

## ***The art of distinguishing employees from independent contractors***

*Jiang Shen Cai trading as French Accent (French Accent) v Do Rozzario*<sup>1</sup>

On 2 December 2011, the Full Bench of Fair Work Australia (**FWA**), on appeal, upheld the FWA Commissioner's finding that Do Rozario was an employee of French Accent (and not an independent contractor) and that Do Rozario had been dismissed unfairly. In reaching its decision, the Full Bench confirmed that the Commissioner had not erred in finding that there had existed an employment relationship and it gave useful guidance regarding the test of employment.

*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.*<sup>2</sup>

For many reasons, it is important for businesses to consider the legal character of the relationship when they engage persons to carry out work for them. For instance, a principal will be liable for superannuation and workers' compensation for all employees but only some independent contractors (workers). A principal is vicariously liable for the actions of its employees but not independent contractors. An employer must comply with obligations arising under the National Employment Standards and Modern Awards (to name but two employment obligations) but has no such obligation towards independent contractors. Only employees have a right to claim unfair dismissal or other general employment protections.

This case note reminds businesses that describing your employees as contractors does not necessarily mean that that is how they will be viewed by a court in the event of a dispute between the parties or an audit by a government authority.

### ***Issues at stake***

French Accent argued that the FWA did not have jurisdiction to hear the unfair dismissal claim because, in the principal's view, Do Rozario was not an employee. French Accent relied primarily on a term contained in its written contract with Do Rozario which stated that both parties agreed that their relationship was **not** one of employment.

The Commissioner considered the terms of the contract and the various indicia of the parties' relationship and observed that the case was "finely balanced". At appeal, French Accent argued

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<sup>1</sup> [2011] FWA FB 8307

<sup>2</sup> Mummery J in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939, at 944, cited in *French Accent v Do Rozzario*

that, in such a case of ambiguity, the terms of the written contract ought to prevail as to the parties' own characterisation of their relationship as stated in the *Massey Proposition*:

"If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another."<sup>3</sup>

The FWA Full Bench found that there was no ambiguity but rather a clear finding by the Commissioner that the relationship was one of employment regardless of how the parties had defined it. The appeal was dismissed.

## ***Guidance***

**In all but the clearest cases, it will be necessary to review in intricate detail the relationship between the parties to determine its true nature. We recommend that you seek legal guidance if you are in doubt about the legal status of the relationship of the parties with whom you contract and the legal implications of the relationship.**

**The FWA Full Bench reminds us that the Massey Proposition is to be followed only if a court or tribunal is unable to reach a decision as to the nature of the relationship.**

What follows is an extract of the detailed restatement by the Full Bench of the steps which ought to be followed in reaching a decision as to the legal status of contracting parties:

"The general law approach to distinguishing between employees and independent contractors may be summarised as follows:

- (1) In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf<sup>i</sup>: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own<sup>ii</sup> of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship<sup>iii</sup>.
- (2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant indicia and the relative weight to be assigned to various indicia and may often be relevant to the construction of ambiguous terms in the contract.
- (3) The terms and terminology of the contract are always important<sup>iv</sup>. However, the parties cannot alter the true nature of their relationship by putting a different label on it<sup>v</sup>. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole<sup>vi</sup>: the parties cannot deem the relationship between themselves to be something it is not<sup>vii</sup>. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract<sup>viii</sup>.

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<sup>3</sup> *Massey v Crown Life Insurance Co* [1978] 2 All ER 576

(4) Consideration should then be given to the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd*<sup>x</sup> and the other authorities as are relevant in the particular context. For ease of reference the following is a list of indicia identified in the authorities:

- *Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.*<sup>x</sup>

Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of an independent contract<sup>xi</sup>. While control of this sort is a significant factor it is not by itself determinative<sup>xii</sup>. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise<sup>xiii</sup>. On the other hand, where there is a high level of control over the way in which work is performed *and* the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee<sup>xiv</sup>.

“The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions.”<sup>xv</sup> “[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a driving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.”<sup>xvi</sup>

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so).*

The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, working for others (or the genuine and practical entitlement to do so) suggests an independent contract.

- *Whether the worker has a separate place of work*<sup>xvii</sup> *and or advertises his or her services to the world at large.*

- *Whether the worker provides and maintains significant tools or equipment.*<sup>xviii</sup>

Where the worker’s investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary<sup>xix</sup>.

- *Whether the work can be delegated or subcontracted.*<sup>xx</sup>

If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor<sup>xxi</sup>. This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- *Whether the putative employer has the right to suspend or dismiss the person engaged.*<sup>xxii</sup>

- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*<sup>xxiii</sup>

Typically, this will arise because the worker is required to wear the livery of the putative employer.

- *Whether income tax is deducted from remuneration paid to the worker.*<sup>xxiv</sup>
- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*<sup>xxv</sup>

Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- *Whether the worker is provided with paid holidays or sick leave.*<sup>xxvi</sup>
- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged.*<sup>xxvii</sup>

Such persons tend to be engaged as independent contractors rather than as employees.

- *Whether the worker creates goodwill or saleable assets in the course of his or her work.*<sup>xxviii</sup>
- *Whether the worker spends a significant portion of his remuneration on business expenses.*<sup>xxix</sup>

It should be borne in mind that no list of indicia is to be regarded as comprehensive or exhaustive and the weight to be given to particular indicia will vary according to the circumstances. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

- (5) Where a consideration of the indicia (in the context of the nature of the work performed and the terms of the contract) points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. However, a consideration of the indicia is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture of the relationship 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 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. The details may also vary in importance from one situation to another. The ultimate question remains as stated in (1) above. If, having approached the matter in that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity a term that declares the relationship to have one character or the other<sup>xxx</sup>.
- (6) If the result is still uncertain then the determination should be guided by “matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability” including the “notions” referred to in paragraphs [41] and [42] of *Hollis v Vabu*.”

***Please contact David Markovich of Murfett Legal if you have any queries.***



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- <sup>i</sup> *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at p. 217 per Windeyer J approved by the majority in *Hollis v Vabu* (2001) 207 CLR 21 at para [40]; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (**Brodribb**) at p. 37.3 per Wilson and Dawson JJ.
- <sup>ii</sup> *Hollis v Vabu* (2001) 207 CLR 21 at [47] and [58]
- <sup>iii</sup> *Brodribb* esp Mason J at p. 29.3
- <sup>iv</sup> *Brodribb* per Wilson and Dawson at p. 37.2
- <sup>v</sup> “The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck.” *Re Porter* (1989) 34 IR 179 at p. 184 per Gray J; *Massey v Crown Life Insurance* [1978] 2 All ER 576 at p. 579 per Lord Denning approved by the Privy Council in *AMP v Chaplin* (1978) 18 ALR 385 at p. 389.
- <sup>vi</sup> *AMP v Chaplin* (1978) 18 ALR 385 at 389
- <sup>vii</sup> *Hollis v Vabu* (2001) 207 CLR 21 at para [58]
- <sup>viii</sup> *AMP v Chaplin* (1978) 18 ALR 385 at p. 394
- <sup>ix</sup> (1986) 160 CLR 16
- <sup>x</sup> *Brodribb*
- <sup>xi</sup> Flows from the reasoning of Mason J in *Brodribb* at p 24
- <sup>xii</sup> *Brodribb* esp Mason J at p 24.4
- <sup>xiii</sup> *Zuijs v Wirth Bros. Pty. Ltd* (1955) 93 CLR 561 at p. 571
- <sup>xiv</sup> *Hollis v Vabu* (2001) 207 CLR 21
- <sup>xv</sup> *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at p. 404 per Dixon J
- <sup>xvi</sup> *Brodribb* per Wilson and Dawson JJ at p. 36
- <sup>xvii</sup> *Ibid* at p. 37.1
- <sup>xviii</sup> *Brodribb* per Mason J at p 24.6
- <sup>xix</sup> *Hollis v Vabu* (2001) 207 CLR 21 at [47] see also [58]
- <sup>xx</sup> *Brodribb* per Mason J at p. 24.7
- <sup>xxi</sup> *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *AMP v Chaplin* (1978) 18 ALR 385 at p. 389
- <sup>xxii</sup> *Brodribb* per Wilson and Dawson JJ at p. 36.9
- <sup>xxiii</sup> *Hollis v Vabu* at [50]
- <sup>xxiv</sup> *Brodribb* per Mason J at p. 24.6; Wilson and Dawson JJ at p. 37.2
- <sup>xxv</sup> cf *Brodribb* per Mason J at p. 24.6
- <sup>xxvi</sup> as to paid holidays, see *Brodribb* per Mason J at p. 24.6
- <sup>xxvii</sup> *Brodribb* per Wilson and Dawson JJ at p. 37.1
- <sup>xxviii</sup> *Ibid* at p. 37.2
- <sup>xxix</sup> *Ibid* at p. 37.2
- <sup>xxx</sup> *Massey v Crown Life Insurance* [1978] 2 All ER 576 at page 579 per Lord Denning