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The 2023 Denning Lecture

"On the Job? The Law on Status in a Gig Economy"

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1. If you mention Lord Denning's name to a modern law student, they can usually confidently rattle off a few of his greatest hits: the ingenuity of *High Trees*,[2] the brazen disregard of authority in *Broome v Cassell*,[3] or the remarkable judicial social conscience on display in his advocacy for the deserted wife in *Bendall v McWhirter*[4] – albeit one should add that he regrettably did not exhibit a similar empathy in all his public opinions. Labour law cases though are rarely cited. Yet, Lord Denning's 38 year judicial career spanned the 70s to 1982, so that his later caseload included the inevitable thicket of industrial disputes and employment claims characteristic of that tumultuous decade. I want to briefly mention just one of those cases, which thanks to his inimitable writing style reads rather like an Aesop's fable. It concerns the manager of the Ilford branch of an insurance company.[5]

2. The manager, Mr Massey, happily worked as an employee of the company until one day his accountant advised him that he would be better off if he worked as self-employed. Receiving trading income rather than employment income promised what is the holy grail for many people who end up as litigants: favourable tax treatment. The company agreed and to put their clever plan into action, the parties entered into a new agreement which was substantially identical to the previous employment contract, except that Mr Massey's name was replaced with 'John L Massey & Associates'. No intermediary company was created – as Lord Denning drily remarked, Mr Massey was simply calling himself by a different name.

3. Unfortunately for Mr Massey, he was dismissed a few years later and wanted to bring a claim for unfair dismissal. Such a claim was only open to him if he was an employee

[1] I am very grateful to my judicial assistant Sam Dayan for his invaluable assistance in preparing this lecture.
[2] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
[3] *Broome v Cassell & Co Ltd* [1971] 2 QB 354.
[4] *Bendall v McWhirter* [1952] 2 QB 466.
[5] *Massey v Crown Life Insurance Company* [1978] 1 WLR 676.

and not an independent contractor. So, having carefully arranged his affairs to fall on one side of the contractor/employee line, he was left frantically trying to retread his steps back to the other. Lord Denning, who was by then nearly 80, began his judgment by recognising that parties cannot change the legal status of their relationship by putting a different label on it. Where, however, the nature of the parties' relationship is ambiguous and could plausibly fall within more than one category, how the parties drew up their agreement may be a very important factor in determining the true relation between them. The fact that both parties had genuinely intended Mr Massey to be self-employed was decisive in this case. Mr Massey could not both have his cake and eat it – or as Lord Denning put it, "*having made his bed as being self-employed he must lie on it*".

4. The moral of the fable is clear enough – don't listen to accountants – but my real reason for mentioning the case is that it touches on one of the key themes that I want to discuss this evening. The challenge of correctly classifying different types of labour relationship is as important today as it was in Lord Denning's time. And it is relevant in a variety of contexts whether for the purposes of engaging statutory protections or imposing common law liabilities. In fact, it seems to be getting ever more important, given the growing numbers of people in nontraditional employment and the increasingly intricate statutory framework of rights and entitlements to which the status of "worker" acts as a gateway. Before I turn to consider how the courts have responded to these challenges in recent years, let me briefly sketch the outline of one the most talked about new forms of employment, the gig economy.

Gig Economy

5. The gig economy is an amorphous creature. There is no universally agreed definition of the term, although it is usually taken to refer to the provision of labour via digital platforms. Estimates of its size vary hugely. To give you a flavour, a recent report from the Chartered Institute of Personnel and Development estimates the UK gig economy at just under half a million people, which amounts to roughly 1.4% of the total workforce.[6] By contrast, a 2021 study by the Trades Union Congress found that 14.7% of workers in England and Wales, totalling 4.4 million, work for gig economy platforms at least once a week.[7] A 2017 government report puts the number somewhere between the two.[8]

6. Standing back, it is clear that, on any measure, the gig economy is a significant part of the UK economy which plays an important role in many people's daily lives. I am aware

[6] The Chartered Institute of Personnel and Development, *The gig economy: What does it really look like?* (September 2023).
[7] Trades Union Congress, *Platformisation and the pandemic: changes in workers' experiences of platform work in England and Wales 2016-2021*.
[8] Department for Business, Energy and Industrial Strategy, *The Characteristics Of Those In The Gig Economy* (February 2018).

that it is sometimes casually dismissed as a 'ZIRP' – a zero interest rate phenomenon. This rather ugly acronym encapsulates the idea that many of the leading platforms were originally reliant on Silicon Valley venture capital largesse and that as interest rates rise, their underlying unprofitable business models will be exposed. However, the gig economy has now been with us for over a decade, and there are few signs that it is about to disappear.

7. The next point to note about the gig economy is its sheer diversity. Most of us instinctively think about Uber drivers or Deliveroo riders. However, delivery services probably make up only a fifth of the gig economy.[9] Nearly a quarter of a million people undertake desk-based services, such as web development, translation and even provision of legal services.

8. One area that came as a surprise to me is the burgeoning web novel industry. A web novel is a novel that is published online, often one chapter at a time. There are a number of highly successful platforms which allow anyone to publish their fiction and receive a small share of the revenues. There are also a number of writing guides that the platforms provide to would-be authors,[10] intended to provide a reliable formula which writers can follow to produce a successful novel. Unfortunately, they do not always match all our modern ideals. For example, one guide on writing a werewolf romance bestseller recommends that writers create a dominant powerful male alpha who helps rescue and protect the female lead.[11] I confess that my knowledge of werewolf fiction is limited but I would like to think that fans of the genre are sufficiently broad-minded to enjoy all manner of romantic pairings.

9. Whatever one's views about the gig economy, its impact on our world is undeniable and it is something with which judges and policymakers have begun and are continuing to grapple.

Employees' Rights

10. Turning back to the law, I want to examine how the question of employment status arises across a number of different legal contexts. Let's begin with employees' rights. It is worth reminding ourselves at the outset why status matters. Traditionally, the law operated a binary distinction between a 'contract for service' and a 'contract for services' – only the former constituted a relationship of employment, or, in the archaic language of the time, a relationship of master and servant. This simple binary was complicated by the enactment of statutes, one as early as 1875 but really taking off in the 1990s, which introduced the category of "workers".

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[9] CIPD Report (n.6) page 8.
[10] Viola Zhou, Meghan Toubin, 'Werewolf erotica is the latest global gig work trend (Rest of World, 25 July 2022) <https://restofworld.org/2022/china-romance-novels/> accessed 1 November 2023.
[11] GoodNovel Writer Academy, 'How To Write a Werewolf Bestseller'. <https://academy.goodnovel.com/course/How-to-Write-a-Werewolf-Best-seller/40>.

11. As Lady Hale explained in *Bates van Winkelhof* in 2014 employment law now distinguishes between three types of people.[12] First, those employed under a contract of employment. Second, those self-employed people who are in business on their own account and undertake work for their clients or customers. Third, an intermediate class of workers who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else. This final group are often known as 'limb (b) workers' after the statutory definition contained in section 230(3)(b) of the Employment Rights Act 1996.

12. Certain statutory rights, including the right not to be unfairly dismissed, are limited to those employed under a contract of employment. However, many other important rights are also enjoyed by limb (b) workers, including the national minimum wage and the right to paid annual leave. It was these rights that were the subject of the seminal 2021 Supreme Court decision in *Uber v Aslam*.[13] The case marked the first opportunity for our apex court to consider the legal implications of a paradigmatic gig economy platform: a carefully designed app whose simplicity belies the sophisticated internal machinery sitting underneath coordinating a vast on-demand workforce.[14]

13. Uber's position was that the drivers whose trips were arranged through the Uber app were not its workers. Its argument was anchored in the terms of the labyrinthine written agreements entered into by various Uber entities with drivers and passengers. These agreements purported to limit Uber's role to that of a provider of technology services plus also acting as a payment collection agent for the driver. The contract for transport services was supposedly entered into exclusively between passenger and the driver.

14. The Supreme Court disagreed. The Court's crucial insight was to recognise that the rights asserted by the claimants were statutory and not contractual. The primary task for a tribunal is therefore not to interpret the parties' contracts but rather to construe the statutory provisions and determine whether the claimants fall within their ambit. The conventional wisdom is that when construing a contract, it is not legitimate to look at how the parties have then gone on to operate the agreement in practice. That is illegitimate because the words must have acquired their fixed meaning as at the date the contract was signed. But that is not the exercise that the court is engaged in when deciding whether a claimant has acquired statutory rights. The purpose of the legislation would be fatally undermined if the written agreements of the parties were taken as the starting point of the analysis; it is precisely because of an employer's ability to dictate contractual terms that Parliament decided that statutory protection was required in the first place. It has therefore always been the case that the status of the putative worker is determined by looking at how the relationship has operated in practice.

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[12] *Clyde & Co LLP and another v Bates van Winkelhof* [2014] UKSC 32.
[13] *Uber BV and others v Aslam and others* [2021] UKSC 5.
[14] Jeremias Adams-Prassl,'*Uber BV v Aslam'*: '[W]ork relations … cannot safely be left to contractual regulation', Industrial Law Journal, Volume 51, Issue 4, December 2022, Pages 955–966.

15. How then should the "worker" test be applied? A court or tribunal must consider all the circumstances of the case and weigh them against the statutory definition. The greater the employer's level of control, the stronger the case for classifying the individual as a worker. The Supreme Court held in *Uber* that, notwithstanding the drivers' freedom to choose where and when they worked, the employment tribunal had been right to find that Uber exercised a high degree of control over them. Of particular significance were Uber's exclusive right to determine the remuneration paid to drivers and the tight control it exercised over a driver's decision to accept a ride request. To do this, Uber limited the information provided to the driver before they accepted a ride and closely monitored a driver's rate of ride acceptance, with drivers falling below a certain threshold automatically logged off.

16. I hope you'll forgive me for having set out the case at length, but it really is of fundamental importance in this area. It has authoritatively established that the application of the worker definition to a particular set of circumstances must be rooted in the factual reality of the relationship. Courts will look straight to the facts on the ground and be alert to attempts by "*armies of lawyers*" to disguise them through misleading contractual provisions.[15] This ensures that courts will, as described by one employment tribunal, "*drink from the pure waters of the statute*".[16]

17. Even with the benefit of the conceptual clarity provided by the *Uber* decision, there will of course still be difficult edge cases for tribunals to determine. Gig economy platforms exist on a spectrum, with some truly acting as neutral intermediaries facilitating genuine entrepreneurship and others, such as Uber, exercising tight control over their workforce.[17] One illuminating case is *Pimlico Plumbers*, the facts of which were described by one commentator as reading rather like an employment law exam question.[18] The company's engineers wore branded Pimlico uniforms, drove company vans, and had to closely follow administrative instructions from Pimlico's control room. On the other side of the ledger, they looked after their own tax affairs, were entitled to reject any particular piece of work offered by Pimlico and were only paid if a client paid Pimlico's invoice. The Supreme Court found that the tribunal was entitled to conclude that Pimlico could not be regarded as a client or customer of the engineers. The tribunal's reasoning was grounded in its conclusion that the degree of control exercised by Pimlico over the claimant was inconsistent with the former being a client of the latter.

18. Cases like this, with weighty factors pointing both ways, remind me of Aristotle's observation that "*it is the mark of an educated man to look for precision in each class*

[15] *Consistent Group Limited v Kalwak and Others, Welsh Country Foods Limited* [2008] EWCA Civ 430.
[16] *Windle & Anor v Secretary of State for Justice* [2015] ICR 156.
[17] Adams-Prassl, Jeremias, 'Disrupting the Disruptors', Humans as a Service: The Promise and Perils of Work in the Gig Economy (Oxford, 2018; online edn, Oxford Academic).
[18] Harvey's on Industrial Relations (1 Div C [81.01]).

of things just so far as the nature of the subject admits".[19] Whilst I can see what Aristotle was getting at, as judges we unfortunately don't have the option of throwing up our hands and pleading that the concepts we're being asked to apply don't admit a definite answer. That is a luxury reserved for philosophers. Each status claim requires an authoritative determination – employee, worker or self-employed.

Vicarious Liability

19. Employment status plays a rather different role in the law of vicarious liability. Rather than acting as the trigger for the application of a suite of statutory rights, it forms one half of the test used to determine when one person is responsible for the wrongdoing of another. As Lord Burrows explained in the recent *Jehovah's Witnesses* case earlier this year, vicarious liability is an unusual form of liability as it does not rest on the defendant themselves having owed any duty to the claimant.[20] They are made liable solely by virtue of their relationship with the wrongdoer and that relationship's connection to the wrong. The doctrine has venerable origins, with one law professor making a spirited case that its origins can be traced back to the 'dawn of recorded history with an ox'.[21] The basis for this claim is that the Book of Exodus commands that when an ox gores a person to death, the ox must be killed but its owner cannot be touched. However, where an ox has a history of goring and the owner doesn't take appropriate preventative measures, then if the ox gores someone to death not only must the ox be killed, but the owner too.

20. From those propitious roots, the doctrine was taken up in Roman and Germanic law before becoming settled law in England by medieval times. The doctrine came to the fore in the 17th and 18th centuries with the expansion of commerce and industry. It became increasingly important that victims of accidents could bring claims against employers whose employees had injured them.[22] The scope of the doctrine remained anchored by the requirement that the act must have been committed in the course of the tortfeasor's employment. One colourful example is a case from 1900 in which the over-enthusiastic *conductor* of a horse-drawn omnibus took it upon himself to *drive* the vehicle after the designated driver went to dinner and became unwell.[23] Not entirely surprisingly, the conductor proceeded to injure a pedestrian; the court found that the employer was not vicariously liable for the tort committed by the bus conductor, as driving the bus fell outside of the normal course of his employment. A further factor distancing the employer from the tort was that the conductor had been driving dangerously – the bus had been travelling at eight miles per hour at the time of the

[19] Nichomachean Ethics Bk I section 3.
[20] *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15.
[21] Baez, Beau, Volunteers, Victims, and Vicarious Liability: Why Tort Law Should Recognize Altruism (2009). University of Louisville Law Review, Vol. 48, No. 221, 2009.
[22] Giliker, Paula. "Vicarious Liability in the Common Law World: An Introduction." Vicarious Liability in the Common Law World. Ed. Paula Giliker. Oxford: Hart Publishing, 2022.
[23] *Beard v London General Omnibus Company* [1900] 2 Q.B. 530.

accident, which, as counsel sagely noted during a hearing in the 1960s in a bid to distinguish the case, must have been a considerable speed in 1900.[24]

21. Vicarious liability has seen a dramatic expansion of its boundaries over the past 20 years. Sadly, this expansion has primarily been motivated not as a response to technological advancements, but rather as a reaction to a deluge of claims relating to sexual abuse connected to religious institutions and schools. The traditional rule that vicarious liability could only apply to employers for torts committed by their employees in the formal sense proved too restrictive. In response, the courts expanded the doctrine to encompass relationships which are 'akin' to employment. So, for example, in the *Christian Brothers* case in 2012, the claimants had been sexually abused as boys at a Roman Catholic residential school by members of the Christian Brothers Institute.[25] The Supreme Court found that the relationship between the Christian Brothers and the Institute was akin to employment because it had all the essential characteristics of an employment relationship, such as hierarchy, and as the Brothers' activities were undertaken to further the Institute's mission. The fact that the Brothers were bound to the Institute by vows rather than an employment contract was immaterial.

22. Delineating the boundaries of the doctrine's expanded scope has proved to be challenging, with a remarkable number of Supreme Court judgments on the issue over the past decade. However, there is now increasing clarity in the area, with the Supreme Court's unanimous judgment in *Jehovah's Witnesses* earlier this year containing a powerful summary of the law.[26] The classic distinction between, on the one hand, employment relationships and relationships akin to employment and, on the other hand, independent contractors remains good law – vicarious liability can only arise in the former.

23. How are courts to tell these relationships apart? The approach is similar to the tests we encountered in the employee rights context. Relevant factors include: (i) the extent of the defendant's control over the tortfeasor in carrying out the work; (ii) how integral to the organisation is the work carried out by the tortfeasor; (iii) whether there is a hierarchy of seniority into which the relevant role fits. The application of these factors is neatly illustrated by the *Barclays Bank* case.[27] The question was whether Barclays was vicariously liable for torts committed by a doctor it had engaged to perform health checks on people applying to work for the bank. The doctor was alleged to have sexually assaulted the claimants during the medical examinations. The Supreme Court found that the doctor was clearly in business on his own account: he was paid per examination without any overarching retainer and had a wide portfolio of clients, of which Barclays was only one. The judgment resoundingly confirmed that,

[24] *Kay v ITW Ltd* [1968] 1 Q.B. 140, 148.
[25] *The Catholic Child Welfare Society and others v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56.
[26] (n 20) [58].
[27] *Barclays Bank plc v Various Claimants* [2020] UKSC 13.

notwithstanding the expansion of the doctrine of vicarious liability, true independent contractors remain outside its ambit.

24. The outermost boundary of the test was further considered in another recent case concerning child sexual abuse.[28] This time the claimant had been abused whilst on an overseas footballing tour for young boys. The question was whether Blackpool Football Club was vicariously liable for the abuse, which had been perpetrated by a man named Mr Roper. Mr Roper worked as an unpaid talent "scout" for Blackpool FC and ran his own youth football team, which was informally associated with the club. The relationship between Mr Roper and Blackpool FC was complicated; although he did not occupy any official position, the club lavished Mr Roper with free tickets and unrestricted access to the grounds, which he in turn used to attract promising young footballers who might sign with the club. The Court of Appeal determined that the relationship was not akin to employment: it lacked all the normal incidents of an employment relationship. In particular, there was a complete lack of control over Mr Roper, who operated largely independently of the club. Further, as was the case with the doctor in *Barclays Bank*, Mr Roper was not under any obligation to accept work. The claimant's application for permission to appeal to the Supreme Court was refused last year.

25. An unusual feature of the development of vicarious liability is that, as will be apparent, many of the key cases concern sexual abuse. The Supreme Court however has made repeatedly clear that these cases do not form a special category of case; the same rules apply regardless of the context. Accordingly, notwithstanding that the 'akin to employment' gloss may have been formulated to tackle the unusual modus operandi of religious orders, it is of general application.[29] As Lord Dyson recognised in *Mohamud*, these developments have equipped the doctrine to tackle the "*increasing complexity and sophistication of the organisation of enterprises in the modern world*".[30]

Trade Unions

26. The worker category also plays an important role in the law governing trade unions. Take the recent Supreme Court *Deliveroo* judgment as an example.[31] A substantial number of people working as Deliveroo riders in London joined the Independent Workers Union of Great Britain, which in turn made a formal request to Deliveroo for recognition in November 2016 so that it could then engage in collective bargaining for improved terms and conditions. Deliveroo refused the request. The question of the worker category arose because one of the conditions for a valid request for trade union recognition is that the people in respect of whom the union wishes to be recognised are

[28] *Blackpool Football Club Limited v DSN* [2021] EWCA Civ 1352.
[29] Giliker (n. 22).
[30] *Mr A M Mohamud (in substitution for Mr A Mohamud (deceased) v WM Morrison Supermarkets plc* [2016] UKSC 11, [55].
[31] *Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43.

workers. The definition of "workers" in the trade union legislation is similar but not identical to the definition in the Employment Rights Act.

27. By the time the case reached the Supreme Court it was common ground that so far as the domestic legislation was concerned, the riders did not fall within the definition of workers. The only point in contention was whether they had relevant rights under Article 11 of the ECHR. Article 11 enshrines the right to freedom of assembly and association, which includes the right to 'form and to join trade unions'. If they did have such rights then the court would have to consider whether it could read down the domestic law definition of worker in accordance with s.3 of the Human Rights Act 1998 so that it was broad enough to include the riders.

28. Lord Lloyd-Jones and I wrote the Supreme Court's unanimous judgment. We examined the relevant Strasbourg jurisprudence and concluded that the right to join or form a trade union only arises where there is what that court calls an "employment relationship". Here, though, the concept of an employment relationship is not drawn from the common law but is rather an autonomous ECHR concept which applies across all the Council of Europe members. That said, there is significant similarity between the two approaches. In its case-law, the ECtHR has applied and endorsed the criteria set out in a recommendation adopted by the International Labour Organisation (ILO). We agreed with the Court of Appeal that the approach set out in that recommendation broadly parallels the inquiry undertaken in domestic law to identify workers and employees; the focus is on uncovering the realities of the relationship and determining whether that relationship is characterised by subordination.

29. Applying that test, we found that the existence of a genuine ability on the part of the riders to engage a substitute person to carry out a particular delivery was fatal to the Union's case. The right to hire a substitute was inconsistent with an obligation to provide personal service which is key to the employment relationship. We thought that this conclusion was supported by a multitude of other factors, including that: (i) riders can operate if and when they choose and are not penalised for not carrying out any deliveries; (ii) remuneration is entirely dependent on how many deliveries riders make; (iii) riders supply their own equipment; (iv) deliveries are rarely a rider's principal source of income, and (v) the riders were allowed to and did work for Deliveroo's competitors at the same time.

30. Accordingly, we found that there was no breach of Article 11. However, there may well be cases where the ECHR concept of worker is broader than our own. For example, in *National Union of Professional Carers* the Court of Appeal held that foster carers, who would ordinarily fall outside of the domestic statutory definition of worker, were within

the ECHR concept and accordingly the definition had to be read to include them.[32] This in turn meant that their union could apply for recognition.

Tax

31. Employment status also plays a crucial role in the tax context. Tax legislation generally operates a binary distinction between employment and self-employment, with the treatment afforded to the self-employed usually more favourable. In particular, self-employed people pay on average a lower rate of national insurance contributions and are not subject to PAYE. These different taxation rules can have a significant effect. One academic study found that, under certain assumptions, the tax burden faced by an employee and their employer is 35% greater than an equivalent self-employed individual and almost 70% more than a company owner-manager.[33] The Taylor Review reached similar conclusions and deprecated the status quo under which employed people have a disproportionate responsibility for contributing to the Exchequer.[34]

32. Despite ambitions of achieving tax neutrality, there are still plenty of reasons for someone to want to fall into one tax category or the other. Most taxation legislation refers to an "employee" or an "employment contract" without elaboration. In the absence of a statutory definition, the courts have developed and refined the definition of "employment" through case law. Traditionally, the same test for employment status was applied across both the employment and tax contexts. There may have been some differences in how it was applied in practice but in principle the court was looking for the same features of the relationship.

33. This has now been complicated in a couple of ways. First, as we have seen employment law now operates a trifold category of employee, worker and self-employed. Tax law does not recognise the "worker" category and so individuals who are classified as workers for the purposes of employment law may be deemed self-employed for tax purposes.

34. Second, there is a question as to what extent, if at all, the analytical tools developed by the Supreme Court in *Uber* can be deployed in tax cases. As we have seen, those decisions mandated courts to consider all the circumstances in the round without giving special precedence to the parties' written agreement. The rationale for this new approach was rooted in the legislative purpose behind employment legislation. The goal of worker protection has no clear parallel when construing tax legislation. Without that normative underpinning, is there still any justification for looking behind the parties' agreements in such a distinctive manner? The Court of Appeal thought there was no such justification in the recent *Atholl House* case.[35] Applying the IR35 rules in the

[32] *National Union of Professional Foster Carers v The Certification Officer* [2021] EWCA Civ 548.
[33] Abi Adams, Judith Freedman, Jeremias Prassl, Rethinking legal taxonomies for the gig economy, Oxford Review of Economic Policy, Volume 34, Issue 3, Autumn 2018, Pages 475–494.
[34] Chapter 9, The Taylor Review of Modern Working Practice (2017).
[35] *HMRC v Atholl House Productions Limited* [2022] EWCA Civ 501.

Income Tax (Earnings and Pension) Act, the court held that the statutory context did not impute any special meaning to the term 'employee'. The term, it said, should be interpreted as simply incorporating the common law test of employment. By contrast, *Uber* involved the interpretation of an autonomous statutory category, "worker", which had to be interpreted in light of its legislative purpose and the need to ensure that such purpose is not defeated by the way a contract is drafted. Those same concerns did not arise in the context of the IR35 provisions and hence the *Uber* approach was inapplicable.

35. This touches on a question that some of you may by now be wondering: would it not be a good deal simpler to have a single definition of employee which stretches across employment law, tax and vicarious liability? It would certainly have made my talk a good deal shorter. Indeed, the traditional view was that the question "who is a servant" should receive the same answer regardless of the context.[36] Part of the explanation for the recent divergence is that the courts have had to respond to different policy considerations in different contexts. In employment law, the animating principle has been the protection of vulnerable employees; in vicarious liability, considerations of enterprise risk; in tax, questions of revenue protection.

36. Lady Hale considered the question in *Barclays Bank* and recognised the attraction of aligning the employment law concept of workers with the vicarious liability concept of relationships akin to employment. She determined that doing so would be "*going too far down the road to tidiness*"; each category had been developed for different reasons and so eliding them risked confusing the underlying normative justifications.

37. It is possible that fundamental reforms in this area will instead be implemented through legislation. Matthew Taylor was commissioned by the government in 2016 to carry out an independent review of the UK's labour framework. The Taylor Review made a number of recommendations, including that the potential for differences in a person's employment status and tax status should be minimised as far as possible. He proposed that the various status tests currently applied by the courts be codified in legislation such that being employed for tax purposes would inevitably mean that an individual is either an employee or limb (b) worker. The government announced in July 2022 that it did not think that it was the right time to bring forward proposals for alignment between the two frameworks.[37] So we will have to wait and see.

38. Another "watch this space" is a tax case that I recently sat on.[38] The facts of the case are highly unusual, and the legal issues intricate – so I will keep my comments brief. The case concerns the tax status of football referees who all work for a non-profit organisation which sends them out to referee matches. They generally undertake

[36] *Barclays Bank* (n. 27) [29].
[37] Employment Status Consultation: Government Response (July 2022).
[38] *HMRC v Professional Game Match Officials Ltd* [2021] EWCA Civ 1370.

refereeing in their spare time, alongside other full-time employment. The First-tier Tribunal considered their refereeing to be "*a hobby, albeit a very serious one*". The referees were described as committed, driven individuals, who are passionate about football and who have a continual desire to improve. They are ambitious perfectionists who are not doing it for the money. I'd like to think that someone might say the same about judges but I'm realistic.

39. The courts below differed as to which side of the line the referees fell and hence what their proper tax status might be. The case raised interesting issues regarding the control criterion. As you would expect, on match day a referee is in complete control. Much like a judge during a trial, their decision is final. The Laws of the Game make clear that there is no question of the company telling a referee what call to make or even removing them at half time. Again, the courts below disagreed about the significance of that point. The case was heard in late June of this year. Judgment has not yet been handed down.

Conclusion

40. As we reach the end of our tour d'horizon, or, perhaps more realistically, whistle-stop tour, of the law of status, I have a few final reflections. The questions courts are being called upon to answer are the same ones that have been put in front of them for decades. The statutory definition of worker has now been with us in one form or another for a very long time. What has changed is the social and technological context within which those questions now have to be answered. In my view, the case-law we have surveyed shows that the courts are broadly coping well. Cases like *Uber* and *Deliveroo* exemplify a jurisprudence that is highly cognisant of developments in the labour market and intent on keeping pace.

41. Inevitably, there is a time lag between an innovation and the corresponding judicial response. Take Uber as an example. Uber starts its London operations in 2012 and quickly becomes the flagship for a whole new industry. It deploys a new technology in an innovative way. Four years later an employment claim is made against it. The claim involves the interpretation of statutes that were drafted long before anyone had thought of ride hailing. The claim slowly winds its way to the Supreme Court, which pronounces judgment in 2021. In that judgment, the Court grapples with the legal implications of the new technology and, in response, clarifies the correct approach to worker classification. That new approach is already being faithfully applied by tribunals up and down the country. It will doubtless be further refined as the labour market continues to change.

42. In a rather different context, Lord Justice Sachs remarked a half century ago that the law is a "*living thing moving with the times and not a creature of dead or moribund*

ways of thought".[39] I hope the cases I have explored this evening show that it is alive and kicking.

[39] *Porter v Porter* [1969] 3 All ER 640, 643-644.