drivers were independent contractors under a "*contract for service*" and taxable under Schedule D of the Taxes Consolidation Act 1997 ("the 1997 Act"), or employees under a "*contract of service*", and taxable under Schedule E of the 1997 Act.

58. Karshan Ltd had argued that the delivery drivers were independent self-employed contractors (under a *contract for service*) and the Revenue Commissioners argued that they were employees (under a *contract of services*).

59. The Supreme Court (in the unanimous judgment of Murray J.) held that delivery drivers were to be treated as employees and not independent contractors for the

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judgment that "*The Dacas case is not authority for the proposition that the implication of a contract of service between the end-user and the worker in a tripartite agency situation is inevitable in. along term agency worker situation. It only pointed to it as a possibility, the outcome depending on the facts found by the tribunal in the particular case*" and that facts in *Dacas* "*was not the most suitable occasion for offering more detailed guidance on the circumstances in which a contract of service could be implied*". In *James v Greenwich LBC*, Mummery J. further observed that in cases involving agency workers it was unnecessary to consider whether the irreducible minimum of mutual obligations existed, but rather the correct approach was to ask whether, in a context involving a worker, employment agency and end-user, an implied contract of service arose between the worker and the end-user stating at paragraph 51: "*In conclusion, the question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user*."

purpose of the 1997 Act. In brief, the Supreme Court considered that *mutuality of obligation* was an aspect of the 'wage/work bargain' which was satisfied when a worker agreed to undertake a particular item of work in return for pay and did not require an ongoing relationship or any future commitment to provide or perform work.

60. The applicable caselaw (*Henry Denny*,[7] *Castleisland*,[8] *and Karshan*) generally mean that I am required take into account all of the *actual dealings* between the parties. In *Karshan*, at paragraph 240 of the court's judgment, Murray J., for example, observed that:

> "*as a matter of the general law of contract, a court is entitled to look at what the parties actually did when implementing the agreement with a view to determining whether they have, by a course of dealing, established an agreement between themselves (and if so its terms) and/or an agreement that supplements or fills the gaps in the terms of a written document. And in that connection it is clear that the court in ascertaining the true nature of a working relationship is not analysing an ossified arrangement: a person who begins to work on their own account – perhaps casually – may as time passes become, by reason of the frequency of their work or absorption into the employer's undertaking, an employee.*"

[7] *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34.

[8] *Castleisland Cattlebreeding Society Ltd v Minister for Social & Family Affairs* [2004] 4 I.R. 150.

61. Insofar as the respective arguments made on behalf of Ryanair and the respondents are concerned, the following observations of Murray J. at paragraph 241 of the Supreme Court's judgment in *Karshan* have particular application, in this appeal:

> "*The issue of whether the court can disregard provisions of a detailed written contract of employment that define the legal rights and obligations of the parties (as distinct from purporting to describe the legal consequences of those rights and obligations) where those provisions are inconsistent with the manner in which the parties have conducted themselves, raises more complex questions. As I have noted earlier in this judgment, the United Kingdom Supreme Court has decided in Autoclenz*[9] *that it can and, in an appropriate case, should do this. This court has never adopted this position, and neither Henry Denny*[10] *nor Castleisland*[11] *should be understood as having so decided. In neither of those cases was it expressly decided that the substantive terms of the parties' written agreement (as distinct from the conclusions of law they sought to include in their contract) could be over-ridden simply because they were contradicted by the parties' conduct. While, even apart from the doctrine of sham, or application of well established rules regarding mistake, the law of contract allows, in certain very limited circumstances, the parties to an agreement to waive terms by conduct or, for that matter, while in some situations one party may be estopped by their conduct from relying upon provisions of a written agreement, the conditions under*

[9] *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] I.C.R. 1157.

[10] *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 I.R. 34.

[11] *Castleisland Cattle Breeding Society Limited v Minister for Social & Family Affairs* [2004] 4 I.R. 150.

which this can occur are wholly exceptional. Generally, the variation of a written contract requires a fresh contract supported by consideration, and usually the court is not entitled to look at how the parties conducted themselves with a view to interpreting a written instrument. In this case, as I explain, the question of looking to the conduct of the parties so as to deem certain provisions of a written agreement to no longer form part of the contractual arrangements between the parties does not arise, as the points at which the parties' practices were found to be inconsistent with the written agreements were of limited significance".

62. Previously, it was a *sine qua non* that you had to have *mutuality of obligation* before there could be any relationship of contract of service (*i.e.*, an employee). Post *Karshan*, it is now a feature or a factor that you look at it in the overall round. At paragraph 253 of his judgment, Murray J. restated the applicable law in the following five questions/principles when looking at the *totality* of the relationship and when seeking to determine whether a worker is an employee engaged under a contract of service (*i.e.*, an employee) or whether they are an independent contractor engaged under a contract for service (*i.e.*, self-employed):

"*In determining whether a contract was one "of service" or "for service" should be resolved by reference to the following five questions:*

(i) Does the contract involve the exchange of wage or other remuneration for work?

(ii) *If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?*

(iii) *If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?*

(iv) *If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.*

(v) *Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing*".

63. As stated earlier, in *Karshan* the Supreme Court determined that the Tax Appeal Commissioner was entitled to conclude that the drivers were employees for the purposes of income tax.

64. By way of summary, in the appeal before me (and as set out in this judgment), I do not consider that there was any difference or change in the positions adopted by the main actors in these proceedings prior to *or* after 14th October 2009 in such a manner that would lead to an inference being drawn that (a) Brookfield was acting as the agent of (and for) Ryanair or (b) an implied contract of employment was created between Mr. Clements and Ryanair. Throughout this period, for example, Mr. Clements expressly accepted that: (a) he had no entitlement to demand work from Ryanair; and (b) Ryanair could not require him to turn up for work. The remaining part of this judgment also sets out how the facts of this case are very different to that which applied, for example, in the *Karshan* and *Castleisland* decisions.

65. In summary, the central argument made on behalf of the respondents in this case seeks to suggest that the Appeals Officer was correct in inferring that an 'implied employment contract' existed between Mr. Clements and Ryanair which filled in the 'gaps' in the other contracts and arose in (and from) the course of dealings between Ryanair, Brookfield, CXC and Mr. Clements – specifically from inferences drawn from Mr. Clements furnishing his CV, the invitation to the Ryanair assessment/interview and the contact made thereafter including from a telephone call and is predicated upon a further inference that Brookfield was at all times acting in an *agency capacity* for and on behalf of Ryanair in the course of these dealings.

66. The Appeals Officer, for example, initially observes as follows at pages 40-41 of the decision and report dated 12th July 2021:

"*The legal relationship between the parties is governed by the terms of the contract entered into, which may be written, oral, expressed, implied, or a combination of all four.*

While the terms of a contract (or contracts) are an important indication of the nature of the employment, it has been decreed in case law regard must be taken to all the circumstances of the employment and more weight must be given to the actual relationship between the parties involved than to the contact/s in arriving at a decision. There were 5 parties involved in this case and the actual relationships between Mr. Clements and all other parties must be determined through the evidence to come to a determination on Mr. Clements correct insurability.

The four main tests that have evolved through case law, for establishing the difference between a contract for services and a contract for service are as follows:

- *The test of mutuality of obligation – is there a mutual obligation between the parties to provide or accept the work offered, and*
- *The control test – is the person under the control of another person who directs as to how, when and where the work is to be carried out*
- *The integration test – has the worker become 'part and parcel' of the organisation*

- *The test of economic reality – this test incorporates all of the above to establish whether the worker is in 'business on his own account*".

67. Whilst it is common case that Mr. Clements was never *directly employed* by Ryanair, a central tenet of the Appeals Officer's findings (and endorsed by the Chief Appeals Officer) is based on the contact which occurred between Mr. Clements, Ryanair and Brookfield *before* the offer of the contract from Brookfield to Mr. Clements from which *prior contact* the Appeals Officer infers the establishment of an *implied contract* as between Ryanair and Mr. Clements with Brookfield acting as the *agent* of Ryanair.

68. Notwithstanding the deference which I afford the Appeals Officer in coming to that determination, I am of the view that he erred in law in reaching the conclusion that there was an implied contract on the facts as there was no evidence to support such a finding and the inferences which were drawn by the Appeals Officer on those facts are ones to which no reasonable decision maker could have drawn.

69. Accordingly, I consider, for the following reasons, that the inferences drawn by the Appeals Officer which led to his determination that Mr. Clements was an employee of Ryanair DAC during the period from 15th February 2010 to 30th April 2014, were ones which no reasonable decision-making body in his position could draw and were in error.

70. Having regard to the guidance and approach set out in the judgment of the Supreme Court in *Karshan*, I consider the errors in the inferences made by the Appeals Officer were as follows:

- the status and weight given to the nature of the *new evidence* or *new facts* between the Appeals Officers' initial decision/determination dated 17th May 2016 and his revised decision dated 12th July 2021;
- the question of agency, *i.e.*, that Brookfield acted in an *agency* capacity for Ryanair;
- the finding that there was an '*implied contract*' between Mr. Clements and Ryanair.
- the failure of the Appeals Officer to have regard to the *regulatory* context and consequences of Mr. Clements operating Ryanair's *scheduled* flights.

71. I now address each of these matters.

The 'new information/evidence' between the first and second decisions of the Appeals Officer

72. Section 317(1)(a) of the 2005 Act provides that an Appeals Officer may at any time revise any decision of an appeals officer where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given.

73. The report and decision of the Appeals Officer dated 12th July 2021 gave effect to section 317(1)(a) of the 2005 Act and was a re-examination of his first appeal decision dated 17th May 2016/8th July 2016.

74. In brief, the Appeals Officer found as follows:

> "*I hereby decide that new evidence, brought to my attention subsequent to 8th July 2016, establishes Mr. Paul Clements to have been an employee of Ryanair DAC during the period from 15th February 2010 to 30th April 2014. He was insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A provided his total reckonable earnings were €38 or more per week. If his earnings were less than this figure then PRSI Class J applies.*"

75. The Appeals Officer described the "*new evidence or new facts*" for the purposes of section 317(1)(a) of the 2005 Act as: (a) Redsberry representatives indicating that they had not been aware of the Deciding Officer's scoping decision of 25th August 2014 and that they wished to make the case that Mr. Clements was self-employed in the period from 15th February 2010 to 30th April 2014; and (b) Mr. Clements had written to the Chief Appeals Officer.

76. The Appeals Officer decided to convene an oral hearing to establish whether or not there were new facts or new evidence which would render his initial decision of 17th May 2016/8th July 2016 to be erroneous.

Background

77. Initially, Mr. Clements had requested a determination (on 22nd April 2014) from the Scope Section of the Department of Social Protection on his insurability for the period between 15th February 2010 and 30th April 2014 when he flew aeroplanes on Ryanair's *scheduled flights*.

78. During this period (*i.e.*, from 15th February 2010 to 30th April 2014), Mr. Clements had been paying PRSI at Class S on the basis that he was a proprietary director of Redsberry (also referred to in the Appeal Officer's report as "RMS").

79. Mr. Clements had given a statement of resignation as a Director of Redsberry Management Services on 2nd March 2014 and that his last day providing services would be on 1st May 2014.

80. The Deciding Officer determined on 25th August 2015 that Mr. Clements was an employee of Redsberry for the purposes of insurability and communicated this decision to Mr. Clements and Redsberry. Mr. Clements appealed this decision on 29th October 2015 and contended that he was an employee of Ryanair and not Redsberry claiming that he was under the control of Ryanair in the delivery of his services in the period from 15th February 2010 to 30th April 2014.

First decision of Appeals Officer dated 17th May 2016

81. In the first decision dated 17th May 2016, the Appeals Officer recites that he had carefully considered all available information on the appeal file in the context of the governing legislation and refers to the following evidence:

- "*The appellant,*[12] *on 26th February 2010, agreed and signed a contract with CXC Consultants Exchange Ltd whereby he undertook to become a director and shareholder of RMS and CXC agreed to supply the services described in CXC Consultants Exchange Ltd brochure "The Information pack" to the appellant, through this limited company structure, subject to terms and conditions listed in the contract*
- *The terms listed in this contract included the following:*
    - *that the appellant was employed by RMS in the capacity of a director and shareholder and would be paid a salary calculated from the revenue received on the appellant's behalf from third parties who enter into agreements for the appellant's services*
    - *that the appellant understood, in signing his contract, that RMS would not exercise any form of direction or control over his actions other than as specified in the CXC Information Pack*
    - *that the appellant would agree to abide by the terms and conditions of the various contracts which RMS signed with agencies and clients on* [sic.] *his behalf and with his permission. In the event of non-performance by the appellant, RMS, would not be responsible for any loss to the client or agency*

[12] Mr. Clements.

- *the appellant will abide at all times by the rules laid out by the Revenue Commissioners for any income tax, corporation tax, value added tax or any other government impost payable by the Company or any fees received by the Company. The company will undertake the administration and payment of all the above taxes as required by law to include PAYE/PRSI*

- *A copy of a standard contract for services that Brookfield Aviation International Ltd (hereafter referred to as "BAI") agrees with what it terms to be an "Employment Company" to provide the services of what it terms the "company representative". BAI, in this contract, engages the "Employment Company" as an independent consultant to provide the services of the "company representative" on the terms and conditions set out in the contract.*
- *Documentation on file suggests that BAI entered into one of these contracts for services, through a contract numbered 8051, made on 27th October 2009, with an "Employment Company" which is un-named (but assumed to be RMS) to provide the services of the appellant, who is named as the "company representative" on the terms listed within this contract. The secretary/director of the "Employment Company" normally signs this contract. The "Company Representative" also signs it.*

- *This contract commits the "Employment Company" to responsibilities in relation to the "company representative" including the following:*
    - *To make the "company representative" available to perform work on behalf of the contractor (BAI) for the Hirer (named as Ryanair in this contract).*
    - *To ensure that the "company representative" will be available to perform work of 11 of 12 months in the year from April to March.*
    - *To provide a substitute to perform the work if the "company representative" is not available, provided the substitute is acceptable to the contractor and the hirer.*
    - *Neither the Employment Company nor the company representative shall be deemed to be an officer, agent, employee or servant of the hirer or the contractor.*
    - *To ensure that the "company representative" will operate in accordance with the scheduling guidelines of the Hirer (referred to as Ryanair in the contract).*"

82. The Appeals Officer observed that he had set this evidence out so that he "*could determine who is contracting with whom to do what*" and then stated as follows[13]:

"*I have determined, having done so, that Ryanair did not explicitly enter into any contractual agreement directly with the appellant*,[14]

[13] As I have used the terms "Brookfield" and "Redsberry" in this judgment I have added those terms to the references to BAIL [Brookfield] and RMS [Redsberry].

[14] Mr. Clements.

either as a contract for services (with appellant as a self-employed person) or a contract of service (with appellant as employee). The evidence is that Ryanair was the end-user of his services as a pilot. The available evidence is that the explicit contractual agreements are as follows:

BAI [Brookfield] *agreed a contract with RMS* [Redsberry], *which is described as an "employment company" to provide the services of a "company representative" as a pilot. The appellant is the company representative that RMS* [Redsberry] *provided under the terms of this contract. BAI* [Brookfield] *then, as it had a contract with Ryanair to provide pilots to fly their routes, provided the appellant as the "company representative" of RMS* [Redsberry], *as a service response to meet Ryanair's needs.*

Case law has identified the existence of mutuality of obligation between the parties as sine qua non or an irreducible minimum in the absence of which a contract, whatever else it may be, cannot be contract of service. As I have stated above, there is no evidence of any contract directly between the appellant and Ryanair. There is no evidence that Ryanair was under any obligation during the period 15th February 2010 to 1st May 2014 to provide work for the appellant. Ryanair contracted with BAI [Brookfield] *to provide it with Pilots under terms and conditions agreed within that contract. The appellant happened to be one of the pilots provided, as a service response, through BAI* [Brookfield], *to meet Ryanair's business needs. While the work he performed, while assigned work @Ryanair,*

may be an integral part of Ryanair's business, the evidence is not that he performed is as a worker who was integrated into Ryanair's Business but rather as a worker supplied on foot of contracts agreed between himself and RMS [Redsberry], *RMS* [Redsberry] *and BAI* [Brookfield] *and then BAI* [Brookfield] *and Ryanair.*

He did, however, agree by contract to be employed in the capacity of a director and shareholder by RMS [Redsberry] *and to then abide by the terms and conditions of the various contracts which RMS* [Redsberry] *signed with agencies and clients on his behalf and with his permission. He also agreed, as a condition of this contract, that he would be under the direction of third parties when RMS* [Redsberry] *contracted for his services to be provided. The evidence is that he was made a director at RMS* [Redsberry] *with an allocation of 20 shares out of the total 120 shares listed for this Company. RMS* [Redsberry] *then agreed terms and conditions under which he would work, through BAI* [Brookfield], *for Ryanair. Formally, RMS* [Redsberry] *invoiced BAI* [Brookfield] *for the work done by the appellant @Ryanair and RMS* [Redsberry] *then paid him for this work done.*

It is clear that RMS [Redsberry] *did not exercise day-to-day control over the appellant while he was providing services for @Ryanair. Ryanair, through BAI* [Brookfield] *appear to have exercised this day-to-day control. However, under the terms and conditions of the appellant's contract tying him to RMS* [Redsberry], *RMS* [Redsberry] *had the authority to exercise overall control over him in the work he performed. RMS* [Redsberry] *paid his salary and the terms of this*

contract also allowed RMS [Redsberry] *to terminate the contract by giving the appellant one calendar month's notice.*

Section 12(4) of the Social Welfare Consolidation Act 2005 prescribes that, where an individual agrees with another person to do or perform personally any work or service for a third party then the person who is liable to pay the wages or salary of the individual concerned in respect of the work or service concerned is deemed to be the individual's employer.

I have decided, for these reasons, that the appellant was employed by Redsberry Management Services Ltd [Redsberry] *and thus, was insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A, provided total reckonable earnings are €38 or more a week, for the period 15th February 2010 to 1st May 2014. If his earnings were less than this figure during this period, then PRSI Class J applies. In the circumstances, regrettably, this appeal does not succeed*".

83. I have set out in full the first decision of the Appeals Officer, Mr. Aidan Reddy, given on 17th May 2016 as in my view, save for the reference to *mutuality of obligation* which is now governed by the (subsequent) decision of the Supreme Court in *Karshan*, it succinctly and accurately sets out the relationship between the *dramatis personae* in this appeal: Mr. Clements, Brookfield, Redsberry, CXC and Ryanair. I agree with the Appeals Officer's interpretation of the principal contractual documents in issue which, in my view, did not change when he reconsidered the matter and

issued his revised decision just over five years later, albeit incorrectly on that latter occasion.

84. In that report and revised decision dated 12th July 2021, the Appeals Officer describes this previous (or first) decision of 17th May 2016 (set out above) in the following terms:

> "*The evidence collected by the Department in its process and included in the appeal file I received, satisfied me that Mr. Clements was under the day to day control of Ryanair, as he contended,* ***but that this right of control appeared to have been agreed and covered in the terms of written contracts/agreements Mr. Clements had with CXC Consultants Exchange (now Contracting Plus Consulting Ltd.) and RMS*** **[Redsberry]** ***and the contract which RMS*** **[Redsberry]** ***had with BAIL*** **[Brookfield].** ***Mr. Clements, according to the terms of these written contracts, had agreed to be under the control of third parties in the delivery of his services. The available evidence was that Ryanair was a third party or end-user of his services, in accordance with the terms of these written contracts***.
>
> ***The available evidence satisfied me that the contracts provided the authority for Mr. Clements to be under the control of the end-user (third party) in the delivery of his services***. [15]
>
> *I concluded, given that there was no appeal lodged on behalf of RMS* [Redsberry], *that RMS* [Redsberry] *had accepted that, for the purposes of insurability, it was Mr. Clements' employer. I*

[15] Emphasis added in this judgment.

determined, given Mr. Clements' grounds of appeal, RMS's apparent acceptance of the Department of Social Protection decision and the available evidence, that this appeal was of such a nature that it could be properly determined without a hearing, in accordance with Article 13 of the Social Welfare Appeals Regulations 1998 (Statutory Instrument 108 of 1998). I issued a summary decision which, in addition to communicating the decision itself also included my reasons for making this decision on 8th July 2016 based on the evidence available to me".

85. Later in this judgment under the sub-heading, *Finding of 'implied contract'*, I refer to the conditional acceptance by the Appeals Officer at page 59 of his report dated 12th July 2021 of the five points (at (i) to (v)) which characterised the legal relationship and contractual position as between Mr. Clements, Brookfield, Redsberry and CXC Consultants Exchange (Contracting Plus Consulting Ltd) and Ryanair.

86. It is in that context that the Appeals Officer identified the following five bullet points as comprising:

"*The established facts that are missing from above, are all new facts not before me when I determined this appeal in July 2026 and are as follows*:

- *29th June 2009, Mr. Clements submitted a CV to Ryanair Recruitment.*
- *12th October 2009, Ryanair Pilot Recruitment invited him to attend for a Ryanair Cadet Assessment on 14th October 2009*

informing him that he would undergo a personal interview and technical assessment to convince Ryanair of his suitability to join them.

- *14th October 2009, Mr. Clements attended for this Ryanair Cadet Assessment.*
- *October 2009, date unknown, Mr. Clements received a phone call from Ryanair Recruitment informing him that he had done well at this assessment.*
- *22nd October 2009, Mr. Clements receives his first contract from BAIL* [Brookfield]*, having had no prior connection with BAIL* [Brookfield]".

87. The above bullet points are described by the Appeals Officer as *new* factual matters within the meaning of section 317(1)(a) of the 2005 Act (which provides for the revision of a decision where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date of the first decision). However, rather than providing a purported basis for the Appeals Officer reversing his initial decision made on 17th May 2016, in my view, these and other factors confirm that his initial decision on 17th May 2016 was, in fact and in law, the correct decision.

88. First, I do not agree that these matters (set out in the five bullet points above) comprise matters which undermine or vitiate the previous (correct) interpretation of the legal relationship and contractual position as between Mr. Clements, Brookfield, Redsberry, CXC Consultants Exchange (Contracting Plus Consulting Ltd) and

Ryanair, which are summarised at sub-paragraphs (i) to (v) at page 59 of the Appeals Officer's report dated 12th July 2021 and in the previous (or first) decision of the Appeals Officer dated 17th May 2016. In so doing, the Appeals Officer has taken an erroneous view of the law and that – in and of itself – is a ground for setting aside the resulting decision (as per *Deely v The Information Commissioner* [2001] 3 I.R. 439).

89. Second, there is, in my view, no basis from which it could be inferred from the matters set out in the five bullet points (set out above) that there existed an implied contract as between Mr. Clements and Ryanair. Mr. Clements' CV was sent to a number of entities, including Ryanair, and he was invited to an assessment/interview. The purpose of this assessment/interview was to *type rate* Mr. Clements as a pilot. Type rating has an important *regulatory* function for a pilot as it approximates to a process of granting aircraft certification, in this instance by Ryanair, to pilots who have completed training and testing on a specific type or model of aircraft. Type rating training courses typically also include mandatory training elements for the relevant type or model of aeroplane as defined in the operational suitability data established in accordance with Annex I (Part 21) to Commission Regulation (EU) No 748/2012 (recast) which lays down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations.

90. Typed rating and the associated process of certification allows the pilot in question to operate that type or model of aircraft and this process is maintained with regular training and testing. In Mr. Clements' case, for example, page 1 of the Terms and Conditions of Agreement document states that "[t]*his Contract for Services is only*

valid subject to the company representative successfully completing a Ryanair B737-800 Type-rating Course or Operators Conversion Course as applicable."

91. Third, the Appeals Officer erred in equating this process with an offer of employment from Ryanair. This error is, I believe, systemic and permeates the report of the Appeals Officer of 12th July 2021. Type rating was *not* an offer of employment. As Mr. Clements acknowledged in his evidence, the type rating process involved physically operating a simulator where the pilot was assessed and typed rated for the particular model of aeroplane that the particular airline uses. As explained previously, the reason why this is done is essentially regulatory in the context of the particular model of aeroplane operated by an airline, whether that was, for example, Boeing 737-MAX 10 aircrafts or, as in this case, a Boeing 737-800. It was not an offer of employment and was not an *indicia* of an implied contract. As just mentioned, this error also informs the further error, insofar as the Appeals Officer held that there was an implied contract as between Mr. Clements and Ryanair.

92. In addition, on Wednesday 10th April 2019, Mr. Clements at page 35 of the transcript stated in answer to a question as to whether it was Paul Burke who told him to expect a call from Brookfield that "*I can't remember, my recollection of the telephone call ten years ago. Maybe there was words, I can't remember exactly what he said. But I have a feeling there was intimation to expect contact, be that what it is from Brookfield*". On Wednesday 10th April 2019 Mr. Clements at page 31 of the transcript stated that "*I'd heard of other people who had got positions through Brookfield. I wasn't aware of whether there was any direct employment as well. There could have been, but all I heard of was there was a company called Brookfield involved*", and on

Wednesday 10th April 2019, Mr. Clements, at page 38 of the transcript, stated that he "*had heard of Brookfield previous to the Ryanair assessment*". On Wednesday 10th April 2019, at pages 36 and 37 of the transcript, Mr. Clements confirmed that he made the choice to accept the offer of a position/contract with Brookfield and that he never had a contract with Ryanair. On Wednesday 10th April 2019, at page 39 of the transcript, Mr. Clements confirmed his understanding that he had no doubt as to the fact that his services were being provided to Ryanair by Brookfield and that when accepting the position with Brookfield, he was in fact contracting with Brookfield to make his services available by Brookfield for delivery elsewhere.

93. Fourth, the Appeals Officer gives no weight to the fact– and appears to completely ignore – that Ryanair as an aeroplane operator involved in commercial air transport is *required* to be the holder of a valid Air Operator Certificate ("AOC") issued by the Irish Aviation Authority ("IAA") which authorises it to conduct commercial air transport operations in accordance with the conditions and limitations as so certified. As the holder of this certificate, Ryanair (as with all other commercial airlines) is legally obliged to ensure that it is satisfied with those pilots (including their ability to fly and have appropriate qualifications, *etc*.). This is a further example of the Appeals Officer not properly directing his mind to the regulatory aspects of the evidence which was furnished.

94. Accordingly, in relation to the first criterion *(a) the intention to create legal relations*, the Appeals Officer's determination at page 61 of the report dated 12th July 2021 that he was "*satisfied that Mr. Clements' submission of his CV directly to Ryanair Recruitment and Ryanair Recruitment's response, with an invitation to attend a*

Ryanair Cadet Assessment to convince Ryanair of his suitability to join them" was "*evidence of an intention to create legal relations*", is, in my view, erroneous.

95. Further, before Mr. Clements sent around his CV, he stated that he knew, from speaking to colleagues, that Ryanair were operating through Brookfield and it is difficult to understand how it can be determined that the submission of a CV can be equated with evidence of an intention to create legal relations.

The question of agency

96. In relation to the second criterion "*(b) Offer*" at page 61 of his report, the Appeals Officer refers again to Ryanair having not provided a copy of its contract with Brookfield and that Brookfield, in its communications with Mr. Clements, had informed him that it had been supplying contract pilots to Ryanair since 1994. This is the context for the Chief Appeal Officer's finding of agency, *i.e.*, that Brookfield were acting as agents on behalf of Ryanair.

97. The Appeals Officer stated, for example, at page 61 of his report dated 12th July 2021:

> "*I read this as BAIL* [Brookfield] *introducing themselves to Mr. Clements, providing a context for contacting him at this time, him having had no previous connection with them*".

98. This appears to be the foundation for what became an inference that Brookfield was effectively the agent for Ryanair when in fact what occurred was an explanation of the express written contract with Brookfield.

99. The Appeals Officer continues at page 61 of his report dated 12th July 2021:

> "*The contract that BAIL* [Brookfield] *placed before Mr. Clements was a contract to pilot Ryanair planes and they explained the terms upon which he could achieve this outcome, less than two weeks after he had undergone a Ryanair Cadet Assessment and having been informed by Ryanair Recruitment that he had performed well at this assessment. The evidence, in addition to this, is that BAIL* [Brookfield] *had access to Ryanair's internal CrewDock system. When Mr. Clements made requests on this system for time off work, he received his responses from BAIL* [Brookfield], *not Ryanair, despite CrewDock being an internal Ryanair system.*
>
> *I have determined from this that BAIL* [Brookfield], *in making this connection with Mr. Clements and offering him the opportunity to complete contract negotiations, was acting on behalf of Ryanair. It is not shown that, in this process, BAIL* [Brookfield] *was an independent contractor. The very strong inference to be drawn from the available evidence is that BAIL* [Brookfield] *was acting as an agent for Ryanair in its communications directly with Mr. Clements. And I am guided also by a statement in the Diageo v Mary Rooney judgment that the law has long regarded it as possible, in appropriate contexts, that an act which A procures B to do should be regarded as done by A.*
>
> *I have determined that the terms put to Mr. Clements, on Ryanair's behalf, by BAIL* [Brookfield], *was an offer from Ryanair.*"

100. The entirety of the Appeals Officer's findings on 12th July 2021 rests on two interdependent inferential propositions: (i) Brookfield acted as agent for Ryanair, or in an agency capacity for Ryanair; and (ii) there was an implied contract between Mr. Clements and Ryanair. The Appeals Officer infers that Brookfield acted as agent for Ryanair, or in an agency capacity for Ryanair, in its communications directly with Mr. Clements. (In addition, for example, at page 65 of the report and decision dated 12th July 2021, at the conclusion of the sub-heading "**(2) The Control Test**", the Appeals Officer *inter alia* stated that he had "*concluded that BAIL* [Brookfield] *was an agent of Ryanair in these arrangements*").

101. In this part of his report dated 12th July 2021, the Appeals Officer seeks to contextualise his determination – that (i) Brookfield was acting as *an agent* for Ryanair and, (ii) the aforesaid constituted *a form of offer* to Mr. Clements by Brookfield *on behalf of* Ryanair – by Brookfield introducing themselves to Mr. Clements having had no previous connection less than two weeks after he had undergone a Ryanair Cadet Assessment. I do not believe, however, that the context as so described provides the basis for such an inference or that it informs (or dilutes) in any way, the legal and contractual relationships accepted by the Appeals Officer at page 59 of his report and described later in this judgment under the sub-heading *Finding of 'implied contract'*, and the analysis carried out in the Appeals Officer's first decision on 17th May 2016.

102. The Appeals Officer determined from this that Brookfield, *in making this connection with Mr. Clements* and *offering him an opportunity to complete the contract negotiation* – corresponding with Mr. Clements enclosing contractual

documentation – was acting on behalf of Ryanair, *i.e.*, acting as the agent of Ryanair. It is difficult to understand the basis for such an inference having regard to both (i) the facts (and contracts) as outlined and (ii) the concept of agency explained as "*where there is no conferral of authority to alter legal relations, but merely a chain of contracts, the intermediate contracting parties will not normally be agents and will not routinely owe fiduciary duties up the chain. Equally, the mere fact that one person does something in order to benefit another, and the latter is relying on the former to do so or may have requested or even contracted for performance of the action, does not make the former an agent of the latter*".[16]

103. There are, in addition, difficulties in inferring the concept of *agency* to the chronological and factual matrix which was before the Appeals Officer and in suggesting that the *subsequent* express contractual arrangements – as between Mr. Clements, Brookfield, Redsberry and CXC – were *consequent upon* the existence of an earlier implied contract or were in some sense an alleged fulfilment of this implied contract (noting, of course, that the Appeals Officer was not aware of the details of the contract as between Brookfield and Ryanair). This is not, in my view, a case where *a course of dealing between the parties* – the engagement by Mr. Clements with Ryanair and Brookfield prior to 14th October 2009 and before Mr. Clements' engagement with CXC or Redsberry, including the assessment, the phone call, the furnishing of the contract by Brookfield and its supply of specific instructions, *etc.* – could be described as giving rise to an implied contract or which "*filled in any suggested gaps*" in the contractual arrangements, which were clear as to their purpose and intent.

[16] Peter G. Watts, FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell Ltd., UK, 22nd Ed 2020) at p. 3.

104. To adopt the Appeals Officer's rationale requires ignoring, for example, the specific role of a number of the parties engaged in this arrangement (and their contractual arrangements (including Mr Clements agreement with Brookfield, Redsberry and CXC, Redsberry's agreement with Brookfield, and the fact of Brookfield's agreement with Ryanair), the fact that Mr. Clements at all material times expressly agreed and signed up to these arrangements, and would effectively mean deleting Redsberry from the narrative, *reading in* a contractual paramountcy to: (i) the attendance by Mr. Clements at a simulation/interview; (ii) the receipt of a telephone call; and (iii) correspondence enclosing contracts with Brookfield supplying specific instructions to Mr. Clements on the steps he must take in order to fly with Ryanair, with matters to be inserted such as it being a contract with TBA Ltd (To Be Advised) *etc.* and at a time when Mr. Clements had no knowledge or connection with CXC or with Redsberry, and, choosing a point in time – 14th October 2009 – as an implied contractual *denouement.*

105. In relation to the third criterion "*(c) Acceptance*" at page 61 of his report, the Appeals Officer took the view that by taking the steps which he was required to do – including completing negotiations, contacting one of the accountancy firms on Brookfield's list to become a director and shareholder and operating through a Limited Company set up by the accountancy firm and signing the Brookfield contract – this constituted evidence of Mr. Clements' acceptance of the offer made, *i.e.*, Mr. Clements had accepted the terms of the contract which had been laid down for him by Brookfield "*on behalf of Ryanair*". When all of those things are done it is said that

Mr. Clements' express and signed contract with Brookfield was as a result of an implied contract with Ryanair, with Brookfield acting as Ryanair's agent.

106. This constitutes, in my view, inferences and conclusions found that no reasonable decision making body could draw and was also an erroneous view of the law. This is the case irrespective of Ryanair's claim of procedural unfairness that the claim of the alleged agency of Brookfield on behalf of Ryanair was never argued or raised in any of the previous hearings and that the only complaint was the fact that Ryanair's contract with Brookfield was never furnished.

107. In relation to the fourth criterion "*(d) Consideration*" at the top of page 62 of his report, the Appeals Officer refers to Mr. Clements having flown his rostered hours and Ryanair making payment for these rostered hours. However, and as set out later in this judgment, the rostered hours were set and were a regulatory aspect of the *scheduled flights* and the method of billing and payment to Mr. Clements was as set out in contractual arrangements in the written contracts (which are referred to later in this judgment).

Finding of 'implied contract'

108. Having considered these factors, *i.e.*, (a) the intention to create legal relations, (b) offer, (c) acceptance and (d) consideration (as outlined above), the Appeals Officer states at page 62 of the decision and Report dated 12th July 2021 that he has:

> "*determined, from the available evidence, that all of the elements of a contract were present between Mr. Clements and Ryanair and that there was an* ***implied contract*** *between Ryanair and Mr. Clements.*

Therefore, as I am satisfied that there was an ***implied contract*** *between Ryanair and Mr. Clements, I have examined* ***this contract*** *to determine as to whether* ***mutuality of obligation*** *is established between Ryanair and Mr. Clements.*

I note that ***this implied contract*** *included terms requiring Mr. Clements to contact a listed accountancy form, agree arrangements with the accountancy firm contacted and operate through a limited company set up by the accountancy firm, as well as the terms listed in the BAIL* [Brookfield] *contract. I have determined, from the evidence, that Mr. Clements adhered to all of the conditions of* ***this contract****.*

I have determined that Ryanair, Mr. Clements having adhered to these terms, then provided him with work flying Ryanair planes. I am satisfied, from the available evidence, that Mr. Clements, personally, undertook this work within the terms of the contracts put before him, and Ryanair made payment for this work. I have decided, for the reasons I have outlined above, that mutuality of obligation has been established between Mr. Clements and Ryanair."[17]

109. To recap, this finding of an implied contract was based on, first, the letter from Mr. Clements to Ryanair Recruitment enclosing his CV; second, the invitation from Ryanair Recruitment for Mr. Clements to attend a cadet assessment (simulation exercise for type-rating) and interview; third, the telephone call from Paul Burke of Ryanair Recruitment to Mr. Clements confirming that he had passed the assessment and notifying him that Brookfield would be in contact with him; and fourth, the

[17] Emphasis added in this judgment.

emphasis placed by the Appeals Officer on the determination that Mr. Clements had no prior contact with Brookfield (who stated that they had been supplying pilots to Ryanair since 1994) and the Appeals Officer's determination that Brookfield were acting as Ryanair's agent when it wrote to Mr. Clements enclosing documentation, including a draft contract, which contained what was described on behalf of the respondents, as Brookfield supplying specific instructions to Mr. Clements on the steps he must take in order to fly with Ryanair, with matters to be inserted such as it being a contract with TBA Ltd (To Be Advised) etc and at a time when Mr. Clements had no knowledge or connection with CXC or with Redsberry.

110. A conceptual difficulty with the Appeals Officer's decision to infer that there was an implied contract between Ryanair and Mr. Clements, is in assessing what precisely he considered the implied contract addressed relative to the written contracts which expressly governed aspects of the relationship between the various parties. In his decision and report dated 12th July 2021, the Appeals Officer stated that the "*implied contract*" between Ryanair and Mr. Clements "*included terms requiring Mr. Clements to contact a listed accountancy firm, agree arrangements with the accountancy firm contacted, and operate through a limited company set up by the accountancy firm, as well as the terms listed in the Brookfield contract*." He then determined, that after Mr. Clements had adhered to these terms, Ryanair then provided him with work flying Ryanair aeroplanes and made payment for this work and concluded that *mutuality of obligation* has been established between Mr. Clements and Ryanair.

Emphasis on what occurred prior to 14th October 2009

111. As mentioned earlier in this judgment, at page 59 of his report and determination dated 12th July 2021, the Appeals Officer determined that he "*was satisfied*" that the following five points described the legal relationship and contractual position as between Ryanair, Brookfield, Redsberry, CXC and Mr. Clements (which in fact had been set out in the submission at the hearing before him by senior counsel on behalf of Ryanair) but, significantly, added the caveat or condition that this was "***substantially correct from a starting date after 14th October 2009***":

> "*(i) Ryanair contacted BAIL* [Brookfield] *to provide Ryanair with a pool of pilots.*
>
> *(ii) BAIL* [Brookfield] *contacted RMS* [Redsberry] *for the purpose of making Mr. Clements available to provide his services as a pilot to BAIL* [Brookfield]. *In the said contract, RMS* [Redsberry] *is the "Employment Company" and Mr. Clements is the "company representative". RMS* [Redsberry] *contracted to make Mr. Clements available to perform work on behalf of BAIL* [Brookfield], *for Ryanair.*
>
> *(iii) Mr. Clements contracted with RMS [Redsberry]. Mr. Clements agreed to become a director/shareholder of RMS [Redsberry]. Clause 1 provided that RMS* [Redsberry] *is the employer, and clause 2 states that Mr. Clements "is employed by RMS* [Redsberry]*" At clause 13, Mr. Clements agreed to be bound "by the terms and conditions of the various contracts which RMS* [Redsberry] *will sign with the agencies and clients on Mr. Clements' behalf."*

(iv) M[r]*. Clements contracted CXC whereby CXC Consultants Exchange Limited (latterly Contracting Plus) agreed to provide services to RMS* [Redsberry]*, as described in the CXC Consultants Exchange Limited brochure.*

(v) This is the accepted contractual position of all parties. It has to be noted that no witness as to fact present at the time was called by CXC. Ms. Wiecek joined CXC some number of weeks after the BAIL [Brookfield] *contract was signed and Ms. Smith was not involved at all (see pages 21 and 22 "Outline Written Submission on behalf of Ryanair" being the closing submission on behalf of Ryanair).*"

112. In summary, the contractual position was follows: Redsberry guaranteed to furnish a qualified pilot to Brookfield for the purposes of Brookfield then being in a position to offer a pool of pilots to Ryanair for its scheduled flights. This appears, however, to have been accepted by the Appeals Officer but only on a *conditional* basis, the condition being that the matters which occurred *before 14th October 2009* somehow changed the meaning of the above and converted it into an implied contract as between Mr. Clements and Ryanair. In so concluding or inferring, the Appeals Officer erred in his approach of effectively diluting the above description of what, he accepted, was the *correct* legal and contractual position, by his over-emphasis on, and interpretation of, the matters which transpired "*up to and including 14th October 2009*" and in addition to Brookfield's non-attendance before him and the non-furnishing of the contract between Ryanair and Brookfield due to commercial sensitivity.

113. The following examples confirm that his entire report of 21st July 2021 is predicated upon this erroneous approach.

114. Immediately after setting out these points outlined from (i) to (v) and stating that he was "*satisfied that this listing of relationships and contracts is substantially correct from a starting date after 14th October 2009*", the following *caveat* is added:

> "*However, I deem the events up to and including 14th October 2009 to be significant. I also deem it significant to know clearly, from evidence, the nature of the relationship between Ryanair and BAIL* [Brookfield]. *Counsel for Ryanair, in setting out the legal relationships, does not mention the direct communications between Mr. Clements and Ryanair between 29th June 2009 and 14th October 2009 and that Mr. Clements had attended a Ryanair Cadet Assessment prior to being contacted by BAIL* [Brookfield] *and him being offered an opportunity to pilot Ryanair planes.*
>
> *BAIL* [Brookfield], *despite numerous invitations to do so, has not participated in this re-examination process. In fact, BAIL* [Brookfield] *did not provide any response to correspondences I issued, even acknowledgement of receiving the numerous correspondences that I have issued to them. I issued these correspondences to BAIL's* [Brookfield's] *address as provided to the Department of Social Protection by both Ryanair and Mr. Clements. This was the same address as showing on the BAIL* [Brookfield] *contract. I also wrote to BAIL* [Brookfield] *at its registered address and issued one correspondence to this registered address via*

registered post. I received confirmation from An Post that the correspondence was received, but I did not receive any communication from BAIL [Brookfield], *acknowledging the correspondence. Counsel for Mr. Clements requested sight of a copy of the contract between Ryanair and BAIL* [Brookfield] *but Ryanair declined to provide same on the grounds of commercial sensitivity*".

115. This erroneous approach, also, for example, subtends the Appeals Officer's findings of the existence of an alleged "*implied contract*" as between Mr. Clements and Ryanair where he acknowledges that there was "*certainly no written or expressed contract*" and then in same sentence asks rhetorically, "*but was there, potentially, an implied contract?*"

116. This error permeates the findings and entire report of the Appeals Officer dated 12th July 2021 but this is especially the case when, in response to senior counsel for Ryanair submitting that none of the factors which comprise a contract – offer, acceptance, consideration and intention to create legal relations – are present, the Appeals Officer makes a determination that "*all of the elements of a contract were present between Mr. Clements and Ryanair and that there was an implied contract between Ryanair and Mr. Clements.*" The Appeals Officer accepts that there was no written or express contract but addresses the rhetorical question of whether there was an implied contract, at pages 61 and 62 of his report, under the following sub-headings:

"*I have looked at these elements in the context of Mr. Clements' relationship with Ryanair based on all evidence now available to me and I have concluded as follows:-*

(a) Intention to Create Legal Relations

I am satisfied that Mr. Clements submission of his C.V. directly to Ryanair Recruitment and Ryanair Recruitment's response, with an invitation to attend a Ryanair Cadet Assessment to convince Ryanair of his suitability to join them, is evidence of an intention to create legal relations.

(b) Offer

Ryanair has not provided a copy of his contract with BAIL [Brookfield]. *BAIL* [Brookfield], *in its communications to Mr. Clement on 27th October 2009, informed him that it had been supplying contract pilots to Ryanair since 1994. I read this as BAIL* [Brookfield] *introducing themselves to Mr. Clements, providing a context for contacting him at this time, him having had no previous connection with them. The contract that BAIL* [Brookfield] *placed with Mr. Clements was a contract to pilot Ryanair planes and they explained the terms upon which he could achieve this outcome, less than two weeks after he had undergone a Ryanair Cadet Assessment and having been informed by Ryanair recruitment that he had performed well at this assessment.*

The evidence, in addition to this, is that BAIL [Brookfield] *had access to Ryanair's internal crewdock System. When Mr. Clements made requests on this system for time off work, he received his responses from BAIL* [Brookfield]*, not Ryanair, despite crewdock being an internal Ryanair system.*

I have determined from this that BAIL [Brookfield]*, in making this connection with Mr. Clements and offering him the opportunity to complete contract negotiations, was acting on behalf of Ryanair. It is not shown that, in this process, BAIL* [Brookfield] *was an independent contractor. The very strong inference to be drawn from the available evidence is that BAIL* [Brookfield] *was acting as an agent of Ryanair in its communications directly with Mr. Clements. I am guided also by the statement in Diageo v Mary Rooney Judgement that the law has long been regarded it as possible, in appropriate contexts, that an act which A procures B to do should be regarded as done by A.*

I have determined that the terms put to Mr. Clements on Ryanair's behalf by BAIL [Brookfield] *was an offer from Ryanair.*

(c) Acceptance:

The evidence is that Mr. Clements did all that was asked of him to complete negotiations. He contacted one of the accountancy firms on BAIL's [Brookfield's] *list. He became a director and shareholder in RMS* [Redsberry]*, so that he would be operating through a Limited Company set up by the accountancy firm, as requested, he signed the*

BAIL [Brookfield] *contract at page 8, as requested, albeit in the wrong place.*

I have determined that this is evidence of Mr. Clements acceptance of the offer made.

(d) Consideration

Mr. Clements flew his rostered hours and Ryanair made payment for these rostered hours.

I have determined, from the available evidence, that all of the elements of a contract were present between Mr. Clements and Ryanair and that there was an implied contract between Ryanair and Mr. Clements.

Therefore, as I am satisfied that there was an implied contract and Mr. Clements, I have examined this contract to determine as to whether mutuality of obligation is established between Ryanair and Mr. Clements.

I note that this implied contract included terms requiring Mr. Clements to contact a listed accountancy firm, agree arrangements with the accountancy firm contacted and to operate through a limited company set up by the accountancy firm, as well as terms listed in the BAIL [Brookfield] *contract. I have determined, from the evidence, that Mr. Clements adhered to all of the conditions of this contract.*

I have determined that Ryanair, Mr. Clements having adhered to these terms, then provided him with work flying Ryanair planes. I am satisfied, from the available evidence, that Mr. Clements, personally, undertook this work within the terms of the contracts put before him, and Ryanair made payment for this work.

I have decided for all of the reasons I have outlined above, that mutuality of obligation has been established between Mr. Clements and Ryanair."[18]

The Contract & Associated Documents

117. Further, in addition to the events which occurred prior to 14th October 2009 *not* providing a basis for inferring an agency capacity on Brookfield on behalf of Ryanair or an implied contract as between Ryanair and Mr. Clements, the documentation and dealings beteen the parties after that date, as follows, also confirms that the Appeals Officer's determination of 12th July 2021 was erroneous.

118. For example, by e-mail dated 27th October 2009 (at 15:56), a person (with the first name Debra) from Brookfield sent Mr. Clements five documents: (1) a covering letter (dated April 2009); (2) the Contract; (3) the Frequently Asked Questions (FAQs); (4) Calendar month off request; and (5) Cadet introduction ('intro') letter.

[18] Emphasis added.

119. The covering letter is dated April 2009 and appears to be a *pro forma* letter sent to pilots from a Mr. Declan Dooney (Commercial Manager). It referred to the receipt of the contract from Brookfield and stated that the relevant pilot (here Mr. Clements) was obliged to set up taxation arrangements in Ireland to ensure that he was operating in a fully compliant manner in relation to meeting his taxation liabilities and further stating that "[t]*his is only basis on which Brookfield will supply your services to Ryanair*"; it stated that he should contact one of the accountancy firms listed in the FAQ document to ensure that arrangements were in place for payment; it referred to the AESP which is the Limited Company through which Mr. Clements would be operating as the AESP representative which meant that he "*will be supplying*" his "*services to Brookfield as a representative of your Limited Company or AESP*"; in terms of signing and returning the contract that he was "*only required to sign the contract on page 8 as the "AESP representative." The name of the company that you will be working through will be supplied by the accountancy firm to Brookfield at a later date*"; it provides details in relation to completing a type-rating course and stated that the pilot would be allocated to a base after completion of line training; it also addressed details of periods of unavailability.

120. The initial draft of the contract was also furnished. Pages 1-14 were entitled "*Private and Confidential Pilot Agreement Brookfield Aviation International Ltd - Terms and Conditions of Agreement*".

121. While, of course, not dispositive of the 'employee versus independent contractor' question, the contract as signed was a Contract for Services No. 8051 and stated that it was a "[c]*ontract for Services made on 27th October 2009*". The contract

was between Brookfield ("the Contractor") and TBA Ltd (the "Employment Company" or "EC") which in this case was Redsberry and Mr. Clements was "*the company representative*".

122. In the definitions section, the "Hirer" is defined as Ryanair Plc; "Pool" is defined as a collective term from the group of pilots who provide services to the Hirer from time to time on behalf of the Contractor (*i.e.*, in this case, Brookfield).

123. As mentioned earlier, page 1 of the Terms and Conditions of Agreement document states that "[t]*his Contract for Services is only valid subject to the company representative successfully completing a Ryanair B737-800 Type-rating Course or Operators Conversion Course as applicable.*"

Flight hours

124. A further example of the regulatory nature of the industry is the cap or prescription on the number of flight hours which a pilot can carry out. Again, this was a matter which was addressed before the Appeals Officer but no consideration or weight appears to have been attached to the fact that in order to ensure both safe flight operations and that pilots at all times remain fully alert, EU law requires a limit of 900 flight hours per (calendar) year in EU Regulation 83/2014 ("Flight Times Limitation") and there have been over the years, in addition, a large amount of statutory instruments promulgated pursuant to the Air Navigation legislation.

125. There was no *mutuality of obligation*. In the transcript of Wednesday 10th April 2019, Mr. Clements confirmed that he knew the Ryanair cadet assessment was

for the purpose of assessing his ability to fly in a simulator. Previously, Mr. Clements had acknowledged that he had heard, from conversations with colleagues, that pilots had obtained positions through Brookfield and he was not aware of whether there was any direct employment as well and he agreed that at that time, his focus was on 'getting to fly'. Mr. Clements agreed that the reference in Paul Burke's email to cadet assessment (comprising a technical assessment and personnel interview) was in the context of a skill's test in assessing whether he was competent and capable of flying aeroplanes through the use of a simulator and further assessing his suitability and interpersonal skills. There was no basis for the Appeals Officer to infer that an implied contract exists as between Mr. Clements and Ryanair. There was, for example, no obligation on Ryanair to give Mr. Clements work, yet the Appeals Officer conflates an indication by Brookfield, in the context of operating ***scheduled flights*** for Ryanair, that Mr. Clements might expect or anticipate, on average 850 flight hours p.a., with an obligation on Ryanair to provide Mr. Clements with 850 flight hours per year. Such a conflation was incorrect.

Substitutes

126. At page 35 of the decision and report, dated 12th July 2021, the Appeals Officer determined as follows:-

> "*I have noted the available evidence, in relation to RMS's* [Redsberry's] *capacity to provide a substitute as a suitable replacement, is that Mr. Clements was the first RMS* [Redsberry] *pilot director. RMS* [Redsberry], *which had been registered since 2004, had no pilot directors prior to Mr. Clements becoming director in the company in 2009. So, this evidence tells me that RMS* [Redsberry]

was not in a position to provide an agreed exceptional and qualified nominated substitute, if this was an available option.

I have determined it to be an established fact, from this cumulative evidence, that, in reality, neither Mr. Clements, nor RMS [Redsberry], *can provide a substitute. I have concluded that Mr. Clements' evidence with supporting e-mail documentary evidence, combined with the evidence of strict regulation in the Airline industry, the absence of another appellant director in RMS* [Redsberry] *and the terms in the BAIL* [Brookfield] *contract in relation to non-availability for work and requirements to be otherwise available, all combine to strongly support an inference that neither Mr. Clements nor RMS* [Redsberry] *could realistically, provide a substitute to Ryanair, on days when Mr. Clements could not provide personal service.*

I have also determined that it is an established fact, from the cumulative available evidence, that BAIL [Brookfield] *was obliged to offer work and that Mr. Clements had an obligation to personally take the work offered.*

This cumulative evidence leading me to this determination is as follows (re-stating evidence recorded above):

- *Mr. Clements was notified of hours for which he was rostered each Friday.*

• *He worked these hours and was paid for them to the extent that his flying hours were in excess of 850 in 2011 and 2012 and, on a pro rata basis for months worked, also heading towards being in excess of 850 hours in 2014.*

• *The evidence in the BAIL* [Brookfield] *contract is that RMS* [Redsberry] *had to ensure that Mr. Clements would be available to perform the work from the commencement date for eleven months of twelve calendar months, is further evidence of an obligation to perform work.*

• *BAIL* [Brookfield] *communications directly to Mr. Clements on 27th October 2009, included communications that he was required to "only" operate for eleven full calendar months in a calendar 12 months, that he was obliged to apply for one calendar month off plus ten additional days, that he needed to be available for stand-by days, that he had to apply to BAIL* [Brookfield] *for periods of non-availability (**page 36, core book of evidence under the heading "Periods of Unavailability" and page 54 under the heading "How many stand-by days do I need to be available for?" and also pages 55 to 57 for other relevant contract terms**).*

• *The BAIL* [Brookfield] *contract, at Schedule 1, informs that the contract is in agreement for a period of 5 years (**see page 46, core book of evidence**).*"

127. Under the sub-heading "Engagement", clause (c) provides that "[i]*f the company representative cannot perform the Work the EC* [Redsberry] *shall provide a*

substitute to perform the Work provided that the substitute shall have the necessary experience and qualifications to perform the Work and is acceptable to the Contractor and the Hirer" and clause (d) states that "*It is acknowledged that the EC* [Redsberry] *is engaged as an independent consultant by the Contractor* [Brookfield] *to provide the services of the company representative* [Paul Clements]. *Neither the EC* [Redsberry] *nor the company representative* [Paul Clements] *shall be deemed to be an officer, agent, employee or servant of the Hirer* [Ryanair] *or the Contractor* [Brookfield] ".

128. An important feature of the regulated nature of the industry in considering the question of substitutes (or 'swaps') is that a substitute must be suitably type rated and have available flight hours which can be used. Further, Mr. Clements accepted in cross-examination that Ryanair, as an AOC licence holder, was obliged to be satisfied that a proposed substituted pilot was both type rated and possessed available hours.

129. The Appeals Officer failed to recognise that these factors are a pre-requisite for a substitution and apparently decided that there was no substitutability.

130. The documentary e-mail evidence suggests, for example, that there were a number of substitution (or swap) requests in or around April and May 2012, all of which had been accommodated.

131. The request would be made through the Crewdock system and Mr. Clements stated if it was rejected it was probably deemed ineligible "*for regulatory reasons*",

e.g., due to insufficient hours being available, rather than due to Ryanair refusing a substitution.

132. The error which the Appeals Officer made in this regard was attributing a 'master and servant' inference simply because the communication of the regulatory requirements was facilitated through a Ryanair communications system, *i.e.*, Crewdock, when the basis for the decision was because of *regulatory enforcement* under Irish Aviation Authority regulations which require, for example, pilots to take a 12-hour break between finishing on one flight and commencing the next flight.

133. In the example given in evidence, Mr. Clements had used up his available flying hours (Mr. Clements had been on seven flights ('seven lates') which meant that the proposed swap was within the prohibited 12 hours minimum period between the last flight and the next proposed swapped flight) and was, therefore, unable to 'swap' with the colleague who requested a substitution, but a 'swap' was available with another pilot from the pool of pilots available to Ryanair from Brookfield and this, therefore, enabled the roster (which is pre-planned every four weeks) to be given effect to. It is logical, therefore, in this heavily regulated pre-planned environment that the process of substitution or 'swapping' between two qualifying pilots is given effect to by applying, in the first instance, to the person or body which is operating the schedule, *i.e.*, Ryanair. This is entirely different to inferring that this is an example of 'control' in a master-servant relationship. In my view, it is not. This, however, does not appear to have been accepted by the Appeals Officer when assessing the evidence and the chain of documentary e-mails dealing with the issue of substitution or

'swapping'. There is no basis for the Appeals Officer to infer that it was not possible for Redsberry or Mr. Clements to substitute a pilot.

Remuneration Terms & Expenses

134. Schedule 1 of the contract dated 27th October 2009 (commencement date 15th February 2010) sets out the "Remuneration Terms", including the contract costs between Redsberry and Brookfield and includes, for example, details in relation to the "*Recurrent Training fee payable by the €4.50 per scheduled block hour EC*" which is charged to Redsberry and deducted from the fees paid by Brookfield.

135. Further, and having regard to the fact that Mr. Clements was type-rated to fly Boeing Aircraft 737-800 aeroplanes (which Redsberry paid for), Redsberry claimed the training expenses in the period from October 2009 to February 2010 as a business expense and reclaimed the VAT. These matters were not given sufficient weight by the Appeals Officer or the Chief Appeals Officer when considering the *indicia* of the relationships. Clause 12 of the contract identifies training costs and provides that the EC (*i.e.*, Redsberry) will be responsible for the cost of the flying of training flights, which is what occurred.

136. At page 151 of the transcript dated Friday 21st May 2021, Ms. Smyth confirmed that the staff of Contracting Plus (CXC) created the invoice for Redsberry who sent (or issued) it to Brookfield, based on the information they received from Brookfield. The fact that Mr. Clements also maintained records of the times flown is an aspect of the regulatory requirements which arise from supplying piloting services for *scheduled flights* for an airline.

Crewdock

137. Schedule 2 provides for Scheduling Guidelines for Contractor Pool Member's operating with the Hirer and under the sub-heading "Schedule Publication" states that upon entry into the Hirer's system, a company representative will have access to "*Crewdock.com*" which "*will provide all documentation and information required to operate within the Hirer's network; key information such as Flight Crew Information (FCI's) and memo's will be available to all company representatives; Rosters are published each Friday and loaded on Crewdock.com contains "confidential" information for The Hirer's pilots. You must not allow access to any person as this is in breach of the confidentiality clause*".

138. Similarly, in answer to the question "*How do I communicate with Ryanair with regard to receiving my schedule and relevant information*", the Frequently Asked Questions ("FAQs") document states that "[a]*ll relevant operational information for Ryanair pilots is published on Crewdock (www.crewdock.com). On entry into the Ryanair system the contract pilot will be given access to crewdock and thereafter will have all the required documentation and information required to operate within the Ryanair network. Rosters are published every Friday and all communication between pilot and flight operations/flight crew scheduling is done via the Crewdock system.*"

139. The Appeals Officer, in his determination, failed to have regard to the fact that the contractual terms made it clear from the outset that all communication was through crewdock – an internal Ryanair communication system. This could not form

the basis for an inference to be drawn that the use of crewdock constituted a basis for an implied contract between Ryanair and Mr. Clements.

Choice of base

140. The Frequently Asked Questions ("FAQs") described the relationship between Brookfield and Ryanair as follows: "*Brookfield Aviation International Limited (Brookfield) has been supplying contract pilots to Ryanair since 1994, and currently operates a large pilot pool. You will be supplying your services via a Limited Company to Brookfield who will place you in a pool of pilots which Ryanair utilizes as their operational needs require*". In answer to the question "*When will I know when and where I will be based*", the FAQs state that "[y]*our base will be allocated by Ryanair during your training period. This will be according to where the current demand for pilots will be, however, your own preferences will be taken into consideration and ultimately most pilots get to operate from the base of their choice. Please bear in mind that contractually you have no entitlement to a specific base*".

141. In assessing, for example, the *master and servant* relationship, the Appeals Officer ignored the regulatory nature of the airline industry in which Mr. Clements was operating. The nature of the industry requires that a pilot is required to be based somewhere, for example, Dublin, Rome or the United Kingdom and he or she could apply to change that base. The evidence adduced before the Appeals Officer was that in the event of a vacancy arising, an application could be made to change base. In Mr. Clements' case, he changed from Rome to the United Kingdom. It was not the case that he had *no choice* (as determined by the Appeals Officer) and the question of the choice of base could not provide an inferential basis for determining first, that there

was no choice available for Mr. Clements and second, that it, therefore, exemplified the 'indicia' of *a contract of service* with Ryanair.

Managed or personal services company

142. Documentation enclosed with the e-mail dated 12th November 2009 (15:20) from Catherine Hurley of CXC Consultants Exchange Ltd acknowledged receipt of Mr. Clements' acceptance of the contractual terms and for choosing CXC as his accountant, and *inter alia* stated that Mr. Clements would be registered as a company director and would be providing his services through Redsberry Management Services Ltd ("Redsberry").

143. As just mentioned, the managed or personal services company – also referred to as "*the CXC company*" through which Mr. Clements would provide his services Redsberry. CXC were chosen as the accountancy firm which managed the contract and provided the administration, *e.g.*, all queries, invoicing and payments, including a named Account Manager and secure access through 'MyCXC' to the company accounts. Mr. Clements was registered as a director and had a shareholding in the company and CXC provided a full management service to Redsberry. The contract and associated documentation including, for example, the "Information Pack" defined the relationships from the very beginning, including the requirement, for example, that Redsberry was required to have its own Employers and Public Liability Insurance and that the contract with Brookfield was signed by CXC, on Mr. Clements' behalf, once he had "*agreed to the terms and conditions of the contract with the consultant/contact.*" The CXC Information Pack (at page 9 of 13) provided a clear Step by Step Flow Chart for Mr. Clements setting out the terms and conditions.

Essentially, the contract was finalised and signed by Brookfield and CXC on Mr. Clements' behalf, the set up communications, the contractor responsibilities, invoicing (CXC raised an invoice based on roster information and forwarded it to Brookfield for payment and Brookfield made payment to CXC) and payment (on receipt of payment from Brookfield, CXC calculated the pay on the same day and the net amount was deposited into the nominated bank account on the same day as cleared funds).

144. In summary, at all times Mr. Clements was aware of the contractual position: he was the company representative of Redsberry which contracted with Brookfield and the contract, for example, provided substitution on the condition that the substitute was equally qualified.

145. On 12th November 2009, Mr. Clements signed the following declaration:

> "*I Paul Clements hereby confirm that I have engaged the services of CXC in relation to my taxation, I fully confirm that I will be operating through the following company, Redsberry Management Services Limited and authorise Brookfield Aviation to make payments into this company account with immediate effect*."

146. On 18th November 2009, Mr. Clements signed and dated the following consent, which was entitled:

> "*Consent Page – These documents will be sent back if they are not signed and dated.*
>
> *I hereby consent to act for Redsberry Management Services Limited*

as director of the aforementioned company and I acknowledge that as director I have legal duties and obligations imposed by the Companies Act, other enactments and at common law."

147. There was, therefore, no factual basis at the beginning, or at the end of the process, for inferring that there was an implied contract. For example, on Wednesday 10th April 2019, at pages 37 and 38 of the transcript, Mr. Clements confirmed that he was in doubt as to what was meant when the cover letter enclosed in the email (dated 27th October 2009) stated that Mr. Clements was obliged to set up his taxation arrangements in Ireland in order to ensure that he was operating in a fully compliant manner in meeting his taxation liabilities and that this was the only basis on which Brookfield would supply his services to Ryanair. Further, on Wednesday 10th April 2019, at pages 39 and 40 of the transcript, Mr. Clements confirmed that he was not surprised that as part of the tax arrangements, the cover letter enclosed in the email (dated 27th October 2009) stated that Mr. Clements was required to contact one of the accountancy firms listed in the enclosed FAQ document and also that in answer to a question which stated that "*it's quite clear you are not being offered a job by Ryanair; isn't that correct?*" he answered "*Well, I am going to fly planes for Ryanair, but it's not a direct contract with Ryanair, no*".

148. The Appeals Officer placed significance on the fact Mr. Clements did not attend directors' meetings. Whatever about the regulatory implications of that, if any, it did not provide the basis for making of an inference which effectively converted that issue into an '*indicia*' of master-servant relationship in the context of an implied

contract as between Mr. Clements and Ryanair and which sought to ignore the factual and legal involvement of Redsberry.

149. The Appeals Officer erred in not having regard to the contract as between Mr. Clements and CXC. On 26th February 2010, for example, Mr. Clements (the 'specialist') and Michael Dineen (for an on behalf of CXC Consultants Exchange Limited (Redsberry Management Services Ltd) signed and agreed the terms and conditions of service (consisting of approximately 16 paragraphs) provided by CXC Consultants Exchange Limited, which included that the specialist (Mr. Clements) would be employed by Redsberry in the capacity of a director and shareholder and would be paid a salary calculated from the revenue received on the specialist's behalf from third parties who enter into agreements for the specialist's services.

150. I do not agree with the contention on behalf of the respondents, in seeking to support the Appeals Officer's decision, that the clauses in this contract were not "disregarded" by the Appeals Officer's finding of an implied contract with Ryanair because, it is submitted, that the implied contract predates this arrangement and that these clauses do not exclude a contractual relationship between Mr. Clements and Ryanair. The contract between Paul Clements and CXC was clearly part of the contractual arrangements which were envisaged by all of the parties and signed off by Mr. Clements. Attempting to retrospectively '*read in*' a purported earlier implied contract does not find any basis in the actions of the parties, and requires the role of CXC and Redsberry to be entirely discounted or ignored. There is no basis for the Appeals Officer's apparent dismissal of these matters and the making of an inferential

finding of an implied contract based on matters which included a telephone call and attending a simulation assessment and interview.

The failure of the Appeals Officer to have regard to the <u>regulatory</u> context and consequences of Mr. Clements operating Ryanair's <u>scheduled</u> flights

151. In the relevant period between 2010 and 2014, Mr. Clements was a director and shareholder of Redsberry. Redsberry invoiced Brookfield who supplied a pool of pilots to Ryanair's in relation to their '*scheduled flights*'.

152. There does not appear to be a recognition by the Appeals Officer of the regulatory meaning and context of the term '*scheduled flights*' operated by Ryanair when considering the piloting services carried out Mr. Clements.

153. By virtue of the Aviation Regulation Act 2001 (as amended), for example, the Irish Aviation Authority ("IAA") is the competent authority in Ireland for the purposes of Council Regulation (EEC) 95/93 ("the Slot Regulation"). In summary, the IAA is required to determine the capacity available for slot allocations – the coordination parameters – at, or example, Dublin Airport by reference to the "*scheduling period*" which means either the summer or winter seasons as used in the schedules of airlines.[19] As an EU airport, the allocation of slots is necessary where the demand for facilities is greater than the supply and in consequence there is a need to regulate their use by airlines, including, for example, by Ryanair.

[19] See, for example, the observations of the High Court in *Aer Lingus & Ors v Irish Aviation Authority & Ors* [2024] IEHC 624 per Barry O'Donnell J. at paragraph 21.

154. Further, the regulated nature of the industry means that the passenger air traffic movement seat cap at, for example, Dublin Airport, is determined months in advance for the period between 30th March 2025 to 25th October 2025 and this, in turn, is informed by a number of disparate regulatory controls including, for example, planning conditions which address the operational use of the airport in relation, for example, to the use of the terminals, night-time flights and the number of passengers, etc. The international nature of this regulated industry is exemplified, for example, by the US-EU and Canada-EU Open Skies/Air Traffic Agreements.

155. As mentioned earlier in this judgment, Ryanair is required by the IAA to conduct its operations in accordance with the conditions and limitations certified in its AOC which entails, for example, a continuing obligation in relation to the number of flights operated by pilots who provide their services.

156. In the context of the evidence adduced by Mr. Francis O'Kennedy, on Thursday 20th May 2021, in relation, for example, to the creation of invoices as a direct consequence of communications that came from Brookfield through to Contracting Plus, who then generated the invoice, his answer arose from a question put to him on behalf of Ryanair which suggested that it was not unusual that the calculation of the list of hours being flown was carried out, in the first instance, by the airline, which had the obligation under its own regulatory licensing regime to keep an accurate account of all hours flown.

157. The first three questions of the five-pronged test in *Karshan* asks cumulatively, first whether the contract involves the exchange of wage or other

remuneration for work, secondly, if so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer and thirdly, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement. Throughout the Appeals Officer's revised report and finding there exists, in my view, a fundamental misunderstanding about the role of a pilot in an industry which is the subject of a myriad of regulations. Ryanair does not decide "*the thing to be done, the way in which it shall be done, or the means to be employed in doing it.*" Rather, Mr. Clements brought his flying skills to bear as a pilot flying Ryanair's '*scheduled flights*'.

158. As set out, the concept of *scheduled flights* incorporates, therefore, a miscellany of regulations in an environment where the routes, times and number of flights have been effectively predetermined months in advance, via a number of regulatory provisions in relation to which Ryanair has no control over.

159. The regulatory context which subtends the term '*scheduled flights*' for which Mr. Clements provided his services (which has a national, European and international provenance) includes, for example, the following: planning and environmental regulations (which can be enforced by the planning authorities and the Environmental Protection Agency ("EPA" through their respective statutory and regulatory codes) and which can often prescribe the use of both airport infrastructure and the actual number of day-time and night flights; noise regulations (for example, Regulation (EU) No 598/2014) on the establishment of rules and procedures with regard to the introduction of noise related operating restrictions at European Union airports (this

has been given effect, for example, at Dublin Airport by the Aircraft Noise (Dublin Airport) Regulation Act 2019); (as described above) the IAA is the statutory body which is vested with responsibility, in accordance with EU and national law, for the co-ordination of the slots used by aircraft arriving and departing at an airport pursuant to the Council Regulation (EEC) No.95/93 as amended (*i.e.*, the 'Slot Regulation'). Ryanair, for example, is not responsible for the allocation of slots which are set many months in advance but it means, of course, that an airline has to set its timetable approximately six months in advance, which explains why, for example, in this case, Mr. Clements made himself available through his service management company, Redsberry, via Brookfield to Ryanair for that period of time; the Commission for Aviation Regulation ("CAR") has responsibility in Ireland for the regulation of airport charges under the Aviation Regulation Act 2001; (as mentioned earlier) internationally, the EU-US Air Traffic Agreement was entered into in or around April 2007.

CONCLUSION

160. As set out earlier, having regard to the fact that the Chief Appeals Officer by decision dated 15th December 2022 refused to revise the aforesaid decision of the Appeals Officer dated 12th July 2021, I have extended the time for Ryanair to appeal the decision of the Appeals Officer dated 12th July 2021 pursuant to section 327 of the 2005 Act and O. 90 of the RSC 1986.

161. Having regard to the guidance in *Karshan*, when looking at the totality of the arrangements during the period between 15th February 2010 to 30th April 2014, the

following is a summary of the position: Mr. Clements was not engaged under a contract of service (*i.e.*, as an employee) for Ryanair, either expressly or impliedly; Brookfield was not acting as the agent of Ryanair; the contractual arrangements *inter alia* provided for the provision of a pool of pilots by Brookfield to Ryanair and did not involve the exchange of wage or other remuneration from Ryanair to Mr. Clements having regard to the restatement of the mutuality of obligation set out in *Karshan* (referred to earlier); notwithstanding that the questions/principles set out at sub-paragraphs 253(ii), (iii) and (iv) of the *Karshan* judgment comprise sequential subordinate clauses in conditional sentences (and to borrow an interpretive aphorism, have a "conjunctional" quality, by the use of the words "*If so*" and "*If these three requirements are met*" with the effect, for example, that the question at paragraph 253(ii) is dependent on the answer to the question at paragraph 253(i) and similarly the questions at sub-paragraphs 253(iii) and (iv) are conditional and interdependent), it is apposite to also address the matters set out at paragraphs 253(ii) to (v) of the *Karshan* judgment. Consequently, the contractual arrangements were not ones pursuant to which Mr. Clements agreed to provide his own services to Ryanair, rather Redsberry agreed to provide services to Brookfield, which in turn provided a pool of pilots (which included Mr. Clements) to Ryanair. There was no contractual arrangement between Redsberry and Ryanair or Mr. Clements and Ryanair; in further consequence (as just discussed), the question which asks "*does the employer exercise sufficient control over the worker to render the agreement one that is capable of being an employment agreement*" is answered in the negative, in particular having regard to a context where the services were provided in relation to *scheduled flights* in an industry which is highly regulated and where Ryanair and all operators and pilots are subject to a myriad of regulations over which they have no control; the question at

sub-paragraph 253(iv) in the *Karshan* judgment asked that if the three requirements at sub-paragraphs 253(i),(ii) and (iii) are met, are the terms of the contract consistent with a contract of employment, or are they more consistent with the worker being in business on his own account. First, I consider that the requirements in sub-paragraphs 253(i), (ii) and (iii) of the *Karshan* judgment have not been met; second, I consider that the contractual arrangements were not those which would allow a determination to be made that Mr. Clements had an implied contract of employment with Ryanair; in relation to the question posed at sub-paragraph 253(v) of the judgment in *Karshan* save for the answers to the questions at sub-paragraphs 253(i) to (iv) and as further addressed in this judgment, there was not anything further in the 2005 Act which required any other changes to the tests referred to at paragraph 253 of the judgment in *Karshan.*

162. Accordingly, I consider that the re-examined decision of the Appeals Officer, dated 12th July 2021, to the effect that Paul Clements was an employee of Ryanair DAC during the period from 15th February 2010 to 30th April 2014 for the purposes of categorising his insurable status under the Social Welfare Acts was predicated upon inferences and conclusions which: (i) no reasonable Appeals Officer could draw; (ii) resulted from an incorrect interpretation of documents which were before the Appeals Officer; and (iii) was a conclusion based upon an erroneous view of the law.

163. Having extended the time for this appeal and having regard to the provisions of the 2005 Act, including sections 317, 318, 320, 327, and 327A thereof, and in circumstances where consequent upon the Chief Appeals Officer's decision of 15th December 2022 not to revise the decision of the Appeals Officer dated 12th July 2021,

that determination dated 12th July 2021 remains extant, I shall, for the reasons set out in this judgment, set aside the Appeal Officer's decision dated 12th July 2021 that Paul Clements was an employee of Ryanair DAC during the period from 15th February 2010 to 30th April 2014 for the purposes of categorising his insurable status under the Social Welfare Acts.

PROPOSED ORDER

164. In the circumstances, subject to hearing further from the parties, I propose to make the following orders:

(i) An Order extending the time for Ryanair to appeal the decision of the Appeals Officer dated 12th July 2021 pursuant to section 327 of the 2005 Act and O. 90 of the RSC 1986;

(ii) An Order pursuant to section 327 of the 2005 Act setting aside the decision of the Appeals Officer dated 12th July 2021 on the grounds set out at paragraph (q) of the Appellant's Notice of Motion dated 16th January 2023, namely that in all the circumstances, having regard to the evidence adduced before the Appeals Officer by the parties to the appeal, Ryanair was not an employer, for the purposes of the social welfare code, of Mr. Clements in the period between 15th February 2010 to 30th April 2014 (1st May 2014); no documentary or oral evidence of an express/implied contract of employment was introduced to superintend the Appeals Officer's said finding; no reasonable inferences from the evidence actually adduced could ground such

a finding; the Appeals Officers said finding was based on an incorrect interpretation of documents/oral evidence adduced and, furthermore was based on an erroneous view of the law.

165. I shall discuss with the parties the precise form of the orders to be made and the terms of any further orders or consequential declarations which arise.

166. Any further submissions which the parties wish to make on these matters and also on the question of costs (having regard *inter alia* to O. 90, r. 6 of the RSC 1986 which provides that "*No costs shall be allowed of any proceedings under this Order unless the Court shall by special order allow such costs*"; to sections 168 and 169(1)(a) to (g) of the Legal Services Regulation Act, 2015 and (the re-cast) O. 99 of the RSC 1986) should be exchanged and filed in court by Friday 24th January 2025. In this regard, I would also draw the parties' attention to the recent decision of the Supreme Court on costs in *Little v The Chief Appeals Officer & Ors* [2024] IESC 53 (judgments of Hogan J. and Murray J. delivered on 19th November 2024).

167. On that basis, I shall put the matter in before me on Wednesday 29th January 2025 at 10:00 to deal with these matters and any ancillary or consequential matters which arise.

CONLETH BRADLEY

26th November 2024