

Neutral Citation Number: [2007] EWHC 613 (Ch)

Case No: CH/2006/APP/0214

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2007

Before :

MR JUSTICE MANN

Between :

**SPEARMINT RHINO VENTURES (UK)
LIMITED**

Appellant

- and -

**THE COMMISSIONERS FOR H.M. REVENUE
AND CUSTOMS**

Respondent

MR. D. MILNE Q.C. and MR. A. HITCHMOUGH (instructed by **Messrs Jeffrey Green Russell**) for the **Appellant**.

MR D. GOY Q.C. and MS. N. SHAW (instructed by **The Solicitor's Office of HM Revenue & Customs**) for the **Respondent**.

Hearing dates: 18th January 2007

Judgment

Mr Justice Mann :

Introduction

1. This is an appeal from a decision of the VAT & Duties Tribunal (Chairman Sir Stephen Oliver Q.C.) given on 27th January 2006 in which the Tribunal allowed an appeal against a ruling that the appellant (“SR”) made supplies of entertainment services to customers at or through its six clubs in the UK. The services in question were entertainment by dancing and entertainment by providing companionship for a specified period of time at the clubs. The issue that arises on this appeal is whether the supplies are in fact made by SR or whether they are made by the dancers in question. SR maintains that the latter is the case. The appeal has the by-product of enabling the judiciary to fill in some of the gaps in its knowledge demonstrated, but teasingly left, by *Sutton v Hutchison* [2005] EWCA 1773 at paragraph 1.

Outline facts

2. It will assist in a consideration of the detailed facts and documentation if I set out an outline of the method of operation of the clubs. For the purposes of these proceedings, SR’s club at Tottenham Court Road, London, was taken as a typical example.
3. The club is described as a “gentleman’s club”. A member of the public pays £8 for admission and on entering goes into an area in which he (or she) may drink, socialise, eat and watch partially clad women dancing on a podium. At any one time (depending on the day, time of day and availability) there are between 20 and 140 young women available to provide the entertainment services in issue in these proceedings. Some of them will be those dancing on the podium. These proceedings do not, at least directly, concern that activity. The activities which concern me are those provided as a result of more direct engagement between the women and the customer. For a sum of money, the women can be engaged to perform private dances for the customer. For this purpose the customer (with or without accompanying people) and the dancer go to one of several booths where the private dance takes place. A fee of £10 is charged for a semi-nude dance; £20 is charged for a nude dance. Each dance lasts for a “track”, i.e. about three minutes. The dance is arranged as between the dancer and the customer. In addition to those services, the dancer and the customer can agree what is called a “sit-down”. For £250 (a sum which is in fact negotiable) a woman can be engaged to sit and socialise with the customer for an hour. Any additional dancing services will be the subject of a separate arrangement. Dancers are paid in cash or in Rhino chips – chips issued by the club on a credit card transaction and which can be used as a form of currency in the club.
4. It is common ground in these proceedings that the women are not employed by the club. They are all self-employed. They pay a sum to the club which allows them to ply their trade for a session of eight hours (it is £15 for a daytime session and £80 for an evening session). They enter into an agreement described as a “licence” which entitles them to enter and dance (and to some extent obliges them to as well). They also have to pay £40 every time they arrange a sit-down. There are some limited tips which they habitually or traditionally pay to various people, but I need not dwell on those. Other than that, no other sums pass between the club and the dancers. The monies which are paid for the dances and for the sit-downs go to the dancers. The customers do not pay the club for the dances and sit-downs. The club obviously provides the premises at which the dances take place, and it provides additional services such as the services of a “house mother” who helps to advise and look after

them (and who is traditionally tipped £3 by each dancer for each session), and the assistance of security staff who will confirm the bargain made for each sit-down and who will apparently assist in the persuasion of a customer who might otherwise be minded not to pay.

5. The dispute between the parties is, as I have indicated, whether the entertainment services are supplied by the club or by the dancers. HMRC says that those services are supplied by SR to the customer. They are supplied through the dancers whom they have engaged. Accordingly, it is said that SR is obliged to account for VAT in respect of the consideration supplied for the services. SR says that the services are provided by the dancers themselves and not by the club.
6. The Tribunal decided that the contentions of HMRC were correct. From that decision SR appeals. Whether or not the Tribunal was correct depends upon a proper analysis of the relationships, and principally on a consideration of the effect of various transactional and other documents. Although those documents have to be set in their factual context, it was not submitted that the documents were in any way a sham or failed to record the true relationship between any of the parties. The relevant facts and documents are set out in more detail below. So far as the facts are concerned, they are taken from the facts as set out in the Tribunal's decision with an occasional reference to other parts of the material which was available to the Tribunal. There was no material dispute of fact in this matter.

The documents

7. The principal document affecting the relationship between the dancers and the club is called a Dance Performance Licence ("DPL"). It is no doubt deliberately called a "licence". One is not, of course, to be taken in by labels. What ultimately matters is the substance of the relationship, not the labels that the parties might have chosen to put on any particular parts of it. This document is entered into between the club and each dancer. Its material terms are as follows.
8. The first section is entitled "Background". In other documents it would no doubt be called "Recitals". Paragraph 1 recites that SR operates "a business establishment at the Premises where live nude, semi-nude and/or bikini dance entertainment is presented to adult members of the general public". Paragraph 2 provides:

"Owner is desirous of licensing to a Performer the right to use certain private and/or public areas of the Premises for purposes of presenting live nude, semi-nude and/or bikini entertainment to the adult general public pursuant to and in accordance with this Licence."

And paragraph 3 provides:

"(3) Performer is desirous of licensing the premises for the purposes of performing live nude, semi-nude and/or bikini entertainment to the adult general public pursuant to and in accordance with this Licence."

9. Clause 1 is entitled "Licence of Premises" and, so far as is material, reads as follows:

- A. Owner licenses to Performer the right during normal business hours to use those parts of the Premises designated by the Owner for the performing of live nude, semi-nude and/or bikini entertainment known as ‘Booths’ upon the terms and conditions set out below.
- B. Performer shall exercise her rights under this licence in respect of the Booths at the Premises by occupying whichever Booth that she may for the time being chose [sic] together with a customer and, if relevant, another Performer.
- C. Whilst in occupation of a Booth, Performer shall have the right to exclude and admit all others as she shall choose.
- D. In return for her right to occupy a Booth, Performer shall pay the Licence Fee stipulated in clause 4 below.
- E. Performer’s rights to occupy a Booth under this clause will be for the duration of each dance that she performs in the Booth.”

10. Clause 2 deals with the “Term of Agreement”. It is expressed to be for one year, automatically renewing for three successive terms of one year each unless terminated by notice.

11. Clause 3 deals with the “Scheduling of Dates”. It provides for the Performer to establish the particular days “on which she desires to enjoy her licence in respect of the Premises”. The days are to be set one week in advance and for a minimum of eight consecutive hours, during which “Performer shall provide entertainment consistent with this licence”. It goes on:

“Owner shall make the Premises available to the Performer and the Performer hereby agrees to take up the licence in respect of the Premises for a minimum of three (3) sets per week. Once scheduled, neither Performer nor owner shall have the right to cancel or change any scheduled sets except upon material breach [sic] as defined below or as mutually agreed.”

Thus there is some form of obligation on the dancer to attend a minimum number of sessions. The clause goes on to provide for liquidated damages to be payable to the club for each session missed.

12. Clause 4 deals with the “Licence Fee”. I do not need to set out its terms. In summary, the evidence, as summarised by the Tribunal, was that at the Tottenham Court Road premises a dancer pays £15 to enter for a daytime session (noon to 8 p.m.) plus £5 per dance. For night-time sessions (8 p.m. to 4 a.m.) she pays £80 plus £40 for each sit-down for the first hour and £20 for any succeeding hour with that customer. Dancers at SR’s regional premises pay a fixed £20 to enter plus £7 a dance.

13. Clause 5 deals with “use of Premises” and reads:

“Performer agrees to:

- (a) perform nude, semi-nude and/or bikini entertainment at the premises for the general public during all hours of each set. Performer hereby specifically acknowledges that Performer's agreement to perform such entertainment during all set periods of time is a material obligation under this Licence. In consultation with Performers who enjoy licences in respect of the premises, Owner shall establish a fixed fee for the price of chair, table and couch dances performed in the premises ('Dance Performance Fees') and Performer agrees not to charge a customer more than the fixed price for any such dance performance, although nothing contained in this licence shall limit the Performer from obtaining 'tips' and/or gratuities over and above the established price for such dances. The parties acknowledge and agree, however, that Dance Performance Fees are neither tips nor gratuities, but are rather charges to the customer as consideration for the services of obtaining a dance performance. Performer recognises that her obligations as set forth in this paragraph are material considerations to the Owner in order to (i) produce the maximum gross sales possible from dance performances during the term of this licence for the benefit of both Owner and Performer, and (ii) assure regular maximum operation of entertainment at the premises for the benefit of both Owner and Performer;
- (b) use her best efforts in connection with the performance of her entertainment at the premises;
-
- (f) maintain accurate daily records of all the income earned from and at the Premises during this Licence in accordance with all applicable taxation laws...."

14. Clause 6 deals with "Compliance with Rules and Regulations". It provides that the Owner can impose such rules and regulations on the use of the premises by the Performer as may be required by, inter alia, statutes, regulations and other laws.

15. Clause 7 deals with the "Status of Parties".

"A. The parties acknowledge that the status created between Owner and Performer is that of Licensor and Licensee in relation to the premises, and that this status is a material consideration of this licence. The parties specifically disavow any employment relationship, and agree that this licence shall not be interpreted as creating an employer/employee relationship."

Sub-clause B is a curious clause apparently designed to operate were it somehow to be found that the dancer was an employee of the club. It provides:

"B. Performer specifically acknowledges that were the relationship between Owner and Performer to be that of employer/employee, Owner would be entitled to collect and retain

all Dance Performance Fees collected by Performer from Customers – said funds being acknowledged in the circumstances of an employer/employee relationship to be the sole and exclusive property of the Owner The parties specifically acknowledge that Performer’s entitlement to obtain and retain Dance Performance Fees pursuant to this licence is contingent and conditional upon the acknowledged status of the parties as is set forth in sub-clause 7(A). The parties additionally acknowledge that were the relationship between them to be that of employer and employee, Owner would be entitled to control Performer’s work schedule and hours of work; physical presentation; costumes and other wearing apparel; music; work habits; the selection of her customers; the nature, content, character, manner and means of her performances; and her ability to perform at or for other locations or businesses. Performer desires to control all these matters to the exclusion of Owner, and Owner and Performer agree by the terms of this licence that all such matters are exclusively reserved to the decisions of the Performer. Performer specifically represents that she does not desire to perform as an employee of Owner subject to terms 7 and conditions outlined in this sub-paragraph, but rather desires to perform consistent with other provisions of this licence as a licensee.”

16. Clause 8 deals with taxes and provides that the Performer is exclusively responsible for all taxes arising out of income earned by her at the premises. Clause 9 provides for her to supply all her own costumes.

17. Clause 10 deals with the “Nature of Performances.

“Owner shall have no right to direct and/or control the nature, content, character, manner or means of Performer’s performance. Performer acknowledges and agrees, however, to perform live nude, semi-nude and/or bikini entertainment consistent with the type of entertainment regularly performed at the premises.”

18. Clause 13 provides that the licence is acknowledged to be personal in nature and that the Performer has no right to sub-licence her rights or to assign them without the consent of the owner. It also provides that the Performer’s obligations are not exclusive that she may perform her entertainment activities at other businesses and locations.

19. Clause 15 provides for “Owner’s Additional Obligations”.

“Owner shall, in addition to the licensing of the premises as set forth above:

- A. Provide to the Performer at Owner’s expense music used on the premises, lighting and dressing room facilities;
- B. Pay any and/all copyright fees due relative to the music used on the premises;

C. Advertise the business in a commercially reasonable manner for the benefit of both Performer and Owner....”

20. In order to have a DPL, a performer must apparently fill in a form called “Application for Licence to Occupy Place”. Little turns on that, though she does agree not to “handle customers” or to allow them to “handle” her, and not to perform in an obscene or otherwise illegal or unlawful manner.
21. Various rules are set out in a Code of Conduct for Dancers. They provide for such things as “appropriate attire”, signing in on time and the conduct of the performance when dancing. In particular, when a dance is being performed, there are strict rules as to how the customer and the dancer are to behave. The regulation is very tight – the customer must be seated in a particular way and must not touch the dancer. The dancer may only touch the customer “above the customer’s chest”; and there are other controls restricting the explicitness of the performance. Dancers are not allowed to leave with the customer, and have to wait until all the customers have left the premises before they can leave themselves. They are not to agree to meet a customer outside the club. The following rules are also significant:
- “23. Topless table dances and full nude table dances may be performed for a pre-determined rate as set by the individual Club.
 - 24. Dancers are required from time to time to participate in promotional activities and offers as designated by the Club manager.
 - 25. Dancers are required from time to time to participate in stage and podium performances as designated by Club staff.”
22. The promulgation of these rules is at least in part designed to comply with the entertainment licence awarded by the local authority (London Borough of Camden). One of the terms of that licence requires the production of a code of conduct in consultation with the local authority and the Metropolitan Police. Another of the conditions requires that rules be produced for customers indicating conduct that is unacceptable, and that those rules should be prominently displayed at tables and other appropriate locations within the club. Those rules appear on a leaflet placed on each table. They indicate clearly what customers are not allowed to do. I do not need to set them out here, but they also set out the Table Dance Rules, which inter alia set out the fees and that it is customary to “tip a minimum of £1 per dance...while you are seated at the tip rail around the stage...Table Dance fees are set by the club and considered fees, not tips. Dancers are not permitted to charge more than the stipulated rate. However, a customer may elect to tip the dancer or purchase a drink for the dancer....Dancer’s company available on an hourly basis.”
23. One other document is significant. The evidence recorded by the Tribunal and accepted by it was that a notice to customers was shown at the club and was apparent to customers as they walked down into it. It read as follows:

“To our valued customers

TABLE DANCE FEES

Topless table dances are £10.00 per track

Nude table dances are £20.00 per track

.....dancers are under exclusive contracts to perform at this club and not considered employees. Table dance fees, as detailed above, are fees and not tips that are set by the club and may not be varied by a dancer. Dancers in turn pay the club a commission set by the club in which they perform. Tips for main and other stage performances and elsewhere voluntarily given by customers are considered gratuitous and the club receives no portion thereof.

At times a dancer will suggest her company for a period of an hour. If agreed, the standard rate is £250. It is negotiable how many dances, topless or nude, are performed within this period of time. Both parties at the start of the period the company is provided must agree the fee and times.... We enforce that customers may not inappropriately touch dancers during the stage and table side performances and we will strictly enforce such rules and ask customers with inappropriate behaviour to leave the premises immediately.”

The supervision of dancers

24. It is common ground that the dancers are self-employed. It was no part of the case of HMRC that there was any disguised contract of employment or any element of sham or falsity about the relationship. However, not surprisingly, the club exercises a degree of control over the dancers. I have made reference above to some of the obligations. The decision of the Tribunal records some of the practical side of the relationship. The house-mother, Miss Reed, recognises that the dancers were the key to the success of the club. So long as the club had a reputation for being full of attractive, charming and skilled dancers then the right sort of customers would continue to come to the club. She ran a sort of shift system to ensure that the right number of dancers were likely to be available to meet demand. She made sure that a situation did not arise in which there were too many dancers for a given shift. "Markers" kept a record of how many dances a dancer performed during afternoon sessions at the Tottenham Court Road club and all sessions in the regional clubs. Miss Reed also kept an eye on the appearances of the dancers.

The Decision

25. The Tribunal correctly recorded the contentions of the parties. SR maintained that the dancers were contracting with the customers directly whereas HMRC maintained that they were doing so for and on behalf of SR. In paragraph 53 of its Decision it acknowledged that if it were to find that, for VAT purposes, the dancers were providing services as SR's agent it would need to be satisfied that mutual obligations existed between the dancer and SR for that purpose. It would also need to be satisfied, among other things, that the dancer was under an obligation to SR to perform, that the services to be performed were agreed, that the consideration

receivable by the dancer was agreed, that the duration of dancer's undertaking was specified, that the dancer had a right of access to SR's premises and that SR was committed to providing the dancer with facilities. It then described the DPL as a "framework agreement" and not a licence "as such". The document had to be read in conjunction with other documents -- the Code of Conduct, the Dancer Assessment, the procedure for disciplinary action and the "actual agreement that engages the dancer to attend for the particular session". The Decision then went on to set out the practical mechanism by which the dancer was engaged (interview, assessment, induction and education into the way in which the dancer should conduct herself). In paragraph 56 the Tribunal describes how a dancer is engaged for a particular session and points out her obligations when she is in the club -- to perform during all hours of the session, to "produce the maximum gross sales possible from dancer performances", and others. It observes that in return SR agrees to give the dancer access to the premises and the customers for the session, to provide the necessary music, lighting and dressing-room facilities and to advertise the business.

26. In paragraph 58 the Tribunal summarises the "essence" of the features as follows:

"... each dancer is committed in contract, from the time she is engaged for the session until her departure from the premises after the session is over, to perform in SR's entertainment business and, using her own skills to 'maximise gross sales', to entertain individual customers of SR by dancing or participating in sit-downs. The money side of the arrangement between dancer and SR is agreed between them. SR is, as regard [sic] each session entitled to specified amounts from the dancer ... the dancer is free to keep whatever cash or rhinos the customer gives her. The duration of the dancer's engagement is agreed. The dancer's right of access (her license) is agreed. SR agrees to make its customers and the benefit of all its facilities available to the dancer. The dancer agrees that SR's management may continue to supervise her."

27. The next paragraph (paragraph 59) contains the conclusion of the Tribunal. It reads:

"59. We think that, in the light of those features, there is a contractual framework within which SR provides the relevant services to the customer through the dancers as agents. The dancer is at SR's premises to perform and that is the means by which SR conducts its own entertainment there."

28. The Decision then goes on to deal with the question of what consideration is provided to SR in return for its supplies. It reaches its conclusion as to this in one sentence with no supporting reasoning:

"The tariff fee for the dance and the agreed fee for the sit-down will clearly be consideration due to SR."

29. The Decision then goes on to leave over for another occasion the status of the tips received by dancers.

The basis of the appeal and the contentions of the parties

30. SR, through Mr Milne Q.C., submits that the Decision reaches a conclusion which is illogical in its own terms and which is wrong when measured against the facts as found and as otherwise exist. It claims that the Tribunal wrongly took into account the level of control which the club could exercise over the dancers, failed to take into

account all relevant parts of the contractual relationship and came to the wrong conclusion. Its short statement of conclusion is a non sequitur in its context. HMRC, through Mr Goy Q.C., supported the Decision and said it was correct, averring that in the circumstances the Tribunal was right to come to the conclusion that the dancers are acting as agents for SR.

31. There was a short dispute as to whether or not this case was one of those in which the decision of the Tribunal was one of fact and degree and should therefore be treated as one of fact rather than law with the constraints on an appellate tribunal's intervention set out in *Edwards v Bairstow* [1956] AC 14. It is clear to me that it is not. The relevant facts have been found by the Tribunal. The analysis of those facts so as to arrive at a conclusion as to whether or not it is the dancers or SR who is supplying services is one of law. It is common ground that the question is really one of agency. That is a legal question. Accordingly, it is open to me to consider whether the conclusions of the Tribunal were right or wrong, and if I come to the conclusion that they were wrong then I can and should substitute my own decision.

The proper analysis

32. Both parties in this case started from common ground as to what the question was. In the wording of paragraph 6 of the Decision it is whether:

“when the dancer supplies her services to the customer, she is doing so as a principal in her own right (as SR contends) or, as the Customs contends, a self-employed person acting on behalf of or for the account of SR”.

The question is therefore one of agency, as each side accepted. It was also common ground that the dancers were self-employed, but that does not determine the question of agency. Mr Goy put his case most starkly when he submitted that when a dancer agrees to dance, she enters into that agreement on behalf of and as agent for the club. The question for me is whether that is right or not. I shall consider that question on the basis of the facts before turning to the impact of authority.

33. HMRC's case in support of agency on the facts flows from the terms of engagement, the extent of control over the dancers and the extent to which the dancers can be said to be part of the business of SR. The dancers are not entitled to do what they like and attend when they like. Having agreed to attend, they must then attend. Their conduct is closely controlled. The fees of the dancers are specified by the club, not the dancers. The local authority controls the activity of the club, not that of the dancers. The notice that customers see when they enter the club refers to "our customers" - this is said to demonstrate that the customers are the customers of SR and no one else. If a dancer is paid in Rhino chips and cashes them in and there is a credit card loss on the chips, then the club bears the loss, not the dancer.
34. SR submits that the facts allow only one answer to the question, and that answer is not what the Tribunal found. The question of control is irrelevant, and it is said that from the documents the irresistible inference is that the dancers are operating their own respective businesses at the premises. All the obligations are said to point away from agency.

35. In my view, on the facts SR's case is correct. It seems to me to be a very forced construction of events, if it is possible at all, to say that the dancers are contracting as agents for the club. The documents themselves have no particular badges of agency. The DPL is, in its terms, a licence permitting entry to the premises so that the dancer can apparently ply her trade. Background (2) expresses the desire of the club to give her a licence, and Background (3) expresses her desire to licence the premises for that purpose. It is not suggested that those expressions of desire are in any way a sham or are to be disregarded. The rest of the terms of the document (which, so far as relevant, are set out above) pursue that notion. Nothing in that document suggests that the dancer is vested with any authority to do anything on behalf of the club. True it is that the club is entitled to exert a certain amount of control over the dancer (see clause 6), but that does not create an agency. It might be consistent with an agency, but that is different. Although clause 7B considers the position on the hypothesis that the dancer is an employee (which she is not) it points firmly away from any agency in referring to the customers as her customers and still reserving to her a significant degree of control over her activities. None of the other documents to which the dancer is a party suggest the existence of an agency either. The application for a licence is entirely neutral on the point, as is the code of conduct to which the dancer is required to sign up.
36. Both sides relied on the notice displayed "TO OUR VALUED CUSTOMERS". Obviously it does not in terms deal with the question of agency, but it tends to point away from it so far as it bears on the point at all. I place no reliance at all on the possessive adjective "our". Clearly the customers are customers of SR on any footing. It does not, of itself, say anything going to the relationship between the dancers and the club, which is the key question. The notice makes clear that the dancers are not employees. Again, that is not determinative of the agency question, but it certainly does not suggest the existence of a relationship (employer/employee) from which an agency would more naturally flow. It tends to suggest that they are performers, which is consistent with their being self-employed performers plying their self-employed trade at the club in their own right. The notice goes on to state (perhaps slightly inaccurately) that the dancers pay a commission to the club in which they perform. That tends to point away from a conclusion that the dancers are performing on behalf of the club. Mr Goy is entitled to rely on the fact that the notice indicates that fees for the dances are specified, which is certainly what one would expect if the dancers were employees of the club and were paid by the club. However, it does not, by itself, point strongly towards agency. I consider that the reference in the notice to the standard rate for a sit-down is neutral.
37. The documents, therefore, do little or nothing to suggest an agency. However, they are not the entire story. The true relationship between the parties is to be gleaned from the overall effect of the documents, coupled with any other relevant facts bearing on the question. I have considered that point. I do not think that it is quite right to describe the DPL as a framework document. It is a key document which is an important part, but not the whole, of the overall picture. For the reasons that I have given, it does not suggest an agency. It suggests a genuine licence given to a third party to allow that third party to carry on a trade or profession at the licensed premises. The overall picture does not detract from that. Of crucial significance, in my view, is the fact that, while the rate of the fees is agreed, the entirety of fees for dancing and for a sit-down is kept by the dancers (even though they pay a fee for each

afternoon dance). There could no doubt be an arrangement involving an agency in which that factor existed, but that important fact tends to demonstrate the genuineness of the situation in which the dancer engages and performs in her own right. The evidence clearly demonstrates that the dancer chooses her own customers. While she is expected to carry out sufficient performances to further the objects of the club, she is nevertheless, within that constraint, free to decide how many customers she dances for. She decides whether or not she has a sit-down with a customer, and can negotiate a fee which departs from the standard fee. She keeps that fee. The fact that she is obliged to pay £40 to the club does not mean that she negotiates the sit-down on behalf of the club. She negotiates it on behalf of herself.

38. In short, I consider that the evidence of the relationships in this case does not demonstrate an agency. I find it hard to identify any which would support a finding of agency.
39. The Tribunal came to a different conclusion. Its reasoning starts in paragraph 53 where it sets out various factors on which it would have to be satisfied before it could be concluded that the dancers were providing services as the agent of SR. I agree that some of those factors would be likely to be present where there was an agency, but they are not all badges of agency (though they are consistent with it). The meat of the Decision is at paragraphs 58 and 59. Mr Milne submits that paragraph 59 is a non sequitur, and I agree with him. The terminology of the Tribunal is that the features referred to in paragraph 59 are a “contractual framework” within which the dancers provide services as agents. If by that expression they mean some sort of metaphorical shell within which one finds the legal concept of agency, then that suggests that the legal concept is derived from other matters beyond those making up the shell (framework). But it does not identify those other matters, and I have been unable to do so. If by the framework metaphor the Tribunal seeks to describe the factors from which the agency can be seen to arise, then I do not consider that the Tribunal’s decision on the point is correct. By and large the Tribunal describes various facts of the relationship correctly but they do not demonstrate that when the dancers perform (and sit) they are doing so as agents for the club. The first sentence of paragraph 58 describes how the dancers fit into SR’s business. Those factors would be consistent with an agency analysis, but they do not compel it. The paragraph then describes money arrangements. Those arrangements are twofold – the arrangements between SR and the dancers, and the arrangements between the dancers and the customers. The fact that the dancer pays for the daily right or opportunity to dance, and the fact that she keeps the fees for dances and sit-downs, are, taken together, significant pointers away from her performing as the agent of SR. Then there are miscellaneous matters, which individually are at best neutral. Obviously the overall effect of the various factors is critical, but even taken together they do not give rise to a conclusion of agency. If one asks whether the club benefits from the dancers’ activities, then of course it does. If one asks whether it controls their activities, then again it does, to an extent. But neither of those questions is the relevant one. If one asks the question – when a dancer reaches an agreement with the customer, is she in fact making an agreement between the club and the customer, the answer is plainly not. The monetary arrangements point the other way, and the other factors do not bring the situation back towards agency.

40. That, then, is the position on the facts, and ultimately this is a case which has to be decided on its own facts. However, there are authorities which assist to some extent, because they demonstrate the attitude of the courts in analogous circumstances.
41. In *Kieran Mullin Ltd v Customs & Excise Commissioners* [2003] STC 274 Park J had to consider a case where the taxpayer was a company which owned hairdressing salons and entered into arrangements with self-employed stylists who actually provided the services. Park J contrasted two scenarios – a “services to the salon” structure in which the stylist provided services to the salon for the purpose of enabling the cutting and styling of salon customers’ hair; and a “services to the customer” structure in which the stylists supplied services to the customer. Those two structures correspond to the analyses of HMRC and SR respectively in the present case. On the facts of that case each stylist was self-employed; they agreed to abide by rules contained in the company’s instruction booklet; they paid rentals for their chairs; and they agreed to attend during certain specified hours. Rentals were set from time to time. The controls over the stylists included punctuality, attendance, dress and the provision by the stylists of their own tools and equipment. The financial arrangements were such that the stylists received the sums paid for their services by customers, less the rental for their chairs (via an initial pooling in the cash registers of the company). The pricing structure was set by the company and the stylists were obliged to have regard to it in dealing with customers (see para 38).
42. Park J held that on the facts the structure was a “services to the customer” structure. He did so by acknowledging the effect of the relationship between the parties both as recorded in documents and as it appeared in practice. The critical provision of the contract was the one which provided that stylists would rent a chair from the company in exchange for a payment, and that the stylists did not receive a fee from the company (see para 35). The parallels with the present case will be obvious – the dancers have a licence to dance, and they do not get paid by the Club. There are also parallels arising from the factors in *Kieran Mullin* referred to in the preceding paragraph. The structure in that case was similar to that in the one before me. I have come to the same conclusion on my facts as Park J did on his. Two points in Park J’s judgment are of particular relevance. The first is his finding that control by the premises owner over the subcontractor is likely to be of only marginal relevance. In *Kieran Mullin* there was a significant degree of control over the activities of the stylists, but Park J did not find that of much assistance in determining the agency or non-agency quality of the relationship between company and stylist - see paragraph 40(iii). I agree, in relation to the facts of the case before me. The second is his finding that it was not particularly relevant to consider how the matter would strike customers - see paragraph 32. Although that point was not relied on by either side in the appeal before me, I have come to the same conclusion.
43. The approach of Park J was followed by Evans Lombe J in *Ringside Refreshments v Customs & Excise Commissioners* [2004] STC 426. That was another case in which it was necessary to consider whether the individuals engaging directly with the public in selling them hotdogs and hamburgers were doing so as principals in their own right or as agents for those who provided the vans and supplies. The arrangements purported to be of the former nature, and there being no element of sham Evans Lombe J said that the arrangements were in law what they purported to be. While it is

another case on its own facts, the decision which I have reached in this case is in line with that one.

44. Mr Milne also drew to my attention the Tribunal decision in *Leapmagic Ltd v Commissioners of Customs & Excise*. That was a case in which self-employed hostesses entertained customers at a club. The hostesses charged and kept fees, though the manner of control over attendance was rather less than that in the present case. On the facts of that case the Tribunal found that the services were supplied by the hostesses, not by the club. It was not impressed by a submission from HMCE that a reference to the hostesses as “our” hostesses tended to point to an analysis in which the club was providing the entertainment as a whole, including the services of the hostesses. By the same token I have already attributed no real significance to the same adjective used in the notice seen by customers entering the SR premises in Tottenham Court Road. This is another case on its facts, in which the Tribunal had to analyse the question that I have analysed and came to the answer at which I have arrived. It gives me comfort but no more.
45. For its part HMRC sought to rely on *Cronin v Commissioners of Customs & Excise* [1991] STC 333, which Mr Goy pointed out was apparently not referred to in *Kieran Mullin*. In that case Mr Cronin operated a franchise agreement for driving lessons. Instructors agreed to charge a standard tuition fee and paid a franchise fee which was geared to the tuition fee. The instructors were provided with cars which were taxed, insured and repaired by Mr Cronin. The cars bore the logo of Mr Cronin’s driving school. On this and other material the Tribunal found that the instructors were supplying services on behalf of Mr Cronin. Brooke J declined to interfere with that finding. Mr Goy submits that I should do the same, and seeks to draw other parallels.
46. That was another case on its facts. As Brooke J observed at page 340g:

“This recital of the arguments tending in each direction shows very clearly that a decision in a case like this may not be an easy one, and that on deceptively similar-looking factors different tribunals may come to different decisions.”

I would agree with that. On the particular facts of that case Brooke J considered that the Tribunal’s decision was justifiable, and he declined to interfere. I think it highly unlikely that the decision of Park J in *Kieran Mullin* would have been any different if it had been cited to him. His decision was different on its facts. So is mine.

Conclusion

47. Accordingly I consider that the Tribunal erred in its analysis and reached the wrong conclusion in this case. I shall allow the appeal and determine that, in respect of the services provided by the dancers at SR’s premises, SR does not make a supply of services for VAT purposes.