A contract of service is made between an employee and an employer whereas in a contract for services, a party -- the independent contractor -- contracts to provide services for another party. The independent contractor is thus self-employed.

There are some statutes which only apply to those involved in a contract of service, the Employees Provident Fund Act 1991 being one of them. The Employees' Social Security Act 1969 -- which provides certain benefits to employees in case of invalidity and employment injury -- is only applicable if there is a contract of service or apprenticeship between the person who is employed and the employer. The Industrial Relations Act 1967 makes provision for the regulation of relations between employers and workmen and their trade unions. The Workmen's Compensation Act 1952 is another statute whose applicability depends on the presence of a contract of service or apprenticeship. Section 19 of that Act imposes on a principal a liability in the case of a workman employed by contractors -- though to enable the section to bite, a contract of service must subsist between the workman and the contractor. A person under a contract of service with an employer and who satisfies the other conditions laid down in the Employment Act 1955 is entitled to various minimum safeguards such as the provision of annual leave, maternity leave, sick leave and termination benefits which are all denied to the independent contractor. Furthermore, at common law, certain terms are implied into a contract of service irrespective of whether or not the employee falls within the ambit of the Employment Act 1955.

Though there are exceptions, an employer is not vicariously liable for torts committed by an independent contractor. Thus, in Hillyer v Governors of St Bartholomew's Hospital, a consulting surgeon selected by the plaintiff operated negligently on the latter. The governors of the hospital were held not liable as the consultant was an independent contractor who was merely using the facilities of the hospital.

If a tort is committed by an employee in the course of his employment, the employer will be liable for any injury or damage to third parties. This was illustrated in Cassidy v Ministry of Health where a resident surgeon of a hospital...
negligently performed an operation on the plaintiff. It was held that the hospital authority, being the employer, was liable.

Another reason why it is important to distinguish between an employee and an independent contractor is that at common law, the employer owes a duty of care to the employee to provide a reasonably safe system of work whereas the employer does not usually owe such a duty to the independent contractor. n10

It is therefore imperative that some tests be formulated to differentiate between an employee and an independent contractor. The dividing line between a contract of service and a contract with an independent contractor is often very fine. n11

The predicament is: what is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities, the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. n12

Recourse to the statutes is not of much help. The statutes define employee, employer and contract of service n14 mainly in terms of one another. No further guidance is given as to the other characteristics of those terms. For instance, a contract of service is defined in s 2 of the Employment Act 1955 as:

... any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract; ... . n15

A declaration by the parties that the contract is one of service or for services is not conclusive. n16 It is not obligatory on the courts to give effect to the label which the parties place on their relationship. The courts will still have to analyse the factual matrix of the matter before coming to any decision as to the nature of the employment. However, such declaration of the parties may be persuasive to the courts when making a decision. An argument against this judicial inclination is that since a contract of employment is consensual, what the parties label it should be conclusive, more so where there are pointers in both directions.

The applicant in *Massey v Crown Life Insurance Co* n17 was an employee of the respondents. Later, it was agreed that he should be treated as self-employed and this was effected by executing a new agreement although his actual duties remained substantially unchanged. It was held that he had become employed under a contract for services. While the parties cannot alter the nature of their relationship by putting a different label on it, where the situation was in doubt, or was ambiguous, an agreement which stipulated the nature of the relationship affords strong evidence of what it is. n18 In that case, there was a genuine attempt to change the legal situation to that of a contract for services. There was no attempt to deceive the Inland Revenue. It was a genuine agreement to enable the applicant to be treated as being self-employed. Consequently, his claim for unfair dismissal was dismissed. Having made his bed as being 'self-employed', he must lie on it. n19

A temporary employment is not decisive of the question whether it is a contract of service. n20 Salleh Abas FJ (as he then was) in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* said: n21

In our view, the duration and nature of an employment, be it temporary or permanent, is immaterial for the purpose of determining the existence of a contract of service. As long as there exists a relationship of a master and servant or that of an employer and employee, the law will infer a contract of service existing between them, notwithstanding the fact that the service or the employment is intended by the person in the position of master to be temporary or of a short duration only.
Similarly, a person who works part-time for another cannot be conclusively deemed to be employed under a contract for services based on this fact alone although this factor may be important in deciding his status as an employee.

The fact that a contract makes no provision for time off is merely a reflection of the fact that there are no specified hours of work. The fact that there is no provision for sick pay and holidays is merely a reflection of the fact that the contract is of very short duration. The payment of remuneration by way of commission rather than by a fixed salary is not decisive.

Also, it is by no means a necessary incident of a contract of service that the employee is prohibited from serving any other employer. The fact that having more than one employer is not conclusive that a person is carrying on business on his own account was highlighted in Fall (Inspector of Taxes) v Hitchen, where a professional dancer was engaged by a company under a written agreement which provided for a weekly payment irrespective whether or not he was called upon to perform or rehearse. The company not only allowed but also encouraged him to carry on outside work. Pennycuick VC held that he was under a contract of service.

The right of the employer to terminate the contract upon breach by the employee is also not determinative. Even in a contract for services, a breach by one party which goes to the root of the contract will entitle the other party to terminate it. In this respect, there is no difference between a contract for services and a contract of service, except that in the latter case the employer's right is spoken of as a right of dismissal -- a peculiarity of words which makes no difference to the substance.

Control test

A number of tests have been proposed in the common law regime to differentiate between an employee and an independent contractor; the earliest being the control test which was in vogue in the 19th century. The test is that if the employer can direct a person not only what to do but also how to do it, then a contract of service exists. It was said that in a contract of service, the employee agrees -- expressly or impliedly -- that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other the employer. Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done.

The undesirability of applying the control test rigidly is borne out by Hillyer v Governors of St Bartholomew's Hospital, where it was held that nurses working in the operation theatre were not employees of the hospital because they took their orders from the operating surgeon and not the hospital authorities, although they were employees of the hospital for general purposes.

That the control test may not be decisive was sounded out by Somervell LJ in Cassidy v Ministry of Health where his Lordship made reference to the case of a certified master of a ship. The master may be employed under what is clearly a contract of service, and the owner can tell him where to go, but the latter has no power to tell the former how to navigate the ship.

The traditional control test may be relevant at the dawn of industrialization when the technology or methodology of doing a piece of work often resided in the employer but it appears to be unrealistic in the present time with a vastly different socio-economic milieu. It must indeed be modified if it is to be valid.

Control may not be the decisive test as regards a professional man or a man of some particular skill and experience. In such a case, the employer is often unwilling, if not unable, to order the employee how to do the work. Conversely, a contract for services may be so detailed that significant indirect control is exercised. Control is relatively more determinative in the case of manual workers who do not expend much skill or expertise in doing their work.

The notion that there is a difference between an ordinary workman and a man who has contracted to exhibit and
employ his skill was canvassed in *Walker v The Crystal Palace Football Club Ltd.* n37 It was argued in that case that the club had no right to dictate to the footballer how he should play football. In rejecting this argument, Cozens-Hardy MR said: n38

He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions. In my judgment, it cannot be that a man is taken out of the operation of the Act [the Workmen's Compensation Act 1906] simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody.

Many modern applications of the control test have introduced a refinement to the test in that the employer retains the power of controlling the manner of doing the work even though such power is rarely or may not be exercised. n39 What matters is lawful authority to command so far as there is scope for it and there must always be some room for it, if only in incidental or collateral matters. n40

Megaw J in *Amalgamated Engineering Union v Minister of Pensions and National Insurance* said: n41

In my view, and I think this is supported by the authorities, the question of control of the employee is an important element in deciding whether or not the contract is a contract of service but it is a test or criterion which is far from being an absolute one. The nature of the control which is required in order to bring the employment within the scope of a contract of service varies almost infinitely with the general nature of the duties involved. If, for example, one finds that the contract, whether a written contract or an oral contract, has laid down in considerable detail what the duties are which are to be performed, and that the employer, ie the union or the branch, has the right to dispense with the services of the employee if it is not satisfied with the manner in which he carries them out, the actual absence of any express provision as to the right of the employer to control the manner of carrying out the work may be of very much less importance than it would be in other cases.

Despite being weather-beaten through time, the control test is not without relevance. If an employer is invested with control over the manner in which work is carried out or the right of such control, then most probably a contract of service exists. However, the absence of control is no longer conclusive as to the existence or otherwise of the relationship of employer and employee. n42 The greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. n43

*Integration and organization tests*

In *Stevenson (or Stephenson) Jordan & Harrison Ltd v MacDonald & Evans*, n44 one Evans-Hemming was employed as an accountant by the plaintiffs. After his employment ended, he produced a book of lectures based on his experience with the plaintiffs. Upon his purported assignment of the copyright in the book to the defendants, the plaintiffs initiated proceedings to restrain publication of the book. Some of the lectures were based upon a specific assignment to produce an instruction manual on behalf of clients of the plaintiffs. Denning LJ said: n45

In so far as Mr Evans-Hemming prepared and wrote manuals for the use of a particular client of the company, he was doing it as part of his work
as a servant of the company under a contract of service; but in so far as he prepared and wrote lectures for delivery to universities and to learned and professional societies, he was doing so as an accessory to the contract of service and not as part of it. The giving of lectures was no doubt very helpful to the company, in that it might serve directly as an advertisement for the company, and on that account the company paid Mr Evans-Hemming the expenses he incurred. The lectures were, in a sense, part of the services rendered by Mr Evans-Hemming for the benefit of the company. But they were in no sense part of his service. It follows that the copyright in the lectures was in Mr Evans-Hemming.

In the same case, Denning LJ further said as follows: n46
It is often easy to recognize a contract of service when you see it but difficult to say wherein the difference lies. A ship's master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

In the subsequent case of Bank Voor Handel en Scheepvaart NV v Slatford & Anor, n47 Denning LJ cast a different perspective on his earlier proposal when he said: n48

In this connexion, I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization ...

The first question that arises from these two cases is whether the proposed tests are one and the same or are entirely different. Intended or otherwise, the latter appears to be more logical. The emphasis of the test in Stevenson (or Stephenson) Jordan & Harrison is on the work of the person being an integral part of the business; whereas in the latter case, the focus is on the person as part and parcel of the organization. If a person is part and parcel of an organization, what he does must certainly be integral and not accessory to the business. However, the converse is not necessarily true.

Due to a multitude of factors including economies of scale, high turnover and a tight labour market, more and more businesses are contracting out work which was previously done by their own employees to independent contractors. Does such work then become accessory to the businesses merely because it is now being handled by independent contractors?

The second dictum of Denning LJ was commented upon by MacKenna J in Read Mixed Concrete as follows: n49

This raises more questions than I know how to answer. What is meant by being 'part and parcel of an organization'? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders? Though I cannot answer these questions, I can at least invoke the dictum to support my opinion that control is not everything.

The organization test may exclude casual workers and those who work for more than one employer concurrently from being deemed to be employed under a contract of service.
The integration test was espoused in *Whittaker v Minister of Pensions and National Insurance*, n50 where a trapeze artiste who performed trapeze acts and was also an usherette for a circus was held to be employed under a contract of service as her duties were an integral part of the business of the circus. These tests may be more relevant to professionals and other skilled workers than the control test.

In *Employees Provident Fund Board v MS Ally & Co Ltd*, n51 the business of the respondent company was run by a group of persons known as working assistants. The working assistants came and went at will. They were not required to keep regular hours. They did not take any orders or instructions from the company in the conduct of the business. They could take leave to go to India for periods from a month to a year without obtaining permission from the company. The Federal Court held that although there was a laxity of control, an indirect form of control existed as the board of directors of the company could decide the amount that a working assistant got from his share of the profits. Wan Suleiman FJ said: n52

I would with respect say that having considered the evidence, the correct conclusion to be drawn is that there is a sufficiency of control or if one is to apply the test employed by Denning LJ in *Bank Voor Handel en Schepvaart NV v Slatford & Anor and Stevenson* (or *Stephenson Jordan & Harrison Ltd v MacDonald*), working assistants are 'part and parcel' of the organization; that they are employed as part of the business and their work is done as [an] integral part of and not as an accessory to the business.

**Entrepreneur test**

*Market Investigations Ltd v Minister of Social Security* n53 was a case concerning a member of a panel of part-time interviewers of a company employed in market research who was supplied with the company's instructions as to the method in which interviews were to be conducted. The company would sometimes ask the interviewer whether she was agreeable to do a number of days' work within a fixed period. If she agreed, she would be sent the particulars and detailed instructions of the assignment, including the persons she was to interview and the questions she was to ask. She might also be asked to attend the company's briefing meetings or she might receive instructions from the company's supervisor. She was free to work when she chose and during the assignment, she could work for other firms doing similar work. The court held that she was engaged under a series of contracts of service. Cooke J said: n54

... the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

Essentially, the crucial question to be posed in the entrepreneur test is: Is the person his own boss? Reference may
also be usefully made to *United States v Silk*, n55 where the Supreme Court of the United States proposed the 'economic reality' test. Important factors to be considered are the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation. n56

In the Canadian case of *Montreal v Montreal Locomotive Works Ltd*, n57 Lord Wright said:

In many cases, the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way, it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words, by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

In *Lee Ting Sang v Chung Chi-Keung & Anor*, n58 a Privy Council decision emanating from Hong Kong, the applicant was a mason who chiselled concrete for a sub-contractor at a construction site using tools supplied by the sub-contractor. He received instructions from, but was not supervised by, the sub-contractor. His work was inspected periodically by the main contractors' foreman. He worked from 8am-5pm and was paid on a piece-work or daily basis according to the nature of the work he had to do. When the applicant finished his work early, he helped the sub-contractor to sharpen tools. Sometimes, he worked for other contractors but he gave priority to the sub-contractor's urgent work and told those others for whom he was then working to replace him. He incurred a head injury during the course of his work. He claimed against both the sub-contractor and main contractors for employees' compensation, an issue which revolved around the question whether he was an employee or an independent contractor. The Privy Council -- in holding that he was an employee of the sub-contractor -- laid down the fundamental test which was whether or not he was performing services as a person in business on his own account and thus was an independent contractor.

The criticism levelled at the 'own-boss' test is that it is circular to some extent; the worker is not his own boss if he is an employee. n59 It has also been criticized as producing little greater certainty or rationality than the others. n60

**Composite test**

The courts have increasingly gravitated away from reliance on any single factor to be decisive as modern employment situations are far too complex. For instance, Lord Thankerton in *Short v J & W Henderson Ltd* n61 cited with approval 'the four indicia of a contract of service' first mentioned in *Park v Wilsons & Clyde Coal Co.* n62 viz: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal.

It appears that (a) and (b) are of scant assistance in distinguishing between a contract of service and a contract for services, the reason being that (a) and (b) can easily be made applicable to a contract for services with a change in terminologies.

A four-fold test was promoted by Lord Wright in *Montreal v Montreal Locomotive Works Ltd* n63 involving elements of (i) control; (ii) ownership of the tools; (iii) chance of profit; and (iv) risk of loss.

There are two arguments on the relevancy of ownership of equipment on whether the relationship of the parties is one of an employer and employee. Firstly, the owner of the equipment is the one who has control over the work to be performed. Secondly, if a person hires an independent contractor, presumably the independent contractor will be required to provide all the necessary implements to perform the work. Both notions may have a certain degree of truth depending on the circumstances. The latter is particularly relevant where sophisticated machinery is concerned. Where the work requires sophisticated or expensive machinery -- and this is provided by the workman -- it is difficult to envisage that he is an employee.
In *Ready Mixed Concrete*, n64 MacKenna J held that there are three conditions for the existence of a contract of service: (i) the employee agrees to provide his own work and skill in the performance of a service for the employer; (ii) there must be some element of control exercisable by the employer; and (iii) the other terms of the contract must not be inconsistent with the existence of a contract of employment. n65

In *Braddell v Baker*, n66 it was held that if an employee could delegate another man to do his work, then that was not a contract of service but a contract for services. However, it has also been said that a limited or occasional power of delegation may not be inconsistent with a contract of service. n67

If a worker employed by A is lent to B, the question arises whether the worker has become an employee of B’s or he still remains A’s employee. This scenario confronted the court in *Denham v Midland Employers Mutual Assurance Ltd*. n68 Denning LJ held that the worker would become B’s employee only when the employee was transferred so completely that B had the right to dictate not only what the employee was to do, but also how he was to do it. n69

*Ready Mixed Concrete* n70 was a most difficult case to decide as the relevant elements were equivocal. In that case, a company engaged a team of ‘owner-drivers’ to deliver concrete to its customers. The issue of whether the company was liable to pay national insurance contributions in respect of the drivers predicated on whether or not they were its employees. The drivers were the owners of the lorries and had to maintain them at their own expense and pay all running costs. However, the lorries had to be painted in the company colours; the company could instruct the drivers to carry out repair work and specify where it should be done; they could only use the lorries for the company’s business; and the company had the right to acquire the lorries at the market price thereof on the determination of the contract. The drivers had no fixed hours of work or meal breaks; and they could choose the routes to take. On the other hand, they had to wear the company’s uniforms; they had to take instructions from the foreman and they had to be available when required. They were paid by mileage but were also guaranteed an annual minimum wage. The drivers could employ a relief driver but the company had the right to insist on the driver himself performing. Ultimately, the court held that the drivers were self-employed as there was nothing there inconsistent with the contention that the drivers were independently running their own small businesses. If the court had given more regard to those facts which pointed away from a contract for services, the decision could easily have gone the other way.

**Question of law or fact**

In the rare event that the question whether a person is an employee or an independent contractor can be deduced solely from documents, then it is a question of law. n71 Otherwise, if the relevant facts of the relationship have to be analysed and evaluated to come to a finding of the actual legal relationship, then this is regarded as a question of fact. n72

At first blush, this does not appear to be the correct approach; ordinarily, a question of fact is one which is capable of objective verification. This nomenclature twist could be actuated by the intention to shield the appellate court from being inundated by appeals because of the difficulty in formulating a test which can be applied across the board with certainty and reliability. An appeal on a question of law will be allowed if it can be shown that the lower court had arrived at its decision by applying the wrong legal principles or that it had reached a conclusion on the facts which no reasonable court applying the law could have reached. This issue is of more acute implication under the English Employment Protection (Consolidation) Act 1978 as pursuant to s 136(1), an appeal can lie from a decision of the industrial tribunal to the appeal tribunal only on a question of law.

However, there is no judicial unanimity in this matter. For example, in *Morren v Swinton and Pendlebury Borough Council*, n73 Lord Parker CJ remarked:

The terms of the contract of course are fact, and to that extent the determination depends upon fact, but it seems to me perfectly clear that once the primary facts are found, then it is a pure question of law as to what is the reasonable inference based on the legal
The interpretation of the contract.

The same approach commended itself to MacKenna J in *Ready Mixed Concrete*, n74 where his Lordship opined that whether the relation between the parties to the contract is that of employer and employee or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract.

Ackner LJ in *O'Kelly & Ors v Trusthouse Forte plc* n75 argued trenchantly that whether or not two parties have entered into a contract is a question of law and not of degree and what is found on the facts to be the true nature or quality of the legal relationship is equally a question of law.

In *Currie v Commissioners of Inland Revenue*, n76 Lord Sterndale MR mooted the proposal that the answer to the issue depends on the circumstances of the case when he said:

Is the question whether a man is carrying on a profession or not a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question; it must depend upon the circumstances with which the court is dealing. There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession; and therefore, looking at the matter from the point of view of a judge directing a jury, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case, the question is undoubtedly, in my opinion, one of fact ....

In *O'Kelly*, n77 Fox LJ said:

I accept that the question whether a contract is a contract of service can, in a general sense, be called one of law. But I doubt if that is useful in relation to the present problem. It gives too general an answer to a more complex matter. Thus it is evident from the authorities that a question can, in a general sense, be characterized as one of law without excluding the possibility that, in the end, it resolves itself into a question of fact in individual cases.

Sir John Donaldson MR said in *O'Kelly*: n78

There is no doubt that there are pure questions of law which throw a court back to questions of fact. The most obvious example is what length of notice is required to terminate a contract which does not expressly make provision for termination. This is a pure question of law and the answer is 'Such time as is reasonable in all the circumstances'. Applying that direction to facts whose nature, quality and degree are known with complete precision will no doubt always produce the same answer. But this is not real life. In reality, every tribunal of fact will find and assess the factual circumstances in ways which differ to a greater or lesser extent and so can give rise to different conclusions, each of which is unassailable on appeal. In this sense, but in this sense alone, their conclusions are conclusions of fact. More accurately, they are conclusions of law which are wholly dependent upon conclusions of fact.
The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract, those findings and that assessment will dictate the correct legal answer. In the familiar phrase, ‘it is all a question of fact and degree’.

The issue whether a contract is one of service or for services can only be established by an investigation and evaluation of the factual circumstances in which the work is performed. \( n79 \) There will be many borderline cases in which similarly instructed minds may come to different conclusions. \( n80 \) With the rival contentions swirling in a broth of uncertainty, it is a relief that the Privy Council in *Lee Ting Sang* \( n81 \) held that it must be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate court as a question of fact to be determined by the trial court.

**Conclusion**

It is inconceivable that a universal test which is reliable and satisfactory can be conjured to distinguish between a contract of service and a contract for services given the infinite factual circumstances in which employment can take place. One test may be of more relevance than others in a certain situation or one factor may be more important than others in some circumstances.

Policy considerations may also play a role. It is possible that the criteria for determining who is an employee depend on the purpose of such determination. For instance, a person employed by a sub-contractor may be loaned to the main contractor. It is conceivable that as regards liability to contribute to the Employees Provident Fund, the sub-contractor is considered to be the employer whereas the duty to take reasonable care of the safety of the worker falls on the main contractor as the employer.

It can be envisaged that the tests would have to evolve with the times to maintain their relevance as there have been tremendous changes in the employment marketplace triggered by the advances in communication and information technologies and the preference of many people to work with greater independence and freedom. People are increasingly demanding more time for themselves and their families and this -- coupled with the time wasted in commuting to and from the workplace -- has made working at home a welcome concept. Many employees also desire to work ‘flexi-hours’. The level of skills has also increased.

All relevant aspects of the relationship have to be considered as it is unlikely that any single factor is decisive. The various tests can be converged in that all relevant factors ought to be considered. From a survey of the authorities, it is suggested that the following factors may be relevant in deciding whether a person is engaged under a contract of service or for services:

- (a) the intentions of the parties;
- (b) the nature of the agreement between the parties;
- (c) whether there is any provision in the agreement for holiday pay, sick leave, etc;
- (d) whether the employer contributes his share to the Employees Provident Fund;
- (e) the degree of control the employer exercises over the person;
- (f) whether the person is considered an integral part of the organization of the employer by relevant third parties like other employees, clients, suppliers, etc;
- (g) whether the person works, or retains the right to work, elsewhere;
- (h) the premises where the person works;
(i) whether the person hires his own helpers;
(j) the nature of the equipment;
(k) the party which provides the equipment;
(l) the party which provides the investment;
(m) which party bears the business risks;
(n) whether the person benefits directly from the success of the venture;
and
(o) whether the person has set up his own business-like organization.

The above list is certainly not exhaustive. Slavish and rigid adherence to any kind of check-list by totalling the number of factors that are in favour and those that are not and deciding the issue on the preponderance of such factors is self-defeating. A useful approach may be gleaned from the following passage in Hall (Inspector of Taxes) v Lorimer: n82

The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation.

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FOOTNOTES:

n1 The equivalent terms of ‘servant’ and ‘master’ are archaic and seldom used.


n3 Act 4.

n4 Act 177.

n5 A ‘workman’ under the Industrial Relations Act 1967 is one who is engaged under a contract of service (Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 at p 391, per Gopal Sri Ram JCA).

n6 Act 273.

n7 Act 265.

n8 [1909] 2 KB 820.
n9  [1951] 2 KB 343.

n10  See, for example, *McArdle v Andmac Roofing Co & Ors* [1967] 1 All ER 583.

n11  Supra n 2 at p 138, per Smith J.

n12  *Lee Ting Sang v Chung Chi-Keung & Anor* [1990] 2 WLR 1173 at p 1176, per Lord Griffiths.

n13  'Workman' in the Workmen's Compensation Act 1952 and Industrial Relations Act 1967.

n14  Contract of employment' in the Industrial Relations Act 1967. This term is increasingly being favoured over 'contract of service'.

n15  An apprenticeship contract is defined in s 2 of the Act as a written contract entered into by a person with an employer who undertakes to employ the person and train or have him trained systematically for a trade for a specified period which shall not be less than two years in the course of which the apprentice is bound to work in the employer's service.

n16  *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at pp 512-513.

n17  [1978] 2 All ER 576.

n18  Ibid at pp 579-580.

n19  Ibid at p 581, per Lord Denning MR.

n20  *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437 at p 445.


n22  *Market Investigations Ltd v Minister of Social Security* [1969] 2 WLR 1 at p 12, per Cooke J.

n23  Ibid.

n24  *Pauley v Kenedo Ltd* [1953] 1 All ER 226.

n25  Supra n 22 at p 11, per Cooke J.

n26  [1973] 1 WLR 286.
n27 Supra n 22 at p 12.

n28 Ibid.

n29 Yewens v Noakes (1880) 6 QBD 530; Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] 1 KB 762.

n30 Supra n 16 at p 515, per MacKenna J.

n31 Ibid.

n32 Supra n 8.

n33 Supra n 9.

n34 Ibid at p 352.

n35 Employees Provident Fund Board v MS Ally & Co Ltd [1975] 2 MLJ 89 at p 94, per Wan Suleiman FJ.

n36 Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576 at p 582.

n37 [1910] 1 KB 87.

n38 Ibid at p 92.

n39 Gibb v United Steel Co Ltd [1957] 2 All ER 110.

n40 Zuijs v Wirth Brothers Pty Ltd [1955] 93 CLR 561 at p 571.

n41 [1963] 1 WLR 441 at pp 453-454.

n42 Mat Jusoh bin Daud v Sykt Jaya Seberang Takir Sdn Bhd [1982] 2 MLJ 71 at p 74.

n43 Beloff v Pressdram Ltd [1973] 1 All ER 241 at p 250, per Ungoed-Thomas J.


n45 Ibid at p 111.
n46 Ibid.


n48 Ibid at p 295. This remark is actually obiter.

n49 Supra n 16 at p 524.

n50 [1967] 1 QB 156.

n51 Supra n 35.

n52 Ibid at p 96.

n53 Supra n 22.

n54 Ibid at pp 9-10.

n55 (1946) 331 US 704.

n56 Ibid.

n57 [1947] 1 DLR 161 at p 169.

n58 Supra n 12.


n60 Ibid.

n61 (1946) 62 TLR 427 at p 429.

n62 [1928] SC 121 at p 159.

n63 Supra n 57 at p 169.

n64 Supra n 16.
n65 Ibid at p 515.

n66 (1911) 104 LTR 673.

n67 Supra n 16 at p 515, per MacKenna J.

n68 Supra n 20.

n69 Ibid at p 444.

n70 Supra n 16.

n71 Davies v Presbyterian Church of Wales [1986] 1 All ER 705.

n72 See Smith v General Motor Cab Co Ltd [1911] AC 188; Bobbey v WM Crosbie & Co Ltd (1915) 114 LT 244; and Easdown v Cobb [1940] 1 All ER 49.

n73 Supra n 36 at p 583.

n74 Supra n 16 at p 515.

n75 [1984] 1 QB 90 at p 114.

n76 [1921] 2 KB 332 at pp 335-336.

n77 Supra n 75 at p 119.

n78 Supra n 75 at pp 123-124.

n79 Supra n 12 at p 1178, per Lord Griffiths.

n80 Ibid at p 1179.

n81 Ibid at p 1178.

n82 [1992] 1 WLR 939 at p 944, per Mummery J.