HIGH COURT OF AUSTRALIA

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Details of Filing

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[2021] HCATrans 016

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S137 of 2020

B e t w e e n -

DENTAL CORPORATION PTY LTD

Applicant

and

DAVID MOFFET

Respondent

Application for special leave to appeal

GAGELER J
GORDON J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON THURSDAY, 11 FEBRUARY 2021, AT 12.10 PM

MR B.W. WALKER, SC: May it please the Court, I appear with my learned friends, **MS J.J. BATROUNEY, QC**, **MR D.J. McINERNEY, SC** and **MR J.S. DARAMS**, for the applicant. (instructed by King & Wood Mallesons)

MR I.M. JACKMAN, SC: I appear with **MR M. GIBIAN, SC** and **MS L. SAUNDERS** by video link, in Sydney. (instructed by HWL Ebsworth Lawyers)

GAGELER J: Mr Walker.

MR WALKER: May it please your Honours. Your Honours, there are two aspects to our application. The first concerns what might be called a jurisdictional or proper constitution of the suit point, but it turns, of course, upon the nature of the provision which is at the heart of the second point, the second aspect, and may I turn directly to that.

GAGELER J: Are you really persisting with the "no matter" point?

MR WALKER: Your Honours, I was about to go to the second of the points.

GAGELER J: I know you were, but really the first one is barely arguable.

MR WALKER: Your Honour, the difficulty, of course, is that whether one frames it as utility of declaration or a proper constitution of the suit, or in the most grandiose way, which is a *Judiciary Act* point, it has all, at its heart, asking the question, how can this litigation properly determine the application to the facts of the case of a provision where the parties simply have no rights under those provisions?

GAGELER J: I think that leads into a difficulty with this case being a vehicle for your construction point and that is that it is vitally concerned with - - -

MR WALKER: I am only too well aware of that.

GAGELER J: Yes.

MR WALKER: But, of course, your Honours appreciate that one of the peculiarities of these provisions is that they provide a regime for the imposition of a tax by reference to a so-called shortfall, a matter which involves, as it were, the Commissioner in and observing a monitorial role but not in a role which renders the Commissioner apt to any relevant mandamus with a financial effect, so we say. Beyond what I have just said in answer to Justice Gageler's question, however, there is nothing further I

want to say about that first point and it does lend itself, in an application for special leave, to omission from the grant, of course. Could I then go - - -

GAGELER J: What I almost said - I did not quite complete the thought - is that the absence of the Commissioner from this litigation is problematic from the perspective of this being a suitable vehicle to deal with the construction of the provision of the Tax Act that you want to agitate.

MR WALKER: It is, of course, against that pervasive concern that we have raised the first point as we have. Rather than as it were cut off the bow upon which we are sitting we would rather say no, there is first to be observed that the way in which the case was determined against us should not have proceeded as it did precisely because of what I would prefer to call a failure properly to constitute the suit.

That, in our submission, is a matter worthy of special leave and if section 12(3) of the *Superannuation Guarantee (Administration) Act* point has sufficient interest, which we submit it plainly does, then granting leave so as to include the first aspect would ensure that the jurisprudence does not remain in an arguably infirm state until a properly constituted suit can raise the point again. By raising the absence of the Commissioner we are able, with respect, also to engage with the peculiar nature of the provisions in section 12. As I say, otherwise I have nothing further to say about that first point.

The significance of section 12 can be seen in the rather optimistic words of paragraph 12(1)(b) that subsection (3) is among those that:

> make particular provision to avoid doubt as to the status of certain persons.

The matter starts in subsection (1) with the perhaps unnecessary stipulation that "employee" has its ordinary meaning. Subsection (3) then introduces words of beguiling simplicity as a matter of English but carrying, of course, a very heavy load of history, custom and flexibility of commerce, namely:

> If a person works under a contract –

In this case, as your Honours know, there is a network of contracts and contractual relations that would need, in order for the decision below to be correct, to continue to answer the description, namely:

> a contract that is wholly or principally for the labour of the person –

the person being Dr Moffet, and the issue in question only for the purposes of the *Superannuation Guarantee (Administration) Act* point by now in the

litigation, only for those purposes would be an employee, depending upon the answer.

In our submission, this is not a matter entirely free of authority in this Court, and yet there is no reasoning which deals with what must be at the very least a case evocatively similar, if not right on point, and that is *Neale v Atlas Products* 94 CLR 419, the subject of submissions in paragraph 35 of our application at page 94 of the application book.

It was of course a different statutory provision, but the language in question plainly provides a parallel to the language under the current statute. In that case it was wholly or substantially for the labour of a person to whom the payments are made, so the same important preposition "for", the same important characterisation "labour".

It was considered decisive in that case – as we have drawn to attention the passage at 425 of 94 CLR – that what was there expressed to be the freedom left by the contract to the contractor to choose to do the work himself or herself or to have some others do it was enough to preclude the requisite characterisation of a payment made wholly, or even at all, for the labour of the person to whom the payments are made.

We point to the very clear holding – not capable of being glossed or attenuated – that the terms of the provisions in this case do not require Dr Moffet to be the dentist providing the dentistry services at all to any extent. Unquestionably, there may be the role of self-interest on his part – whether he wishes to have a holiday or whether he wishes to bear the expense of procuring the provision of dental services – and, of course, all against the critical provision that this is a contract, or these are contractual provisions, I should say, which require a guaranteed minimum revenue with a shortfall obligation on the part of Dr Moffet.

So that whether or not he works in the practice, there must be a payment of a minimum to our client and it is only by revenue that either his work generates – or somebody else's work procured by him generates – a surplus which then brings in the sharing arrangement.

GORDON J: At application book 73, at paragraphs 82 and following you have this analysis of the provision or the section in issue in this application.

MR WALKER: Yes.

GORDON J: What is wrong with that construction?

MR WALKER: In our submission, the - - -

GORDON J: I ask in this sense. Is it a question of principle or is it a question of application of principle to the facts - in effect, it is a question of the construction of the agreements that has gone wrong?

MR WALKER: First of all, as a matter of principle, their Honours, in our submission, have been seduced by the preposition "for" the labour of a person into disregarding what is all on the other side as well. If you were characterising these arrangements - - -

GORDON J: This is a challenge to the last sentence of 85?

MR WALKER: Exactly. These are arrangements which do not actually require Dr Moffet to provide any labour at all and where payment is regarded as whether he has provided – what is rather unflatteringly for a professional called – labour or not. That is the first thing. The second thing is there is so much else that this is a contract for. It is for the provision by sharing, in stipulated manner, including a minimum take for our client, the revenue of an ongoing business that has been purchased.

GAGELER J: But the conclusion of the Full Court takes that into account, does it not? It has not said that it is wholly for his labour. It is said that it is principally for his labour.

GORDON J: In particular, at paragraph 87 and following, all of the things that you are now identifying are set out, are they not?

MR WALKER: No. It is the last sentence of paragraph 88 which, in our submission, is a negative answer to Justice Gageler. Of course it is discussed because we argued it, but it is said that those are matters that could not be relevant for ascertaining what the services agreement was for from Dental Corporation's perspective.

It is the tunnel vision which leaves out of account that the statutory characterisation is with respect to what the contract is itself. The contract is wholly or principally for and this is a case where there need be no labour of the person in question at all, that ought to have been enough, but that in truth that is because the setting was one in which either by working himself or by procuring the work of another or others, revenue may be generated not only to recoup the minimum payment he is obliged to ensure but also to generate surplus in which he may then share.

GORDON J: Does the argument of complaint hold true given the terms of paragraph 91?

MR WALKER: Yes, it does.

GORDON J: It seems as though the analysis was more limited rather than looking at the whole suite of agreements and looking at the service agreement.

MR WALKER: In our submission – that is, your Honour asked me about whether it was in principle or an application question.

GORDON J: Yes.

MR WALKER: In principle, you must look at the whole of the suite of arrangements which give each other character. It is a character which cannot be divorced.

GORDON J: So there is no complaint about that aspect of it, or there is?

MR WALKER: No, there is complaint about that. We have repeatedly said, taken as a whole, looked at properly as a whole, as a composite, these are not arrangements which answer the description of the contract "wholly or principally for the labour of Dr Moffet". So that is very much to the fore. Whether that is a question of principle or application might be a nice question. Certainly, as a matter of principle, you must look at the whole, which will include a composite where there is more than one party.

As a matter of application, once one observes that principle, then the outcome here was, we submit, plainly wrong. So there are two matters of principle. In other words, there is not this one-way tunnel by which you omit an understanding of what this contract was for. Plainly, there is an error in application in failing to notice that this is not a contract which requires the provision of any labour by Dr Moffet at all and, thirdly, there was in principle a failure to look holistically at the arrangement as the statute plainly requires when it uses the adverbs "wholly" or "principally". That is a characterisation question which means you cannot fractionate; you must look at the whole matter.

The fractionating only comes with the money. Your Honours are familiar with what was drawn to attention as to paragraph 11(1)(b)(a) of the Act, application book 98. One will find that the salary or wages are then defined to be payments under a 12(3) contract that are made in respect of the labour of the person working under the contract. That is an extremely elusive concept when one applies it to the contractual arrangements that obtained in this case and are not the subject of any doubt as to the facts.

GAGELER J: Mr Walker, you have been drawing attention to the plurality judgment.

MR WALKER: Yes.

GAGELER J: In Justice Wigney's judgment, paragraph 116, there is a pretty straightforward, robust conclusion. I am reading what he says in the middle of the paragraph:

> That services agreement was also a contract which was at least "principally" for the "labour" of Dr Moffet because its terms reveal that its predominant purpose was to secure Dr Moffet's provision of the relevant services.

Is that a correct way of analysing the facts?

MR WALKER: No. That leaves out of account altogether the provisions to which we have drawn attention which make it crystal clear that it does not have to provide, do work – that is provide labour – at all. In other words - I am afraid to say that in paragraph 116, Homer appears to have nodded. His Honour has left completely out of account those very distinguishing features, not by the way uncommon, very often the hallmark of an independent contractor, for example, of the provisions in this case.

GORDON J: It may be unfair in this sense, that his Honour agrees with what the plurality say and then in 112, in effect, talks about the "multifactorial assessment of the totality of the relationship" in relation to the cross-appeal, I accept, and then sets out, in a sense - - -

MR WALKER: At 113, about line 22, the very matter that we emphasise is, with respect, correctly recognised by his Honour, but it is entirely absent from the reason in paragraph 116. When his Honour talks about he worked under a contract because he provided personal services pursuant to the terms, et cetera, his Honour cannot possibly be bearing in mind that he did not have to do that at all; that was a matter of his choice, not a contractual obligation. When his Honour talks about a predominant purpose to secure to Dr Moffet's provision of the relevant services, that is, with respect, diametrically opposed to what his Honour has noted in paragraph 113 was the true character of this bespoke relationship of carefully - - -

GORDON J: It may be splitting hairs, Mr Walker, but I had understood the plurality at 90 to say that the effect of clause 3.1 was to require Dr Moffet to do all of these things personally but give him the option. In other words, it may be a distinction without a difference.

MR WALKER: With respect, I cannot be sensibly said to be required to do something myself if I do not have to. That is an absurdity. Now, that may come about from what are called carefully negotiated commercial relationships, but it is the option upon which we rely. He could not be sued for not working.

GORDON J: Then it is the next sentence in that paragraph where they say that flesh is put on the bones of that option by clause 7.

MR WALKER: Yes, well, that is in particular nurses, et cetera. So, in our submission, this simply is a case with very large implications where the model of contracts of this kind for the provision of services but not personally by the contracting party – so we have independent contractors immediately – were to be regarded as capable of being characterised in the way that section 12(3) requires the Commissioner to consider. I see the time.

GAGELER J: Thank you, Mr Walker. Mr Jackman, we do not need to call upon you.

MR JACKMAN: May it please the Court.

GAGELER J: There is no reason to doubt the jurisdiction of the Federal Court, nor are we persuaded that there is reason to doubt the conclusion reached in the Federal Court that the respondent was an employee of the applicant by operation of section 12(3) of the *Superannuation Guarantee (Administration) Act*. In the absence of the Commissioner of Taxation as a party, the case does not present as an appropriate vehicle for this Court to examine the construction of that provision on appeal. The application for special leave to appeal is refused with costs.

AT 12.31 PM THE MATTER WAS CONCLUDED