Outline of facts in Jamsek

1. Mr Jamsek left high school at 14 years old; Mr Whitby left at 15 years old. Neither had any other formal education or qualifications. Both had only ever worked in basic jobs requiring their manual labour (FC [30]).

2. In 1977, Mr Jamsek and Mr Whitby each commenced working in a lighting manufacture and distribution business carried on at that time by Associated Lighting Industries Pty Limited (**ALI**) (being the business later transferred to the second and then the first appellant). Mr Jamsek was then about 22 years old and Mr Whitby was about 17 years old. By 1980 both men were full-time delivery drivers for ALI (FC [31] - [34]).

3. Notably, the work of a delivery driver was not complex, did not need to be closely supervised and, by 1985, the men had been doing such work for ALI for at least 5 years.

4. In 1985, ALI apparently implemented a plan to reduce its overheads and risks, purporting to convert its employed drivers, including Mr Whitby and Mr Jamsek, into "independent contractors" and requiring them to purchase the trucks then owned by the business and undertake the same work as they had prior to these arrangements. Such conduct by employers is now prohibited by section 358 of the FW Act, but it was not unlawful in 1985.

5. Relevantly, the drivers were told just before Christmas in 1985: "*If you don't agree to become contractors, we can't guarantee you a job going forward*." (FC [40]). Faced with that ultimatum, Mr Jamsek and Mr Whitby signed the new contracts and bought the trucks as required by the company and at the prices demanded by the company (FC [40], [43] – [46], [200], [201], [206]).

6. The Full Court concluded that the circumstances in which Mr Jamsek and Mr Whitby entered their new life as "business" owners was as follows (at [201]):

> "… [Mr Jamsek and Mr Whitby] were faced with the likely, if not certain, prospect of redundancy should they not enter into the 1986 Contract. There was no opportunity for negotiation and [Mr Jamsek and Mr Whitby], unless they wished to seek alternative work, were compelled to accept the terms of the 1986 Contract. This was not a case where, for instance, [Mr Jamsek and Mr Whitby] sought professional advice and subsequently initiated discussions with the company about restructuring the terms of the working relationship. In truth, the company wanted the change, and [Mr Jamsek and Mr Whitby] had to accept the change or leave. These circumstances

diminish any suggestion that there was a clear mutual intention to alter the nature and structure of the relationship between the parties."

7. The single document entitled "Contract Carriers' Arrangement" was executed by Mr Jamsek, Mr Whitby and the other drivers as a "group" without any negotiation in 1986, 1993, 1998 and 2001 (FC [40], [57], [63], [66]) and:

(a) entitled the drivers to four weeks leave *without* pay, but with an expectation that they would take at least two of those weeks in January and that any leave period of more than two weeks required permission from the company (cl 3(a));

(b) provided that if the company decided to close the NSW Branch for a longer period than two weeks, then (cl 3(a)):

(i) for notice given in November, the drivers would be paid an hourly rate for a 9 hour day and they had to be "on call"; and

(ii) for no notice given before December 19th, then the drivers would be paid their "usual weekly rate" and had to attend the sites and "work as directed";

(c) required the drivers to work a "standard nine hour working day with a usual starting time of 6am" (cl 7(b));

(d) required each driver to be paid an hourly rate (cl 7(b));

(e) stipulated that "sick day or unable to work days" had to be notified by the drivers (identified in the contract as "he") by no later than 6am (cl 8);

(f) contained a promise on the part of the drivers that each not offer "his" vehicle for sale "with any guarantee of either the continuity of work for [the company] or [the] implied acceptance [by the company]… of the purchaser" (cl 2(1)(k));

(g) did not permit any other person to drive the drivers' trucks without the company's permission (cl 2(1)(g));

(h) permitted termination of the contract where the drivers did not first obtain the company's permission before selling their vehicle for any purpose other than replacement (cl 5(e)); and

(i) recognised that while the "Contractors" were "working under the same arrangement" they were fully independent from each other (cl 5(a)) but would co-ordinate with each other (cl 5(b), cl 9(c)) including as to matters of pay (cl 5(f)).

8. In 2001, Mr Jamsek and Mr Whitby were also required by the appellants to complete a "manifest run sheet" each day. The purposes of the run sheet included outlining deliveries to be completed that day and enabling the appellants' warehouse manager or other company managers to identify where the drivers would be at certain times (FC [71] – [72]).

9. During their 30 years as so-called "independent contractors", Mr Jamsek and Mr Whitby "were ostensibly required, or at least expected" (FC [224]) to:

   (a) permit the appellants to affix to their trucks tarpaulins adorned with the company's (large) name and logo (FC [51], [61], [73], [79],[219] – [220]); and

   (b) wear company-branded clothing, including jackets and shirts (FC [58], [108], [222]).

10. Mr Jamsek and Mr Whitby did not, at any time after 1986, have a practice of trying to increase their income or business opportunities by seeking further sources of work. In working for one business only, Mr Jamsek and Mr Whitby did not enter into transactions on a continuous and repetitive basis in the pursuit of profit: on the contrary, Mr Jamsek and Mr Whitby entered into, in effect, only *one* transaction of substance being solely their work for the appellants.

11. Mr Jamsek and Mr Whitby were thus not entrepreneurial or profit-motivated. They were men of limited education and ambition who ended up in partnership structures and owning delivery trucks *not* because they were striving for greater income or personal autonomy, but because as young men in their 20s with no significant skills, they were faced with the loss of their jobs. They had no goodwill in their "businesses".

Extract from *Hollis v Vabu* [2001] HCA 44; 207 CLR 21

"48. First, these couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any "goodwill" as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed in the record.

49. Secondly, the evidence shows that the couriers had little control over the manner of performing their work. They were required to be at work by 9.00 am and were assigned in a work roster according to the order in which they signed on. If they signed on after this time, they would not necessarily work on their normal "channel". Couriers were not able to refuse work. It was stated in Document 590 that "ANY DRIVER WHO DOES SO WILL NO LONGER WORK FOR THIS FIRM." The evidence does not disclose whether the couriers

were able to delegate any of their tasks or whether they could have worked for another courier operator in addition to Vabu during the day. It may be thought unlikely that the couriers would have been permitted by Vabu to engage in either activity.

50. Thirdly, the facts show that couriers were presented to the public and to those using the courier service as emanations of Vabu. They were to wear uniforms bearing Vabu's logo. Vabu stated in Document 792 that "DRIVERS SHOULD ALWAYS BE AWARE THAT THEY ARE A DIRECT REPRESENTATION OF THE COMPANY. THEIR ATTITUDE AND APPEARANCE CAN ONLY BE SEEN AS A DIRECT REFLECTION OF OUR ORGANISATION." Certain attire ("thongs, singlets, swim shorts, torn jeans and other unclean or torn attire") was not permitted. Further, Vabu required that all couriers "should be clean shaven unless that person is bearded".

51. The question of the significance of livery in cases where the issue is whether the individual wearing it is an employee or an independent contractor is not a new one. In *Quarman v Burnett* itself, Parke B said that the wearing by the coachman, with the consent of the defendants, of their livery was a "matter of evidence only of the man being their servant, which the fact at once answers". Here, there is rather more to the facts.

52. Couriers were required to wear Vabu livery partly from Vabu's wish to advertise its business. Mr Hollis was unable to identify the cyclist who struck him down other than by the Vabu livery. Vabu knew that a significant number of its couriers rode in a dangerous manner but had failed to compel its couriers to adopt an effective means of personal identification. Rather, the effect of Vabu's system of business was to encourage pedestrians to identify the couriers "as a part of [Vabu's] own working staff"; the phrase is that of Dean Prosser and Professor Keeton, used by them as a guide to classification of a person as an employee.

53 Fourthly, there is the matter of deterrence. Reference has been made to the findings of fact in this case respecting the knowledge of Vabu as to the dangers to pedestrians presented by its bicycle couriers and the failure to adopt effective means for the personal identification of those couriers by the public. One of the major policy considerations said by the Supreme Court of Canada in *Bazley v Curry* to support vicarious liability was deterrence of future harm. McLachlin J said:

> "Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision. Failure to take such measures may not suffice to establish a case of tortious negligence directly against the employer. ...
>
> Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm. A related consideration raised by Fleming is that by holding the employer liable, 'the law furnishes an incentive to discipline servants guilty of wrongdoing'."

54. Fifthly, Vabu superintended the couriers' finances: Vabu produced pay summaries and couriers were required to dispute errors by 6.00 pm Friday of the same week. "Unjustified or unsubstantiated" claims for additional charges, such as due to waiting time, wrong address or excess weight, could result in total deduction of that particular job payment. There was no scope for the couriers to bargain for the rate of their remuneration. Evidence in chief was given by Vabu's fleet administrator that the rate of remuneration to the bicycle couriers had

remained unchanged between 1994 and 1998. Vabu was authorised to hold for six weeks the last week's pay of a courier against any overcharges, unpaid cash jobs or outstanding insurance claims. Final cheques would not be processed until all of Vabu's property had been returned. Failure to return Vabu's equipment, including the uniforms, or the return of damaged equipment or unwashed uniforms resulted in replacement or washing costs being deducted from this amount. Vabu undertook the provision of insurance for the couriers and deducted the amounts from their wages and, as discussed above, passed on an excess to all bicycle couriers and did not pay medical or hospital costs. The method of payment, per delivery and not per time period engaged, is a natural means to remunerate employees whose sole duty is to perform deliveries, not least for ease of calculation and to provide an incentive more efficiently to make deliveries.

55. Moreover, Vabu stipulated in Document 590 that "[n]o annual leave will be considered for the period November to Christmas Eve, nor for the week prior to Easter. Leave requests will be considered in accordance with other applications and should be submitted to the manager in writing at least 14 days prior." This suggests that their engagement by Vabu left the couriers with limited scope for the pursuit of any real business enterprise on their own account.

56. Sixthly, the situation in respect of tools and equipment also favours, if anything, a finding that the bicycle couriers were employees. Apart from providing bicycles and being responsible for the cost of repairs, couriers were required to bear the cost of replacing or repairing any equipment of Vabu that was lost or damaged, including radios and uniforms. Although a more beneficent employer might have provided bicycles for its employees and undertaken the cost of their repairs, there is nothing contrary to a relationship of employment in the fact that employees were here required to do so. This is all the more so because the capital outlay was relatively small and because bicycles are not tools that are inherently capable of use only for courier work but provide a means of personal transport or even a means of recreation out of work time. The fact that the couriers were responsible for their own bicycles reflects only that they were in a situation of employment more favourable than not to the employer; it does not indicate the existence of a relationship of independent contractor and principal.

57. Finally, and as a corollary to the second point mentioned above, this is not a case where there was only the right to exercise control in incidental or collateral matters. Rather, there was considerable scope for the actual exercise of control. Vabu's whole business consisted of the delivery of documents and parcels by means of couriers. Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude. Their work was allocated by Vabu's fleet controller. They were to deliver goods in the manner in which Vabu directed. In this way, Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, as the two documents relating to work practices suggest, to its customers they *were* Vabu and effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees.

CFMMEU and ZG: Back to the future

Notes of Mark Irving QC prepared for ALLA Seminar

As a hat tip to the late Shane Warne, the ratio of PC in **23** words is:

- A court determines the character of an employment relationship **only** by reference to the matters that concern the parties' legal rights and duties. PCP at [43], [56], [59], [61], PCG at [162], [172]: effectively applying *Rossato* at 37, 57, 61, 62, 63, 64, 66, 98. per Kiefel CJ, Keane, Gordon and Edleman JJ: contra Gageler and Gleeson JJ.

Two matters flow from this proposition:

- The conduct of the parties after the formation of the contract (including the manner of performance of rights and duties) is not relevant in assessing the nature of the relationship, other than conduct that affects the parties' rights and duties: PCP at [18], [57] PCG at [176], [187]-[189], ZP at [6], [8].
- The substance or reality of the relationship is irrelevant, as is the disparity of the bargaining power: PCP at [44]-[46], ZP at [6], [8] [51], [62], ZGS at [99]: see also PCP at [88].

Overview of seminar

1. Some key terms (re)defined
2. The **permissible sources** of evidence that can be used in the categorisation process and the consequential centrality of the terms **(the core issue of principle)**
3. The different frameworks
4. Categorisation terms

The facts and the split

- The facts and the split are discussed in the annexure.
- There was a 3-2-2 split in ZG and the 3-2-1-1 split in PC.
- In ZG it was the plurality (Keifel CJ, Keane and Edelman JJ), Gageler and Gleeson JJ, Gordon and Steward J.
- In PC it was the plurality, Gageler and Gleeson JJ, Gordon J, with Steward J agreeing with Gordon J's statement of principle but dissenting in the result for currently irrelevant reasons.
- Except on the issues on which there was unanimity, the **majority** on the definitional and core issue consists of the reasons of the plurality Keifel CJ, Keane and Edelman JJ, along with Gordon J and Steward JJ in ZG and the same practically in PC.
- On some issues (categorisation terms, framework) there may be no clear majority.
- For the purposes of the discussion below I call Keifel CJ, Keane and Edelman JJ, and Gordon J (with or without Steward J) the contract centric majority (the CC majority).
- GG took a fundamentally different approach to what was being characterised (the relationship, not the legal rights and duties) and so differed on what PFC was relevant and why it was relevant.
- At the conclusion of oral hearing in ZG, the CFMMEU was permitted to make a 2 page submission addressing questions raised by the court in the ZG hearing. That submission is not on the HCA site. It addressed the core issue of principle. For employment law completists, a copy of that submission is annexed below. The blue portions were expressly rejected. Paragraphs 2-3 describes the contract centric approach and explains the limited circumstances PFC is relevant and why; paragraphs 4-6 were the preferred approach adopted by GG, explaining the broader 'relationship' based inquiry, why it should be adopted and the consequences for the relevance of PFC.

Definitions clarified

'Employee'

- 'Employee' under the FW Act means an employee under the common law. *The statutory context in this case did not matter:* PGG at [93]; PCG at [161]; ZP at [4]. Unanimous

The 'MFT'

- The multifactor test (MFT) remains in place. It requires
  - 1. The court to consider all relevant facts: PCP at [32], [55], [61], [89]-[90] PGG at [113] , [114], [119], PCG at [174], [175]. Unanimous
  - 2. The court not treat any one fact as necessary *(perhaps)* or determinative: PCP at [73], [89]-[90] , PGG at [114], [119], PCG at [174], [175]: note ZP at [60] Unanimous
- What the decisions redefine the permissible sources for the relevant fact and so define the MFT.
- Gordon J only rejected the MFT to the extent that test impermissibly required a roaming inquiry into post formation conduct: PCG at [189], [198]: see also at [174], [185] and PCP at [32]. However, she took the approach stated in the 2 propositions above.
- The members of the court differed in approach to the role within the MFT to post formation conduct (PFC). There were also difference to resolving the materiality issue in the MFT and the framework (see below).
- IMHO, the MFT in 1 remains as meaningless as it ever was; and in point 2 remains as muddle headed as it ever was; and, unless a proper framework is adopted, will continue to produce impressionistic results as it ever has.

'Totality'

- Totality as a 'principle' remains in place *but has been redefined.*
- Totality means all of, *but only, the facts drawn from the permissible sources discussed below.*
- It does not also refer to conduct engaged in by the parties in the performance of the contract, except to show an alteration of rights or a term is legally ineffective: PCP at [56], [61], PCG at [162], [172], [173], ZP at [6], [45]-[46] ZSG at [95], [107]: cf the broader meaning in PGG at [121] , ZGG at [80] CC majority

'Orthodoxy' and Cam

- The principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally: PCP at [60], [88], PGG at [124], PCG at [162], [173], [187], ZP at [61]. Unanimous
- The contract centric majority emphasised that they was applying to contracts of employment the 'orthodox' principles governing contracts, such as the principles governing the use of post formation conduct and variations: PCP at [51], PCG at [176], ZP at [51]: CC majority
- **Difference:** The plurality thought that all of the previous High Court decisions supported their 'contract centric' approach. GG thought it was 'impossible' to reach that conclusion:[1] PCP at [52]: cf PGG at [136], ZGG at [80]
- In the course of the debate about the meaning of previous decisions, GG at ZGG [82] referred to reasons of Dixon J in *Cam* that are drawn from the HCA file, and the trial judge decision in that matter that was 'perfectly right'. To the best of my researches, those documents are only accessible via the National Archives. For employment law completists, I annex a copy of the reasons of Dixon J (which is summarised in the ALJ report), the trial judge's reasons and the contract in Cam. They are the only note of the reasons of any member of the Court on the 200 page National Archives file. You might want to think about how you prove them before relying on them.

[1] PGG at [136] referring to the same High Court authorities referred to by the plurality, but adding *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41; *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395; *Dietrich v Dare* (1980) 54 ALJR 388; 30 ALR 407.

The new contract centric approach

The centrality of the terms and the permissible sources

- The character of the relationship is determined **only** by reference to the matters that concern the parties' legal rights and duties: see ratio: CC majority
- Those rights are largely found in the contract. In PC and ZG, they were exclusively found in the contract.
- Those rights may also be found in governing statutes and industrial instruments: PCP at [40]-[41], PCG at [172] : CC majority
- It is the rights and duties, not the parties' expectations, that are relevant: ZP at [52]-[53], [55]. *Rossato* at [61], [95]-[96], adopted in ZGS at [111]: CC majority
- The character is determined at the time of the formation of the contract, subject to an alteration of the rights or duties or proof a term is legally ineffective: PCP at [46], PCG at [174], [176], [187]: CC majority
- The nature of a contract, and the meaning and legal effect of its terms, are matters of law, not fact. In contrast, the nature of a relationship – the issue addressed by GG – is a question of fact: PCP at [64]: see also PCP at [66] and PCS at [204]: cf PGG at [103], [121], [132], [144], [158]. : CC majority The issue is not whether the parties intended to create an employment relationship. Note the propositions in this dot point were not adopted by a majority but they appear to follow from the ratio and other propositions adopted.

The permissible sources - what evidence is relevant in the characterisation process?

It is not only the terms written down that are relevant. In comprehensive contracts the *permissible sources* of evidence which a court can rely on to characterise the contract are:

- The terms of the contract;
- The circumstances surrounding the making of the contract (see below);
- Post formation conduct that shows an alteration of the rights or duties (see below);
- Other evidence that shows the terms are legally ineffective (see below).

In addition, in non-comprehensive contracts the court can also rely on:

- Post formation conduct that shows a contract was made;
- Post formation conduct that shows what the terms are.

Subject to the final four dot points, the manner in which the parties performed the contract is no longer relevant. The 'substance' or 'reality' of the arrangement, and the extent to which the terms reflect a disparity of bargaining power (short of a disparity justifying equitable intervention), are never relevant.

Permissible sources: Circumstances surrounding the making of the contract: CC majority

- This is always admissible. The surrounding circumstances are relevant to the construction of the terms of the contract: PCP at [45]-[46], PCG at [175], ZP at [61]: see also PCP at [15]
- These must be matters that are known to both parties at the time of formation: PCP at [45]-[46], PCG at [175], ZP at [61]: see also PCP at [15].
- Relevant surrounding circumstances include:
  - The nature of parties (individual worker or partnership): ZGS at [99], [107], PCG at [172]
  - Nature of the business venture (fact that the business is in labour hire): PCP at [70]- [72], PCG at [200].
  - Nature of job (skilled v unskilled): PCG at [175]: see also at PGG [158] and PCS at [204].
  - Purpose or object at time of formation (eg purpose to end an employment relationship in conversion cases): PCG at [175], ZP at [61]: see also PCG at [187].
  - Statutory framework (for workers under visas, Migration Act)
- It does not include:
  - The subjective understandings of the parties (I intended – believed - it to be....): PCG at [175], [187]: see also PCP at [61], *Rossato* at [95]

- Matters only known to the hirer of labour (all other workers are independent contractors; ATO – FWO has classified workers as independent contractors): PCP at [45]-[46], PCG at [175], ZP at [61]: see also PCP at [15].
- Matters only known to the worker (eg that the worker is running a business on the side; that the worker is seeking the tax benefits of running a business)

Extrinsic evidence that shows the terms or a term is legally ineffective: CC majority

There are a series of reasons why a term may be legally ineffective. This may be because of facts that are not recorded in the terms, or involve an alteration, or involve the circumstances surrounding the formation. Evidence, including post formation conduct, can be led to prove a term is legally ineffective on the following grounds:

- The written document (or a term of it) are a sham in the narrow sense [the decision was not about sham – its scope remains uncertain]: PCP at [43], [48], [54], [59], PCG at [175], [177]: see also ZP at [8].
- The written document (or a term of it) is a pretence (not addressed directly by the HCA)
- The contract is ineffective under statute: PCP at [59], ZP at [8].
- The contract is ineffective as it was contrary to general equitable doctrines (eg unconscionable conduct; fraud; etc): ZP at [8]
- To seek a rectification: PCG at [177].
- Though not dealt with, duress (a common law doctrine) would also be another ground.

Permissible sources: post formation conduct that shows an alteration of the terms: CC majority

One of the major changes in the law concerns the treatment of post formation conduct. This is how the parties carried on their relationship. It is how they performed the contract on a day to day basis. This evidence is irrelevant unless the post formation conduct shows an alteration of the legal rights and duties, such as by a change in the term or conduct that shows a term is legally ineffective. The following types of PFC are admissible:

- PFC that effects a variation by agreement to the original terms: PCP at [42], PCP at [48], PCP at [54], PCG at [177], [178]; see also ZP at [8], ZGS at [110]
- PFC effects a variation by conduct to the original terms: PCP at [42], [48], [54], [188].
- PFC that gives rise to an estoppel: PCP at [42], [48], PCG at [177].
- PFC that waives a particular right: PCP at [42], [48].
- PFC that shows the contract has been novated and replaced: PCG at [178] ZP at [8], ZGS at [108], [109]).
- PFC that shows a course of dealings resulting in a new term or contract

Where the contract is not comprehensive, admissible PFC includes

- PFC that shows what the terms are: PCP at [42], [48], PCG at [177].
- PFC that shows a contract was made: PCG at [177], [188], [189]: see also at PCG at [178] concerning proving a course of dealings.

When PFC is admissible it is for the purpose of determining what the rights and duties of the parties are. It is not an unbounded inquiry into how the relationship evolved: PCP at [57], PCG at [178].

Variation and control

Conduct that effects a variation is crucial for putative employees in characterisation cases. In accordance with the above, in 3 circumstances evidence of PFC consisting of the exercise of control by the hirer, particularly over how work is performed, is admissible to prove that one of the terms of the contract was that the hirer had the right to direct the putative employee about the matter the subject of the direction:

- Where the terms are silent on whether there is that right of control;
- Where the terms deny that there is a right of control;
- Where the contract is not comprehensive, and the PFC shows what the terms are

PCP at [42] gave 2 examples of where PFC evidencing control is relevant in proving a variation:

Imposition of practices as a manifestation of control: 'The imposition by a putative employer of its work practices which manifests the employer's contractual right of control over the work situation.' ***[work practices manifesting control]***

Acceptance of exercised power: 'The employee's acceptance of the exercise of power that shows the employer has been ceded the right to impose such practices' : PCP [42] ***[acceptance of the power to impose work practices]***

- In most cases the former approach of tendering evidence of the agreed terms and evidence of the PFC showing control will continue, just by reference to a different conceptual justification.
- Where there are comprehensive terms, the PFC now will only be relevant to show an **alteration** in the rights and duties. Putting all of the evidence of performance of the contract and appealing to the metaphysical 'reality' of the relationship is not permissible.
- It is the conduct affecting rights, not expectations that is relevant.
- The plurality referred approvingly to 11 previous High Court decisions that it indicated were consistent with their approach. They include cases in which:
    - **Comprehensive, prove possible sham:** There were comprehensive terms and evidence of PFC concerning the exercise of control was tendered and considered relevant as proving sham: *Cam and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162, *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138
    - **Comprehensive, prove possible variation re control**: There were comprehensive terms and evidence of PFC concerning the exercise of control was tendered and considered relevant as proving there was or was not a right of control and thereby a variation of the comprehensive terms: *Logan v Gilchrist* (1927) 33 ALR 321; *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138
    - **No written terms; determine term re control:** There were no written terms and evidence of PFC concerning the exercise of control was tendered and considered relevant as proving there was or was not a right of control and was thereby was or was not one of the terms of the contract: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, *Stevens v Brodribb Saw Milling Company Pty Ltd* (1986) 160 CLR 16, *Humberstone v Northern Timber Mills* [1949] HCA 49; 79 CLR 389, *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571-2
    - **Written terms, not comprehensive, variation by conduct to prove control term:** There were written terms, but they were not comprehensive, and evidence of PFC concerning the exercise of control was tendered and considered relevant as proving there was or was not a right of control and was thereby was or was not one of the terms of the contract: *Neale v Atlas Products (Vic) Pty Ltd* [1955] HCA 18; 94 CLR 419, *Wright v Attorney-General for the State of Tasmania* (1954) 94 CLR 409; [1954] HCA 26, *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* [1944] HCA 23; 70 CLR 539, *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 (perhaps).

Obviously, where there is a comprehensive agreement which is not alleged to have been varied or be a sham (or any of the other admissible PFC grounds), then evidence of the performance of the contract is impermissible: *ZG, PC, Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597; 50 ALR 417, *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385

The framework of assessing relevant evidence

Having established what are the permissible sources of evidence, and what is not, and having retained the MFT which requires all relevant facts be considered, the next question is **– how are the admissible facts assessed in reaching a conclusion?**

- **The plurality approach:** As noted above, the MFT is retained. The materiality problem is that in a MFT it is not clear what facts count a lot, and what count a little, and why. How does one assess which relevant fact is significant?

- The question whether the worker is conducting his or her own independent business, as distinct from serving in the business of the employer provides a more meaningful framework to guide the characterisation of the parties' relationship. There is force in that submission: PCP at [35].

- *The framework is provided by the 'own business/employer's business' imperfect dichotomy.* The plurality's new focus - framework approach is subject to 3 provisos:
  - Whether a person is an employee is always the central question
  - The dichotomy is not perfect *(police officers, ecclesiastics)*
  - Not all contractors are entrepreneurs

- With the above 3 provisos, the plurality stated:

  > 'the dichotomy [*that is own business- employer's business*] usefully focuses attention upon those aspects of the relationship generally defined by the contract which **bear more directly** upon whether the putative **employee's work** was **so subordinate to the employer's business** that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise. In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist' plurality at PCP [39]. See also ZP at [60]

- **"usefully focuses attention"** – not the only issue – but the issue of focus
- ***"Bear more directly"*** - some relevant factors indirectly reflect the nature of the relationship; some more directly. The focus permits the assignment of relative significance.
- ***"Work was so significant to the employer's business"*** - assessment of the work in the context of the employer's business; it is not just a question of whether the employee was subordinate in the sense of being subject to control, but also with the work itself was subordinate to that business;
- ***partially an integration assessment;*** the dichotomy is between an "independent exercise" and "performing work subordinate to the employer's business"
- This focus provides **cogency and coherence** to the employment distinction
- This focus **avoids impressionism and mechanistic** approaches

Gordon J took a similar approach: 'the better question to ask is whether, by construction of the terms of the contract, the person is contracted to work in the business or enterprise of the purported employer': PCG [183].

The end result appears to be - when assessing the significance of a relevant fact in the characterisation process, the court should consider the extent to which the fact bears directly or obliquely on whether the worker is contracted to work in the employer's business rather than part of an independent enterprise. The more directly it bears on that issue, the more significant it is.

Cff GG - Control, IBO and integration form the 2 or 3 main overlapping considerations in the assessment: PGG [113]. They are in a way 3 ultimate questions: PGG at [114]. Note on control, considers the **'degree'** of control: [120]-[121]

Characterisation terms (CTs)/ labels

- Only arose in PC, not ZG.
- CTs are not determinative: PCP [58], [63]- [65], [79], PGG at [127], [184] unanimous
- The plurality considered the labels are of no weight at all in the assessment of the relationship, but may be relevant in rare cases in the construction of the other ambiguous contract terms which create rights: PCP [58], [63]- [65], [79]
- It is not clear what Gordon J decided. She thought the categorisation terms relevant: PCG at [184] and [199]. She held that, although all of the terms whole of the contract is to be construed including whatever labels the parties have used to describe their relationship, and that construction depends in part on the parties to the contract, the nature of the contract is determined by reference to the rights created by it. Ordinarily a label itself creates no rights, but may indicate the nature of the parties (such as the description of Mr McCourt as being self-employed). It thereby is relevant in the characterisation process as an aid to construction rather than a term that itself bears weight.
- Gageler and Gleeson JJ endorsed the traditional approach that characterisation process was informed by the terms describing the relationship: PGG at [127].

Though the law now turns on Gordon J's observations, the law is probably now:

- CTs cannot act as a tiebreaker in the case of otherwise evenly balanced factors
- CTs are not relevant to indicate the intention of the parties as the contract centric approach does not turn on the intention of the parties
- The new role of CTs is that they can be used as an aid to construction of other ambiguous operative terms that create rights and duties.
- The gloss on the forgoing is that a term that is both a CT and an operative term will be relevant as it is operative.

Odco

- The Odco model is effectively dead: PCP at [86] GG held Odco was different because of control, hourly and obligations about doing work: PGG at [157].
- Odco was wrongly decided, as was the WACSA decision in PCS in 2004.
- Of course, if the terms in the Odco model were changed a different result might be reached. But the labour hire contracts based on that model would under PC create employment relationships.

Annexure 1

The facts and decision in PC

Facts in PC In July 2016 Mr McCourt was a 22-year-old backpacker on a working holiday visa who did not conduct a business. On 25 July 2016 he attended an interview at the offices of PC, a labour hire company, where he signed an Administrative Services Agreement (the ASA) and an Induction Manual. The ASA (clause 4(a)) required Mr McCourt 'to co-operate in all respects with...the builder in the supply of labour', contained various terms characterising the relationship as not one of employment. The next day an employee of PC called Mr McCourt and offered him work at the site of Hanssen, a builder largely of high-rise residential apartments. As to how the written terms were performed, on 27 July 2016 Mr McCourt attended the site, the supervisor directed him to be inducted by a worker engaged by Hanssen, was told he would be directly supervised by a leading hand engaged by Hanssen. Mr McCourt worked as a general labourer principally engaged to clean and move materials who worked under the close supervision of Ms O'Grady and other workers engaged by Hanssen at that site. He was told what to do and how to do it. He usually worked about 50 hours over 6 days per week from 26 July 2016 until 6 November 2016 and then, after a holiday, again from 14 March 2017 to 30 June 2017. The terms of the ASA were applied to the work before and after that holiday: PCP at [2]-[5]. The terms of the ASA are set out in PCP at [14]. At the hearing before the High Court, the union did not allege that the post formation conduct varied the initial terms or that the written terms were a sham.

The arrangement involved a typical triangular labour hire relationship in which there was a contract between the worker (Mr McCourt) and a labour hire company (PC); a contract between the labour hire company and a third party client (Hanssen), under which the labour hire company agreed to provide workers to Hanssen; and no contract between the worker and the client. The terms of the labour hire agreement (LHA) are TJ annexure A. Under clause 4 of the LHA the workers were 'under the client's direction and supervision from the time they report to the client and for the duration of each day on the assignment.'[2] PCP at [10]-[13]. McCourt and the CFMMEU (the union) alleged PC contravened various National Employment Standards and s 45 of the *Fair Work Act* 2009 (Cth) (the Act) by not paying Mr McCourt in accordance with the governing award. During his period of engagement Mr McCourt was paid about 75% of what he would have received under the award. The success of these claims depended on Mr McCourt being an employee.

The decisions below in ZG: The union had been unsuccessful at trial. The trial judge had held that there was no contractual right of control in the ASA; the fact that McCourt was not conducting his own business was treated one indicator of employment; the lack of integration within PC's business slightly contraindicated employment, as did the right to work for others and the casual nature of the engagement. The characterisation terms were then treated as the default position from which there was insufficient reason to depart and as a decisive tie-breaker as other factors were balanced. The previous appellate decision, *Personnel No 1*, [2] involving essentially the same facts was distinguished.[3] A Full Court dismissed the union's appeal because *Personnel No 1* was not distinguishable and not plainly wrong.[4] Each member of that court would have decided the case differently if *Personnel No 1* had not prevented them from doing so.

The split in PC: The High Court by majority granted the appeal, with Steward J being the only dissentient. There were four sets of reasons delivered: one by the plurality (Keifel CJ, Keane and Edelman JJ), one by Gageler and Gleeson JJ, and separate reasons of Gordon and Steward J. As discussed in more detail in this article, there were a great array of issues discussed that formed part of the reasoning processes in the various judgments. On some but not all issues the reasoning of the plurality was supported by Gordon and Steward JJ; on others the reasoning of Gageler and Gleeson JJ formed part of the majority; and on other issues there was no majority.

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[2] *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31 (*Personnel No 1).*

[3] PCP at [19]-[24].

[4] PCP at [25]-[31].

The facts in ZG: In 1977 Mr Jamsek was employed by ZG as a truck driver.[5] In late 1985 ZG insisted he purchase his own truck and become an independent contractors. Mr Jamsek set up a partnership with his wife. The partnerships purchased a trucks and entered into a contract with ZG under which the partnership agreed to provide the truck and a driver and the cart goods to places as directed. The partnership and ZG entered into a comprehensive written contract. It was not alleged that post formation conduct varied the agreed terms or that the written terms were a sham. The partnership paid the maintenance and operational costs of the truck, issued invoices, was paid for work done and divided the income between Mr Jamsek and his wife. Mr Whitby was engaged under the same arrangements. Now and again the partnership updated the truck used, each purchasing on finance $70,000 vehicles in 1990. Mr Whitby also used a small ute for some deliveries. His partnership was dissolved in 2012 after his divorce from his wife. On the termination of the arrangements, Mr Jamsek and Mr Whitby made claims for annual and long service leave whose success depended on them being employees.[6]

The decisions below in ZG: The trial judge (Thawley J) concluded that the respondents were not employees. The Full Court of the Federal Court of Australia (Perram, Wigney and Anderson JJ) held Mr Jamsek and Mr Whitby were employees. Anderson J wrote the leading judgment, with which Perram J and Wigney J agreed. In reaching that conclusion, the Court devoted significant attention to the manner in which the parties actually conducted themselves over the decades of their relationship, the expectations of the parties under the contract, the lack of goodwill generated under the contract, and considered the disparity of the bargaining power affected the contract so that the 'substance' and 'reality' of the relationship was one of employment.[7]

The split in ZG: The High Court unanimously granted the appeal. There were three sets of reasons delivered: one by the plurality (Keifel CJ, Keane and Edelman JJ), one by Gageler and Gleeson JJ, and one by Gordon and Steward JJ.

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[5] The facts are at ZP at [11]-[36], ZGS at [97]-[98]. The terms of the contract are at ZG [18]. The initial engagement was with a different corporation but did not matter for the purposes of this case: ZP [1].

[6] There was also a claim for superannuation contributions whose success depended on a slightly different issue which is beyond the scope of this note: ZP at [71]-[76].

[7] See ZP [5]-[7], [37]-[59].

Annexure 2

The CFMEU 2 page note submitted to the Court

1. It was contended by the parties in both matters that the 'totality' of the relationship is relevant. However, that does not answer: what facts extrinsic to the express terms are relevant? And why are they relevant? The answers depend on the nature of the task being undertaken by the court.

2. Assuming the task is to characterise a contract, the agreed terms are relevant, as are the circumstances surrounding their formation. Further, where the contract is not integrated on formation, extrinsic evidence is admissible to establish what were the terms agreed, including by reference to the parties' conduct. Whether integrated or not, evidence of post formation conduct may be led to prove a sham in its narrow sense, to prove a pretence or disguise in their broader sense, to resolve an ambiguity about the nature of the relationship, to identify the subject matter of the contract (such as whether it is subordinated labour), to give meaning to an open textured term, to establish an estoppel, to establish a fact vitiating the contract, to prove a novation, to prove a variation or abandonment, or to prove an implied term. These final two categories are particularly important in the context of employment. When the parties' practice involves subordination of the worker to control, then submission to that practice may establish a tacit acceptance of a change: ***R** v Foster* at 151. The inference of agreement to a change arising from conduct is in practice more readily drawn due to the common features of employment: being a relationship that tends to be governed by informal documents, that tends to be long-term involving changing demands over many years and in which submission to unilaterally imposed work practices (or through the obedience to directions) is a central feature of the relationship.

3. Further, employment contracts are the only class of contract in which the right of control is implied in law. It is rare for non-employment contracts to confer an express right of control. In the absence of such an express term and any variation, if as a matter of practice the engager of labour is exercising control and the worker is submitting to it, then, to give legal recognition to the power the parties have recognised the engager of labour has, it is necessary to imply a term conferring the right of control. As that term is only implied in employment contracts, the practice reveals the 'real relation' – being that of employment (***R** v Foster* at 155). This is not an appeal to a metaphysical notion of the 'reality'. It is a contractual explanation why the engager of labour has the power it is exercising: namely, there is a term implied in law because of the nature of the relation.

4. The alternative and preferable approach is that the court's task is to characterise the relationship, not the contract. In *Hollis* the majority spoke consistently of 'the nature of the relationship' and at [24] drew a distinction between the relationship and the contractual terms: see also Mason J in *Stevens*. By virtue of being in the *relationship* of employment the common law imposes fiduciary obligations on employees, a duty of care on employers, and vicarious liability on employers. Accepting those obligations arise from the relationship is not to deprecate the fact that those obligations may be modified by the terms of the contract.

5. The distinction between independent contractor and servant arose at a time when employment was understood as a status (a relationship) and not a contract. Elements of employment as a status (relationship) have not been expunged from the common law or merged in the concept of the employment contract. There may be an employment contract but no employment relationship, and there may be a relationship, but no employment contract. For example, a wrongful dismissal terminates the relationship, but not the contract and so an employment contract may exist for years after a dismissal in the absence of an employment relationship. Further a person can be in a relationship of employment without an employment contract, as when work is performed for weeks under an agreement that is ineffective (such as an agreement that is incomplete or uncertain as to an essential matter).

6. If the issue is, as *Hollis,* history and principle suggests, what is the nature of the relationship (and not what is the nature of the contract), facts relevant to assessing the nature of the relationship are considered. Relationships do not have terms. Relationships change and evolve. The contract will be central in determining the nature of the relationship. But it is not the only evidence. The relationship consists in part of what the parties do, not just what they have agreed to do, just as the scope of a fiduciary undertaking, the scope of an agency, and the scope of employment consists in part of what the parties

do. The common law's limits on the use of extrinsic, post-formation conduct have no application to determining the nature of a relationship. What the parties do (reality) should be considered rather than focussing only on the agreed terms (form).

7. The purposes of imposing vicarious liability, like the purposes of the FW Act, would be undermined by focussing exclusively on what the parties have agreed and excluding how the parties have in practice conducted their relationship. It is the function of the court, not the parties, to determine the nature of that relationship.

8. The answer to the temporal issue depends on whether it is the relationship or the contract being characterised. If the former, post formation conduct about what the parties do (including, in *Hollis*, the work systems and being subject to control) is considered if relevant to the nature of the relationship. If the latter, post formation conduct about what the parties do is only relevant in the more limited circumstances identified in par 2. But, as noted in pars 2 and 3, in the context of work relations in practice the breadth of the circumstances results in post formation conduct being relevant in most cases. For McCourt, whichever approach is taken leads to the same result.

9. Conduct about which the other party is completely ignorant is usually not relevant in the process. It may, for example, be relevant in proving a sham, a pretence or disguise or reliance in estoppel. If the court's task is to characterise the relationship, then it may be relevant to prove the nature of the parties (such as whether both parties were conducting a business).[8]

[8] Liability limited by a scheme approved under Professional Standards Legislation
I am a member of the Victorian Bar Professional Standards Scheme approved under Professional Standards Legislation. My liability is limited under that Scheme. A copy of the Scheme will be supplied on request.

CAM & SONS PTY. LTD. v. SARGENT

ORAL JUDGMENT DIXON J.

I agree. The proceedings are based upon an award of the Commonwealth Court of Conciliation and Arbitration, but the award was not put in evidence. We have not, therefore, the advantage of knowing its exact terms. We are told, however, that in the view of the parties the liability of the defendant depends upon the existence between it and the plaintiff of the relationship of master and servant. The course of business between the parties, viewed from the outside, would appear to suggest that the plaintiff was no more than the master of the ship owned by the defendant, occupying the ordinary position of a master. But an agreement is relied upon by the defendant in order to show that the true relationship was something else. That agreement purports to demise the ship to a partnership consisting of the master and the crew of the ship, all apparently being treated as jointly constituting the charterers or hirers of the ship and in that respect as standing on an equality. The clause in which that is done merely speaks of the partnership hiring the ship. There is no hire specified and there are no words which expressly put the possession of the ship in the partnership. The agreement shows that the ship was to be loaded and discharged by the

owners and it may be doubted whether on the whole agreement, notwithstanding the use of the word "hire", an intention appears of completely depriving the owners of control and placing the exclusive possession of the ship in the master and crew forming the so-called partnership.

An examination of the provisions of the agreement discloses that in truth the remuneration of the crew is a fixed sum of money per trip of voyage, a sum which cannot increase, although conceivably it might diminish, if the so-called earnings of the partnership were insufficient to provide it. The use of the ship is strictly limited to voyages between two specified ports, Sydney and Swansea, and it is limited to the carriage of cargoes provided or found by the ship-owner.

In a matter of this sort we are to look at the substance of the transaction and not to treat a written agreement, which is designed to disguise its real nature, as succeeding in doing so if it amounts merely to a cloud of words and, without really altering the substantial relations between the parties, describes them by elaborate provisions expressed in terms appropriate to some other relation.

In my opinion this agreement, whilst it contains many clauses and seeks to elaborate many ideas which look towards a relationship of hire or demise, when it is analysed does nothing more than provide for a lump

sum payment per trip to a number of people who are to conduct the operations of the defendants in an ordinary normal manner, operations which are carried out by means of the ship. All moneys arising from the ship are to come to the hands of the owners, though under the description of "agents." They are to provide the ship in all respects except food and they are not accountable to the "partnership" who receive nothing but a fixed sum per trip. No new member of the ship's company is to be signed on without the approval of the owners. Nothing is said as to the position of the original members who leave the ship and in fact two did so and were replaced by two new members whose status must have been that of employee. Like all the others they signed articles opened in the ordinary form. I think the learned judge was perfectly right in treating the substance of the relation of master and servant as subsisting between the parties to the litigation before him.

In my opinion the appeal should be dismissed.

No. 7 - DEFENDANT'S EXHIBITS.

EXHIBIT "1".

New South Wales
One Pound
Stamp Duty
N. 1. 3. 39. K.

New South Wales
Fine Paid
Stamp Duty
N. 1. 3. 39. K.

AGREEMENT made this first day of November one thousand nine hundred and thirty-eight BETWEEN CAM & SONS PTY. LIMITED having its registered office at Number 1 Bank Street Pyrmont near Sydney in the State of New South Wales (hereinafter called the Company) of the one part AND OWEN SARGENT ALFRED HAYTER JAMES WOOD FOWLER RICHARD TAYLOR HUGO BOITANO GEORGE JONES SYDNEY NORTHEY WILLIAM MATHER and ARTHUR JOHN MANNING all of Sydney aforesaid carrying on business together as Ship Charterers (hereinafter called the Partnership) of the other part WHEREAS the Company is the owner of the Steamship "Tuncurry" and has agreed to hire the said ship to the Partnership upon the terms and conditions hereinafter contained NOW IT IS HEREBY AGREED as follows:-

1. The Company agrees to hire to the Partnership and the Partnership agrees to take on hire from the Company the Company's Steamship "Tuncurry" for the time being.

2. The Partnership if required so to do by the Company shall enter into and complete the usual Agreement adopted by the Company in connection with the charter of ships. The determination of the Secretary of the Company as to the terms and conditions of such usual Agreement shall be binding and conclusive upon the Partnership.

3._____The Partnership agrees with the Company that it will use the said ship only for the purpose of the carriage of such cargoes of coal as are found by the Company in pursuance of this Agreement between the ports of Sydney and Swansea in the said State.

4._____The earnings of the Partnership as hereinafter defined shall be divided as follows:

The Partnership shall be entitled to a proportion thereof calculated in accordance with the provisions of the next clause hereof and the Company shall be entitled to the balance thereof.

5._____The method of calculating the proportion of earnings to which the Partnership shall be entitled is as follows:-

The Partnership shall be entitled to the sum of Eleven pounds ten shillings (£11.10.0) plus ten shillings (10/-) per trip allowance for labor for mooring on arrival, assisting to load coal and unmooring on departure of the vessel at Swansea, for each voyage from the port of Sydney to the port of Swansea and return PROVIDED ALWAYS that on each return voyage to Sydney the said ship has a full cargo of approximately 150 tons. In the event of the said ship returning to Sydney from Swansea without a full cargo the partnership shall not be entitled to any moneys in respect of the said voyage and the determination of the Secretary of the Company as to whether or not the said cargo is a

full cargo shall be binding and conclusive upon the parties hereto; Provided however that in the event of there not being sufficient coal in the boxes at Swansea to make a full load or in the event of there being insufficient water on the crossing to enable a full load to be carried or in the event of the weather being too bad to come out with a full load; then in these circumstances this clause shall not apply. If in any week the earnings of the Partnership exceed the sum of Three hundred and fifty pounds (£350) then the Partnership shall also be entitled to five per centum (5%) of the earnings for that week. Any such percentage to which the Partnership may be entitled shall be paid to the Partnership every four weeks, the first payment (if any amount then be due) to be made at the expiration of four weeks from the date hereof.

6._____The term "earnings" as used herein shall mean the gross moneys earned by the operation of the said ship less the following expenses: The cost of all necessary fuel, stores, equipment, repairs, insurance premiums, running expenses of the said ship, commission for the securing of cargoes and other expenses of a similar nature, but not including the cost of any food or sustenance for the crew of the said ship which shall be borne solely by the Partnership.

7._____The Partnership hereby appoints the

Company sole agent of and for the Partnership for the purpose of securing cargoes for the said ship, and for the purpose of the collection of all moneys due to the Partnership for the carriage of such cargoes and the Partnership hereby authorises the Company to give valid discharges and receipts for the payment of the same.

8._____The Partnership authorises the Company to deduct from the moneys so collected its proportion of earnings to which it is entitled hereunder and also to pay from such moneys the expenses set forth in Clause 6 hereof.

9._____In all questions of doubt, conflict or difference as to accounts between the Company and the Partnership, a certificate signed by the Company's Accountant shall be binding and conclusive between the Company and the Partnership.

10._____The Partnership shall cause such cargoes as are obtained by the Company to be efficiently and expeditiously carried between the said ports of Sydney and Swansea.

11._____The Company shall cause all cargoes to be discharged from the said ship at its own expense.

12._____Only such persons shall be employed by the Partnership as Master and crew of the said ship as shall be and continue to be from time to time approved by the Company, but the Company must give to the Partnership notice in writing in each case of non-approval signed by the Secretary of the Company.

13._____The Partnership will employ a crew such as will in the opinion of the Secretary of the Company be sufficient to efficiently navigate the said ship and will further comply with all Acts and Regulations which apply to the said ship.

14._____If at any time the Secretary of the Company considers that the Partnership is unable to cope with the cargoes to be transported between the said ports the Company may cause such cargoes to be transported in ships other than the said ship receipts and expenditures in respect of such cargoes shall respectively belong to and be borne by the Company and shall in no way be deemed to be within this Agreement.

15._____The Company may at any time cancel this Agreement and the hiring thereby created by giving seven (7) days notice in writing to the Partnership signed by the Secretary of the Company and the Partnership shall thereupon return the said ship to the Company at such place in the port of Sydney as shall be designated in the said notice. Or the Partnership may determine this Agreement by giving seven (7) clear days notice of termination served on the Secretary of the Company.

16._____If default shall be made by the Partnership or any member thereof in the performance of any of the terms hereof such default continuing for the space of two days then at the option of the Company this Agreement may be determined and any notice of determination

shall be deemed to be sufficiently served if placed or affixed on some portion of the ship or on the wharf at which the ship usually berths when in Sydney.

IN WITNESS the parties hereto have hereunto set their hands and seals the day and year first before written

THE COMMON SEAL of CAM & SONS PTY. LIMITED was hereunto affixed by Charles Caminiti Governing Director in the presence of:) Charles Caminiti

L. Wright, Secretary.

SIGNED SEALED AND DELIVERED by the said OWEN SARGENT in the presence of:) Owen Sargent.

L. Wright,

AND by the said ALFRED HAYTER in the presence of:) Alfred Hayter

L. Wright.

AND by the said JAMES WOOD FOWLER in the presence of:) James W. Fowler.

L. Wright.

AND by the said RICHARD TAYLOR in the presence of:) Richard Tayler.

L. Wright.

AND by the said HUGH BOITANO in the presence of:) Hugh Boitano.

L. Wright.

AND by the said GEORGE JONES in the presence of:) George Jones

L. Wright.

AND by the said SYDNEY NORTHEY in the presence of:) S. J. Northey.

L. Wright.

AND by the said WILLIAM MATHER in the presence of:) William Mather.

L. Wright.

AND by the said ARTHUR JOHN MANNING in the presence of:) A.J. Manning

L. Wright.

IN THE DISTRICT COURT OF)
)
THE METROPOLITAN DISTRICT)
)
HOLDEN AT SYDNEY.)

BEFORE HIS HONOR JUDGE MARKELL.

Wednesday, 20th March, 1940.

SARGENT v. CAM & SONS, PTY. LIMITED.

JUDGMENT.

HIS HONOR: The plaintiff in this action is seeking to recover from the defendant company certain sums of money which he claims are due to him upon a balance of account as master of the S.S."Tuncurry" for wages and overtime under the provisions of a Commonwealth industrial award.

The defendant is the owner of the S.S. "Tuncurry", and by an agreement dated November 1, 1938, it purported to hire the said vessel to the plaintiff and eight other persons upon the terms appearing therein.

This agreement remained in force until 31st March, 1939, so that the relevant period is from 1st November, 1938 to the latter date.

The said agreement provided briefly that the defendant hired the "Tuncurry" to the plaintiff and his fellow contractors - therein referred to as the partnership - the partnership undertaking to use the said ship only for the purpose of carrying such cargoes of coal as might be found by the defendant

from Swansea to Sydney.

The partnership was to receive from the defendant £11.10.0 together with 10/- mooring allowance per trip from Sydney to Swansea and back, provided the vessel on the return journey carried approximately 150 tons of coal, and, in addition, in certain events the partnership was to get 5% of what is referred to in the agreement as the earnings.

I shall refer more particularly to certain other provisions of the agreement later in my judgment.

It is claimed on behalf of the defendant company that the effect of this agreement was to make the plaintiff and the other members of the partnership independent contractors and that they were in no sense employees of the defendant. On the other hand the plaintiff contends that the agreement is merely a colourable sham and that in fact he was employed with the others by the defendant to navigate the vessel from Sydney to Swansea and back and that therefore he comes within the terms of the award above referred to and is entitled to the wages and overtime claimed.

It is not denied that if the plaintiff be found to have been an employee of the defendant he comes within the award and would be entitled to such payments.

I feel no doubt that the agreement was entered into by the defendant for the

purpose, if possible, of evading the award, but this motive on the part of the company is immaterial unless the plaintiff was in fact employed by it.

The decision as to whether, in certain circumstances, a person is an independent contractor or an employee is often a matter of great nicety, the decisive factor being the amount of control exercised or exercisable by the alleged employer.

In the present case the relationship between the parties is to be determined by a careful consideration of the terms of the agreement made between them and their conduct whilst it was in force.

In my opinion a scrutiny of the alleged hiring agreement can only lead to the conclusion that the relationship between the plaintiff and the defendant was that of employee and employer.

In the first place, although the plaintiff purported to hire the defendant's vessel, he was not paying anything for that privilege, but instead had cast upon him the duty of carrying the defendant's coal from Swansea to Sydney, receiving for that service an amount which may well be described as a wage to be divided between him and his fellows, who, in fact, constituted the crew of the said vessel.

The partnership could carry the defendant's coal only, and was bound to do so

efficiently and expeditiously and the company might cancel the contract at any time by seven day's notice in writing.

In fact, practically every clause in the agreement confers upon the defendant powers which, in my opinion, are only consistent with the exercise by it of that control over the plaintiff which is necessary to create the relationship of master and servant. In addition to this, the actions of the defendant company, while the agreement was in force, such as the giving of the orders referred to in Exhibit F, leads me to the same conclusion. I therefore find that the plaintiff during the relevant period was in fact an employee of the defendant company and that the provisions of the said award apply to him.

The only evidence as to the hours and overtime worked is that of the plaintiff, but I have formed the opinion that he is a truthful and reliable witness, and I am therefore prepared to accept his testimony on this point.

I find a verdict for £202.15.6 in favour of the plaintiff.

H.J. Markell,
1/4/40.
