Neutral Citation Number: [2011] IEHC 458

THE HIGH COURT

2008 440 SP

IN THE MATTER OF THE SOCIAL WELFARE CONSOLIDATION ACT 2005

BETWEEN

NEENAN TRAVEL LIMITED

APPELLANT

AND

MINISTER FOR SOCIAL AND FAMILY AFFAIRS

RESPONDENT

Judgment of Miss Justice Laffoy delivered on the 8th day of December, 2011.

1. The proceedings

1.1 These proceedings are brought by the appellant pursuant to s. 327 of the Social Welfare (Consolidation) Act 2005 (the Act of 2005) by way of appeal against a decision of an appeals officer (the Appeals Officer) in the respondent's department (the Department), which was communicated to the appellant on 13th April, 2005, which held that the employment of Mr. Tom Leech (Mr. Leech) by the appellant was insurable under the Social Welfare Acts at Class A, on the basis that Mr. Leech's employment with the appellant was under a contract of service, rather than on a contract for services.

1.2 An appeal under s. 327 is an appeal to this Court "on any question of law" against a decision of an appeals officer.

1.3 The relief sought by the appellant in the special summons which initiated the appeal, which was issued on 29th May, 2008, was an order setting aside the decision of the Appeals Officer and a declaration that Mr. Leech was insurable under Class S and engaged by the appellant under a contract for services. A refund of contributions alleged to have been incorrectly paid by the appellant to the respondent was also sought.

2. The factual background

2.1 While I discern some factual inconsistencies in the affidavits filed in these proceedings and in the documents exhibited therein, they are not material to the issue the Court has to determine. There is no dispute as to the core facts.

2.2 The company is a private limited company, which is involved in the travel business, which was incorporated in 1968. Mr. Leech, who has been described in the special endorsement of claim on the special summons as "a former proprietary director" of the appellant and has been described in the submissions made to the Court as a "shareholding executive director", commenced his relationship with the company in 1972 as an employee. Class A PRSI contributions (appropriate to employment under a contract of service) had been paid in respect of his employment up to 5th April, 1992, following which Class S PRSI contributions (appropriate to self employment involving a contract for services) were paid from 6th April, 1992 up to the date of the termination of his employment. Mr. Leech had become a shareholder of the appellant in 1988, when he became the owner of 16.7% of the issued share capital of the appellant. I assume that it was around this time that he also became a director of the appellant.

2.3 Mr. Leech remained with the company until 5th December, 2003, when he left on the basis of what was described in a letter to him of that date from Mr. Con Neenan, chairman of the appellant, as an "Early Retirement/Severance Offer", at a time when he was over sixty years of age. As part of that arrangement Mr. Leech was paid what was described as an "*ex gratia* payment" of a substantial amount, approximately one sixth of which was described as being the "statutory payment". It was a condition of the retirement arrangement that he transfer his entire shareholding in the appellant to Mr. Neenan for a nominal sum of €5.

2.4 The appellant made a claim under the Redundancy Payments Acts 1967 to 2003 in respect of what was considered by it to be the "statutory payment" element of the arrangement with Mr. Leech. The Redundancy Payments Section of the Department of Enterprise Trade and Employment raised with the Scope Section of the respondent's department (the Department) whether Mr. Leech was "compulsorily insurable for all benefits under the Social Welfare Acts" at the date of termination of his employment by letter dated 17th December, 2003. That led to an assessment of the status of Mr. Leech, which led to the decision of the Appeals Officer, which is the subject of these proceedings.

3. The process within the Department

3.1 On 30th March, 2004 Mr. Leech completed a Form INS 1 in which he furnished to the Department the basic information on which his status was assessed. The core facts set out at para. 2.2 above are based on the information provided by Mr. Leech on that form. He disclosed the dates of commencement (1st November, 1972) and cessation (5th December, 2003) of the work he performed for the appellant. He described the work he performed as "Sales Director". He disclosed that he was paid a fixed monthly salary, the rate of pay being determined by the appellant, and that he worked 40 hours per week, and that he was supplied with a company car. He was paid holiday pay, sick leave and expenses were refunded. He was not in receipt of directors' fees, share dividends or drawings. There was reference to a standard contract, which was not signed and which is not before the Court. Mr. Leech indicated in the Form INS 1 that he could have been dismissed "as per the contract" for "unsatisfactory performance".

3.2 On 8th April, 2004, a deciding officer (the Deciding Officer) dealing with the assessment of Mr. Leech's status in the Scope Section of the Department decided that Mr. Leech's employment was insurable under the Social Welfare Acts at the ordinary rate of insurance up to 5th April, 1979 and thereafter at PRSI Class A rate, subject to reckonable earnings exceeding the relevant threshold at any particular time. The reason given by the Deciding Officer for the decision was that, on the basis of the available information, she concluded that he was employed under a contract of service.

3.3 The appellant appealed that decision. An oral hearing was held on 15th February, 2005 at which Mr. Leech gave evidence, as did

Mr. Neenan. Mr. Paul Wallace, a member of the firm of accountants who act as auditors to the appellant also testified. As I have stated at the outset, the decision of the Appeals Officer was communicated to the appellant by letter dated 13th April, 2005. The Appeals Officer upheld the decision of the Deciding Officer. The appellant was informed that the Appeals Officer's reasons for his decision were as follows:

> "I have carefully considered all the available evidence in this case, including that adduced at the oral hearing and the further submission made by Mr. Neenan, and I am satisfied that while Mr. Leech had considerable responsibility and autonomy in the day to day running of the business areas under his control, the factual position is that he is still a minority shareholder and, as such, was subject to the majority vote of the other shareholders who have overall control of the company. In this regard it is my view that Mr. Leech could not make any major policy or business decisions without prior consultation with his fellow shareholders.
>
> In these circumstances, I am satisfied that Mr. Leech's employment in the company is more consistent with that of a contract of service rather than for services."

3.4 Following correspondence with the Appeals Officer, the appellant's solicitors requested that the decision of the Appeals Officer be reviewed by the Chief Appeals Officer pursuant to s. 318 of the Act of 2005. In the course of the correspondence, the Appeals Officer, in a letter dated 27th July, 2005, listed factors which had been addressed at the oral hearing and which had not been disputed by Mr. Neenan, namely:

> "- Mr. Leech did not own the business. He had only a 16% shareholding.
>
> - He was paid a fixed monthly salary.
>
> - He worked a 40 hour week.
>
> - He got holiday and sick pay.
>
> - He was paid expenses.
>
> - He supplies labour only.
>
> - He had to render personal service.
>
> - He was not free to hire another individual to assist him and could not send a substitute.
>
> - He was treated as an ordinary employee as to how, what or when the [work] is done.
>
> - The company decided on his remuneration.
>
> - He did not stand to lose or gain financially from the work performed."

The Appeals Officer stated that, while he had emphasised the control and minority shareholding aspects, the foregoing matters formed part of the overall decision.

3.5 The Chief Appeals Officer issued his determination on 13th June, 2006. It was that, in the light of his review of the case, he did not find that the Appeals Officer was mistaken in relation to the law or the facts and, consequently, he saw no reason to revise the decision of the Appeals Officer. The determination was a substantial document running to five pages, in which issues addressed in Counsel's Opinion, which had been submitted by the appellant's solicitors, were addressed. Those issues are reflected in the grounds on which the appeal in these proceedings was advanced. They have been comprehensively addressed in the written submissions from both sides which the Court has had the benefit of.

4. Grounds of appeal/general observations

4.1 The grounds of appeal set out in the special endorsement of claim in the special endorsement of claim on the special summons, all of which were pursued, are as follows:

> (a) that the Appeals Officer erred in law in determining that Mr. Leech , a "former proprietary executive director holding 16.7% of the issued share capital" was engaged by the appellant under a contract of service and insurable under Class A for the purpose of the Social Welfare Acts;
>
> (b) that the Appeals Officer erred in law in failing to properly consider the significant shareholding held by Mr. Leech and the level of autonomy which he enjoyed;
>
> (c) that the Appeals Officer failed to apply the appropriate tests set out by the Employment Status Group in its "*Code of Practice for determining Employment or Self-Employment Status of Individuals*" to Mr. Leech's contractual status;
>
> (d) that the Appeals Officer erred in law in failing to recognise that Mr. Leech was exposed to financial risk in carrying out his work, thus ignoring his shareholding and the potential for a reduction in the value of that interest in the event of any change in market conditions, mismanagement, negligence or fraud;
>
> (e) that the Appeals Officer erred in law by failing to acknowledge that Mr. Leech's equity holding would have benefited from sound management in the scheduling of engagements or in the performance of tasks arising from the engagement;
>
> (f) that the Appeals Officer erred in law and acted *ultra vires* in making his determination in the absence of any statutory or common law authority defining the contractual status of "executive shareholding directors";
>
> (g) that the Appeals Officer erred in law in endorsing the imposition of a charge to PRSI on the appellant in the absence of any definitive charging section;
>
> (h) that the Appeals Officer erred in law in failing to have recourse to the definition of "proprietary director" as defined in s. 770 of the Taxes Consolidation Act 1997 in accordance with the common law maxim *in pari materia* to the effect that

statutes can be construed together when they deal with the same subject, and should have had regard to the fact that "proprietary director" is therein defined to include a director who is the beneficial owner of shares carrying more than 5% of the voting rights in the company, which definition would have provided the Appeals Officer with the required statutory authority;

(i) that the Appeals Officer erred in law in failing to consider guidelines published by the Department entitled "*Scope – Insurability of Employment*" and, in particular, Part 4.1, which outlines the procedures pertaining to directors and deems the payment of fees or emoluments to such individuals to be liable to self employment contributions at PRSI Class S;

(j) that the Appeals Officer discriminated against the appellant in not applying the treatment which is given to "similar entities and to partnerships where the profit, voting entitlements and terms of engagement of equity holding partners are identical to executive shareholding directors";

(k) that the Appeals Officer erred in law by failing to recognise that the appellant company was run in the form of a quasi-partnership entitling each quasi-partner to participate in management, to expect their fellow quasi-partners to act in good faith and to object to any fundamental change in the direction of the company's business activities; and

(l) that the Appeals Officer erred in law by his failure to recognise the substantial status associated with minority shareholders pursuant to the Companies Acts and the sufficient parity provided to minority shareholders in dealing with majority shareholders.

4.2 The grounds relied on at (f) and (g) above may be readily disposed of. In essence, the appellant's position is that the Appeals Officer was purporting to make law, rather than applying the law. Counsel for the appellant invoked Article 15.2.1 of the Constitution and the decision of the Supreme Court in *Cityview Press Ltd. v. AnCO* [1980] I.R. 380 in support of the contention that it was constitutionally impermissible to do so and sought to bolster the submission in reliance on the well established jurisprudence to the effect that a strict approach has to be adopted to interpreting a taxation statute, including the Social Welfare Acts. That submission is incorrect for a number of reasons.

4.3 First, what the Appeals Officer was doing was applying relevant provisions of the Social Welfare (Consolidation) Act 1993 (the Act of 1993) then in force which prescribed whether a person was a compulsorily insurable employee for the purposes of the Social Welfare Acts. Without getting bogged down in detail, for example, a person over the age of sixteen and under pensionable age in employment in the State under a contract of service was such a person (s. 9 and Part 1 of the First Schedule of the Act of 1993). There is a considerable body of jurisprudence, some of which will be referred to later, as to what constitutes a "contract of service" in the context of the application of the Social Welfare Acts. Therefore, while there is no statutory definition of "contract of service", there is no lacuna in the law.

4.4 Secondly, in *Minister for Social, Community and Family Affairs v. Scanlon* [2001] I.R. 64, Fennelly J., with whom the other members of the Supreme Court agreed, described the role of deciding officers and appeals officers as follows (at p. 87):

> "Counsel for the defendant also argued that the provision infringed the constitutional scheme of separation of powers by assigning a judicial function to deciding officers. Implicit in this submission is the consequence that all deciding and appeals officers are exercising judicial functions. I am quite satisfied that this argument is devoid of merit. Such decisions are inherently administrative. They deal with the administration of the statutory social welfare code. The fact that such officers are bound to act judicially does not alter the character of their functions."

4.5 Finally, it is important to emphasise that, as counsel for the respondent submitted, the Court has a narrow jurisdiction under s. 327, in that it is limited to determination as to whether a decision of an Appeals Officer is correct in law. Counsel for the respondent was correct in his submission that an issue as to the *vires* of an officer of the respondent cannot be pursued in these proceedings.

5. The Law

5.1 The core issue on this appeal is whether the Appeals Officer, with whom the Chief Appeals Officer concurred, was correct in law and on the facts in finding that Mr. Leech was employed by the appellant on a contract of service between 1992 and 2003 for the purposes of the Social Welfare Acts.

5.2 The leading Irish authority on the question of what constitutes a contract of service in the context of the Social Welfare Acts is the decision of the Supreme Court in *Henry Denny and Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. Counsel for the respondent reminded the Court of the view expressed by Hamilton C.J. in that case that the Court should be slow to interfere with the decisions of expert administrative tribunals, pointing out that, in this case, three experts, the Deciding Officer, the Appeals Officer and the Chief Appeals Officer had come to the same conclusion as to the insurability of Mr. Leech under the Social Welfare Acts. While the caveat issued by Hamilton C.J. has to be always borne in mind, what is important for present purposes is the guidance given by the Supreme Court in that case as to the proper approach in determining whether a particular employment is under a contract of service in the context of the Social Welfare Acts.

5.3 As a prelude to considering the authorities, Keane J. stated (at p. 49):

> "The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as [the Social Welfare (Consolidation) Act 1981], is to be regarded as a contract 'for service' or a contract 'of services' have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a 'servant' and 'independent contractor'. However, there is a consensus to be found in the authorities that each case must be considered in the light of its particular facts and of the general principles which the courts have developed …."

Later, having considered the authorities, Keane C.J. stated (at p. 50):

> "It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with

> which it is conducted by him or her."

5.4 The foregoing principles were reiterated by the Supreme Court in *Castleisland Cattle Breeding Society Ltd. v. Minister for Social and Family Affairs* [2004] 4 I.R. 150.

5.5 The Court has not been referred to any authority in this jurisdiction in which a court considered the status of a person who was both a shareholder and a director, and worked for the business, of a company under statutory provisions which regulate social insurance, employment and redundancy and suchlike. The issue has been considered by the courts in the United Kingdom, where, prior to the decision of the Court of Appeal in *Secretary of State v. Bottrill* [2000] 1 All ER 915, there were conflicting decisions.

5.6 The facts in the *Bottrill* case were that Mr. Bottrill was the managing director and the sole shareholder of a company which had one other director. In August 1994, he had signed a contract of employment, setting out his duties, working hours and entitlement to remuneration, holiday and sick pay. He worked the hours indicated and paid tax and National Insurance Contributions as if he were an employee. The company became insolvent, and, as a result, a receiver was appointed. Mr. Bottrill became redundant and was dismissed with effect from April 1996. He applied to the Secretary of State for a redundancy payment from the National Insurance Fund, but the application was rejected on the grounds that he was not an employee within the meaning of the relevant statutory provisions. In the Court of Appeal, the issue for determination was identified by Lord Woolf M.R., delivering the judgment of the Court, as whether a person who is a controlling shareholder of a company can also be an employee of that company for the purposes of the Employment Rights Act 1996 (ERA). Lord Woolf commented on the significance of the issue as follows (at p. 917):

> "The significance of the issue is that if the controlling shareholder is an employee, then upon any of the conditions specified in s. 166(7) being satisfied (broadly speaking on insolvency), as an employee, the controlling shareholder is entitled to recover certain sums, which would otherwise be owing from the company, from the Secretary of State in accordance with the provisions of the ERA including statutory redundancy payments …."

5.7 In setting out the conclusions of the Court of Appeal, Lord Woolf stated (at p. 925):

> "We recognise the attractions of having in relation to the ERA a simple and clear test which will determine whether a shareholder or a director is an employee for the purposes of the Act or not. However, the Act does not provide such a test and it is far from obvious what Parliament would have intended the test to be. We do not find any justification from departing from the well-established position in the law of employment generally. That is whether or not an employer or an employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding that is certainly a fact which is likely to be significant in all situations and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly it is not to be taken as determinative without considering all the relevant circumstances."

That passage reflects a similar approach to the approach adopted by the Supreme Court in the *Henry Denny* case.

Lord Woolf later pointed out that there are logical problems "in taking a controlling shareholding as the test". During the life of a contract, control of a company can change and it would be extraordinary if that factor could affect the employment status of an individual during the same contract for the purpose of making claims under the ERA. He also remarked on the irony that, if control were to be the decisive test, it would probably only "bite" for the purposes of claims under the ERA when the individual was no longer in control because of the insolvency of the company.

5.8 On the facts in the *Bottrill* case, the Court of Appeal held that the tribunals which had considered the matter were entitled to conclude that "there was a genuine contractual relationship between Mr. Bottrill and his company".

5.9 The Court of Appeal had been asked by counsel for the Secretary of State to provide guidance because of the frequency with which problems of the type exemplified by the *Bottrill* case arose. Having stated that the Court was not anxious to lay down rigid guidelines for the factual inquiry which the tribunal of fact must undertake in the particular circumstances of each case, the Court made the following comments (at p. 926):

> "The first question which the tribunal is likely to wish to consider is whether there is or has been a genuine contract between the company and the shareholder. In this context how and for what reasons the contract came into existence (for example, whether the contract was made at a time when insolvency loomed) and what each party actually did pursuant to the contract are likely to be relevant considerations.
>
> If the tribunal concludes that the contract is not a sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, can actually give rise to an employer/employee relationship. In this context, of the various factors usually urged as relevant …, the degree of control exercised by the company over the shareholder employee is always important. This is not the same question as that relating to whether there is a controlling shareholding. The tribunal may think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the articles of association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant. It is for the tribunal as an industrial jury to take all relevant factors into account reaching its conclusion, giving such weight to them as it considers appropriate."

5.10 In the *Bottrill* case, the Court of Appeal followed the decision of the Inner House of the Court of Session in Scotland in *Fleming v. Secretary of State for Trade and Industry* [1997] IRLR 682. Mr. Fleming was the managing director of a company in which he also held 65% of the shares. The remaining shares were held by the finance director. Mr. Fleming worked alongside other employees of the company, with the same hours of work, and had no other employment. His remuneration was paid under the PAYE system but when the company got into cash flow difficulties, he elected not to take his salary in the hope that the company would overcome its problems and he would be able to receive payment later. When the company went into liquidation, all other employees including the finance director, received redundancy and statutory notice payments from the Secretary of State. Mr. Fleming's application for these payments was refused on the grounds that he was not an employee of the company. The Inner House of the Court of Session dismissed an appeal against a decision of the Employment Appeal Tribunal, which had found that there were no grounds for interfering with the decision of the industrial tribunal which had upheld the decision of the Secretary of State. Lord Coulsfield in setting out the views of the Court stated:

> "We agree that it is well-established that the question whether or not a person is an employee is a question of fact to be decided by the industrial tribunal and that neither the Employment Appeal Tribunal nor this court is entitled to interfere unless the industrial tribunal has in some way misdirected itself or arrived at a conclusion which cannot reasonably be supported. In the present case it seems to us that, in taking all the factors together, there was ample material to entitle the industrial tribunal to reach the conclusion that the appellant was not an employee for the purposes of the employment protection legislation. There were, as counsel for the respondent recognised, factors on which the appellant could rely on as pointing towards an employment relationship, such as the fact that the appellant worked alongside other employees of the company with the same hours of work and had no other employment. On the other hand, the fact that he was able to decide to draw no salary during the last month of the company's existence, the fact that he personally guaranteed its obligations and the fact that he held a substantial majority shareholding are all factors which point in the opposite direction, as is the fact that there was no written record of his terms of employment. The fact that the salary which the appellant received was paid through the PAYE system is, in our view, neutral. In all the circumstances, therefore, we have no doubt that there was ample material on which the industrial tribunal was entitled to reach the conclusion that the appellant was not an employee."

In general, that position also reflects the position adopted by the Supreme Court in the *Henry Denny* case. In the application of the relevant principles, however, the Court was dealing with Mr. Fleming's factual circumstances, which are wholly distinguishable from the factual circumstances of Mr. Leech.

6. Application of the law to the core issue

6.1 The matter which the Deciding Officer had to decide and which was the subject of the appeal to the Appeals Officer in this case did not have the factual complexity that most of the appeals on a question of law under provisions similar to s. 327 which have come before the Superior Courts have involved. For instance, in both the *Henry Denny* case and the *Castleisland Cattle Breeding Society* case the worker, to use a neutral term, had a contract from the person for whom the work was done which described the status of the worker as that of independent contractor, which it was recognised was not conclusive, so that the decision maker was bound to examine and have regard to what the real arrangement on a day to day basis between the parties was. That type of complexity has the potentiality to give rise to incorrect findings of fact by the decision maker and the drawing of incorrect inferences from primary facts. Nothing of the sort arose either before the Deciding Officer or the Appeals Officer in this case. There was only one complication, which did not give rise to any issue of fact. That was that Mr. Leech was a minority shareholder, owning 16.7% of the issued share capital of the company, and that he was also a director of the company. Therefore, the primary question for the Court in this case is whether the conclusion of the Appeals Officer as to the significance of that factor was based on an erroneous view of the law, as contended in ground (a) of the grounds of appeal.

6.2 It is understandable that the Appeals Officer, in giving the reasons for his decision, as set out in the letter of 13th April, 2005, focused on that complication, which was the nub of the issue before him, and did not expressly address the additional factors which he listed in his letter dated 27th July, 2005. Although he did not use the precise terminology used by Keane J. in the *Henry Denny* case, the essence of what he found was that Mr. Leech was performing the services he rendered not for himself but for the company, which was under the control of the majority shareholders. The information given by Mr. Leech on the form INS 1, which I have summarised at para. 3.1 above, could have led to no other conclusion. The quantum of Mr. Leech's shareholding could not have displaced that conclusion.

6.3 There clearly was "a genuine contract" between the appellant and Mr. Leech. Unlike the shareholder in the *Bottrill* case, who was the sole member of the company, Mr. Leech was a minority shareholder. In my view, there was no necessity for the Appeals Officer to explore the additional matters referred to by Lord Woolf in the *Bottrill* case.

6.4 While at this point it is possible to find that the conclusion reached by the Appeals Officer was not based on an erroneous view of the law as contended for at ground (a), I think it appropriate to consider the other specific grounds of appeal relied on by counsel for the appellant in support of his contrary argument.

7. Conclusions on other grounds of appeal

7.1 As regards the ground set out in para. (b), that the Appeals Officer failed to consider the significant shareholding held by Mr. Leech and the level of autonomy he enjoyed, in my view, the Appeals Officer was correct in emphasising the fact that Mr. Leech was merely a minority shareholder. He was also correct in implicitly differentiating between the autonomy enjoyed by Mr. Leech in the day to day running of the business areas under his control and his capacity to control, or even influence, decision making at board or shareholder level, for example, in general meeting. Mr. Wallace's description of Mr. Leech's involvement in the running of the business of the company does not lead to the conclusion that Mr. Leech was anything other than an employee of the company under a contract of service.

7.2 Paragraph (c) and paragraph (i) of the grounds of appeal can be considered together. In relation to para. (c), the "Code of Practice" referred to is a leaflet which was prepared by the Employment Status Group (the Group) set up under the Programme for Prosperity and Fairness. The Group membership was drawn from relevant government departments, for instance, the Department, the Irish Congress of Trade Unions and the Irish Business and Employers Confederation (IBEC) and other relevant bodies. As the leaflet itself explains, the Group was set up because of a growing concern that there were increasing numbers of individuals categorised as "self employed", when the indicators may have been that "employee" status was more appropriate. The purpose of the leaflet was to eliminate misconceptions and provide clarity. The leaflet was appended to the guidelines referred to in para. (i) issued by the Department entitled "Scope – Insurability of Employment", which guidelines are designed to provide guidance for decision makers, such as deciding officers and appeals officers in the Department. While both documents have been prepared on the basis that they reflect the law and the decisions of the courts, the task of a deciding officer or an appeals officer is to apply the law, irrespective of what is contained in the two documents. As I have stated, I am of the view that, in this case, the Appeals Officer did apply the law correctly. As regards Clause 4.1 of the guidelines, which deals with directors, it recognises that a director of a company may not have executive functions, in which case any fees he receives are classed as self-employment contributions under PRSI Class S, whereas, if he has executive functions, then one must consider whether he performs those functions under a contract of service or under a contract for services and the Class A or Class S dichotomy comes into play. Undoubtedly, when that happens, the deciding officer or an appeals officer must determine the issue as to whether the shareholder performs his functions under a contract of service or under a contract for services in accordance with the principles laid down by the Supreme Court in the *Henry Denny* case. I am satisfied that that is what the Appeals Officer did in this case. I reject the argument that there was an over reliance on the "Code of Practice", which raises questions about the validity of the determination. Accordingly, the grounds of appeal set out in paras. (c) and (i) are not maintainable.

7.3 As regards the grounds set out at paras. (d) and (e), Mr. Leech worked for a fixed monthly wage and other perquisites, which the company paid. The fact that he had a minority shareholding, the value of which might have varied depending on the manner in which

the employees of the company, including Mr. Leech, performed their duties, in my view, is entirely immaterial in the context of the issue which the Appeals Officer had to determine.

7.4 The definition of "proprietary director" contained in the Tax Code is of no relevance to the issue as to the insurability of Mr. Leech under the Social Welfare Acts between 1992 and December 2003. That issue was governed at the time by the provisions of the Social Welfare Code referred to earlier. Accordingly, the ground set out at para. (h) must be rejected.

7.5 The grounds set out in paras. (j), (k) and (l) can be considered together. The company law principles invoked by the appellant were of no relevance in relation to the determination which the Appeals Officer was required to make for the reasons set out below.

7.6 To take the concept of quasi-partnership private companies, which was invoked by counsel for the appellant, first, as is pointed out in Courtney on *The Law of Private Companies* (2nd Ed., 2002) (at para. 1.128), where a relationship of equality, mutuality, trust and confidence, based on a personal relationship, subsists between the members of a private company in which the owners (shareholders) and managers (directors) are the same persons, it may be appropriate to describe it as a quasi-partnership. Courtney (op. cit.) at para. 1.130 observes that "evidentially an inequality of shareholding is anathema to the mutuality that has consistently been found to be a requirement for a quasi-partnership company". Mr. Leech did not have equality of shareholding at any time. Prior to Mr. Leech becoming redundant, the shareholders, apart from Mr. Leech, were Mr. Neenan, who owned 36.66% of the issued share capital of the company and two other members of the Neenan family who between them owned 46.67% of the issued share capital of the company. Accordingly, on the evidence available, there is no basis whatsoever for concluding, if it was a relevant factor for consideration by the Appeals Officer, that the appellant company was at the time a quasi-partnership company. If it was, it seems unlikely that Mr. Leech would have disposed of his minority shareholding for the nominal sum of €5 as he did in 2003. In any event, as Courtney points out at para. 1.131 the consequence of a finding that a company properly falls to be treated as a quasi-partnership is that it entitles the quasi-partners to participate in the management of the company, to expect that their fellow quasi-partners will act in good faith, and to object to any fundamental change in the direction of the company's business activities. Even where it is recognised that a quasi-partnership exists in a company, it impacts only on the rights of the members inter se, so as to give rise to equitable considerations over and above the legal and statutory rights which govern the relationship of the members.

7.7 Similarly, s. 205 of the Companies Act 1963, which was also invoked on behalf of the appellant, is concerned with providing a remedy to a shareholder where the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner which is oppressive or in disregard of its interests. The object is to provide the members with a process for obtaining redress in respect of improper treatment within the corporate structure. Looking at it in the abstract, it is difficult to see how the availability of the s. 205 remedy within a corporate structure can have any bearing on a determination as to the insurability under the Social Welfare Code of a person who works for the company and is also a shareholder, or a shareholder and director, of a company.

7.8 It is perhaps not beyond the bounds of possibility that the existence of the type of facts that give rise to the recognition of a corporate quasi-partnership might be relevant in a particular case in determining whether an employer/employee relationship exists between the company and a shareholder worker. However, that is entirely hypothetical. In the determination of the employment status of Mr. Leech, the Appeals Officer was correct in not attaching any weight to his role as a minority shareholder and a director of the appellant.

7.9 Apropos of the grounds set out at paras. (j), (k) and (l), I think it is appropriate to recall the most fundamental principle of company law, which was laid down over a century ago in *Salomon v. Salomon & Co. Ltd.* [1897] AC 22: a registered company constitutes a legal person with a legal identity separate and distinct from its individual members or shareholders.

8. Summary of conclusions

8.1 The issue for determination by the Appeals Officer was whether Mr. Leech, at the relevant time, was in the employment of the appellant under a contract of service, which was precisely the same issue as had to be determined in the *Henry Denny* case under earlier codified social welfare legislation. On the authority of the decision of the Supreme Court in the *Henry Denny* case, in order to find that Mr. Leech was in employment under a contract of service, the Appeals Officer had to find that he performed the services he was contracted to perform for the appellant, and not on his own account. It is not in issue that, prior to becoming a shareholder of the appellant, the relationship of employer and employee existed between the appellant and Mr. Leech and that Mr. Leech provided services to the appellant under a contract of service. In my view, the Appeals Officer applied the law correctly in determining that the acquisition of the 16.7% minority shareholding in the appellant did not change that relationship. The terms of the employment of Mr. Leech, as disclosed on the Form INS 1, are only consistent with employment under a contract of service.

8.2 Notwithstanding that, by reason of the low level of Mr. Leech's equity stake as a member of the appellant, the question whether his membership and his position as director interfered with his status as an employee of the appellant under a contract of service was readily capable of resolution so as to produce the unambiguous answer that it did not, without any foray into the principles of company law, I have addressed the matters raised by counsel for the appellant by reference to the grounds of appeal in some detail. However, it has not been necessary, and I have not attempted, to identify any general principle which would be of assistance in identifying the point at which, or the circumstances in which, a substantial shareholding and the top management role in a company may be indicative of the fact that the person in that position is acting on his own account and not as an employee of the company. Each case must be considered on its own facts in accordance with the general principle which the courts have developed, as Keane J. stated in the *Henry Denny* case.

8.3 There is undoubtedly a measure of truth in the view one encounters in textbooks on Contract Law and Employment Law that the outcome of issues as to whether an individual performs services as an employee under a contract of service, rather than as an independent contractor under a contract for services, may be influenced by the context in which the issue arises. In the *Bottrill* case, Lord Woolf noted (at p. 926) that, in a case where National Insurance Contributions had been paid, to deprive an individual of his claims under the ERA could be to deprive unjustly that individual of the benefits to which he could properly expect to be entitled after he and his "employer" had made the appropriate contributions. In this case, however, there is no evidence before the Court as to any adverse impact of the reclassification of Mr. Leech as insurable under Class A on Mr. Leech himself.

8.4 In reality, what happened was that from 1992 onwards the appellant did not pay the appropriate PRSI contributions under Class A in respect of Mr. Leech. Yet the appellant made an application under the Redundancy Payments Acts for a refund of what it treated as a statutory redundancy payment to Mr. Leech. At the hearing of the appeal, counsel for the appellant acknowledged that that application should not have been made, properly recognising, it seems to me, that the appellant "could not have its cake and eat it". The appellant could not claim a refund under the Redundancy Payments Acts in respect of part of the redundancy lump sum it had paid to Mr. Leech, while claiming that it was only liable for Class S PRSI contributions in respect of Mr. Leech. In view of the outcome of the decision of the Appeals Officer, the appellant was entitled to make that claim, subject to the payment of the proper PRSI contributions consequent on the reclassification of Mr. Leech under Class A.

8.5 As regards the monetary implications for the appellant of the Appeals Officer's decision, the overall outcome from the perspective of the appellant is that it has made an additional payment of €59,368.99 to the Department in discharge of the employer's element of the PRSI contribution under Class A, which it has sought to recover in these proceedings. However, it has received €19,200 from the Department of Enterprise, Trade and Employment as an appropriate refund (60%) of the statutory redundancy payment it made to Mr. Leech. As the determination of the Appeals Officer was not erroneous, the appellant is not entitled to a refund of the sum of €59,368.99 as claimed. In any event, I think it is doubtful as to whether, in these proceedings, it would be appropriate to make an order for payment of money against the respondent.

9. Order

9.1 There will be an order dismissing the appellant's appeal.