IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
WORKCOVER DIVISION No D12215996

BETWEEN:

WILLIAM YOUNG Plaintiff

and

BPS PROPERTY GROUP PTY LTD Defendant

MAGISTRATE:	GINNANE
DATE HEARD:	15 & 16 MAY 2014
DATE OF DECISION:	11 JUNE 2014
WHERE HEARD:	MELBOURNE

APPEARANCES	COUNSEL	SOLICITORS
For the Plaintiff	P Rosenberg	Petersons
For the Defendant	S Manova	Hall & Wilcox

Catchwords: Whether plaintiff a worker within meaning of s 5 of Accident Compensation Act 1985 – acceptance of liability by authorised insurer – ongoing receipt of weekly payments – notice of termination –opinion of Medical Panel – whether defendant's conduct constitutes an admission that plaintiff a worker- circumstances warranting departure from admission- distinction between being bound by admission and estoppel- defendant not bound by admissions – consideration of whether plaintiff a worker – determined that plaintiff a worker – setting aside notices of termination and applying medical panel opinion

REASONS FOR DECISION

HIS HONOUR:

Introduction

1. This proceeding was commenced by way of the plaintiff's Complaint endorsed with a Statement of Claim contesting the lawfulness of a notice issued to him and dated 9 May 2013 that conveyed a decision to terminate his receipt of weekly payments of compensation on the basis that he was not a "worker" within the meaning of the *Accident Compensation Act (1985)* ("the Act") and a

further notice dated 13 May 2013 withdrawing a notice dated 4 March 2013 pursuant to the plaintiff's permanent impairments claim on the ground that the defendant was not satisfied that the plaintiff had sustained a work-related injury. By way of relief the plaintiff seeks reinstatement of weekly payments of compensation and medical and like expenses from 10 June 2013; reinstatement of an entitlement to compensation representing a 31% whole person impairment pursuant to s 98C of the Act and a declaration that he was a worker, or a deemed worker under the Act.

2. The plaintiff was represented by Mr P Rosenberg of counsel and the defendant was represented by Ms S Manova of counsel.

Preliminary issue

3. At the commencement of the hearing a matter arose concerning the extent to which, if at all, the defendant was bound by conduct that the plaintiff described as "admissions against interest" concerning his status of a "worker" within the meaning of the Act at the time the claimed work injury occurred. The plaintiff submitted that the defendant had treated him as a worker for the purposes of the Act in the administration and payments of his claim for weekly payments and his impairment benefits claim. The plaintiff did not contest the defendant's argument that subject to discharging a burden of proof, it could as a matter of law withdraw an admission. Nonetheless, the plaintiff submitted that because a Medical Panel had made a decision in relation to the plaintiff and extent of his impairment, its decision operated in a manner and with a force analogous to that of a court order or judicial determination and because its opinion was necessarily predicated on the plaintiff being clothed with the status of a worker for the purposes of the Act, the defendant thereafter was bound by the finding implicit in its opinion. Lastly, the plaintiff submitted that, in any event, the defendant through its authorised insurers was at all relevant times aware of the facts subsequently relied on to contest the plaintiff's status as a worker and it would be unfair to allow the defendant to revisit the plaintiff's status.

4. For the reasons expressed below, I am unable to accept the plaintiff's submission.

The witnesses

5. The plaintiff adduced oral evidence from the plaintiff. He was cross-examined by the defendant. The defendant called evidence from Matthew Bell who worked with the plaintiff over a period of years. It also relied on an affidavit of Lisa Mary Gulikers, a lawyer in the employ of CGU, sworn 14 May 2014 that touched on a number of relevant factual matters. In addition Ms Gulikers gave oral evidence and was cross-examined by the plaintiff.

Factual background

6. William Robert Young (the plaintiff) was born on 27 May 1957. He commenced his working life as a labourer and progressively found his niche in carpentry. Although it was not until last year that he obtained a certificate in this trade, he had over the course of the preceding years honed his skill on the job. On 28 September 2011 he suffered an injury within the meaning of the Act. The injury occurred whilst he was engaged in work on the construction of a new build home for the defendant. The defendant is also known as "Porter Davis Homes.

7. The plaintiff's Claim Form for the injury he sustained was lodged with the defendant on 10 October 2011 (Ex P4).Initially the plaintiff's claim was administered by Cambridge Workers Compensation Insurance Victoria Pty Ltd, trading as "XChanging" and from 1 December 2011 by CGU who became the defendant's authorised insurer for the plaintiff's claim. Liability was accepted by XChanging on behalf of the defendant (Exhibit LG2 to the Affidavit of Lisa Mary Gulikers).Ms Gulikers deposed (paragraph 7) that liability was accepted without any investigation of circumstances being carried out to determine, *inter alia*, if the plaintiff was a worker within the meaning of the Act.

8. After becoming the defendant's insurer on 1 December 2011 CGU continued to pay the plaintiff weekly payments of compensation and medical and like expenses until a Notice of Termination of weekly payments of compensation and medical and like expenses was issued dated 9 May 2013 (Ex P6).

9. Furthermore by Claim Form dated 31 October 2012 the plaintiff sought impairment benefits under the Act (LG4 to the Gulikers Affidavit). At about this time it appears to me that the administration of the plaintiff's claims for benefits took different paths within CGU but without any overarching supervision of the claim by CGU.

10. Ms Gulikus deposed that the plaintiff's impairment claim was dealt with by Ms Parker, an "Impairment Benefits Specialist" employed by CGU. The claim for impairment benefits was administered by her. Ms Parker issued a notice to the plaintiff dated for March 2013 in which liability for the injuries the subject of impairment was accepted.

11. Ms Gulikus deposed to the work and operation of the Impairment Benefits Section within CGU and, on information and belief, deposed that had that section been aware of the existence of a controversy about whether the plaintiff was a "worker" within the meaning of the Act, liability for the impairment claim would not have been accepted.

12. In her oral evidence Ms Gulikus testified about the operation of a computer data program operating within CGU called "Nova". She said that impairment specialists in CGU do not interrogate Nova "to any great extent". The circumstances that might trigger recourse to data retained in Nova or the existence of any protocols for the inclusion, retention and/or authorised access to data in Nova was not the subject of any evidence.

13. Mr Rosenberg submitted that the explanation proffered by the defendant was unsatisfactory. In particular Mr Rosenberg identified an absence of explanation of whether or not Ms Parker had accessed data in Nova relating to the plaintiff. He submitted there ought be some hesitation on my part in concluding that she did not, and in furtherance of that contention, he referred to the contents of a notice dated 13 November 2012 from the defendant containing the statement that: "*Impairment Benefits team is currently in the process of reviewing your claim*". Mr Rosenberg also submitted that the same notice contained an information sheet detailing the process and timelines for the plaintiff's impairment benefits claim included the following statement: "*Once CGU has reviewed all available information, we will advise you of a decision in relation to liability for your claimed injuries and any entitlement to compensation for the accepted injury/s*". Mr

Rosenberg submitted that the Court could conclude from these statements that the review of the plaintiff's claim would have extended beyond the question of impairment and touched upon and required that consideration and determination be afforded "*any entitlement to compensation for the accepted injury/s*". Mr Rosenberg also submitted that following on from that review the defendant made another admission against interest when it issued the further notice dated 4 March 2013 accepting liability for the claimed injuries of "Both lower legs/broken heels". In addition and following on from the defendant issuing the termination notice of weekly payments, it was not until after the Medical Panel gave its opinion that the defendant gave the notice seeking to withdraw the admission for the permanent impairment claim.

14. Mr Rosenberg points to further admissions against interest by the defendant that it was the "employer" of the plaintiff including an assessment report completed by a rehabilitation provider IPAR at the request of the insurer and sent to the defendant, the plaintiff and the plaintiff's general practitioner which was predicated on the plaintiff as a "worker" and that listed the defendant as the employer. I place little weight on designations adopted in reports such as the IPAR report. There is always the chance that they have been adopted from their use in other material. Certainly there is nothing to indicate that the appellation was used after any considered judgement or after resolution of some conflict on the point. At the time of the report no such controversy existed or was known to exist regarding the plaintiff's status.

15. Mr Rosenberg also submitted that it is a matter of "great significance" that the defendant failed to advise either the Medical Panel or the plaintiff that it had withdrawn its admission of liability between the time it reviewed a circumstance report initiated by one Brady Yates, a case manager with CGU in April 2013, and the Medical Panel Opinion dated 21 May 2013.

The defendant's burden

16. The defendant bears a burden of proof in satisfying the Court of the existence of circumstances that informed its conduct and why the facts that led to its decisions should not be regarded as binding. So much is made plain in *Ansett v Taylor [1996] VSCA 171*.

17. As a consequence of evidence adduced by the defendant it seeks to not be bound by the corollary that follows from its prior acceptance of liability for weekly payments concerning the plaintiff's status. It submits that the prior acceptance of liability for weekly payments does not amount to a binding admission in law.

The Medical Panel

18. In dealing with this controversy it is appropriate at this juncture that I say something about the operation of a Medical Panel under the Act.

19. An opinion by the Medical Panel is binding on the parties: s 68(4) of the Act states:

> *For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred.*

20. In *Maurice Blackburn Cashman v Brown (2011) 242 CLR 647* The reasoning of the High Court is expressed at 660 [34] to [35]:

> *At first sight, s68 (4) of the Act is cast in terms of very general application. Reference is twice made to "any court, body or person". But the sub-section is introduced by the expression "[f]or the purposes of determining any question or matter". Those words should not be given a literal meaning. The meaning of the phrase that best accords with its context, and which should be adopted, is "for the purposes of determining any question or matter arising under or for the purposes of the Act"[emphasis added]. Those are the purposes for which the opinion of a Medical Panel on a medical question is to be adopted and applied and accepted as final and conclusive.*

21. The Court went on:

Once that step is taken, it is then clear that s 68(4) does not speak at all to the litigation of questions or matters that are not questions or matters arising under or for the purposes of the Act. More particularly, s68 (4) does not speak at all to an action for damages brought by a worker against an employer". (emphasis in original)

22. The Court continued:

As the plaintiff submitted in argument in this Court, s134AB of the Act regulates when an action for damages may be brought by a worker against an employer. But contrary to the plaintiff's submission, once the steps required by s 134AB have yielded the result that there is either a determination or a deeming that a serious injury has been suffered, and the conditions prescribed by s 134AB have been satisfied, the prosecution of an action brought by the worker is not a matter with which the Act deals in any respect that permits or requires the application of s68(4).

Issue estoppel

23. It follows from the High Court's construction of s68 (4) of the Act that "no issue estoppel arises out of the opinions expressed by a Medical Panel under s104B (9) in an action later brought by a worker against the worker's employer" [39]

24. At [40] the Court said:

It is a necessary condition for an issue estoppel to exist between parties that the decision from which the estoppel arises was a final decision. Where, as here, the statute establishing the body in question prescribes that its decisions are final for the purposes of that Act, no greater ambit of finality should be attributed to its decisions than the Act itself marks out. Thus no estoppel arises because the quality of "finality" which the Act gives to an opinion expressed by a Medical Panel (in this case under s 104B (9)) is finality for the purposes of determining any question or matter arising under or for the purposes of the Act. No wider finality should then be ascribed to a Panel's opinion.

25. The defendant made the following written submissions on the question of the opinion of the Medical Panel.

> *The opinion of the Medical Panel dated 23 May 2013 does not preclude the Court from now determining the factual dispute as to whether the plaintiff is a "worker". The Medical Panel opinion is limited to two narrow medical issues:*
>
> *(i) the assessment of the plaintiff's whole person impairment pursuant to the AMA Guides (4th Edition); and*
>
> *(ii) whether the plaintiff suffered a total loss injury mentioned in the table to s 98E(1) of the Act.*
>
> *It is not disputed that the Medical Panel opinion is binding on the parties in accordance with s 68(4) of the Act. In particular, parties are precluded from agitating any dispute regarding the plaintiff's impairment assessment or the issue of total loss. However, there is no binding decision of the Medical Panel that determines the factual issue of the plaintiff's status as a "worker".*
>
> *The Medical Panel solely determined medical question, in accordance with its function. In Wingfoot Australia Partners v Kocak [2013] HCA 43, the High Court confirmed that "the function of a Medical Panel is to fall and to give its own opinion on the medical question referred for its opinion" [47].The Medical Panel does not have an arbitral or adjudicative function. The High Court said:*
>
> > *"In performing that function, the Medical Panel is doubtless obliged to observe procedural fairness, so as to give an opportunity for parties to the underlying question or matter will be affected by the opinion to supply the Medical Panel with material which may be relevant to the formation of the opinion and to make submissions to the Medical Panel on the basis of that material. The material supplied may include the opinions of other medical practitioners, in submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed are those opinions. The Medical Panel may choose in a particular case to place weight on a medical opinion supplied to it in forming and giving its own opinion. It goes too*

> *far, however, to conceive of the function of the Panel is being either to decide a dispute to make up its mind by reference to competing contentions or competing medical opinions. The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience in its own medical expertise" [47].*

In this case, the Medical Panel has exercised its function with respect to the question of impairment and total loss. Section 68 (4) of the Act requires that the opinion of the medical panel be adopted and applied only for the purposes of determining the question of the plaintiff's impairment and/or "total loss" In Wingfoot*, the Court stated (at paragraph 37)*:

> *"What s 68 (4) of the Act on that construction requires is that an opinion of a Medical Panel on a medical question referred to it must thereafter be adopted and applied the purposes of determining the question or matter, arising under or for the purposes of the Act, in which the medical question arose and in respect of which the medical question was referred to the Medical Panel. What s 68 (4) does not require is that the opinion must thereafter be adopted and applied for the purposes of determining some other question or matter".*

The issue was further address by Court at paragraph 64 of its reasons, when it said:

> *The legal effect given by s 68 (4) is not that the opinion must be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act. The legal effect given by s 68 (4) is of the opinion must be adopted and applied for the purposes of determining the question or matter, arising under or for the purposes of the Act, in which the medical question arose and in respect of which the medical question was referred to the Medical*

Panel. The opinion is given no greater legal effect through the operation of issue estoppel.

26. Thus the defendant submitted that the Medical Panel opinion does not preclude the Court from determining the question of whether the plaintiff was a "worker" within the meaning of the Act. I agree by and large with that submission. It would be manifestly absurd, in seeking (or choosing not to seek) the opinions of medical panels for the decision-making power of a Magistrate to be constrained by the terms of an opinion stated by a medical panel for the purpose of resolving a legal question that goes to a necessary element to invoke jurisdiction under the Act for the payment of benefits and allied matters. Jurisdiction cannot be conferred where none exists whether by consent or by error.

27. It follows therefore that I am unable to accept the extent of the submission made by Mr Rosenberg for the plaintiff who contended that the decision of the Medical Panel is akin to, or in the nature of, a court order and as such upon the provision of the opinion of the panel any attempt to re-agitate the status of the plaintiff is exhausted and cannot be revisited.

<u>Is the defendant bound by its prior acceptance of liability for the claim for weekly payments and or the plaintiff's 98C impairment benefits claim nd thus estopped from departing from the expectation created by it?</u>

28. I am satisfied that as a matter of principle, should a defendant over a protracted period of time make weekly payments of compensation and accept liability for permanent impairment which carries with it an acceptance that a claimant is a worker within the meaning of the Act, and fixed with sufficient facts or knowledge to give reason to question the underlying basis on which the claimant's status is predicated but does nothing in response to the same, then this may amount to an admission that the claimant was, at the relevant times, a "worker". However, I do not accept that this would amount to an estoppel in law. Whilst the act of making weekly payments could in a given set of circumstances amount to an admission, this is a distinct issue from whether they would give rise to estoppel by conduct. In my judgement it would be anomalous that the making of weekly payments of compensation under the Act, the continuation of which and termination of the same on the basis that a worker is "not entitled to compensation" is specifically

contemplated for under the Act could amount to an estoppel. For conduct to be capable of amounting to an estoppel there need be an unequivocal representation by one party to another such as to induce the other party as a matter of fact to alter his or her position to his or her detriment. There is nothing evident in this proceeding that the plaintiff acted to his detriment. This then leaves me to consider whether the conduct did amount to an admission and if so, what then flows as a consequence.

Admission

29. I am satisfied that the defendant's conduct in the administration of the plaintiff's claim amounted to an admission. However, as I have already adverted to, the effect of an admission in law may be ameliorated by a party. I regard the existence and ongoing making of weekly payments by the defendant amounts to some evidentiary basis that the plaintiff was a "worker". Therefore, I need to consider if the defendant has by evidence discharged its onus in displacing the weight that I should otherwise accord the admission based on the management and administration of the plaintiff's claim for statutory benefits that he was at the relevant time of his injury a "worker". If I am not satisfied that the defendant has discharged its burden then there is no basis to proceed otherwise than by the Court granting the plaintiff the relief sought, that is, to set aside the defendant's decision terminating weekly payments and apply the determination made by the medical panel.

The evidence to displace the prima facie "admission"

30. In her affidavit Ms Gulikus deposed that Brady Yates commissioned a circumstance investigation report in relation to the question of whether the plaintiff was a "worker" within the meaning of the Act. Why the investigation was triggered was not deposed to by Ms Gulikus but some explanation was provided in her oral evidence. It was appropriate that an explanation was forthcoming by the defendant to explain why the plaintiff's claim was administered in the manner it was in order to enable me to determine if the defendant has adduced evidence of sufficient weight to explain why the admissions occurred and the extent to which the weight that I should otherwise afford them should be diminished. The evidence of Ms Gulikus was to the following effect:

(a) The initial decision to accept liability for the claim for weekly payments and medical and like expenses was made following a conversation between the former claims agent XChanging and a representative of the defendant (Shannon Overall, the defendant's payroll officer). A file note apparently made by the claims agent on the Nova computer program identifies that the substance of the conversation was that the payroll officer gave an assurance that there was no objection to the claim being accepted (Exhibit P8)

(b) In light of the payroll officer’s assurance together with the significant injury suffered by the plaintiff, liability for the injuries was accepted and no circumstance investigation report was initiated into the claim including whether the plaintiff was a "worker" within the meaning of the Act.

(c) When the claim was transferred to CGU payment of compensation continued but the focus of the claim was not adjusted until subsequently.

(d) The decision to accept liability for the s 98C claim was made in circumstances where the impairment benefits division of CGU was unaware that the plaintiff’s status as a “worker” under the Act was being investigated. Ms Gulikus deposed that the impairment benefits section is a specialist division within CGU and, according to Miss Gulikus, rarely considers eligibility. Although the impairment benefits section has access to the Nova computer program, it does not have a need to interrogate it.

(e) The plaintiff’s weekly payments and medical and like expenses were still being paid to him at the time the impairment benefit section made its decision to accept liability for the 98C claim. The acceptance of liability for s 98C was an administrative decision made in line with existing acceptance of liability for the weekly payments and the medical and like expenses claim and there was no reason for the impairment benefits specialist to investigate the validity of the initial acceptance of liability which was predicated on the plaintiff holding the status of a “worker” within the meaning of the Act.

(f) The decision to terminate the plaintiff's entitlement to compensation was made in response to fresh information received following a formal

investigation into the accident circumstances and the plaintiff was advised of that decision of the defendant in the notice of termination dated 9 May 2013.

31. The defendant submitted that in all the circumstances any conduct amounting to an admission or admissions against interest are not "very significant" and should be considered as only one of a range of considerations coming into play in determining the plaintiff's status within the meaning of the Act.

32. I accept the defendant's submission and I am satisfied that there is sufficient reason to otherwise not bind the defendant to the admission concerning the plaintiff's status. Therefore it follows that the question before me is refined to whether or not the plaintiff was a "worker" within the meaning of the Act.

Worker

33. Before an inured person is entitled to compensation under the Act he or she must be a "worker". Section 5 of the Act defines the word "worker" in the following terms.

> ***worker*** *means an individual—*
>
> *(a) who—*
>
> *(i) performs work for an employer; or*
>
> *(ii) agrees with an employer to perform work—*
>
> *at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or*
>
> *(b) who is deemed to be a worker under this Act.*

34. Thus the Act defines "worker" in various ways. Most commonly, the word "worker" is defined to mean a person who has entered a contract of service with an employer whether by way of manual labour, clerical work or otherwise and

whether the contract is express or implied, is oral or is in writing. The expression "contract of service" is used in contrast to "contract for services". In addition and in certain circumstances, s 8 of the Act deems an independent contractor to a principal as working under a contract of service with that principal. Relevantly, s 8(1) provides:

> *…where any person…in the course of and for the purposes of a trade or business carried on by the person enters into a contract with any natural person…(a) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in the name of the contractor or under a firm or business name; and (b) in the performance of which the contractor …performs some part of the work personally…*

35. I asked counsel if they were aware of relevant authority of the meaning to be accorded the words, "or otherwise". They said they were not aware of any. I expressed the tentative opinion that the words appear to contemplate some other arrangement for the performance or agreement to perform "work" for an employer otherwise than under a contract of employment but that does not amount to a contract for services.

36. Paragraph (a) of s 5 of the Act adopts the common law concept of "contract of service". In distinguishing a contract of service from a contract for services, historically, the presence or absence of control was the deciding circumstance. However, with the changing conditions of employment, the test of employment has become more nuanced. As Mason J said in *Stevens v Brodribb Sawmilling Co Proprietary Limited (1986) 160 CLR 16*.

> *"A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it…But the existence of control, whilst significant, is not the sole criterion by which to gauge whether the relationship is one of employment. The approach of this*

> *Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question….Other relevant matters 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."*

37. In their joint judgment in ***Brodribb***, Wilson and Dawson JJ said:

> *In many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee….. The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction of income tax...*

38. There is no single formulation of a test that is dispositive in all cases. In ***Marshall v Whittaker's Building Supply Co (1963) 109 CLR 210*** Windeyer J said at 217 that the distinction between a employee and independent contractor is:

> *"…rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own".*

39. The test set out by Windeyer J was referred to with approval in *Hollis v Vabu Pty Ltd (2001) 207 CLR 21 at [31]-[33]* and subsequent appellate decisions such as *Australian Air Express Pty Ltd v Langford (2005) 147 IR 240 at [16]*.

Assessing the evidence against legal principles

40. The arrangement between the defendant and the plaintiff was contractual although naturally both have a decidedly different perspective of what type of contract it was – the plaintiff asserts one of service; the defendant one for services. The plaintiff agreed to perform work. He was a carpenter although not holding formal qualification in that trade until recently although nonetheless he carries with him considerable practical experience in the field of carpentry. The defendant engaged the plaintiff over a lengthy period of time. The plaintiff worked on the construction of homes by the defendant who traded as Porter Davis Homes. Between 2003 and the date of the injury he worked very substantially for Porter Davis.

41. There was nothing committed to writing that required the exclusive use of the plaintiff's labour by the defendant or the exclusive exertion of labour and skill by the plaintiff for the benefit of the defendant. The plaintiff was questioned about whether there were occasions when he worked otherwise than for the defendant and, in particular, in connection with the construction of homes built by other builders. He said this occurred but very infrequently. He said that in the period he was engaged with the defendant, there may have been "*in all five or six other jobs*" of in the order of perhaps "*a week each*" that he worked. He said that the defendant was not happy about it, which I take to mean at least, that the plaintiff made the defendant aware that he was performing such other work, but there was no evidence to suggest that the defendant had endeavoured to exercise any dominion over him by refusing him permission to do such other work.

42. The plaintiff was not paid a wage by the defendant. He was paid a set fee that was the subject of negotiation with the defendant although "negotiation" is perhaps somewhat exaggerated as the defendant in such situations understandably will often hold the whip hand. In any event the plaintiff appears to have issued invoices for set work on a regular basis on invoices bearing the letterhead of Porter Davis.

43. I note however that the plaintiff's payment arrangement did not accord with one of the exhibits relied on by the defendant that identified him as in receipt of weekly earnings.

44. Whether a plaintiff is furnished the benefits commonly associated with employment is relevant in determining if an employment relationship exists. In fact the plaintiff was not paid a wage nor annual leave and sick leave. A wage, with taxation deducted together with superannuation contributions under the *Superannuation Guarantee (Administration) Act 1992* are strong indicia of a contract of service or of employment. Their provision suggests a relationship of employment and their absence suggests the relationship is ***Brodribb*** [at 24]. They are absent in this case. As to taxation, whether it is deducted from a worker's remuneration and the type of tax that is deducted is relevant too in determining if an employment relationship exists but it has been held that the weight to be given this matter, among a range of circumstances should be slight. It will be given little weight if for example, it is customary in the industry not to deduct tax from the pay of its employees or if the employer has a history of not doing so. The defendant led no evidence of any similar arrangements with other workers.

45. It has been observed in a good number of decided cases that a distinguishing feature of a contract for service is "remuneration and risk". This reflects the common feature that an employee's wealth will largely be fixed whereas those persons engaged in conducting their own business do so in the hope of making a profit and just not a pay cheque. There was little by way of evidence to suggest that the plaintiff held sway in this sense as the defendant fixed the rate at which he would be paid for framing a house. Neither of the party's adduced evidence how the rate was struck, however, the plaintiff testified that the rate had only increased once in the course of the many years of work he did for the defendant. Coupled with the evidence that other jobs were few and far between over the relevant years, the evidence is not persuasive that the plaintiff was pursuing an enterprise of profit. In any event there are numerous examples of employees paid by results and independent contractors being paid by the hour. However there are some aspects of the evidence in this case to suggest to the contrary and matters the plaintiff submitted that were important in support of a finding that the plaintiff was not a worker are:

(a) The plaintiff held a registered Australian Business Number (ABN). An ABN is a requirement for a sole trader to operate in the Goods and Wholesale Tax system (the GST) including claiming GST credits and avoid having amounts withheld from payments to the sole trader by business clients and in case such as here, for example, the defendant. The plaintiff was thus registered for GST and said that he submitted quarterly Business Activity Statements (BAS). His registered business name was" William Young" but there was no evidence of the extent to which it traded.

(b) The plaintiff employed other workers namely, Matthew Bell and Sean Yates and another. Matthew Bell testified. He said he was employed as an apprentice from about 2000 to 2004 and afterwards as a carpenter and thereafter the plaintiff commenced to invoice the defendant separately on his behalf. Bell said that he regarded himself as employed by the plaintiff. Despite suggestions that it would be forthcoming, there was in fact no evidence of that and Mathew Bell denied it.

(c) The plaintiff paid wages to his employees and the concomitant statutory benefits associated with a wage. These payments were made by him after he received payment from the defendant following the provision of his own invoice. This may have some work to do in informing the relationship of the plaintiff in connection with those other persons but it cannot determine his relationship and status with the defendant.

(d) There were no set hours of work laid down by the defendant. The defendant conferred a set piece of work to be completed by a certain time but the means by which this was achieved within that envelope of work was a matter for him.

(e) Such control as was exercised was minimal and for the great portion of each day the defendant did not have a supervisor on site other than perhaps between 5 and 20 minutes each day to check on the plaintiff's progress.

46. In considering the effect of the matters relied upon by the defendant it is invariably true that a person conducting a business is able to manage the

performance of the work in a manner directed at maximising the potential for profit and that one manner of doing so is to engage other workers to perform the contracted work or by reducing the overheads of the business. The plaintiff did just that for periods of time and engaged his own apprentices to perform work for which the plaintiff was paid by the defendant.

47. There was no evidence that the plaintiff could delegate the performance of the work to frame up a house or perform the attendant carpentry work to someone else such as one of apprentices. The capacity to do so is a factor that may properly weigh against the relationship of employment and, there is of course in law, a distinction between a right to delegate the performance of the service and the right to obtain the assistance of another to perform the work: *Whitehead v Workcover/Employers Mutual Fund Ltd (2007) 168 IR 443 at [14] to [15]*.

48. An enterprise operating as a business tends to have its own invoicing system, standard terms of trade, payment and debt collection systems. The invoices put in evidence by the plaintiff and relied on by the defendant are scant in terms of information supplied by the business operator to the defendant. They also are attendant with some features that are not run of the mill. They were issued by the plaintiff to the defendant on the defendant's letterhead. The plaintiff said they were a form of invoice he was told he could use. Also there is no narration of works performed that one might associate and expect with the provision of an invoice from a contractor.

49. The invoice did not add GST and the defendant did not deduct any PAYG tax from the amount it paid.

50. In one sense, the provision by the plaintiff of an invoice is equivocal. Since there was no other way of gauging the number of hours worked, providing an invoice was a way of establishing them. The inclusion of the ABN. The plaintiff came to the various sites in his own truck and largely speaking with his own tools. These are relevant factors. The plaintiff was providing skilled labour and his tools of trade. On the other hand, the defendant arranged for the delivery of all building materials. Frequently, independent contractors provide their own materials and charge a margin on those materials. There was no evidence of that in this case.

51. A “Worker’s Injury Claim Form” was signed by the plaintiff and lodged with the defendant. The plaintiff’s account of this was that while in hospital following his injury he was visited by someone from the defendant. The plaintiff said that it occurred such a long time ago that he could not remember what if any information included on the form he provided or that had been filled in by the defendant. In any event the form was signed by the plaintiff. The plaintiff is identified in the form as a “sole trader” and in response to the query, “Which of the following apply to you?” the tick box options included “contract” and “contractor” and the box adjacent the description “contract” was ticked. In response to the question, “What was your usual pre-tax hourly rate” the information furnished was $35.52 and a similar response appended in answer to the question, “what were your usual pre-tax weekly earnings”. The form is signed by the plaintiff next to the descriptor, “Worker’s signature” and by Shannon Overall, Payroll Supervisor next to the descriptor, “Employer’s signature”. I do not regard the provision of signatures or information supplied to comport with a pro forma document as of itself determinative of the proper character or status of the engagement. In any event neither party argued the existence of a pre-tax hourly rate

52. Except for the non-deduction of PAYG tax, the use of an invoice and the provision by him of a truck and tools, the remaining factors point to a contract for services. On balance, I am satisfied that the plaintiff was a “worker”. Plainly, his injury arose out of or in the course of his employment with the first defendant.

53. Section 8 of the Act is inapplicable. The plaintiff is not a “contractor”. If he was, then he was not performing “work incidental to a trade or business regularly carried on by” him in his name or under a firm or business name. The work was incidental to his trade but he did not undertake a contract outside the scope or course of that trade or business. He was a carpenter and it was carpentry work he performed. Section 9 is also inapplicable.

54. There was nothing by way of evidence put before me that the plaintiff held himself out as a carpenter available on a contract basis to the world at large. The evidence I could expect or anticipate in such an event might include, for example, business cards, inclusion in an on line directory, advertising whether in hard copy or electronically or in the yellow pages.

55. The various sites at which work was carried out by the plaintiff were decisions taken by the defendant. The plaintiff had no say in it.

56. The level of supervision exercised by the defendant does not appear to have been significant but in my view given the nature of the work the plaintiff performed that is not surprising.

57. The plaintiff said that he was instructed by the plaintiff to wear steel capped boots although it was not suggested in the evidence they were supplied to the plaintiff by the defendant.

58. The plaintiff spoke of a practice by which he was told by the defendant to erect window frames before the onset of weekends and also that no work was to be undertaken on the roofs of two storey homes until scaffolding had been erected. The plaintiff said this was not a matter of legislative or other prescription but rather amounted to the defendant's way of doing things.

59. The plaintiff said that although he supplied the principal tools of the trade, consumables used in the projects were supplied by the defendant. They would be delivered in a box bearing the defendant's name.

60. Applying my assessment to the evidence, I am satisfied that existed a degree of control exercised over the plaintiff for or on behalf of the defendant. Control means subject to the direction of the employer: *Narich Pty Ltd v Commissioner of Payroll Tax (1983) 2 NSWLR 597 at 601 and 605-6*. The extent of control actually exercised is not as important as the existence of the power to do so. Certainly the power to dictate where work is to be performed is indicative of control see: *Brodribb* at 36.

61. The plaintiff submitted that as a matter of fact he was integrated into the defendant. The "integration test" was once commonly called the "organisation test" and held sway particularly in the United Kingdom for a period of time as the determinative test to answer the question whether a worker is an integral part of an organisation. There is scant evidence of integration of the plaintiff in the defendant. A particular aspect of integration relied on by the plaintiff is a high visibility jersey that he was supplied and wore and that bore on its back in large print the name of the defendant. The plaintiff submitted that it is incongruous that

a person conducting their own business enterprise would *advertise* someone else. It may be said as was pointed out in *Vabu v Hollis* at [39]-[40] that the wearing of another's uniform is a representation of sorts to the world that the worker is an employee.

The overall synthesis or multi factor approach to the issue

62. Rather than some slavish adherence to various indicia and treating them as a list of ingredients the absence of any leading to an ordained outcome, it has been said in *Hall v (Inspector of Taxes) v Lorimer [19912] 1 WLR 939 at 944* that:

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

Conclusion

63. I am satisfied that the plaintiff is a worker within the definition of the Act when assessed against the multitude of factors. Accordingly the relief sought in the prayer for relief by the plaintiff should be granted. I will hear the parties on the form of orders that should be made.