IN THE INDUSTRIAL TRIBUNAL

Cases No's. 48 and 49 of 2010

MARY CALLAGHAN

Complainant

-and-

THE ADMINISTRATOR OF THE GIBRALTAR DEVELOPMENT CORPORATION

Respondent

-and-

ROY SHARMA

Complainant

-and-

THE ADMINISTRATOR OF THE GIBRALTAR DEVELOPMENT CORPORATION

Respondent

Mr Kenneth Navas for Mary Callaghan and Roy Sharma

Mr Johan Fernandez for the Administrator of the Gibraltar Development Corporation

JUDGEMENT

BACKGROUND TO MARY CALLAGHAN'S CASE

By Originating Application dated the 7th October 2010, the Complainant claimed that the Respondent had breached the Gibraltar Development Corporation (Employers Insolvency) Regulations 1991 in determining that the Complainant was not entitled to a payment out of the Insolvency Fund on the grounds that the Complainant was a registered self-employed person. In the Originating Application it was submitted that the Complainant whilst registered as a self-employed person was nevertheless a de facto

employee of Marrache & Co for whom she worked as a "law costs draftsman and accounts".

By Notice of Appearance dated the 21st October 2010, the Respondent contended that as the Complainant had registered as self employed for tax, social insurance and employment matters it was the Respondent's position that the Complainant did not fall within the criteria set out by Regulation 7 of the Gibraltar Development Corporation (Employers Insolvency) Regulations 1991 as she was not an employee of Marrache & Co and that therefore no payment out of the Insolvency Fund could be made to the Complainant.

In due course Mr Lewis Baglietto was appointed as Chairman of the tribunal for the purposes of hearing this case and on the 29th February 2012, the parties came before him for the purposes of a directions hearing.

I pause here to now deal with the background of the other case.

Background to Roy Sharma's case

By Originating Application dated the 7th October 2010, the Complainant also claimed that the Respondent had breached the Gibraltar Development Corporation (Employer's Insolvency) Regulations 1991 in determining that the Complainant was not entitled to a payment out of the Insolvency Fund on the grounds that the Complainant was a registered self employed person. In the Originating Application it was submitted that the Complainant whilst registered as a self-employed person was nevertheless a de facto employee of Marrache & Co for whom he worked as the "head of the trust department/solicitor".

By Notice of Appearance dated the 21st October 2010, the Respondent contended that as the Complainant had been registered as self-employed for tax, social insurance and employment matters it was the Respondent's view that the Complainant did not fall within the criteria set out by Regulation 7 of the Gibraltar Development Corporation (Employer's Insolvency) Regulations 1991 as he was not an employee of Marrache & Co

and that therefore no payment out of the Insolvency Fund could be made to the Complainant.

In due course Mr Lewis Baglietto was also appointed as Chairman of the tribunal for the purposes of hearing this case.

As mentioned above Mr Baglietto held a practice direction hearing on the 29th February 2012 with respect to the Mary Callaghan case, and at said date also held a practice directions hearing for the case of Roy Sharma. Mr Baglietto made various orders on that date with respect to both said cases including that the cases of Mary Callaghan and Roy Sharma be heard together. As from that date on the tribunal has dealt with both cases jointly.

A further practice directions hearing was held by Mr Baglietto on the 10th April 2013 and further orders made, including the setting down of a tentative hearing date for the 7/8th October 2013; in the event the hearing did not occur on that date.

On the 20th November 2013, each of the Complainants signed their respective first witness statements which were subsequently filed with the tribunal.

On the 25th November 2013, a Ms Anna Moffatt signed her first witness statement, which was likewise filed with the tribunal.

On the 27th November 2013, the Complainants filed a joint set of skeleton arguments with the Respondent filing his joint set of skeleton arguments on the 28th November 2013.

Subsequently, Mr Baglietto resigned as chairman of both cases and in May 2014, I was appointed as chairman in substitution.

On the 11th September 2014, the Respondent applied for an order permitting the Respondent to amend each of its two Notices of Appearance so as to add a further ground of resistance to the Notices. The tribunal granted the Respondent the necessary consent to introduce the defence based on the illegality ground (see below) and the cases were adjourned to the 1st December 2014 for hearing.

By the amended Notice of Appearance dated the19th September 2014, the Respondent added an additional ground of resistance to the complaints filed in both cases; namely that the contract of employment that had existed between each of the Complainants and Marrache & Co had been voided as a result of the Complainants knowingly registering as self employed in order to allow Marrache & Co to avoid its statutory obligations to pay social insurance under the Social Security (Insurance) Act and therefore the Complainants were not entitled to any payments out of the Insolvency Fund. I will refer to this ground hereinafter as the "illegality ground."

At the request of the parties the December hearing date was vacated and the matter again came before me on the 9th February 2015 when further directions were given as a result of:-

- each of the Complainants having signed a second witness statement dated the 2nd February 2015;
- Ms Anna Moffalt having signed a second witness statement dated the 2nd February 2015;
- the Complainants filing a second set of joint skeleton arguments dated the 2nd February 2015.

The new trial date was set for the 23rd to 25th March 2015.

On the 12th February 2015, Mr Sharma signed a third witness statement which was subsequently filed with the tribunal.

On the 19th March 2015, Mr Frank Carreras signed a witness statement which was subsequently filed with the tribunal.

Since March 2015 the hearing of both cases has for one reason or another been adjourned various times with the consent of both parties. The delay has not had a material impact on the parties since in essence the facts of the case are agreed by the parties.

The Hearing

The case was finally heard on the 27th and 28th February 2017. In the course of the hearing the only persons who gave evidence were the Complainants but the witness statements of the following persons were tendered on the basis that their evidence was not challenged by the parties; Anna Moffatt, Frank Carreras and Florentina Pitaluga. A number of exhibits were attached to the statements of the Complainants and Ms Moffatt.

I point out at this stage that in coming to my determination I have taken account not only of the oral evidence given before me but also of the contents of the witness statements and exhibits produced to me.

I have also read the skeleton arguments presented and all the authorities drawn to my attention by both counsel. I thank Counsel for both parties for all the assistance they have given me throughout the proceedings.

In this judgement I may quote from the verbal evidence given before me as set out in my notes but this does not signify that I have not taken the contents of the witness statements tendered into account when deciding as to the facts of the case; not that there is much in dispute in either of these cases.

At the commencement of the hearing Mr Fernandez informed the tribunal that, in light of all the evidence produced by the Complainants, the Respondent now accepted that they had been employed notwithstanding their respective registrations as self-employed persons, and that consequently the first ground of resistance as set out in the Notice of Appearance was no longer being relied on. Mr Fernandez further confirmed that the Respondent was only relying on the illegality ground. This concession greatly reduced the length of the hearing and did away with the need to consider all issues relating to the question of whether the Complainants had been employed or self-employed. Having said this, and whilst it is not directly relevant to the remaining issue which the tribunal has to consider, it is to be noted that when I pointed out my confusion as to whether the Complainants were employed by Kristy Secretarial Services or Marrache & Co, Mr Navas put it to me that Kristy Secretarial Services Limited paid the Complainants salary but Marrache & Co employed them. A somewhat strange situation which the authorities

never appeared to question but the matter was not taken any further since what is relevant for the purposes of these two cases is that the Complainants were employed irrespective of who the employer might be.

In the course of his submissions Mr Navas, on more than one occasion, emphasised that this tribunal had to determine the case without tainting the Complainants with the Marrache & Co brush and that the sins of the individual partners of that firm should not be detrimentally applied to either of the Complainants. I agree with and have fully taken on board the concerns expressed by Mr Navas.

Preliminary Issues

The Gibraltar Development Corporation (Employer's Insolvency) Regulations 1991 (hereinafter referred to as "the Insolvency Regulations") impose upon the Administrator the duty to administer the Fund established by the Regulations. The Administrator is assisted in his duties by such persons as he may appoint to be inspectors for the purposes of, amongst other things, requiring "any employer whom he had reasonable cause to believe liable to contribute under these Regulations or the Receiver or Liquidator ..... to produce all such books, documents and records " (Regulation 3).

The Insolvency Regulations define the word "employer" as any person required by the Business Trades and Professions (Registration) Act 1989 to register and who has engaged one or more workers.

I pause here to point out that no evidence has been produced to either show that the Administrator approached the receiver/liquidator of Marrache & Co for information with respect to the status of the Complainants and/or to show that Marrache & Co was registered under the Business Trades and Professions (Registration) Act. The former would have been useful whilst in the latter I have no doubt that Marrache & Co were "required" to register under said Act.

The Insolvency Regulations define the word "worker" as an individual engaged by an employer under a contract, whether written or oral, expressed or implied to which the Employment Regulations 1994 apply. Both parties are in total agreement that both

Claimants are "workers" for the purposes of the Employment Regulations and therefore the Insolvency Regulations.

The Insolvency Regulations require every "employer" to make " a contribution at the relevant contribution rates ..... to the Fund in respect of a worker falling within these Regulations commencing with the time he furnishes information in respect of that worker in accordance with regulation 11 of the Employment Regulations 1994 and then in respect of every complete week during which the employment continues." (see Regulation 6).

I pause here to note that the duty to furnish information on a worker and to make a contribution with respect to that worker falls most clearly on the employer and not the worker.

Regulation 12 of the Insolvency Regulations provides that all applications to the Fund under the Regulations shall be determined by the Administrator save that any question of law arising in connection with such determination can be referred by the Administrator to the Supreme Court. The Administrator did not make use of this provision at the time of his decision, and it is to be noted that the worker has no similar right to take the matter to the Court.

The Insolvency Regulations provide in Regulation 13A the grounds on which the Administrator may refuse an application; namely:-

(a) "where the Administrator considers it necessary to avoid an abuse by the applicant;

(b) if it appears that payment would be unjustifiable because of the existence of special links between the worker and the employer and of common interests resulting in collusion between them;

(c) in cases when where the worker, on his own or together with his close relatives, was the owner of an essential part of the employer's

undertaking or business and had a considerable influence on its activities".

I pause here to point out that it is clear from the letters dated 9th July 2010, sent by the Administrator to each of to the Complainants that the refusal to consider both" of the applications was based solely on "that you are a registered self-employed person "and therefore "you are not entitled to claim such payments". As I understand it, the Administrator refused the applications filed by the Complainants not on any of the grounds set out in Regulation 13A of the Insolvency Regulations, which provisions can only apply when a valid application has been submitted, but rather on the more basic ground that they were not entitled to apply to the Fund since they were not "workers". It is true that before this tribunal the Respondent has conceded that it now accepts that both Complainants are workers and seeks to rely on the ground set out in Regulation 13A (b) but that was not the ground on which the refusal was originally based. The issue takes significance when one considers the jurisdiction which the tribunal has with respect to matters concerning the Insolvency Regulations.

Regulation 14 of the Insolvency Regulations provides that a worker may make an application to the Industrial Tribunal in the situations set out therein. I set out below in full the relevant part of the regulation.

"14(1) A worker who has made an application under regulation 10 and who is aggrieved by the decision of the Administrator thereon, or by the failure of the Administrator to communicate a decision to him, may present a complaint to the Industrial Tribunal :-

(a) that the Administrator has failed to make any payment to the worker or into an occupational pension scheme, as the case may be, or

(b) that the amount paid by the Administrator is less than the amount that should have been paid; or

(c) that no decision has been communicated to him although more than three months have elapsed since the application was made.

(1A) A worker may also present as complaint to the Industrial Tribunal where -

(a) the Administrator has refused an application pursuant to regulation 13A; or

(b) the Administrator had erred in determining that the worker falls outside the scope of these Regulations by virtue of regulation 18(b)."

Considering the various limbs of Regulation 14 one can immediately discard the provisions of Regulation 14 (1A) since at the time the complaint was presented the Administrator had clearly not refused the applications pursuant to Regulation 13A and/or the Administrator did not consider the Complainants as being transnational workers.

This being the case, can it be said that the complaints filed by the Complainants came under the provisions of Regulation 14 (1). Clearly the provisions of Regulation 14 (1) (b) or (c) are not applicable to the cases of either Complainant. Similarly, that part of Regulation 14 (1) which refers either to the failure of the Administrator to communicate to the Complainant his decision, or, to pay into an occupational pension scheme does not apply to the case of either Complainant. Basically this leaves us with the question of whether in the case of either Complainant the complaints filed relate to:-

a worker who made an application under regulation 10 and who is aggrieved by the decision of the Administrator not to make any payment to the worker.

There is no doubt that both Complainants made their applications under regulation 10. The issue is whether Regulation 14 (1) should be interpreted:-

- narrowly so that the use of the word "worker" in the provision means that only persons acknowledged by the Administrator at the time he made his decision as being workers can file a complaint; or
- broadly so that any person, irrespective of the status attributed to him by the Administrator, can file a complaint to the Industrial Tribunal.

I have determined that the legislature would not have wished to deprive a person the opportunity of having the decision of the Administrator to designate him as a self-employed person challenged in this tribunal and subsequently in the Supreme Court. I therefore adopt the wider interpretation of Regulation 14 (1) and conclude that this tribunal has jurisdiction to hear both complaints filed .

Having so determined the next point to arise is whether I should either:-

- on the basis that the Administrator has now conceded before this tribunal that both Complainants were workers, and that therefore his original decision was incorrect, remit the cases back to the Administrator with a declaration that their respective applications should be reconsidered; or
- on the basis that although the Administrator has conceded that the Complainants were workers, he is before this tribunal still contending that they are not entitled under the Insolvency Regulations to any payment, and therefore that I should proceed to determine the matter.

I pause here to point out that whilst Mr Navas would be happy for this tribunal to take the former course, Mr Fernandez feels for expediency sake that the tribunal should follow the latter course.

Regulation 14(3) of the Insolvency Regulations provides that where this tribunal "finds that the worker is entitled to receive a payment from the Fund ..... it shall make a declaration to that effect specifying the amount to be paid and the period to which it relates." My interpretation of this provision is that the tribunal has no power to simply remit the matter back to the Administrator. The Tribunal has to make a determination as to whether the Complainant is entitled to a payment and, if so, the amount in question. In order to make such a determination the Tribunal has to take account not only of the issue

of whether or not the Complainants were self-employed persons but also of the illegality ground raised. If this tribunal does not take cognisance of the illegality ground how can it possibly determine whether "the worker is entitled to receive a payment from the fund." Nothing in Regulation 16 (1) of the Insolvency Regulations conflicts in my view with such a determination.

Chronology of Events

It is incumbent on me to establish to such an extent as is reasonably possible in the light of the evidence before me, the chronology of events in this case, and the following are my findings on this issue based on what has come before me in written or verbal form.

(a) **Mary Callaghan:-**

Mrs Callaghan was employed by Marrache & Co in April 1989 as a law cost draftsman. It is to be borne in mind from this point onwards that Mrs Callaghan is not a solicitor or barrister in Gibraltar or elsewhere notwithstanding the title involved. Mrs Callaghan remained with Marrache & Co until April 1999. During this ten year period she was an employee of Marrache & Co and shown on Government records as such. In April/May 1999 Mrs Callaghan moved over to work for Triay & Triay, with whom she was employed until December 2000. In other words from 1989 to 2000 Mrs Callaghan was an employee.

In December 2000, Mrs Callaghan registered the business name "MC Legal Costing Services" pursuant to the provisions of the Business Names (Registration) Ordinance (now Act). It is a requirement of said piece of legislation that on the anniversary date of registration of each year the owner of the business name files an application for renewal of the business name and pays a renewal fee. It is accepted by the parties that Mrs Callaghan renewed the business name MC Legal Costing Services each and every year from 2001 to 2010. Subsequent to registering the said business name, in December 2000, Mrs Callaghan was approached by the partners of Marrache & Co with a request that she return to work for them in her previous role on a part time basis; i.e. three days a week. In her first witness statement Mrs Callaghan states the following:-

"7. In December, I was invited by the partners of Marrache to return to the firm.

8. I accepted their offer and in January 2001 I returned to work for them in my previous role.

9. Several months after my return to work with Marrache in January 2001, I was required to register as self-employed. I did so because I was not given a choice and was already very involved at the firm."

In her second witness statement Mrs Callaghan states the following :-

"8 I have already explained that I was not given a choice as to the manner of my registration by Marrache at paragraph 9 of my First Witness Statement. It was however explained to me that this was the usual practice in Gibraltar that all lawyers were required to do so and that I was being treated the same as the lawyers. At the time I was not aware of the reasoning for this practice. Given that I was engaged by an established local law firm, I did not feel it necessary to make my own enquiries and relied on their guidance in relation to this issue.

9. As I have stated in my First Witness Statement this was not something which I was allowed to choose."

In her evidence before this tribunal Mrs Callaghan made the following statements on this issue:-

"I was then asked by Marrache to come back. I wanted to do so as an employee but they wanted me in a self employed capacity."

"I had to register as self-employed. I worked very closely with the lawyers and they put me under the same umbrella. I did not think much about it and I registered as self-employed."

"They requested that I register as self-employed. They saw me as a lawyer in course. I worked very closely with my lawyers. I am not a lawyer but I did not question it."

"The partners requested that I register as self-employed. I had no objections to register as such. They wanted me to register as self-employed and I duly did. This tied in."

"Between 2001 to 2004 it was to my advantage because I could do 3 days work for Marrache and two days for someone else."

"When I was first required to register as self-employed was the 8th August 2001."

I find it curious that Mrs Callaghan would have left full time employment with Triay & Triay to go to work part time for Marrache & Co without first ascertaining from her prospective employers what her terms of employment were going to be, or, indeed what her status was going to be. It is also curious that the statement made before this tribunal as to when she was required to register as self-employed, i.e the 8th August 2001, contradicts what is contained in her witness statement. It is even more curious to note that she worked for Marrache & Co from January to August 2001 before the requirement was imposed on her that she register as self-employed, and that after eight months of working as an employee she should, without questioning further, simply agree to what was proposed.

In all of this I note that there appears to be no direct evidence as to whether Government was paid PAYE and/or social insurance contributions for the period January to August 2001 with respect to Mrs Callaghan. I think not from the witness statement of Ms Pitaluga, but it is not clear and therefore I do no more that note the point.

On the 8th August 2001, Mrs Callaghan completed and signed a Self-Employed Registration form. In said form she states that the name of the business is MC Legal Costing Services which commenced business on the 3rd January 2001 and has premises at

Unit 53B, International Commercial Centre. The form comes with the following certification "I certify that the above particulars are correct and complete."

I pause to make two observations with respect to this form. Firstly, it is curious that the date of commencement of the business is given as being the 3rd January 2001, which is not the date on which the business was registered and which is on or about the day she commenced to work for Marrache & Co. Secondly, that there is nothing within the form itself which is intrinsically incorrect or false; moreover it is to be remembered that at that time Mrs Callaghan was both employed by Marrache & Co for three days of the week and self-employed for the remaining two days of the week.

On the 1st October 2001, Mrs Callaghan completed and signed an application for registration pursuant to the Business Trades and Professions (Registration) Ordinance 1989 and submitted it to the Employment Service. In said form it is stated that the name of the business is MC Legal Costing Services which is a sole trader with place of business at Unit 53B, International Commercial Centre and conducting "Legal Costing". A registration fee of £25 was paid. It is a requirement of the Business Trades and Professions (Registration) Ordinance 1989 that on the anniversary of the date of registration each year the registration has to be renewed and a renewal fee paid, both of which Mrs Callaghan did.

I pause here to make two observations. Firstly, this form does not have a commencement of business box and no certification statement to complete and secondly, here again, there is nothing within the form itself which is intrinsically incorrect or false.

In respect of the tax years 2001/2002 to 2003/2004 and 2006/2007 the Complainants husband, at that time married women did not receive a tax return of their own, stated in his tax return that the Complainant received income on a self-employed basis. During these years, and indeed for all years upto and including the tax year 2010/2011, the tax department raised assessments for the Complainant on a self-employed basis.

I pause here to make the following observations with regard to the whole issue of tax:-

(i) at no time has the Respondent indicated, let alone alleged, that Mrs Callaghan did not pay whatever tax was payable by her;

(ii) according to Mrs Pitaluga, in his tax returns for the years 2007/2008 to 2010/2011 Mr Callaghan made no reference at all to his wife's income and yet the tax department did not query this anomaly;

(iii) the pay slips produced to the tribunal with the dates 26th August 2008, 26th December 2008, 26th May 2009, 25th August 2009 and 25th November 2009 all show that Marrache & Co did not deduct any tax from Mrs Callaghan's wages (social insurance however is shown as deducted);

(iv) copies of letters produced to the tribunal dated the 19th June 2009, 7th July 2009, 4th August 2009, 4th September 2009, 20th November 2009 and 21st January 2010 sent by Marrache & Co to the Tax Department show that Marrache & Co were making (at least on one occasion from the Marrache & Co Office account) instalment payments with respect to arrears owed by Mrs Callaghan in accordance with a repayment agreement entered into - it would have been interesting to know the details of the claim filed by the tax department in the Supreme Court but in any event in her evidence Mrs Callaghan stated to me that Marrache & Co paid her tax arrears without deducting it from her gross salary;

(v) the copy produced to the tribunal of the Income Tax Amended Assessment for the year 2008/2009 for Mrs Callaghan shows assessable income of £29,417 for "employment" and £34,000 for "trade". The assessment suggests that the tax department were aware that Mrs Callaghan was receiving income from an employment source; and

(vi) in the course of her evidence before this tribunal Mrs Callaghan stated that her accountants prepared and filed her tax returns and that she did not know what information she gave to the accountant in order to enable him to complete the forms.

In the course of the submissions made, Mr Navas made the point that the tax department should have at the very least queried, if not known, that Mrs Callaghan was employed whilst Mr Fernandez countered that there was nothing known to the tax department which would have made them query, let alone suspect, that Mrs Callaghan was anything other than self-employed. Whilst I am sympathetic to Mr Fernandez's argument, and whilst appreciating the difficulties of collating information in a department such as that of the tax department, especially as its always easier with hindsight, I am of the view that the tax department had ample opportunities to challenge Mrs Callaghan's self-employed status if that is what in fact they believed she only was.

At some point in 2004, and it is unclear exactly at which point, Mrs Callaghan decided to give up her offices at the International Commercial Centre and therefore the majority (but not all) of her self-employed work and to work full time for Marrache & Co. In her first witness statement Mrs Callaghan states as follows:-

> "16 As a result of these changes in circumstances and the increased work load obliged me to work full time. I felt it best to give up my office in the ICC and with it all of the more substantial work that I did for MCLCS.
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> 17. From this point on I worked full time 5 days a week from 10.00 to 18.00 for Marrache. Any occasional outside work which I still did as MCLCS was only on weekends or holidays and from home."

In the course of her evidence before me Mrs Callaghan made the following statements:-

> "It did not even enter my head to change the nature of my registration."
>
> "When I was first required to register as self-employed was the 8th August 2001. When I came back from surgery and I worked full time for them I was not asked to modify my registration in any way."
>
> "I was getting an income from MC Costing. In retrospect the fact that I was getting an income from MC Costing and that this complimented the

request from Marraches for me to register as self-employed had a bearing on my decision."

I pause her to note that at the point she began to work full time for Marrache & Co in 2004 Mrs Callaghan does not allege that Marrache's required/forced her to continue with her official self-employed status. Indeed her statement to the effect that it did not even enter her head to change her official status is convincing.

In February 2010, the world came tumbling down on Marrache & Co and its employees and on the 2nd March 2010, Mrs Callaghan's employment was terminated by the liquidators/receivers of Marrache & Co.

On the 3rd March 2010, Mrs Callaghan completed, signed and submitted an Insolvency Claim Form. In said form she stated that her employer was Marrache & Co and claimed for "Feb salary not paid & Holiday Pay. 1 months notice and redundancy pay."

It would appear that Mrs Callaghan was at that point represented by Stephen Bullock since on the 1st April 2010, the Respondent wrote to him with regard to the claims submitted by the ex-employees of Kristy Secretarial Services Limited. In said letter the Respondent attempted to clarify for Mr Bullock how the fund operated and what criteria were considered. This letter applied as much to Mrs Callaghan's case as it did to Mr Sharma's.

In the letter, the Respondent refers to self-employed individuals that prima facie would not be entitled to claim from the insolvency fund but who may be allowed to claim if they could substantiate there assertions that they were in fact employees of Kristy Secretarial Services Ltd. Nothing has been produced which indicates that at any point Mrs Callaghan submitted evidence to the Respondent in support of her contention that she was an employee of Marrache & Co and/or Kristy Secretarial Services Limited. This could be because subsequent to that she changed lawyers and her current lawyer has experienced difficulties in retrieving documentation.

Whilst no letter to the effect has been produced it would appear that on or about the 9th July 2010, the Respondent wrote to Mrs Callaghan informing her that the Administrator

had determined her to be a registered self-employed person and therefore not entitled to claim against the fund.

(b) **Roy Sharma :-**

Mr Sharma was employed by Marrache & Co on the 1st March 2004. In his First Witness Statement he stated as follows:-

> "I commenced employment with Marrache & Co ("Marrache") on the 1st March 2004. I was immediately required to register as self-employed. Although I disagreed with this requirement, I did so because I was not given a choice."

In his Second Witness Statement he stated as follows:-

> "8 . I came to Gibraltar from the UK in 2004 having worked as a solicitor for a period of seven years. During this time I had always worked as an employee. It is highly unusual for a solicitor in England to work on a self-employed basis. When I arrived in Gibraltar I was contacted by Marrache who offered me a post with a fixed salary but informed me that I had to register as a self-employed as this was the usual practice in Gibraltar and that all lawyers were required to do so. At the time I was not aware of the reasoning for this practice. Given that I was being engaged by an established local law firm, I did not feel it necessary to make my own enquiries and relied on their guidance in relation to this issue.
>
> 9. As I have stated in my First Witness Statement this was not something which I readily accepted.
>
> 10. As far as I was concerned I was being offered a self-employed position and I would be responsible for paying my own tax and social insurance. However, after commencing employment, I began to realise that this was not a true self-employed position at

all and that for all intents and purposes, other than the payments of my tax and social insurance, I was no different to any employee of the law firm."

In evidence to this tribunal Mr Sharma made the following statements on this particular issue:-

"I disagreed with the requirements. It was more of an internal resistance that I felt because when I was in the UK acting as a solicitor I was always an employee of the firm. I found it a strange request to sign up as self-employed as I was used to being an employee of the law firm".

"I received a phone call whilst I was in La Linea from Mrs Leanne Turnbull informing me that they were offering me a job to start immediately. However I would be required to register as self-employed and pay my own tax and social insurance. She informed me this was the usual practice. I was told this was the basis of the offer. I had just arrived in southern Spain. I was not familiar with Gibraltar at all. I was told to ring back once I had considered it. There was no interview or anything. The condition for the job was to register as self-employed."

"I had an internal struggle about it as I did not want to be self-employed as it did not come with any employment rights. At that point I knew it did not come with any employment rights."

"I was told that this was the way it was in Gibraltar. I took it to be a take it or leave it offer."

I pause here to note that whilst Mr Sharma states that he had an internal struggle about the condition imposed on him, and that it was not something he readily accepted, the fact is that at no time did he ever seek the guidance of any government department or discuss the issue with any third party. Indeed he stated that it was not until after Marrache & Co

collapsed that he looked at what exactly his status had been. It would appear that on the basis of what Mrs Turnbull (a lay person) stated he did not feel it necessary to make his own enquiries. It is even more notable that such a situation continued to exist even after events showed him that he was an employee of Marrache & Co rather than a self-employed person. In this regard it is also worth remembering that Mr Sharma informed us that in the UK he had been part of a specialist claims unit investigating insurance fraud and that consequently he knew what indicators to look for in fraud cases.

On the 25th February 2004, a week or so before he commenced his employment, Mr Sharma completed and signed an application for registration pursuant to the Business Trades and Professions (Registration) Ordinance 1999. In said form it is stated that the Business name is Roy Sharma, that he is registering as sole trader with place of business at 5 Cannon Lane (i.e. the offices of Marrache's), which is also the address at which the business is to be conducted. A registration fee of £25 was paid and the e-mail address given was marrache@marrache.com.

On the 6th December 2005, Mr Sharma applied for mortgage interest relief on property purchased and stated in the application form in question that he was self-employed. This he stated even though that by this time he was aware that his employment status was one of employee.

It is to be noted that with regard to his income tax returns Mr Sharma made contradictory statements with regard to his employment position since:-

- in the tax returns for 2005/06 and 2006/07 his income was declared under the self-employed section;
- whilst in the tax returns for this years 2007/08 to 2010/11 his income was declared under the employed section.

The contradictory statements should have raised queries with the Income Tax department but obviously not.

I pause here to note that there is nothing in this form which is intrinsically incorrect and/or untrue and that the details given clearly tie Mr Sharma with Marrache & Co.

On the 25th February 2004, the Employment Service issued Mr Sharma with a certificate confirming that he is registered with them as self-employed with the address of 5 cannon Lane. As previously mentioned the Business Trades and Professions (Registration) Ordinance 1999 requires that the registration be renewed on an annual basis and a renewal fee paid. In accordance with said requirement, Mr Sharma between 2005 to 2009 completed and signed an annual notification form using basically the same wording in each form and in essence confirming that the particulars in relation to his registered business trade profession are those in the application for registration originally submitted. During each of the stated years the Employment Service renewed the registration on the same terms as previously.

As previously stated, in February 2010, Marrache & Co was closed down and all employees contracts of employment terminated.

On the 23rd March 2010, Mr Sharma submitted an Annual Notification to the Employment Service in which he gives notice of a new practice address, namely Suite LG1, O'Callaghans Elliot Hotel, 2 Governors Parade. The subsequent renewal certificate issued by the Employment Service, dated 26th March 2010, gives this address but still confirms the self-employed registration.

On the 29th March 2010, Mr Sharma completed and signed an Insolvency Claim Form in which he stated:-

- the date of his termination of employment was unknown;
- his employer was Marrache & Co;
- that "please note that for tax purposes I was registered as self-employed but treated as an employee throughout employment."
- that he was claiming "February 2010, 8 days unpaid wages, Holidays 4 days brought over from 2009, Annual entitlement - 23 days, Annual Salary £50,000.

On the 1st April 2010, as previously stated, the Respondent wrote to Mr Stephen Bullock on the terms previously mentioned.

As a result of the letter of the 1st April 2010, Mr Sharma produced and signed a Witness Statement dated the 27th April 2010 to which he attached documentation in support of his contention that he was an employee and setting out his submissions as to why he should be considered as having been an employee of Marrache & Co.

By letter dated the 9th July 2010, the Respondent informed Mr Sharma that his claim was being turned down as it had been determined that he was a registered self-employed person. Prior to receipt of this letter, Mr Sharma met with Mr Frank Carreras, the Commissioner of Income Tax, with a view of trying to persuade Mr Carreras that he should be categorised as an employee notwithstanding that he was a lawyer. Mr Carreras has no recollection of having this meeting but does not dispute that it may have taken place. In his witness statement Mr Carreras said as follows:-

> "4. I can confirm that if the meeting did in fact take place, I would have advised Mr Sharma that it was the policy of the Income Tax Office to register and assess all lawyers employed in the private sector as self-employed individuals, irrespective of their relationship with the firm that employed them. This policy continues to date.
>
> 5. I am not aware of any policy other than lawyers employed by Government are issued with employment contracts and are, therefore, registered as employees and taxed under the PAYE system. This has always been the case. I also understand that the ETB registers private sector lawyers as self-employed individuals."

We shall be coming back to Mr Carreras's statement later since Mr Navas has placed great emphasis on the contents of the above quoted paragraph 4.

The Illegality Ground

It is the Respondents' position that:-

"the Complainant's action in having registered as self-employed under the Income Tax Act and the Business Trades & Profession (Registrations) Act, in the knowledge that this was not a true reflection of their employment status and with the purpose of allowing Marrache & Co to avoid their statutory obligations to pay Social Insurance under the Social Security (Insurance) Act made any contract of employment which may have existed between Marrache & Co and the Complainants void and therefore any rights which may be afforded by the legislation to the employees not applicable to the Complainants."

I pause here to make the following observation. There is no direct evidence whatsoever, and indeed as I understand it the Respondent does not dispute there is none, showing that in so far as Marrache & Co were concerned the purpose of having the Complainants register as self-employed was in order to avoid and/or with the intention of avoiding paying social insurance contributions. Apart from fact that both Complainants have categorically denied that such a purpose existed, Ms Anna Moffatt, whose evidence was not contested, made the following statement in her second witness statement:-

"I can however robustly confirm that this practice was certainly not followed for the purpose of Marrache avoiding payment of employer social insurance contributions in respect of the lawyers. In all my time at Marrache this was never even mentioned as the reason or one of the reasons of this practice."

Not much weight can be placed on Ms Moffatt's evidence as to what was or was not the intention of the partners of Marrache & Co in having either or both Complainants register as self-employed and it would be surprising indeed if they had said, or she would admit to it having been said, that the intention of the partners was illegal. There being no direct evidence, the Respondent can only ask this tribunal to infer from the following that there was an illegal intention by Marrache & CO to avoid paying social insurance contributions:-:-

(i) both Complainants registered as self-employed and continued to register as self-employed after they both realised that they were in fact employees of Marrache & Co;

(ii) neither Complainant at any time asked about or queried their correct status with the pertinent Government Departments even after they each individually realised they were employees;

(iii) in Mrs Callaghan's case she was not a lawyer, and therefore the income tax policy referred by Mr Carreras in his witness statement did not apply to her;

(iv) in his first witness statement Mr Sharma had stated that:-

> "4. I commenced employment with Marrache & Co ("Marrache") on 1st March 2004. I was immediately required to register as self-employed. Although I disagreed with this requirement, I did so because I was not given a choice.
>
> This requirement was based on an apparently historical anomaly/anachronism that barristers and solicitors in practice in Gibraltar were allowed to register as such and firms could consequently avoid paying the employer's social insurance contribution and retained a prima facie distance from the practitioner in terms of responsibility for the same in its capacity as employer.
>
> 5. The reasoning behind this requirement was a historical tradition within the local legal profession whereby barristers and solicitors were allowed by the income tax and social insurance departments to register as self-employed thereby allowing the employing firm to avoid paying the employer's social insurance contribution."

and this showed that the intention of the parties was to clearly have Marrache & Co avoid having to pay social insurance contributions;

(v) in her first witness statement Mrs Callaghan had stated that:-

"17 From this point on I worked full-time 5 days a week from 10.00 to 18.00 for Marrache. Any occasional outside work which I still did as MCLCS was only on weekends or holidays and from home.

This requirement was based on an apparently historical anomaly/anachronism that barristers and solicitors in practice in Gibraltar were allowed to register as such and firms could consequently avoid paying the employer's social insurance contribution and retained a prima facie distance from the practitioner in terms of responsibility for the same in its capacity as employer. She was treated in the same way if she were a barrister or solicitor in the respect.

18. The reasoning behind the requirement to register as self-employed was a historical tradition within the local profession whereby barristers and solicitors were allowed by the income tax and social insurance departments to register as self-employed thereby allowing the employing firm to avoid paying the employer's social insurance contribution."

and this also showed that the intention of the parties was to clearly get round the requirement of Marrache & Co having to pay social insurance contributions;

(vi) both Complainants had given incorrect information to Government when completing their various returns/forms which was a criminal offence.

The Complainants counter that they registered as self-employed in good faith and continued with this status of registration in the genuine belief/understanding that Government policy as contained in Mr Carrera's witness statement required this to be the case. Moreover, the Complainants state that the reason for the afore-mentioned quoted statements from their first witness statements (apart from Mr Navas taking some blame for using inappropriate wording when drafting the statements) was because post the event they were seeking to assume/theoritise a possible rationale for the motives behind Marrache & Co's original request for them to register as self-employed; the Complainants not having discussed or even considered with Marrache & CO the reason for their having to respectively register as self-employed. It is further stated that even if

Marrache & Co had intended to evade paying social insurance contributions when they required both and/or either one of the Complainants to register as self-employed this was not known to or in the knowledge of either Complainant and they did nothing to assist Marrache & Co in evading their statutory obligations.

Those then are the main submissions made by either side.

The Law

Contracts may be held illegal and void at common law as being contrary to public policy on a variety of grounds. As is stated at page 205 of Harvey on Industrial Relations and Employment law:-

> "The rule is that if the illegality is apparent on the face of the contract (illegal in inception), or the contract is such that it cannot be performed without illegality on the part of either or both contractors (illegal in performance), then the contract is illegal and void ab initio, and, most importantly, the fact that either or both of the parties are innocent of any fraudulent intent or design is quite immaterial; for ignorance of the law is no excuse."

The principle stems from the words of Lord Mansfield in the case of Holman v Johnson (1775) 1 Cowp 341 at p 343.

> "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted."

In the case of the Complainants, as Mr Fernandez accepts, we are concerned with a contract lawful when made but which the Respondent contends could not be performed without illegality on the part or either or both of the parties to the respective employment contracts.

In the case of Hall v Woolston Hall Leisure Limited (2000) IRLR 518 Lord Justice Gibson stated:-

> "In a third category of cases a party may be prevented from enforcing it.
> That is where a contract, lawful when made, is illegally performed and the party knowingly participated in that illegal performance. In Ashmore, Benson Ltd v Dawson Ltd (1973) 1 WLR 828 Lord Denning MR (at p 833) said:
>
> Not only did (the Plaintiffs' transport manager) know of the illegality, he participated in it by sanctioning the loading of the vehicle with a load in excess of the regulations. That participation in the illegal performance of the contract debars (the plaintiff) from suing (the defendant) on it or suing (the defendant) for negligence.
>
> So too Scarmann L J (at p. 836)
> But knowledge by itself is not enough. There must be knowledge plus participation ..... for those reasons I think the performance was illegal".

and further along stated:-

> "In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee."

In Hewcastle Catering Ltd v Ahmed (1992) ICR 626 the employer had devised a scheme to fraudulently avoid having to pay VAT which his employees were required to implement. The employees gave evidence for the prosecution in the case brought against the employer whereupon the employer dismissed the employees. The employees brought a case of unfair dismissal against the employer. The employer alleged that the contracts of employment were tainted with illegality and that the employees knowingly participated in the fraudulent evasion of tax. On appeal the Court held that the employees

claim was not precluded by public policy since the obligation to make VAT returns and keep proper records was that of the employer, the contract of employment was not one by which the employee was engaged to assist in the fraud, to deny an employee the right to claim could well discourage disclosure of the fraud and that the steps taken by the employees in the implementation of the fraudulent scheme were not essential or significant.

In Bakersfield Entertainment Limited v PJ Church and CL Stuart /UKEAT/0523/05/ZT) the case concerned the defence of illegality to claims by two company directors for unfair dismissal, wrongful dismissal and unlawful deductions. The illegality in question was that Mr Church failed to disclose 65% of his earnings and Mr Stuart 50% of his earnings to the tax authorities. The above quoted passage(s) from Lord Justice Gibson was endorsed by Judge McMullen QC who also followed and applied the Hall case.

In the case of Vakante v Abbey & Stanhope School (2004) EWCA Civ 1065 the Court of Appeal also applied the Hall case with Mumery LJ stating:-

> "the defence of illegality is an appeal to a self-evident legal principal or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim."

and

> "although Hall uses some of the familiar language of legal and factual causation (connection, link), the test does not restrict the tribunal to a causation question. Matters of fact and degree have to be considered, the circumstances surrounding the applicants claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicants claim are all matters relevant to determining whether the claim is so "inextricably bound up with" the applicants illegal conduct that, by permitting the applicants to recover compensation, the tribunal might appear to condone the illegality."

In the case of Colen v Cebrian (2003) EWCA 1675 Carnwath LJ when dealing with a case where a lawful contract had become illegal by reason of performance stated that the approach should be:-

> "there are three issues:
>
> (a) What was the contract
>
> (b) Did it involve illegality
>
> (c) If so, how does this effect the jurisdiction of the Employment Tribunal?"

It is accepted by both parties that the contract was one of employment, and that if I should determine that the contracts were tainted by illegality and void, then neither of the Complainants were employed and therefore neither were entitled to claim under the Insolvency Fund The issues to determine therefore are whether there was illegality which was known to the Complainants and, if so, whether the Complainants actively participated in the illegal performance. If both those questions are answered in the affirmative, then I have to go on to determine whether the Complainants illegal conduct is inextricably bound up with their claim to the Administrator.

Before leaving this part of the judgment I will simply refer to the case of Massey v Crown Life Insurance Co (1978) 2AER 576 and to the following statement of Lawton LJ:-

> "In the administration of Justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantage for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgement the union between fairness, common sense and the law is strained to almost breaking point. The Appellant in this case is asking this Court to adjudge that he is entitled to make claims with two different voices."

The factual element of all the authorities referred to the tribunal by both parties are distinguishable from both of the cases presently before me to the following extent. In all the referred cases the parties to the case were the employer and the employee but before this tribunal we have a third party (the Administrator) seeking in effect to take the seat of

the employer (Marrache & Co) to argue the illegality ground. Having said this, it does not seem to me that this affects the principle's expounded in the above-mentioned cases in any way.

Conclusion

The Respondent has, not unnaturally, placed great emphasise on the contents of paragraph's 4 and 5 of Mr Sharma's first witness statement (see page 24 above) and paragraph's 17 and 18 of Mrs Callaghan's first witness statement (see page 25 above) and sought to infer from said statements that Mr Sharma and/or Mrs Callaghan had conspired with the partners of Marrache & Co to come up with the self-employed requirement in order to avoid the employers social insurance contributions having to be paid. Mr Navas counters this by saying that the statements made in both witness statements were unfortunate drafting by himself and made by the Complainants in order to provide some sort of theoretical rational for Marrache & Co's requirement that they register as self-employed. I have read the paragraph's in question repeatedly and in my view they do not constitute the admissions which the Respondent would like this tribunal to conclude they are. At most what these paragraph's do is indicate that the Complainants were aware prior to February 2010 of the policy of the Income Tax Department, as stated by Mr Carreras, to treat all lawyers across the board as being self-employed persons and, this being the case, therefore that only the employees would have to pay social insurance contributions. This is important with regard to the question of whether the Complainant had knowledge of the illegality.

In the case of Mr. Sharma there is no doubt in my mind that when he commenced to work for Marrache & Co he believed he was doing so as a self-employed person and consequently, at that point in time, in registering as self-employed under the Business Trades and Professions (Registration) Act, he was acting appropriately. The Respondent submits that the registration filed by Mr Sharma was an agreed arrangement with the partners of Marrache & Co so as to enable said partners to avoid having to pay their employers social insurance contributions in respect of Mr Sharma. There is no direct or indirect evidence to justify / support such a submission with regard to the position as at the point of the 1st March 2004. Did the position subsequently change?

Mr Sharma by his own admission has accepted that there came a point in time in 2004 when he realised that his position within the Marrache & Co structure was one of employee rather than self-employed. Mr Sharma has also accepted that at no time did he ever seek guidance of any government department or discuss the issue of his employment status with any third party.

In my view Mr Sharma did come to know that he should be registered as an employed person but simply turned a blind eye to the whole situation, including the issue of whether Marrache & Co sought to illegally benefit from the arrangement, and let matters ride comforted no doubt by the policy imposed by the Income Tax authorities to deem all lawyers to be self-employed persons. It is my conclusion that Mr Sharma had knowledge that his employment status was being wrongly misrepresented by Marrache & Co from the latter half of 2004 onwards but choose to do nothing about it.

In the case of Mrs Callaghan there is even less doubt in my mind that by August 2001 at the latest she was aware that her employment status was not being correctly represented by Marrache & Co but she likewise chose not to do anything about it. Mrs Callaghan, having worked for Marache & Co previously and then for Triay & Triay, knew her correct employment status was one of employee, especially as she also knew she could not be considered a lawyer, and that therefore the Income Tax policy of deeming lawyers as self-employed persons could not apply to her. She also turned a blind eye to the situation including the issue of whether Marrache & Co sought to illegally benefit from the existing state of play.

As the authorities cited require, not only must the Complainants have each known of the illegality alleged but they must also have participated to a substantial degree in the illegality. It is submitted by the Respondent that the Complainant participated in the illegality by filing each year, in the case of Mr Sharma, renewal applications under the Business Trades and Professions (Registration) Act, and in the case of Mrs Callaghan, renewal applications under the Business Names (Registration) Act and the Business Trades and Professions (Registration) Act.

In the case of Mr Sharma I cannot see that the filing of the yearly renewal application in question can by itself be construed as participating in the illegal activity since after all the

policy imposed by the Income Tax Department, and followed by the Social Security Department, required that lawyers register as self-employed. The mere filing of the renewal applications, bearing in mind official policy, does not in my opinion constitute sufficient action so as to hold that Mr Sharma was actively participating in the illegality. Indeed why would he since there is nothing to indicate that he was obtaining any benefit from his registered status; the opposite being the case since he was paying higher social insurance contributions than he needed to as an employee. It has also been said that if Mr Sharma had not registered each year as a self-employed that he would have been dismissed and that this was the benefit to him of the arrangement that existed. There is absolutely no evidence to justify such an assertion. It is true that in March 2004 Mr Sharma was requested to register as self-employed but there is no evidence to indicate that post March 2004, Marrache & Co would have dispensed with his services had Mr Sharma changed his employment status (indeed his tax return forms for the latter years were filed on the basis of an employee); that is mere speculation.

What is more if Mr Sharma would have been actively participating in an illegal attempt to enable Marrache & Co to avoid paying social insurance contributions then he would not have requested Marrache & Co to issue the letter of the 26th June 2006 stating that he was an employee, or, completed and filed some returns on the basis of being an employee. Mr Sharma's judgment was sadly lacking what one would have expected but that is a far cry from saying that he actively participated in the illegality alleged.

I have found the position of Mrs Callaghan somewhat more difficult to reach a conclusion on mainly because she knew from previous employment experience that her employment status was one of employee and that not being a qualified lawyer she was not caught by the Income Tax policy. Moreover, save with the exception of the Tax Return for the year 2008/2009, Mrs Callaghan appears to have always filed, either through her husband or self, tax returns on a self-employed basis. It is also to be noted that Mrs Callaghan appears not to have been paying her tax as the repayment agreement she entered into with the tax department in 2009 demonstrates. On the other side of the coin is the fact that she gained no benefit from being registered as self-employed in the Marrache & Co context and that when filing the renewal forms under the Business Trades and Professions (Registration) Acts and the Business Names (Registration) Act she was doing no more than confirming that she run a self employed business under the name of

MC Legal Costing Services. In my view her admitted turning of a blind eye to her employment status was also short from being active participation.

Earlier on in this judgement I pointed out that under the Insolvency Regulations, as indeed under the Social Security (Insurance) Act, the duty to furnish information on employees and to pay contributions in respect of that employee falls primarily upon the employer and not the employee. In other words, the obligation to inform the tax and employment authorities that each of the Complainants was an employee, and to keep proper records with respect to those employees, and to pay the appropriate social insurance and other contributions with respect to those employees, fell upon Marrache & Co and not the Complainants. This also needs to be taken into account when considering whether either of the Complainants actively participated in the illegality.

Taking all things considered it is my determination that neither of the Complainants participated actively to any substantial degree in any scheme by Marrache & Co to avoid paying social insurance contributions with respect to either or both of the Complainants. This being the case, it follows that I have to determine, and I do so hereby determine, that both Complainants are entitled to receive a payment from the Insolvency Fund.

I now have to deal with the issue of what amount should be paid to each of the Complainants and for what period. I hope that the parties will be able to reach an agreed position on this but if this, is not the case the Secretary will set down a date for the hearing of submissions on this issue.

Dated this 25 day of May 2017

Joseph Nuñez
Chairman