Categorising work relationships: Contract rules?

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On 9 February 2022 the High Court of Australia handed down its decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (***Construct***) and in *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (***Jamsek***). These decisions, together with the Court's earlier decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (***Rossato***), provide important guidance on the correct approach to the categorisation of work relationships in Australia.

In particular, the Court has affirmed that the key determinant of the character of any given work relationship is to be found in the terms of the contract (whether written, oral or a combination thereof) between the parties. It has also severely circumscribed, if not entirely eliminated, the capacity of individuals and corporations to enter into trilateral arrangements such as those colloquially known as 'Odco Contracts'.[1]

Implications of the High Court's decisions

In light of the approach adopted in *Rossato*, the decisions in Construct and *Jamsek* come as no real surprise. There is clearly majority support in the High Court as presently constituted for restricting the frame of reference within which work relationships are to be categorised by excluding post-contractual conduct, other than where variation, waiver or estoppel are at issue. Even then, the frame of reference is restricted to the rights and entitlements flowing from the contract itself, rather than the manner in which it is performed. This is, of course, the approach applied in the interpretation of contracts in general. Consistent with that approach, the Court in all three cases took the view that the principles governing the interpretation of contracts of employment are, and should be, 'no different from those that govern the interpretation of contracts generally'.[2]

This suggests that it should now be much easier for businesses to engage workers on the basis of independent contractor arrangements. This can be done with greater certainty and less legal risk than has been the case for some considerable time. In order to achieve this objective it is critical that the relevant contracts are comprehensive in character and drafted with the utmost care.

1 So-called after their endorsement in *Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 483 and (on appeal) *Building Workers' Industrial Union of Australia v Odco Pty Ltd* [1991] FCA 96.

2 *Construct*, at [60].

It should not be supposed, however, that **all** that is necessary is to draft a comprehensive contract and to characterise it as a principal/contractor relationship.

It is certainly necessary to do both of these things, but it is also important to ensure that the relationship that is being created truly is one of principal and contractor – rather than of employer and employee. Amongst other things, this means ensuring that the principal does not have the capacity to **control** the what, the how, the where or the when of the provision of services by the contractor, and that the contractor can credibly be said to be **in business on their own account**.

The importance of these factors is helpfully illustrated by the circumstances of *Construct* itself. On the face of the contract between them (**ASA**) both Construct and McCourt eschewed any intention to create an employer/employee relationship, but the relationship they created (on the reasoning of six members of the High Court) was not one of principal and contractor, or a contract *sui generis*:[3] rather it was a contract of employment. Critical to this finding was the nature and extent of the control over McCourt's activities that could be exerted by Construct and the fact that he could not realistically be said to be in business on his own account.

In other words it is important to ensure that the totality of the relationship, at the time it is created, is one of principal and contractor rather than employer and employee. The decisions in *Rossato*, *Construct* and *Jamsek* make it easier to do this – but it is clear that careful drafting is required in order to achieve the desired objective.

It is also important to recognise that, even on a strict contractualist view, post-contractual behaviour can still impact in situations where the contact is part written and part oral and/or inferred and it is necessary to fill in the gaps left by the express terms of the contract. The risks that can arise in such situations can best be avoided by reliance upon comprehensive written contracts.

Post-contractual conduct may also be relevant in circumstances where it is alleged that 'subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver'.[4] Again careful drafting, and monitoring of the operation of contractual arrangements, can help minimise the risk of such allegations being upheld, but it must be recognised that it is a risk that cannot entirely be eliminated.

Key takeaways

1. Whilst the decisions in *Rossato*, *Construct* and *Jamsek* provide a degree of certainty in entering into principal/contractor relationships, in order to maximise those benefits it is of the utmost importance to ensure that contracts deal (so far as possible) with all aspects of the relationship between the parties, and that they are apt to create the relationship of principal/contractor, rather than some other kind of relationship such as employer/employee.
2. It should not be assumed that even where a contract is comprehensive, and carefully drafted, that post-contract performance is entirely irrelevant to the categorisation of work relationships. In particular, parties should take care not to:
    a. waive their rights under the contract
    b. vary their contracts by conduct; or
    c. make representations which may subsequently be used to compromise their interests.
3. In seeking to establish the terms of a contract, it is necessary to:
    a. take account of the traditional indicia of the existence of principal/contractor relationships. In particular, engagement of independent contractors through an incorporated entity affords the highest degree of security in the categorisation of the relationship between the parties; and
    b. be wary of common law and equitable principles relating to sham arrangements, and (especially) of relevant legislative provisions such as those in sections 357-359 of the *Fair Work Act 2009* (Cth) and the *Independent Contractors Act 2006* (Cth).
4. In framing drafting principal/contractor arrangements, it is important to:
    a. minimise the extent to which the principal has the legal right to 'control' the what, how, where, or when of the provision of services; and
    b. be wary of relying upon 'tick-a-box' exercises based on lists of criteria of employer/employee and principal/contractor relationships.

3 For example in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (**Ready Mixed Concrete**). the English High Court found that the contractual relationship between concrete delivery drivers and concrete manufacturers that was in issue in that case was governed neither by a contact of employment nor one of principal/contractor: it was governed by a contract *sui generis*.

4 See *Construct*, at [42], and the discussion below.

5. It may be possible to continue to rely upon, or to enter into, Odco Contracts – but it is more difficult to do so than was formerly the case. Businesses that are already party to such arrangements should have them reviewed in order to ascertain whether they are still sustainable.
6. Be aware that there is a distinct possibility that a federal Labor Government, if elected, would review this area and may seek to legislate to reverse all or part of the perceived effect of the decisions in *Construct* and *Jamsek*.

Construct - context

At the relevant time, Mr Daniel McCourt (**McCourt**) was a 22-year-old British backpacker. In July 2016, whilst located in Perth, he entered into an agreement (**ASA**) with a labour hire company called Personnel Contracting Pty Ltd (**Construct**)[5] under which he made himself available to be offered work on construction sites for clients of Construct. In due course, he was offered, and accepted, work on a site operated by Hanssen Pty Ltd (**Hanssen**).

Construct had a contractual arrangement, referred to as a Labour Hire Agreement, with Hanssen whereby Construct agreed to supply labour to Hanssen upon request. Hanssen communicated its needs for labour to Construct, which then offered work to the requisite number of individuals. If the individuals concerned accepted the offer of work, they then reported to, and worked under the direction and control of, Hanssen. They were subsequently paid by Construct on the basis of information provided by Hanssen.

The ASA expressly provided that McCourt was 'self-employed' and that there was no relationship of employer/employee. It also stated that he was not obliged to accept any work that was offered to him, and that he had no claims against Construct in relation to issues such as holiday pay, sick pay and superannuation. McCourt was required by the agreement to supply his own work-boots, hi-vis shirt and hard hat.

Tripartite arrangements of this kind are quite common in the construction industry, and are commonly referred to as 'Odco Contracts'.

Having been offered work with Hanssen, McCourt undertook unskilled labouring work under the direction and control of Hanssen over a period of months in 2016 and 2017. He was paid by Construct at a rate that was some 25% less than the applicable award rate and, in accordance with the ASA, did not receive any statutory employment benefits.

McCourt was not offered any work through Construct after June 2017.

Subsequently, the Construction Forestry Maritime Mining & Energy Union (**CFMMEU**) on behalf of McCourt initiated proceedings seeking to recover entitlements and the imposition of penalties under the FW Act. The CFMMEU's claim was rejected both at first instance and on appeal.

It is not surprising perhaps that over the years unions in the construction industry should have strongly opposed the utilisation of Odco Contracts both industrially and in the courts, given that such contracts leave the worker as an employee of neither the party that provides them to the user, nor of the user. The CFMMEU's legal response included an unsuccessful challenge in the Western Australian Industrial Appeal Court in 2004 to what was, in effect, the same agreement as that entered into by McCourt and Construct some 12 years later.[6]

In the 2020 proceedings, the Full Court of the Federal Court clearly considered that the 2004 Case was incorrectly decided but felt constrained by the principle of comity to follow the earlier decision.[7] The High Court was not subject to any such constraints and at least five members of the Court determined that the 2004 Case was wrongly decided.[8]

Construct in the High Court

Six members of the Court considered that the decision of the Full Court should be overruled, but provided three different sets of reasons for doing so.[9] The seventh member of the Court considered that the decision of the Full Court should be upheld. The existence of the three sets of reasons makes it difficult precisely to determine the basis upon which the Court should be regarded as having made its decision, although there is agreement on the part of six members of the Court as to the end result.

5 Personnel Contracting Pty Ltd traded under the business name 'Construct', and is referred to as such throughout the judgments in the High Court, and in this *Insight*.

6 See *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312 (**2004 Case**).

7 Amongst other things, this principle contemplates that Federal courts should respect the decisions of State courts at the same level in the judicial hierarchy, and vice versa. It is not a rule of law as such, but the Full Court in *Construct* clearly felt impelled to adhere to it. See further [2020] FCAFC 122, [33]-[40] (Chief Justice Allsop) and [125]-[134] (Justice Lee).

8 See further the discussion at 6-7 below.

9 See Chief Justice Kiefel and Justices Keane and Edelman at [1]-[92]; Justices Gageler and Gleeson at [93]-[160]; and Justice Gordon at [161]-[202]. Justice Steward's dissent is at [203]-[223].

Was McCourt an *'employee'* of Construct?

All six members of the majority were of the clear view that the categorisation of work relationships requires that the courts look to the totality of the relationship and that this is to be done at the time the contract is made, rather than at the time the matter falls to be determined.[10] They also agreed that adopting that approach yielded the result that McCourt was an employee of Construct. The Plurality (comprising Kiefel CJ and Justices Keane and Edelman) put the matter thus:

> Under the ASA, Mr McCourt promised Construct to work as directed by Construct and by Construct's customer, Hanssen. Mr McCourt was entitled to be paid by Construct in return for the work he performed pursuant to that promise. That promise to work for Construct's customer, and his entitlement to be paid for that work, were at the core of Construct's business of providing labour to its customers. The right to control the provision of Mr McCourt's labour was an essential asset of that business. Mr McCourt's performance of work for, and at the direction of, Hanssen was a direct result of the deployment by Construct of this asset in the course of its ongoing relationship with its customer.
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> In these circumstances, it is impossible to conclude other than that Mr McCourt's work was dependent upon, and subservient to, Construct's business. That being so, Mr McCourt's relationship with Construct is rightly characterised as a contract of service rather than a contract for services. Mr McCourt was Construct's employee.[11]

In reaching this conclusion, the Plurality decisively rejected the approach that had been adopted by a number of Federal Court judges in recent years, where they were prepared to look behind the express terms of a contract in order to ascertain its true effect – especially where there was some suggestion that the terms of the contract were tainted by the unequal bargaining positions of the parties.

According to the Plurality ([43]):

> In cases such as the present, where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied,[12] waived[13] or the subject of an estoppel,[14] there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship.

And (at [44]):

> Not only is there no reason why, subject to statutory provisions or awards, established legal rights and obligations in a contract that is entirely in writing should not exclusively determine the relationship between the parties but there is every reason why they should. The "only kinds of rights with which courts of justice are concerned are legal rights". The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties. By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights.

10 See Plurality [61]; Justices Gageler and Gleeson (at [121]); Justice Gordon (at [172]-[173]).

11 See also the concise summary of Justice Gordon (at [162]).

12 Variation of a contract can occur with the express or implied agreement of the parties, and such agreement can be inferred from conduct in appropriate circumstances. Variation can alter the rights and duties of the parties without the need to terminate an existing contract and create a new one.

13 Waiver will relevantly occur where a party to a contract elects not to enforce a right they have under the contract.

14 Estoppel is a principle which protects a person who has acted on the basis of an assumption or expectation induced by another person. It does so by preventing the person who induced an action from unilaterally withdrawing the assumption or expectation that induced the action.

Furthermore, in the opinion of the Plurality:

> The principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally, and suggestions to the contrary in cases such as *Autoclenz* 'cannot stand' with the relevant Australian authorities.[15]

In rejecting recourse to the manner in which a contract is performed as an aid to categorising work relationships the Plurality relied (at [45]) upon a passage from the opinion of the Judicial Committee of the *Privy Council in Narich Pty Ltd v Commissioner of Pay-roll Tax*:

> [W]here there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; ***and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract.***[16] (Emphasis added)

Importantly however, Justices Gageler and Gleeson asserted (at [129]) that the italicised passage 'was wrong as a matter of common law principle' and that it was inconsistent with two earlier decisions of the High Court.[17]

In the opinion of Justices Gageler and Gleeson (at [130]) 'focussing exclusively on the terms of the contract loses sight of the purpose for which the characterisation is undertaken', namely 'to characterise the relationship'. Their Honours acknowledged (at [132]) that there are cases, perhaps including *Narich*, where examining the manner of performance of a contract 'will reveal nothing of significance…that cannot be gleaned from an examination of the contractual terms'. However (ibid):

> [T]here will be cases where, without any variation to the terms of a written contract, the true character of a relationship in fact established and maintained under the contract will be revealed through the manner of the performance of the contract. That will be so where the terms of the written contract are sufficiently opaque or obscure to admit of different manners of performance. And it will be especially so where such a contract is a standard form written contract couched in language that might arguably have been chosen by the putative employer to dress up the relationship to be established and maintained as something somewhat different from what it might turn out to be.

Their Honours concluded that (at [143]):

> The true principle, in accordance with what we understand to have been the consistent doctrine of this Court until now, is that a court is not limited to considering the terms of a contract and any subsequent variation in determining whether a relationship established and maintained under that contract is a relationship of employment. The court can also consider the manner of performance of the contract. That has been and should remain true for a relationship established and maintained under a contract that is wholly in writing, just as it has been and should remain true for a relationship established and maintained under a contract expressed or implied in some other form or in multiple forms.

Justice Gordon's approach to what may be looked at for purposes of characterising work relationships was closer to that of the Plurality than to that favoured by Justices Gageler and Gleeson (see [172]-[176]). Justice Steward expressly approved (at [203]) Justice Gordon's approach to categorisation. [18]

This means that five members of the Court endorsed the approach to categorisation advocated by the Plurality, which restricts the frame of reference for the categorisation process to the terms of the relevant contact. Meanwhile Justices Gageler and Gleeson were in a minority, preferring a wider frame of reference which includes post-contractual behaviour. However the matter does not necessarily end there.

It's not that straightforward

Even adopting the Plurality's approach to categorisation, it is important to recognise that there are a number of contexts in which it is permissible to examine the manner in which a contract is performed in order to ascertain its character – and indeed in which it may be necessary and appropriate to do so. These include:

- where it is necessary to evaluate the impact of statute upon the operation of a contract, irrespective of its terms (at [41]);
- where a contract is partly oral and partly in writing, it may be necessary to look to the manner in which the contact is performed in order to ascertain its terms, including whether they have been varied by conduct of the parties, either party has waived their rights, or one party is estopped from asserting them against the other. All of these matters can bear upon the true character of the contract (at [42]);

15 *Autoclenz Ltd v Belcher* [2011] UKSC 41.

16 [1983] 2 NSWLR 597, 600-01.

17 *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 and *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138.

18 As appears below, this is reflected in the joint of opinion of Justices Gordon and Steward in *Jamsek*.

- 'where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver' (at [42] and [46]); and
- where it is necessary to ascertain whether a particular contract is a sham arrangement (at [54]).

In the course of her opinion, Justice Gordon (at [177]) identified a number of contexts where subsequent conduct may legitimately be called in aid for purposes unrelated to construction (Footnotes omitted):

> (1) *formation* – to establish whether a contract was actually formed and when it was formed; (2) *contractual terms* – where a contract is not wholly in writing, to establish the existence of a contractual term or terms; (3) *discharge or variation* – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract; (4) *sham* – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement; and (5) *other* – to reveal "probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract".

It is also most important to appreciate that parties to a contractual arrangement cannot determine the character of a work relationship simply by attaching a 'label' to it. As the Plurality put it (at [58]): 'the parties' legitimate freedom to agree upon the rights and duties which constitute their relationship…does not extend to attaching a 'label' to describe their relationship which is inconsistent with the rights and duties otherwise set forth'.[19]

Indeed, the Plurality went so far as to suggest (at [66]) that 'as a matter of principle…it is difficult to see how the expression by the parties of their opinion as to the character of their relationship can assist the Court, whose task it is to characterise their relationship by reference to their rights and duties', and that 'generally speaking, the opinion of the parties on a matter of law is irrelevant'. Logical as this position may seem, it runs counter to the traditional assumption that parties to a work relationship can remove doubt or ambiguity as to the character of the relationship by means to an express stipulation, so long as that express stipulation is not contrary to the other terms of the contact.[20]

19 See further the Purality at [63]-[65].

20 See, e.g., *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407, 409.

Where does this leave Rossato?

It will be recalled that in *Rossato* the High Court adopted what can properly be regarded as a strict contractualist approach to determining whether a labour hire employee in a coal mine was properly characterised as a 'casual employee'.[21]

> To insist upon binding contractual promises as reliable indicators of the true character of the employment relationship is to recognise that it is the function of the courts to enforce legal obligations, not to act as an industrial arbiter whose function is to synthesise a new concord out of industrial differences. That it is no part of the judicial function to reshape or recast a contractual relationship in order to reflect a quasi-legislative judgment as to the just settlement of an industrial dispute has been emphatically the case in Australia at the federal level since the *Boilermakers Case*.[22]
>
> To insist that nothing less than binding contractual terms are apt to characterise the legal relationship between employer and employee is also necessary in order to avoid the descent into the obscurantism that would accompany acceptance of an invitation to enforce "something more than an expectation" but less than a contractual obligation. It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain. It has rightly been said that it is not a legitimate role for a court to force upon the words of the parties' bargain "a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made."[23] [24]

As the Plurality in the present case point out, the Court in *Rossato* refrained from expressing a concluded view on the effect of the approach it had adopted in that case upon one concerning categorisation of work relationships as employment relationships or something else. According to the Plurality the time 'to express a view on the matter has now arrived' (at [62]). Their Honours went on to note that 'the point was squarely raised and fully argued', and on the basis of that argument, they concluded (ibid) that 'there is no reason in principle why the approach taken in *Rossato* should not be applied where the issue is whether the relationship in question is one of employment'.

As is clear from what appears above, that is precisely what the Plurality and Justice Gordon did in finding that McCourt was an employee of Construct with the terms of the contract being set out in the ASA.

Interestingly, Justices Gageler and Gleeson took a rather less expansive view of the effect of the decision in *Rossato*, stating that that case (at [141]):

> held only that the distinction between a casual employee and another employee was to be found in the terms of the contract of employment. The plurality was not laying down any principle directed to the distinction between an employee and an independent contractor.

This view was clearly not shared by the other members of the majority.

Are Odco Contracts dead?

The decision in *Construct* does not bode well for the future of Odco Contracts. The Plurality determined (at [86]) that the 2004 Case 'was wrongly decided' due to the majority in that case attributing 'decisive significance to the parties' description of their relationship in a manner so as to 'remove the ambiguity' generated by other factors in the analysis pointing in opposite directions'. The Plurality further found that the decision in the 1991 Odco Case[25] was infected by the same error (ibid), and determined that 'that error involves a departure from principle which should not be perpetuated'.

That does however, leave open the possibility that contractual arrangements that avoided the 'critical error' identified by the Plurality might still be sustainable. Support for this can be derived from the opinion of Justices Gageler and Gleeson (at [157]), where their Honours seemed to consider that there were relevant differences between the arrangements that were before the Court in *Construct* and those that were at issue in the 1991 Odco Case. Conceivably therefore, arrangements that took account of the comments of Justices Gageler and Gleeson would be found not to create the relationship of employer/employer.[26] Presumably Justice Steward would be of a like mind, in light of the fact that he was prepared to permit the arrangements that were at issue in *Construct* to continue to operate.

21 [https://www.corrs.com.au/insights/rossato-high-court-clears-the-air
22 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
23 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 388.
24 [2021] HCA 23 [62]-[63].
25 *Building Workers' Industrial Union of Australia v Odco Pty Ltd* [1991] FCA 96.
26 *Building Workers' Industrial Union of Australia v Odco Pty Ltd* [1991] FCA 96.

Has the substance of the test really changed?

Construct has altered the common law by restricting the frame of reference within which the categorisation of work relationships is to take place. Post-contractual conduct has no role to play beyond cases where variation, waiver or estoppel are alleged, or it is said that the contract is a sham.

It is clear however, that having established the frame of reference the analysis proceeds by means of the consideration of very familiar concepts. In particular, the central notions of control, the conduct of one's own business, and integration, remain central to the analysis. Indeed, it must be remembered that for six members of the Court, these were the factors that led to the finding that McCourt was in an employment relationship with Construct.

Justices Gageler and Gleeson, for example, noted (at [113]) that the characterisation of work relationships as employer/employee or principal/contractor 'has long been understood to turn on one or other or both of two main overlapping considerations', namely:

- 'the extent of the **control** that the putative employer can be seen to have over how, where and when the putative employee does the work'; and
- 'the extent to which the putative employee can be seen to work in his or her **own business** as distinct from the business of the putative employer.' (Emphasis added)

Their Honours also identified a third consideration in the form of the extent to which the putative employee could be said to be **integrated** into the business of the putative employer.

The practical distinction between their approach and that of the Plurality and Justice Gordon, is simply that for the other members of the majority the scope of the matters which may be taken into account in analysing these factors is limited to the terms of the parties' contract.

Like Justices Gageler and Gleeson, both the Plurality and Justice Gordon placed significant emphasis upon the degree of control that Construct could exercise over McCourt, and upon the fact that he could not credibly be said to be in business on his own account (as evidenced by the fact that Construct did not press this assertion before the High Court).

Factors that may be relevant for purposes of applying the 'own business' test include, but are not limited to, 'the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.'[27]

To that list should be added whether the services of an independent contractor are provided through an incorporated entity. In many ways this is the 'safest' basis upon which to engage contract labour in the sense that it is only in exceptional circumstances that courts or tribunals will be prepared to 'lift the corporate veil' in order to examine the true character of the relationship.[28] There is nothing in either *Construct* or *Jamsek* to suggest that this proposition no longer holds.

Jamsek – context

Messrs Jamsek and Whitby (**Drivers**) started work with Associated Lighting Industries Pty Limited (**ALI**) at its premises in western Sydney in 1977. During their early years with ALI they were engaged in a range of unskilled or semi-skilled jobs. By 1980 they had both become truck drivers. Thereafter they worked in that capacity for ALI and various successor companies (**Companies**) until 2017, at which point their engagements were terminated by the latest company in the line of succession, ZG Operations Australia Pty Ltd (**ZG Operations**).

From 1986 onwards the Drivers were engaged under a series of written and unwritten contracts (**Contracts**) by which various of the Companies purported to engage them as independent contractors. At the time of entering into the 1986 contract, it was made clear to the Drivers that if they were not prepared to contract on that basis their employment would be terminated.

27 Justice Gordon did not expressly state that either the 1991 Odco Case or the 2004 Case were incorrectly decided, but that is the logic of the position she adopted in this case.

28 See further Corrs Chambers Westgarth, *Categorising work relationships: a world of ambiguity, inconsistency and contradiction* (2021), 3 and 15.

Under the Contracts the Drivers were responsible for providing and maintaining their trucks. Indeed, in the first instance, they actually purchased the trucks they had been driving as employees from their former employer at a price set by the employer.

Over time the Companies provided the Drivers with branded clothing, although they were not obliged to wear it. On occasion their trucks were also painted in Company livery and/or had Company logos affixed to them (at the Companies' expense). The Drivers had the right to work for other clients, but never in fact did so, and indeed could not realistically do so given the number of hours they worked for the Companies.

Although the Drivers enjoyed a certain amount of discretion in terms of the order and manner of delivery of goods, and as to finishing time, the volume and character of their work was almost exclusively determined by the Companies.

Initially both Drivers contracted with the Companies through partnerships, with their respective spouses as the other members of the partnership. Mr Whitby's partnership was dissolved in 2012, and thereafter he worked as an individual, but still (ostensibly) as an independent contractor. The partnerships invoiced the successive Companies on a weekly basis, and following the introduction of the Goods and Services Tax (**GST**) in 1999 they added GST to their invoices. When operating as partnerships, the Drivers' incomes were split with their partners, (the Companies making the payments to each of the Drivers and their spouses), and tax was paid by each of the members of the partnerships.

The engagements of the Drivers were terminated in 2017 in the context of a reorganisation of its business by ZG Operations. Following this, the Drivers commenced Federal Court proceedings seeking to enforce a range of statutory entitlements, and the imposition of penalties for a number of alleged breaches of the FW Act.[29]

The most important of the statutory entitlements for present purposes concerned annual leave under the FW Act, superannuation contributions under the *Superannuation Guarantee (Administration) Act 1992* (**SGA Act**) and long service leave under the New South Wales *Long Service Leave Act 1955* (**LSL Act**).

For their claims to succeed the Drivers had to show that they were in fact 'employees' (for purposes of the FW Act and the SGA Act) and 'workers' (for purposes of the LSL Act), despite the fact that some or all of the Contracts had identified the contracting parties as the partnerships, and expressly stated that they were engaged as independent contractors.

The Drivers claims were rejected at first instance. However their appeal to the Full Court of the Federal Court was successful, and the matter was remitted to the trial judge for determination as to their actual entitlements. ZG Operations sought, and obtained, leave to appeal to the High Court. If the appeal was unsuccessful the sums owing to the Drivers could have been quite substantial – including, for example, payment in respect of almost 40 years of long service leave and extensive periods of untaken annual leave.

Jamsek in the High Court

The appeal was heard jointly with that in *Construct*, and in light of the position adopted by the majority in that case, it is not surprising that the appeal should have been upheld.

The Court was unanimous as to the outcome, but again provided three separate opinions: a Plurality comprised of Chief Justice Kiefel and Justices Keane and Edelman; a joint opinion of Justices Gageler and Gleeson; and a joint opinion of Justices Gordon and Steward.[30]

The Plurality considered that the reasoning of the Full Court was affected by two 'errors of approach' (at [6]):

> The first was the significant attention devoted by that Court (and indeed the primary judge) to the manner in which the parties actually conducted themselves over the decades of their relationship. That was thought to be necessary because those courts took the view that a proper characterisation of the totality of the relationship required a consideration of how the parties' contract played out in practice. The second was the Full Court's reasoning that the disparity in bargaining power between the parties affected the contract pursuant to which the partnerships were engaged, so that the "reality" of the relationship between the company and each respondent was one of employment.[31]

According to the Plurality (at [7]), this process of reasoning 'cannot be sustained', rather (at [70]):

> The services provided by the partnerships involved, compendiously, the truck driving skills of the respondents and the use of the trucks owned by the partnerships. The provision of such services has consistently been held, both in Australia and in England, to have been characteristic of independent contractors, not employees.[32] In the present case, there is no reason to reach a different conclusion.

29 For a full list of their claims, see [2020] FCAFC 119, [126].

30 See respectively paras [1]-[77], [78]-[91] and [92]-[111].

31 The Plurality reiterated the position expressed in *Rossato* and in *Construct* that the expansive approach adopted by the UK Supreme Court in *Autoclenz* involved 'an unjustified departure from orthodox contractual analysis' (at [51]).

32 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Barro Group Pty Ltd v Fraser* [1985] VR 577; *Ready Mixed Concrete.*

In reaching their conclusions in this respect, the Plurality noted that, as in *Construct* (at [8]):

> [T]here was no suggestion that the contract between the parties was a sham or had been varied or otherwise displaced by conduct of the parties. There was no claim by the respondents to set aside the contract either under statute or pursuant to equitable doctrines such as those relating to unconscionable conduct. In these circumstances, and for the reasons given in [*Construct*], **the character of the relationship between the parties in this case was to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship**. The circumstance that entry into the contract between the company and the partnerships may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract. (Emphasis added)

As concerns this last contention, the Plurality noted (at [61]) that 'on the orthodox approach to the interpretation of contracts, regard may be had to the circumstances surrounding the making of a contract.' In the present case, the 1986 contracts came to be made because of the company's refusal to continue to employ the Drivers as employees and its insistence that the only ongoing relationship it was prepared to have with them would be one where 'the partnerships would own and operate the trucks which would transport the company's deliveries'. That being the case, 'it is difficult to see how there could be any doubt that the respondents [Drivers] were thereafter no longer employees of the company.'

The Plurality continued (at [62]):

> The circumstance that this state of affairs was brought about by the exercise of superior bargaining power by the company weighed heavily with the Full Court; but that circumstance has no bearing on the meaning and effect of the bargains that were struck between the partnerships and the company. To say this is not to suggest that disparities in bargaining power may not give rise to injustices that call for a legal remedy. The law in Australia does provide remedies for such injustices under both the general law and statute. Those remedies were not invoked in this case. As has been noted earlier, the respondents did not claim that the contracts with the partnerships were shams. Nor did they seek to make a claim under statute or otherwise to challenge the validity of the contracts that were made by the partnerships. In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation.

Justices Gageler and Gleeson adopted the same approach to the categorisation of work relationships as they had done in *Construct*, and as in that case, they reached the same conclusion as the Plurality, albeit by a different route.

In the circumstances of the present case, their Honours identified (at [87]) two factors which they considered 'pointed inexorably' to the conclusion that the Jamsek partnership 'provided carriage services to the company using their own truck as distinct from a relationship within which Mr Jamsek provided personal service to the company as a truck driver'. The two factors are (at [88] and [89]):

> The first is that Mr and Mrs Jamsek were obliged to, and did, maintain the truck which was used to perform the 1993 contract. A relationship of employment is a relationship of personal service. Personal service is not inherently inconsistent with the individual who provides service being responsible for the physical means by which his or her service is provided… [but it]…has become the "conventional view" that "owners of expensive equipment, such as [a truck], are independent contractors". (Footnotes omitted)

> The second important feature of the relationship is that it was Mr and Mrs Jamsek in partnership who contracted for the doing of the work involving the use of the truck, and who were therefore jointly and severally liable to the company for the performance of the …contract and jointly and severally entitled to be paid by the company when performance in fact occurred. They together invoiced the company as partners and were together paid by the company as partners.

Justices Gordon and Steward concurred in the result of the case, whilst applying (at [95]) the approach to categorising work relationships that had been put forward by Justice Gordon in *Construct*.

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