FAIR WORK AUSTRALIA

Cai (t/as French Accent) v Do Rozario

[2011] FWAFB 8307

Lawler VP, O'Callaghan SDP and McKenna C

23 August, 2 December 2011

Appeal — Unfair dismissal — Express written contractual term providing that worker was contractor — Whether worker was employee or independent contractor — Consideration of the indicia of employment finely balanced — Worker an employee — Fair Work Act 2009 (Cth), ss 400, 604, 607 — Superannuation Guarantee Charge Act 1992 (Cth), s 12.

Words and Phrases — "Employee" — "Independent contractor".

The appellant ran a furniture shop, trading as a sole trader and engaged the respondent to work in the shop. The contract for engagement was wholly oral for the first six months, after which the parties signed a written contract which specified that the respondent worked at French Accent as a contractor. The respondent was to operate the shop in accordance with the opening hours specified by the appellant in return for a weekly payment, to sell furniture to customers and record sales as directed by the appellant and to perform some deliveries.

After considering the approach to the task of determining whether a worker is an employee as summarised by the Full Bench in *Abdalla v Viewdaze Pty Ltd* (2003) 53 ATR 30; 122 IR 215, Commissioner Cargill surmised that although finely balanced, and the indicia point in different directions, the proper characterisation of the relationship between the parties was that of employer and employee.

The appellant took Cargill C's comments as indicating that Cargill C regarded the relationship as ambiguous and submitted that Cargill C erred in failing to give effect to the proposition endorsed in *Abdalla v Viewdaze Pty Ltd* that 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 (the Massey Proposition). The appellant argued that this proposition required Cargill C to conclude that the respondent was an independent contractor rather than an employee.

Held (permission to appeal granted; appeal dismissed) (by Fair Work Australia): (1) There is a public interest in the resolution of the apparent tension between the Massey Proposition and part of the summary in *Abdalla v Viewdaze Pty Ltd*. Accordingly, permission to appeal is granted.

(2) The proposition from *Abdalla v Viewdaze Pty Ltd* that "the ultimate question will always be 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: that is, whether, viewed as a practical matter, the putative worker could be

said to be conducting a business of his or her own" is endorsed. A consideration of the nature of the work performed, the terms of the contract and the so-called indicia must always be directed to the ultimate question.

(3) Cargill C did not err in the manner contended by the appellant. Having considered the terms of the written contract and the various indicia, Cargill C concluded that whilst the case was finely balanced, she was nevertheless satisfied that the respondent was not conducting a business of his own. There was no real ambiguity and accordingly, there was no occasion to apply the Massey Proposition. Finding that a matter is "finely balanced" does not automatically equate to a finding that there is real ambiguity.

(4) The matter is not as finely balanced as Cargill C concluded. Rather, the ultimate question is answered with a degree of comfort in favour of a finding that the respondent was a servant in the appellant's business rather than carrying on a business of his own. A greater significance should be assigned to the nature of the work being performed by the respondent. The respondent's work amounted to that of a full-time shop-keeper, which is conventionally the work of an employee.

(5) The ultimate question is comfortably answered in favour of the respondent being characterised as an employee of the appellant. Notwithstanding the assignment of greater significance to the nature of the work performed by the respondent, that is a matter on which reasonable minds might differ. The appeal must be dismissed.

Cases Cited

Abdalla v Viewdaze Pty Ltd (2003) 53 ATR 30; 122 IR 215.

ACE Insurance Ltd v Trifunovski (2011) 200 FCR 532; 215 IR 143.

Australian Mutual Provident Society v Chaplin (1978) 52 ALJR 407.

Do Rozario v French Accent [2011] FWA 3003.

Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; 106 IR 80.

Humberstone v Northern Timber Mills (1949) 79 CLR 389.

Marshall v Whittaker's Building Supply Co (1963) 109 CLR 210.

Massey v Crown Life Insurance Co [1978] 1 WLR 676.

Porter, Re; Re Transport Workers Union of Australia (1989) 34 IR 179.

Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539.

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic) (1997) 37 ATR 528.

Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation (2011) 244 CLR 97.

Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation (2010) 184 FCR 448.

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16.

Zuijs v Wirth Bros Pty Ltd (1955) 93 CLR 561.

Application for permission to appeal and appeal

D Stewart, for the appellant.

C Briese AO, for the respondent.

Cur adv vult

Fair Work Australia

1 This is an appeal against a decision of Commissioner Cargill[1] dismissing the appellant's jurisdictional objection against the respondent's application for an unfair dismissal remedy. The appellant (Mr Cai) had objected on the basis that the respondent (Mr Do Rozario) was an independent contractor rather than an employee and, as such, not entitled to make application for an unfair dismissal remedy.

2 The Commissioner set out the following background:

> [8] The applicant had been engaged as an employee for much of his working life. During that time he worked for a number of different employers. On two occasions the applicant established his own small business selling furniture and mirrors. Neither of these ventures was successful. The applicant's evidence is that, after the failure of his second business in 2007 and with the decreasing value of his real estate investments, he was in serious financial difficulties.
>
> [9] The applicant's evidence is that it was imperative that he find employment or "do something else". Details of the applicant's financial position in August 2007 and July 2008 are contained in Exhibit Applicant 9.
>
> [10] In early 2007 the applicant approached Mr Cai about wholesaling furniture for him. Mr Cai agreed and the applicant took possession of some chairs for that purpose. However the applicant was unable to get the business going so returned Mr Cai's furniture to him.
>
> [11] In August 2007 Mr Cai informed the applicant that he intended to open a furniture shop in Willoughby. They visited the shop together. Mr Cai signed the lease on the premises on 25 September 2007 and began trading as a sole trader under the name of French Accent. His evidence is that he had been a sole trader in various aspects of the furniture trade since 1990.

3 French Accent was a small retail furniture business operating out of a single shop in a suburban shopping strip. Mr Cai is the owner of the registered business name "French Accent" and at all material times the lessee of the premises out of which the business traded.

4 In December 2007 Mr Cai engaged Mr Do Rozario to work in the shop. The contract for that engagement was wholly oral pursuant to which Mr Do Rozario was to operate the shop in accordance with the opening hours specified by Mr Cai in return for a weekly payment. He was to sell furniture to customers and record the sales in a manner directed by Mr Cai and also to perform some deliveries. The shop had a delivery vehicle for Mr Do Rozario's use in that regard. Mr Cai's wife had what amounted to a management role in relation to monies and accounts. In the early period of the engagement it was she who prepared tax invoices for Mr Do Rozario to sign in relation to the payment of the agreed weekly rate.

5 On 4 July 2008 Mr Cai presented Mr Do Rozario with a single page written contract on French Accent letterhead and asked him to sign it. They had a discussion about a $50-a-week payment increase and there is a handwritten addition to the contract providing for such an increase. Mr Do Rozario signed. The type written part of that contract states:

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1 *Do Rozario v French Accent* [2011] FWA 3003.

> Contract Agreement
>
> Michael Do Rozario works at French Accent, [named business address] as a contractor effective from 3 December 2007. The weekly payment is $850 inclusive. The working days are Tuesday to Saturday 10 am to 5:30 pm.

6 The document then sets out the details of the "Contractor" and "Business", including Mr Do Rozario's ABN number, and the signatures of the parties. The handwritten addition, apparently referring to payment reviews, is as follows:

> TO BE REVIWED EVERY 6 MONTHS.
> STARTING JULY 08 $900 pw

7 The furniture sold in French Accent came from a number of sources. It seems that most of the furniture was owned by Mr Cai. However, he also established arrangements to take furniture on consignment from several other dealers with whom he had struck an agreement and to sell it through the French Accent shop for a 30 per cent commission. A separate sales book was maintained for each of those dealers. Part of Mr Do Rozario's duties was to record the sale of an item owned by one of the dealers in the appropriate book. Mr Do Rozario was also himself one of those dealers but sold only a relatively small quantity of his own pieces of furniture in this way.

8 Mr Cai maintains that Mr Do Rozario was always engaged as a contractor and never as an employee, as affirmed by the written contract.

9 The Commissioner had concerns about the reliability of the evidence of both men and she clearly did not fully accept the evidence of either of them. She made detailed findings on the oral and documentary evidence. We do not propose to set out the full and detailed findings of fact made by the Commissioner. None of the Commissioner's underlying findings of fact is challenged by the appellant. Rather, the appellant challenges some of the Commissioner's intermediate findings, or a failure to make particular intermediate findings, and the Commissioner's ultimate conclusion.

10 The Commissioner purported to apply the conventional approach to the task of determining whether a worker is an employee as summarised by the Full Bench in *Abdalla v Viewdaze Pty Ltd*[2] (*Abdalla*). That summary is relevantly as follows:[3]

> (1) Whether a worker is an employee or an independent contractor turns on whether the relationship to which the contract between the worker and the putative employer gives rise is a relationship where the contract between the parties is to be characterised as a contract of service or a contract for the provision of services. The ultimate question will always be 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: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own. This question is answered by considering the totality of the relationship.
>
> (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.

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2 *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 53 ATR 30; 122 IR 215.

3 *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 53 ATR 30; 122 IR 215 at [34].

(3) The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it. 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: that is, the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract. *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*.

(4) Consideration should then be given to the various "indicia" identified in *Brodribb* and the other authorities bearing in mind that no list of indicia is to be regarded as comprehensive and the weight to be given to particular indicia will vary according to the circumstances. Where a consideration of the "indicia" points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. For ease of reference we have collected the following list of "indicia":

…

(5) *If the indicia point both ways and do not yield a clear result the determination should be guided primarily by whether it can be said that, viewed as a practical matter, the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations as distinct from operating as a representative of another business with little or no independence in the conduct of his or her operations*.

(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*….

(Emphasis added and footnotes omitted)

11 The Commissioner considered the various "indicia" and concluded:

[120] This case is one where the indicia point in different directions. The contract arrangements, the absence of income tax deductions and paid leave tend towards the independent contractor side of the line. Indicia which point to the employee side include: the nature of the work; the regularity of the payments and the fact that they were not referable to the completion of tasks; the absence of a separate place of work, ability to work for others and ability to delegate duties; the applicant's appearance as an emanation of the respondent; the absence of a profession, trade or calling; the absence of the provision and maintenance of significant tools and equipment or significant expenditure on business expenses; and the fact that any goodwill created by the applicant was for the respondent's benefit. The important indicia of control and whether the applicant was running his own business balance in the middle.

[121] Consequently it is necessary to consider whether, viewed as a practical matter, the applicant was or was not running his own business or enterprise with independence in the conduct of those operations as distinct from operating as a representative of French Accent with little or no independence in the conduct of his operations. (*Abdalla* @ para 49).

[122] Although finely balanced, in my view, the applicant falls into the second category. The proper characterisation of the relationship between the parties was that of employer and employee.

12 The appellant submits that having found that the indicia "pointed in different directions" and concluded that a consideration of whether, viewed as a practical matter, the applicant was or was not running his own business or enterprise with independence in the conduct of those operations was "finely balanced", the Commissioner must be taken to have regarded the relationship as ambiguous. It was submitted that, because the written contract between the parties expressly provided that Mr Do Rozario was a contractor, the Commissioner erred in failing to give effect to the proposition, endorsed by the Full Bench in sub-paragraph (3) of its summary, that:

> 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.

(The *Massey*[4] Proposition)

13 It was argued that, on the findings of the Commissioner, an application of that proposition required the Commissioner to conclude that Mr Do Rozario was an independent contractor rather than an employee.

14 The Commissioner's written reasons show that she endeavoured to follow the approach contained in the summary in *Abdalla*. Her ultimate conclusion was based on an application of sub-paragraph (5) of the summary. Although she considered the case finely balanced, she nevertheless concluded that Mr Do Rozario fell into the "second category" of distinction drawn in sub-paragraph (5), that is, Mr Do Rozario, in performing work for Mr Cai was "operating as a representative of another business with little or no independence in the conduct of his or her operations".

15 On one view there is a tension between the *Massey* Proposition and sub-paragraph (5) of the summary; a tension which this case highlights.

16 Pursuant to s 604 of the *Fair Work Act 2009* (Cth) (the FW Act) an appeal against a decision of a single member of Fair Work Australia lies only with the permission of a Full Bench of Fair Work Australia and such permission must be granted if Fair Work Australia considers that it is in the public interest to do so. Section 400(1) provides that Fair Work Australia must not grant permission to appeal from a decision made under Pt 3-2 of the FW Act unless Fair Work Australia considers that it is in the public interest to do so. The present appeal is an appeal against a decision made under Pt 3-2 of the FW Act such that permission to appeal is to be granted if and only if Fair Work Australia considers that it is in the public interest to do so.

17 In our view there is a public interest in the resolution of the apparent tension we have identified. Accordingly, we are required to grant permission to appeal and do so.

18 We endorse the proposition in sub-paragraph (1) of the *Abdalla* summary, based on the High Court authorities, that:[5]

> … the ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or

4 *Massey v Crown Life Insurance Co* [1978] 1 WLR 676.

5 *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 53 ATR 30; 122 IR 215.

> business of his or her own behalf:[6] that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own.[7] This question is answered by considering the terms of the contract and the totality of the relationship.[8]

(The ultimate question)

19 Sub-paragraph (5) of the summary in *Abdalla* should be read as nothing more than a restatement of the ultimate question, designed to bring the focus of consideration back to the ultimate question.

20 A consideration of the nature of the work performed, the terms of the contract, and the so-called indicia must always be directed to the ultimate question. The leading case in this area is the decision of the High Court in *Hollis v Vabu Pty Ltd*.[9] The most significant case since *Hollis v Vabu* is the decision of the Full Court of the Federal Court in *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation*[10] (*Roy Morgan*). That case concerned an appeal against a decision of the Administrative Appeals Tribunal that interviewers engaged by Roy Morgan were "employees" either within the ordinary meaning of that word in s 12(1) of the *Superannuation Guarantee Charge Act 1992* (Cth) (the SGC Act) or because they worked under a contract that was wholly or principally for their labour as specified in s 12(3) of that Act. The Full Court endorsed a passage from the leading judgment in the decision of the Victorian Court of Appeal in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)*,[11] which in turn had endorsed a passage from the judgment of Mummery J in *Hall (Inspector of Taxes) v Lorimer*[12] which makes it clear that 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 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.

21 The *Massey* Proposition came to be part of the general law in Australia primarily through the decision of the Privy Council in *Australian Mutual*

6 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 per Windeyer J approved by the majority in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [40]; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (*Brodribb*) at 37.3 per Wilson and Dawson JJ.

7 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [47] and [58].

8 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 esp Mason J at 29.3.

9 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80.

10 *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 (Keane CJ, Sundberg and Kenny JJ). It may be noted that an appeal by Roy Morgan Research to the High Court, confined to a constitutional challenge to the validity of the superannuation legislation, was unsuccessful (*Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 85 ALJR 1115).

11 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528 at 532-533 per Winneke P (with whom Phillips and Kenny JJA agreed).

12 *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944.

Provident Society v Chaplin.[13] In that case the Privy Council was considering whether insurance salespersons were employees or independent contractors in circumstances where clause 3 of the relevant agreement stated that the relationship between the parties was that of "Principal and Agent and not that of Master and Servant". The Privy Council held:[14]

> Clearly cl 3, which, if it stood alone, would be conclusive in favour of the Society, cannot receive effect according to its terms if they contradict the effect of the agreement as a whole. Nevertheless, their Lordships attach importance to cl 3, and they consider that the following statement by Lord Denning MR in *Massey v Crown Life Insurance Co*… correctly states the way in which it can properly be used: "The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it … On the other hand, if their relationship is ambiguous and is capable of being one or the other [ie either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them."

22 The *Massey* Proposition should be treated as a matter of common sense that allows for the resolution of the ultimate question in cases where, after considering the nature of the work, the terms of the contract and the indicia, real ambiguity remains and the contract declares the relationship to have a particular character. The ultimate question remains as stated.

23 The distinction between employees and independent contractors is a distinction with substantial economic consequences in the modern era. When a worker is an employee, the employer has obligations to comply with the National Employment Standards, observe relevant obligations under the appropriate award or enterprise agreement (which will typically include providing penalties rates, allowances and overtime), pay superannuation and provide workers' compensation insurance coverage. If the employee is not a casual employee, the employer has obligations to provide paid sick leave, annual leave and long service leave.[15] However, if a worker is properly characterised as an independent contractor no such obligations arise. Most employees also have access to unfair dismissal remedies whereas independent contractors do not have access to such a remedy when their contracts are terminated. An employer has vicarious liability in respect of the conduct of its employees but not its independent contractors.

24 The benefits and protections enjoyed by employees may be seen as reflecting a social consensus, expressed in legislation, that workers who are properly characterised as employees *should* have the benefits and protections of superannuation, workers' compensation insurance, sick leave, annual leave and award entitlements (and it is not to the point that other protections, for example unfair dismissal protection, have been more contentious in recent years).

25 The FW Act imposes obligations on employers in relation to their "employees" and confers benefits and rights on "employees" without defining when a worker is an employee as distinct from an independent contractor. The

13 *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407; 18 ALR 385.

14 *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407 at 409; 18 ALR 385 at 389.

15 In some jurisdictions such as NSW regular casuals are also entitled by statute to paid long service leave.

definition of "employee" leaves it to the general law to supply that distinction. The nature of the established general law approach to distinguishing between employees and independent contractors may be seen as contributing to the problem precisely because the nature of the general law test is such that it does not admit a clear answer in every case. Once one adopts the position, as the general law has done, that the distinction is rooted in the objective *character* of the work relationship two things follow. First, the infinite variety of human affairs means that work relationships present as a spectrum, some of which are clearly relationships of employment and others of which are clearly relationships of independent contract but some of which are less clear cut. Secondly, that character of a work relationship is what it is and cannot be changed simply because the parties agree to label it differently (unless, of course, the relationship is sufficiently ambiguous that a clear determination is not possible, the situation addressed by the *Massey* Proposition). That is a matter clearly recognised by the courts and tribunals.

26 Moreover, the nature of the ultimate question is such that in any given case that is not clear cut, reasonable judicial minds may differ as to the correct answer in any given case. This was explicitly recognised in *Roy Morgan*.[16] This necessarily means that there is an area of uncertainty for businesses that wish to engage only on the basis of independent contract and not on the basis of employment. Any change to the present approach is a matter for the legislature. Our duty is to continue to apply the established general law approach until legislation or the High Court requires otherwise.

27 We think that the tension we have identified is more apparent than real and that the Commissioner did not err in the manner for which the appellant contends. In *Roy Morgan* the relevant contract expressly provided that the interviewers were independent contractors rather than employees. In that case the Full Court stated:

> 39. It is apparent that by the time the Tribunal announced its conclusion it had come to the view that the weight of the evidence favoured a finding that the interviewers were engaged as employees rather than as independent contractors. In other words there was no real ambiguity as to the relationship. It is important to take into account the structure of the Tribunal's reasons. After its fact finding, the Tribunal examined the leading authorities. It then considered the indicia identified in the authorities and balanced them against each other. One of the matters it weighed in the balance as pointing against a conclusion that the interviewers were employees was the statement that they were engaged as independent contractors. Finally, at [126]-[129] it announced its conclusion. This it did by pointing to the factors that supported its conclusion that the interviewers were employees. There was no occasion here for the Tribunal to engage in a further balancing process, so as to revisit, for example, the contractual arrangement between the parties. As was said in *Roy Morgan Centre* 37 ATR at 537, approving the primary judge's treatment of comparable statements to those here, namely that the interviewers were independent contractors:
>
> > His Honour clearly understood the significance of the [contractual statements] but said, correctly in my view, that "it is a matter which must yield in its significance to the nature of the whole relationship

16 *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 at [29]-[32].

between (the appellant) and its interviewers."

No error has been shown in the Tribunal's treatment of the statements to which we have referred.

28 In the same way, in the present case, the Commissioner, having considered the terms of the written contract and the various indicia, concluded that, while the case was finely balanced, she was nevertheless satisfied that Mr Do Rozario was not conducting a business of his own. In other words, to adapt the language of the Full Court in *Roy Morgan*, there was no real ambiguity and, accordingly, there was no occasion to apply the *Massey* Proposition. A finding that the matter is "finely balanced" does not automatically equate to a finding that there is real ambiguity. A balance may be fine but nevertheless distinctly in one direction. That is how we read the Commissioner's conclusion in the present case.

29 The nature of the general law approach to distinguishing between employees and independent contractors is such that a summary of that approach that is faithful to the court authorities has a continuing utility in this jurisdiction. The apparent tension in the summary in *Abdalla* highlighted in this appeal, together with the emphasis on the proper approach to a consideration of the indicia provided by the decision of Full Court of the Federal Court in *Roy Morgan*, makes it desirable to recast the summary in *Abdalla*, albeit we do not see that summary as wrong.

30 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:[17] that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own[18] 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.[19]

(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.[20] However, the parties cannot alter the true nature of their relationship by putting a different label on it.[21] In particular, an express term that the worker is an independent contractor cannot take effect according to its

17 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 per Windeyer J approved by the majority in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [40]; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37.3 per Wilson and Dawson JJ.

18 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [47] and [58].

19 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 esp Mason J at 29.3

20 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson at 37.2.

21 "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; Re Transport Workers Union*

terms if it contradicts the effect of the terms of the contract as a whole:[22] the parties cannot deem the relationship between themselves to be something it is not.[23] Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.[24]

(4) Consideration should then be given to the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd*[25] 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*.[26]

  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.[27] While control of this sort is a significant factor it is not by itself determinative.[28] 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.[29] 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.[30]

> 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.[31] "[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 droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform

(cont)

of Australia (1989) 34 IR 179 at 184 per Gray J; *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 at 678-679 per Lord Denning approved by the Privy Council in *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407 at 409; 18 ALR 385 at 389.

22 *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407 at 409; 18 ALR 385 at 389.

23 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [58].

24 *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407 at 411-412; 18 ALR 385 at 394.

25 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

26 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

27 Flows from the reasoning of Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24.

28 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 esp Mason J at 24.4.

29 *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571.

30 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80.

31 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404 per Dixon J.

into a contract of service what in essence is an independent contract.[32]

- *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*[33] *and or advertises his or her services to the world at large.*

- *Whether the worker provides and maintains significant tools or equipment.*[34]

  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.[35]

- *Whether the work can be delegated or subcontracted.*[36]

  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.[37] 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.*[38]

- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*[39]

  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.*[40]

- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*[41]

  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.

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32 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 36.

33 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37.1.

34 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 24.6.

35 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [47] see also [58].

36 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 24.7.

37 *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407 at 409; 18 ALR 385 at 389.

38 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 36.9.

39 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80 at [50].

40 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 24.6; Wilson and Dawson JJ at 37.2.

41 cf *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 24.6.

- *Whether the worker is provided with paid holidays or sick leave*.[42]
- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged*.[43]

  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*.[44]
- *Whether the worker spends a significant portion of his remuneration on business expenses*.[45]

  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.[46]

(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*.

31 Having granted permission to appeal, the appeal proceeds as a rehearing on the evidence before the Commissioner and such fresh evidence as may be admitted under s 607(2) albeit that the powers in s 607(3) cannot be exercised unless error is demonstrated. There was no fresh evidence in this case.

32 In our view the matter is not as finely balanced as the Commissioner concluded. Rather, we consider that the ultimate question is answered with a degree of comfort in favour of a finding that Mr Do Rozario was a servant of

42 As to paid holidays, see *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Mason J at 24.6.

43 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 per Wilson and Dawson JJ at 37.1.

44 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37.2.

45 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37.2.

46 *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 at 678-679 per Lord Denning.

Mr Cai in Mr Cai's business rather than carrying on a business of his own of which the work performed for Mr Cai was part. To the extent that we do not address particular indicia this is because we adopt the Commissioner's treatment of such indicia.

33 On the rehearing we would assign a greater significance than the Commissioner to the nature of the work being performed by Mr Do Rozario. The evidence established that a man named Bill Baker had run the French Accent shop for Mr Cai for several months before Mr Do Rozario's engagement. Mr Baker decided to leave. It was Mr Cai's own evidence that he placed an advertisement on the job advertisements website known as "Seek" for a "shop assistant" to replace Mr Baker.[47] Mr Cai did not receive any suitable applications and instead agreed to engage Mr Do Rozario to take over Mr Baker's role. Mr Cai's own description of the role as "shop assistant" is telling as to the unskilled nature of the work in that particular role.

34 The work being performed by Mr Do Rozario was the work of what amounted to a full-time shop-keeper in a simple one-person shop. This is not the sort of work that is ordinarily performed by a contractor. It is conventionally the work of an employee. In this case, it was Mr Do Rozario's only paid work and amounted to full-time work performed over five consecutive days each week: Tuesday through Saturday from 10.00 a.m. to 5.30 p.m. Mr Rozario was not paid by reference to results but rather was paid a fixed weekly amount for fixed weekly hours. He did not have a company through which he worked. He did not have other customers or clients for whom he performed work. He did not have a business name under which he traded. He did not advertise a business to others.

35 There is no doubt that Mr Cai had sought to insist that Mr Do Rozario be a contractor. Indeed, declaring the relationship to be one of independent contract rather than employment seems to have been the primary purpose of the written contract as it was prepared. Care should be taken in not attributing undue weight to the tax arrangements in relation to the worker. In *ACE Insurance Ltd v Trifunovski*[48] Perram J noted:

> 90. There are a number of authorities which suggest that the deduction of income tax instalments is relevant to the question of employment … Because the deduction of income tax from wages will invariably be a matter of consent between employer and employee (or principal and independent contractor) there is little reason to doubt that the tax treatment of the payments provides an important and contemporaneous insight into what the parties intended and understood about this relationship. And, equally, there is no question but that the parties' intention is an important, although by no means determinative, matter. I do not grasp as a matter of analysis, however, why it is that the tax treatment of the payments advances matters beyond disclosing the parties' understanding of the relationship. …
>
> 91. In this case, I accept that each of the sales representatives understood that he or she was an independent contractor at all material times. Their status as independent contractors was one of the attractions of the position. Indeed, none of them denied that understanding. It is hardly surprising in that circumstance that income tax was not deducted from their

47 Paragraph 32 of Exhibit Respondent 1.

48 *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532; 215 IR 143.

commissions or that they each obtained an ABN. Beyond throwing light on the parties' understanding, however, I do not think this advances matters very far.

36 In a case of this sort it is important to attend to what it is that is said to constitute the *business* of his or her own that the alleged contractor is said to be conducting. Here, the business of Mr Do Rozario's own that he was allegedly conducting was not the business of French Accent. That was Mr Cai's business in which Mr Do Rozario had no ownership interest. Any business being conducted by Mr Do Rozario, as part of which he was working in the French Accent store, was a business different from the business of French Accent.

37 Counsel for Mr Cai made much of the fact that Mr Do Rozario was himself one of the dealers who were able to place their own furniture for sale on consignment in the French Accent shop. Mr Cai's oral evidence was to the effect that Mr Do Rozario wanted to engage in the business of selling furniture on consignment in the French Accent shop and accepted the engagement to work in the shop as part of that business. The Commissioner clearly did not accept that evidence. Mr Do Rozario's oral evidence was to the effect that the arrangement by which he was able to sell his own furniture on consignment in the French Accent shop was separate from his engagement to work full-time keeping the shop and selling furniture on behalf of Mr Cai and all the dealers. The Commissioner appears to have accepted that the arrangements were separate. The absence of any reference in the written contract to the "dealer arrangement" is objective evidence in favour of such a conclusion. There can be no doubt that it is possible for a person to be an employer of another and also have a separate business arrangement with that other.

38 In this context it may be noted that the evidence suggested the sale by Mr Rozario of his own furniture on consignment in the French Accent shop was more in the nature of a hobby than a business. Mr Do Rozario worked in that shop for a period of just on three years. Mr Do Rozario gave evidence that the total value of his own furniture sold in this way in the first year and a half of that period was $4,419. Mr Cai failed to produce the separate "dealer book" for Mr Do Rozario that recorded such sales. There is no suggestion that Mr Do Rozario was responsible for the non-production of that book. In cross-examination Mr Cai agreed that the total value of such sales was less than $20,000 over the period. This was a gross amount and the net return to Mr Do Rozario would have been much less. The Commissioner did not make an explicit finding as to the value of such sales. However, she did accept the evidence of Mr Branch, a furniture trader who was a friend and former employer of Mr Do Rozario. Mr Branch gave evidence that Mr Do Rozario's sale of his own furniture on consignment in the French Accent shop was best described as a hobby.

39 We agree with the Commissioner's rejection of the suggestion that Mr Do Rosario's business was his work for the other dealers.[49] The Commissioner did not find that the arrangement pursuant to which Mr Do Rosario was able to sell his own furniture on consignment through the French Accent shop was part of the original oral agreement under which he was engaged to work in the French Accent shop. There is no reference to this arrangement in the written contract. On the balance of probabilities the arrangement, to the extent that it constituted

49 *Do Rozario v French Accent* [2011] FWA 3003 at [104].

a business (in respect of which, it may be noted, Mr Do Rosario would have been entitled to claim business-related tax benefits such as an entrepreneur's tax offset[50]), was a business conducted pursuant to an arrangement with Mr Cai that was separate from his engagement by Mr Cai to work in the French Accent shop and a mere adjunct to that work. This was not a case where Mr Do Rozario had an existing established business selling furniture or consulting on the sale of French furniture and was engaged by Mr Cai in the course of that business. On the facts found by the Commissioner, Mr Do Rozario was working for Mr Cai because the failure of previous businesses and the failure of property investments left Mr Rozario in significant financial difficulty with no work and no source of income to support himself. He was prepared to accept the engagement offered by Mr Cai because he needed full-time work with regular income.

40 When we stand back from the detailed picture painted by the evidence and the Commissioner's detailed findings and consideration of the indicia, and view it from a distance, making an informed, considered, qualitative appreciation of the whole, we think it plain that Mr Do Rozario was the servant of Mr Cai in Mr Cai's French Accent business and that, from a practical view, the work performed by Mr Do Rozario pursuant to his engagement by Mr Cai to work in the French Accent shop was not part of a business Mr Do Rozario was conducting on his own behalf.

41 For the reasons we have given, on the rehearing we are satisfied that the ultimate question is comfortably answered in favour of Mr Do Rozario being characterised as an employee of Mr Cai in respect of his work keeping the French Accent shop. Notwithstanding that we have assigned a greater significance to the nature of the work performed by Mr Do Rozario, that is a matter on which reasonable minds might differ. It follows that the appeal must be dismissed and we do so.

Permission to appeal granted; appeal dismissed

LILY STRACHAN

50 *Do Rozario v French Accent* [2011] FWA 3003 at [46], [58] and [90].