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TRANSCRIPT OF PROCEEDINGS

O/N H-1057875

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

PERRAM J
WIGNEY J
ANDERSON J

No. NSD 626 of 2019

DENTAL CORPORATION PTY LTD

and

DAVID MOFFET

SYDNEY

10.15 AM, TUESDAY, 27 AUGUST 2019

MS J. BATROUNEY QC appears with MR J. DARAMS and MR D. McINERNEY for the applicant
MR M. GIBIAN SC appears with MS L. SAUNDERS for the respondent

MS J. BATROUNEY QC: If your Honours please, I appear with my learned juniors, MR DARAMS and MR McINERNEY for the appellant and cross-respondent.

PERRAM J: Thank you, Ms Batrouney.

MR M. GIBIAN SC: May it please, I appear with MS SAUNDERS for the respondent and cross-appellant.

PERRAM J: Thank you, Mr Gibian. Yes, Ms Batrouney.

MS BATROUNEY: Your Honours, as you may be aware, I was in court yesterday so I'm aware that you have traversed a number of the decisions that we will again traverse today. And for that reason, I do not propose – well, I will attempt not to repeat what your Honours have already went through yesterday. Your Honours, this case is, of course, a very different factual case that your Honours looked at yesterday. In this case, Dr Moffet was a dentist who owned and ran his own practice for 20 years. He sold that to Dental Corporation for over $2 million, and thereafter entered into an income split of 40/60 with Dental Corporation where Dental Corporation retained 60 per cent, effectively. I will take your Honours to the nuts and bolts of it. But Dental Corporation retained 60 per cent of the income in return for Dental Corporation providing the staff, the premises and the equipment needed to run the practice, and Dr Moffet retained 40 per cent.

Dr Moffet unsuccessfully claimed to be an employee of Dental Corporation, and in that guise sought damages for loss of annual leave and long service leave. And he also sought payments of superannuation guarantee under the extended definition of employee in section 12(3) of the relevant Act. His Honour found below that Dr Moffet was not an employee, but found that he did fall within the extended definition of employee in section 12(3). Dental Corporation are appealing in relation to the superannuation guarantee finding, and Dr Moffet is cross-appealing in relation to the employee findings in relation to annual leave and long service leave.

PERRAM J: Have you worked out how you're going to handle the cross-appeal and the appeal together?

MS BATROUNEY: I've said that I would like to just take your Honours simply to the statutory construction point, which is the section 12(3) point, but I think that will be insufficiently clear without reference to the underlying facts, so I've informed my learned friend that I do propose to take the court through the facts that were found below and then deal with the section 12(3) issue after taking your Honours through the facts.

PERRAM J: I meant something slightly different, which is, have you agreed with Mr Gibian how you're going to the addresses. Are you going do the – you will do your appeal and you will subsequently respond to his cross-appeal?

MS BATROUNEY: Yes.

PERRAM J: Okay. All right.

MS BATROUNEY: Yes, your Honour. So, your Honours, might I start with the notices of appeal. Our notice of appeal is at part A, tab 7. And your Honours will see at page 2 that it's a very short notice of appeal. It simply focuses on the section 12(3) of the Superannuation Guarantee Act. We refer in paragraph (a) that:

> *The Superannuation Guarantee Act requires a determination of whether the respondent worked under a contract that was wholly or principally for the labour of the respondent.*

We say the primary judge failed to determine whether the contract was in fact for the labour of the respondent. At paragraph (d) we say:

> *The primary judge determined the application of section 12(g) of the SG Act by reference to the question whether an employment-like relationship existed between the appellant and the respondent in circumstances where the labour component of the contract could have been provided by the appellant employing an employee.*

Now, this was found on the basis of Bromberg J's findings in On Call. Your Honours, I will take you to a number of cases that we say have danced around the findings in On Call. And at the risk of a terrible pun, your Honours, it's time to call out On Call. We say that Bromberg J misconstrued the operation of section 12(3) of the Superannuation Guarantee Act, and simply failed to engage in the analysis that is required by that section. And that analysis is for this court to determine what was the contract as a whole for. Was it for – was it principally for labour or not? And we say that the phrases "employment-like relationship" and "could have been provided by employing an employee" are impermissible glosses on the words of the legislation. So that's our appeal, your Honours. Could I take you to my learned friend's cross-appeal? That is at the next tab, that is, tab 8 of part A. Now, your Honours will be familiar with these sorts of notices of appeal.

At page 2, the grounds of the cross-appeal are set out. Paragraph (a) states that the primary judge should have found that consideration of the totality of the relationship resulted in a conclusion that the respondent was an employee; (b) the primary judge erred by placing undue weight upon the element of control. Down to paragraph (c). The primary judge erred in giving weight to the subjective intent of a witness. Down to paragraph (d). The primary judge made an erroneous inference when he stated that the respondent ran his personal practice much the same as before, in circumstances in which the respondent had sold the business and was constrained from operating the business himself.

And finally, the primary judge gave undue weight to the description of the relationship between the respondent/cross-appellant, etcetera and the taxation

arrangements of the respondent/cross-appellant. The next ground of appeal is – repeats the first, and the third is an appeal in relation to the Long Service Leave Act and revolves around the reasons why Dr Moffet resigned from his employment, and states at paragraph 3(a) that the primary judge adopted an erroneous approach, and then raises the issue about whether that issue of whether or not the reasons Dr Moffet resigned should be determined objectively or subjectively.

So that in a nutshell, your Honours, are the two appeal notices. Your Honours, there was much debate yesterday about the nature of appellant review. It's our submission that it's – that this court ought not to depart from the findings below unless there's sufficient disagreement which would enliven the court to depart from the hearings below. And I won't bore your Honours by taking your Honours again to the decisions, but I refer to the statements of the Chief Justice in Aldi, which is at tab 2 of our authorities at page 308, at paragraph 28, and also the – your Honour the presiding judge's comments at page 317 at paragraph 50.

We do say that the – in circumstances where in this case the judge has made findings in relation to credibility of the respondent, that we can invoke the Fox v Percy protection in relation to some of the findings that his Honour made, more particularly, in relation to the illness aspect of the long service leave. Here, your Honours, credibility is in issue. And can I take you to four references where credibility has been raised? In the reasons of the primary judge at paragraph 87, and also in the transcript at pages 165, 180 and 216. So that's - - -

ANDERSON J: Could you give me that again, please, Ms Batrouney?

MS BATROUNEY: Yes, of course, your Honour. So it's the reasons of the primary judge at paragraph 87, which can be found at AB61, and also the transcript at pages 165, 180 and 216. Now, while I'm at it, I just better make sure that your Honours actually have those pages. I think – I'm not sure whether your Honours have the entire transcript, but some of it has been included in the appeal book. 180 is coming up to you now. 216 is coming up. So I think your Honours have got – we're just waiting for – while we're waiting for it, could I take you – I will take you in reverse order. So 216. Could I take you to line 30 of transcript page 216? You will see at line 30 on page 216, his Honour says, referring to the respondent:

> *He doesn't strike me –*

Mr Gibian says – I'm sorry, your Honour:

> *He doesn't strike me as the shy, retiring type who would be easily bullied, and I can take that into account.*

So that's one finding. Could I take you, then, to 180. At line 41 of transcript 180, his Honour says:

Because it struck me, put colloquially, as a bit cute to say that he couldn't recall taking a 15.5-week holiday in circumstances where he was promoting that loud and clear to everyone else. So do you make a submission founded on credit at any time?

And then Mr Darams answers that question. And then finally, 165, his Honour says at line 46 on transcript 165:

This was a man bent on maximising his income with an eye keenly attuned to claiming whatever deductions he could and seeking –

I'm sorry. You may not have the next - - -

WIGNEY J: Is that a credibility finding?

MS BATROUNEY: I suppose, if I could come – I will use these three and then I will come to his actual findings in his decision.

PERRAM J: He certainly plays with it.

MS BATROUNEY:

reimbursement of expenses he could. A suggestion that, oh well –

Well, this is – your Honour Wigney J, this is – I'm not sure whether you've got to 166, but it says:

A suggestion that, oh well, he just gave the ledgers and some invoices to the accountant and left it up to him sounds pretty hollow.

WIGNEY J: But what was that in the context of, though?

MS BATROUNEY: The deduction – I will take you later to the income tax returns and the deductions - - -

WIGNEY J: I see.

MS BATROUNEY: - - - he claimed in his income tax returns.

WIGNEY J: Whereas the other references were all to the question of resignation or termination.

MS BATROUNEY: Yes, yes. So could I just take you to the passage that we all refer to in the reasons for judgment, and that is part A, tab 5, and could I take you to page 61 at paragraph 87. So I'm at part A, tab 5, appeal book page 61 at paragraph 87. And his Honour says:

The conclusion that Dr Moffet was retained by Dental Corporation as an independent contractor and not as an employee is a conclusion largely founded upon inferences drawn from the documents in evidence rather than his oral evidence. But the rejection of the assertions made in a letter of resignation depends, to some extent, upon an assessment of the reliability of his oral evidence and the extent to which reliance can be placed upon what he has stated in that letter. Separate from the conclusion that there was an absence of evidence to support the assertions made in the letter, is an assessment that the reliability of what Dr Moffet said and wrote was open to question.

The way in which he gave answers in cross-examination gave rise to questions as to whether what he was saying could be accepted at face value. For example, when questioned whether he had taken 15 weeks holiday in 2011, Dr Moffet initially rejected the proposition. That answer, however, stood in stark contrast to the web pages published in 2013 and 2017 which suggested that he had in fact taken 15 weeks' vacation in 2011. Given the content of those web pages, which were published on Dr Moffet's blog, his answers in cross-examination sounded hollow indeed.

Any explanation that may have been afforded by the representation having been made some five years ago was undermined by the fact that much the same statements were made in the web page published more recently in 2017 promoting the message that it's time to stop leaving so much on the table. A further exchange in cross-examination also occasioned a like reservation as to the reliability of his evidence. This exchanged focused upon Dr Moffet's claim to have earned nearly $2 million in 2011, his cashflow target and how many days per week he would have to work to meet the target.

Dr Moffet was unwilling to accept a proposition that if he earned nearly $2 million in 2011 working four days a week and had a cashflow of 900,000 in 2013. All other things being equal, he will have to work around half as much in 2013 to meet the target. However, Dr Moffet could provide no explanation for why he could not accept that proposition other than we're talking about a two-year time difference. Such exchanges also did not sit comfortably with the more general assessment that Dr Moffet presented as a witness very conscious of the factual issues to be resolved in the present proceeding and as a witness otherwise careful and cautious in the evidence he gave, and also careful in ensuring that his evidence supported his case.

So we divert from the lower sufficient disagreement threshold in relation to this – these credibility findings. So could I start – I will very quickly take your Honours through the decision below. I'm sure your Honours have read it, but just allow me to take you through as quickly as I can some of the findings that his Honour made. Could we start at – the decision below is in part A at tab 5. Could I start at appeal book page 41 which refers to the Acquisition Agreement. And I will take you briefly to the Acquisition Agreement. It's a very long agreement. The Acquisition Agreement is in part C and is at tab 9.1.1. There's only one thing I want to take your

Honours to in relation to the Acquisition Agreement. That's the purchase price. The purchase price is set out at, as I say, tab 9.1.1 of part C. At appeal book page 70 you will see under the clause heading 4.1 Purchase Price. You will see the purchase price for the assets is 2.75 million.

PERRAM J: Yes.

MS BATROUNEY: His Honour sets out what was acquired in the Acquisition Agreement at the bottom of appeal book page 41. It was, as one would expect when one is buying a business, goodwill, plant and equipment, stock, all other property. And they were obviously agreements. They were a duo of agreements, so there was the Acquisition Agreement and the Services Agreement that were executed together. The Services Agreement is probably more relevant for the purposes of this case, and that is set out in part C. I don't need to take your Honours to it. I will take you through his Honour's finding in relation to it rather than to all of the agreement itself. However, your Honours, I will take you to two provisions of the Services Agreement and they are to do with the money, where the money went. So if I could take you to appeal book 43 at paragraph 32. His Honour sets out clause 6 of the Services Agreement, so that's appeal book 43 at clause – at paragraph 32.

This sets out the obligation of Dental Corporation to provide the administrative services, and of course that is the appellant's case, that this contract was for an exchange of a number of things. It was an exchange of property, employees and equipment that was provided by Dental Corporation and for labour to be provided by Dr Moffet, and, of course, Dental Corporation retained 60 per cent of – effectively 60 per cent for the provision of these equipment and services. So Dental Corporation – you will see at 6.2(a):

> *Dental Corporation must ensure that the administrative services are provided to the extent which is reasonably required by the practice principal –*

of course, the practice principal was defined to be Dr Moffet –

> *to enable him or her to operate and manage the practice in a manner which is at least consistent with the standard of the administrative services and support that the practice enjoyed immediately prior to completion and any upgrades agreed as necessary in support of cash flow for the practice.*

Dental Corporation, you will see at clause 6.3

> *At the request of the practice principal, Dental Corporation will acquire equipment and other assets reasonably required for the conduct of the practice.*

Down at about point 8 on the page, you will see "administrative services". These are provided by Dental Corporation. It's set out what the term administrative services is:

Administrative services means the head office and all other administrative services provided by Dental Corporation including information technology services, equipment support, recruitment support, accounting and group marketing.

Down the bottom, you will see there's a requirement for Dental Corporation to employ the employees. At the top of AB 44, Dental Corporation is responsible for paying the employee.

The term "employee" –

this is of some significance, your Honours, because my learned friend has suggested that it was a term of the agreement that Dr Moffet was employed by Dental Corporation, and yet the term "employee" is defined to mean:

…a person employed by Dental Corporation to provide assistance to the practice principal at the practice.

Now, if the practice principal was an employee, that definition does not make sense. Clause 8 of the Services Agreement provides that:

The practice principal shall be solely responsible for all taxes, superannuation and other withholdings or contributions which may be payable out of or as a result of the receipt by the practice principal of the Annual Dental Draw, performance bonus or other moneys paid or payable in respect of the dentistry services payable by Dental Corporation. To the extent required, Dental Corporation may deduct from the Annual Dental Draw any amounts required to meet any obligation to make superannuation contributions.

And clause 9 deals with, perhaps pre-emptively, the bonus and shortfall arrangements. So we rely very much on these provisions. It's very – the provisions operate so that if Dr Moffet does not reach certain targets he has to repay to Dental Corporation amounts they have paid him, so it cuts both ways. So clause 9.1 refers to the performance bonus. It says:

The practice principal will be paid a bonus payment for any increases in the annual cash flow generated by the practice each anniversary year calculated under item 4.

So that's the upside, and the downside is the shortfall:

The parties acknowledge that the practice is expected to generate an annual cash flow each anniversary year which is equal to or greater than the minimum annual cash flow.

Your Honours, that is set out in – I will take you to it in a minute – item 1 of schedule 2 to be $570,000 is the minimum annual cash flow. The clause goes on to say:

> *If the annual cash flow is determined to be less than the minimum annual cash flow in any anniversary year, the practice principal agrees that each payment by Dental Corporation of the Monthly Dental Draw in the subsequent anniversary year will be reduced by 50% each month until Dental Corporation has recovered the cash flow shortfall.*

Now, could I just point out to your Honours there's a difference in terminology. The annual cash flow is the cash flow of the practice as a whole, whereas the dental draw is the amount generated by Dr Moffet, so Dr Moffet's – what I've called about the 60/40 split, that is, on the amounts generated by Dr Moffet, but the upside and the downside, that is, the performance bonus and the shortfall, are calculated by reference to the takings of the practice. The practice included not only Dr Moffet but many other dentists, associate dentists and hygienists, etcetera.

Could I take your Honours to schedule 2, which sets out how the money works. That is in part C, tab 9.1.2, and schedule 2 is about the fourth page from the end at AB 251. As I say, your Honours, this is one of the few aspects of the actual Services Agreement that I want to actually go through with your Honours. So do your Honours have AB 251? So, firstly, the minimum annual cash flow is set out there:

> *The parties agree that the minimum annual cash flow for the purposes of calculating the cash flow shortfall is 570,000.*

Now, secondly, the Annual Dental Draw, and that is defined in the definition section to be:

> …*the amount generated and collected by the practice principal –*

that is, Dr Moffet.

> *The Annual Dental Draw percentage is calculated as a percentage of the annual revenue.*

That is defined to be:

> …*the annual gross revenue generated by the practice principal.*

Leaving aside – there's complications about lab fees, which I don't think we need to go into:

> …*generated and collected by the practice principal as follows.*

So what Dr Moffet was renumerated by was 40% of the annual revenue from 250,000 up to and including 1 million, and 45% of the annual revenue which exceeds 1 million. So your Honours will, of course, notice that he gets nothing for the revenue that is under 250,000, and the monthly dental draw is just effectively a calculation derived from the annual. And then you will see the performance bonus there at clause 4:

> *The performance bonus is calculated as 40% of any increase in the annual cash flow of the practice above 700,000 in any anniversary year.*

Now, the cash flow shortfall is defined in clause 1.1, if I could go back to that. So "cash flow shortfall" is defined at the bottom of appeal book 234, and cash flow shortfall is defined to mean:

> *…the difference between the annual cash flow of the practice in any anniversary year and the minimum annual cash flow.*

And, your Honours, Dr Moffet was indeed required to pay back a cash flow shortfall. As it happened, he never was entitled to a bonus. Back at part A at appeal book 44 of the reasons below, his Honour continues at paragraph 35:

> *Clause 14 of the Services Agreement set forth the nature of the relationship between Dr Moffet and Dental Corporation as follows.*

14.1:

> *This agreement does not create a relationship of employment, trust, agency or partnership between the parties.*

It goes on to say 14.2 under the heading Practice Principal's Independence:

> *Dental Corporation must at all times respect the independence of the practice principal, and will not interfere or seek to influence the practice principal's professional judgment in relation to the provision of dentistry services.*

Now, your Honours will remember that is a ground of appeal that my learned friend says his Honour placed too much weight on this clause 14.1. Could I take your Honours over to page 49 – appeal book page 49 where his Honour, having looked at the Services Agreement itself, comes to a conclusion at paragraph 46. He says:

> *Although it is readily accepted that different minds might draw a different conclusion from the facts presented, it is respectfully considered that the totality of the relationship or the reality of the situation was that after the acquisition of his dental practice in 2007, Dr Moffet was retained by Dental Corporation as an independent contractor.*

Now, he goes on to set out below what are the factors he relied upon in coming to that conclusion. And one of them is set out here at paragraph 49 which my learned friend has included in his notice of appeal as to that his Honour put too much emphasis on this matter in paragraph 49, that is:

> *The rationale for the business, as explained by one of the co-founders of Dental Corporation, Mr Mark Evans, was to assist the dentistry practices with the administrative side of running their practices so that the dentist could focus on dentistry and operate more effectively. The way in which this was to be implemented was explained by Mr Evans in his affidavit as follows: I wanted to ensure that the dentists were independent and free to run their practice in the way they determined best, because I believe that would produce better operational and financial outcomes.*
>
> *I did not want the dentist, from whom we were buying the dentistry practices from, to be employees because I had had experience with other business models that had acquired businesses and then employed the former owner to run the business for them, and it had not worked. My view was and is that when someone who is used to running their own business, they often find the transition to an employee difficult. We wanted the dentist to maintain their independence to ensure the success of the business.*

As I say, my learned friend complains that that was taken into account, given too much weight by his Honour. Over at paragraph AB50 at paragraph 51, his Honour points out that:

> *Prior to the execution of the two agreements, Dr Moffet had access to legal advice and accepted that he must have had legal advice about the terms of those agreements. Indeed, as Dr Moffet accepted, the Services Agreement was witnessed by his solicitor. One of the terms –*

his Honour says –

> *of the Services Agreement is clause 14.1 which expressly stated that the agreement did not create a relationship of employment.*

His Honour goes on at paragraph 52:

> *Although reference has been made to the terms of the two agreements, it is to be noted that no term of the Services Agreement was directed to the hours to be performed by Dr Moffet, which days or the number of days he was required to work or the holidays he could take. And no term was directed to the nature of the work to be undertaken by Dr Moffet other than the general requirement that he provide dentistry services.*

So that, your Honours, of course, goes to the control aspect of it. Repeating the same, his Honour goes on at paragraph 53 to say that:

Dr Moffet determined for himself the hours he worked and when he worked.

He says:

During the course of the Services Agreement from 2007 to 2012, Dr Moffet worked at the practice four days a week and was described as the practice principal. After the expiration of the Services Agreement, Dr Moffet performed services in accordance with a revised agreement negotiated via a series of email exchanges.

which I won't take your Honours to. He goes on to say:

From December 2012 to December 2014, Dr Moffet reduced from working four days per week to three days per week. In 2011 Dr Moffet took 15 weeks' vacation.

This is important because, of course, it's one of the matters that we rely upon. At 57 his Honour says:

The freedom exercised by Dr Moffet as to when he worked and when he took holidays is evident from the following exchange during his cross-examination.

Question:

And at no stage were you given any direction by Dental Corporation that you had to keep the practice open on particular days between hours or something like that.

No.
Question:

It's also the case that you decided the days upon which you would work; correct?

I continued working the same days that I had before I sold to Dental Corporation.

His Honour says:

That's not an answer to the question. Can you answer the question, please.

Mr Darams asked again:

You determine the days upon which you worked during the engagement with Dental Corporation.

Yes.

He goes on to say:

> *The 15-week vacation you took in 2011, you decided when you wanted to take that vacation; correct?*
>
> *I decided when I was absent from the practice, yes.*
>
> *Yes. And I want to suggest to you that you didn't seek the consent or authorisation of Dental Corporation before deciding to go on or taking that absence from the practice.*
>
> *No, that wasn't a requirement of my engagement with them.*

Could I take your Honours over to the next page at the top of appeal book 52. His Honour notes that:

> *There was no supervision and control or the giving of directions by Dental Corporation to Dr Moffet with respect to the patients he was to treat or directions as to the nature of the services he was to perform or the amounts to be charged to clients for the services provided.*

If I could drop down to about point 6 of the page:

> *Irrespective of the absence of any contractual entitlement to give directions to Dr Moffet, as a practical matter, Dental Corporation did not purport to give any directions to Dr Moffet, even in respect to incidental or collateral matters. The submission advanced on behalf of Dr Moffet that he was subject to supervision and control in relation to the work he performed is rejected.*

His Honour goes on to say:

> *Similarly, it was not put in issue that Dental Corporation, pursuant to the terms of the Services Agreement and as a matter of fact, provided administrative services to Dr Moffet and provided such equipment as required to enable Dr Moffet to provide dental services.*

He goes on to say:

> *He had an office and a car park.*

And now, if I could take your Honours over to page 53 at the middle of the page, his Honour goes through the financial arrangements between the parties. I've taken your Honours already to that. I won't repeat it. But there he talks about that he was potentially paid annual bonuses. I should point out, of course, I will take your Honours in a moment to his income tax returns, but his Honour points out at the second dot point at paragraph 63, sorry, 63 that:

Dr Moffet was reimbursed by Dental Corporation for expenses he had incurred in connection with providing dentistry services at the practice.

Again, your Honours, it's not determinative, but, of course, Dr Moffet provided invoices to Dental Corporation. He was part of the GST system and he lodged BAS statements – Business Activity Statements under the same ABN that he had before he sold his practice. You will see, your Honours, at AB54 one of these invoices is set out. At page AB54 you will see there that there is a tax invoice that describes the total collections there, 169-odd thousand, less lab fees, Dr Moffet's commission. You will see there's a commission made of 43 per cent there. And there is a deferred component adjustment. That's to do with the annual adjustments. So at paragraph 65 at about point 5 on the same page, his Honour says:

During the years he was retained by Dental Corporation, it also emerged that Dr Moffet retained the ABN he had obtained prior to the acquisition of Dental Corporation, which was the same that appeared on the invoices issued to Dr Moffet by Dental Corporation as in the invoices they prepared for him to issue to them. And also Dr Moffet filed tax returns which, although was representing that his main business or professional activity was dental surgeon, also represented that he was engaged in a number of other business activities.

Also, Dr Moffet:

Claimed deductions incurred in generating his income as a dental surgeon, being expenses for which he was not reimbursed by Dental Corporation.

Your Honours, could I very quickly take you to the tax returns that are – that were filed by Dr Moffet. That is at tab 13.7.2.

PERRAM J: What page is it?

MS BATROUNEY: And, in particular, could we start at page 446. Page 446. So this is a tax return that at the top of page 446 the date, 2008, is set out. Now, this is shortly after the practice had been acquired by Dental Corporation. And you will see under the heading Income at about point 4 on the page, there's the line:

Other gross income from business sources. Professional fees from Marsden, Victoria practice.

That's about 116,000. And I submit that that's hangover from his previous practice before he sold it to Dental Corporation. And we see the dental draw from Dental Corporation starting to come into his tax return there. 299-odd thousand. And you will see that there's a number of expenses listed there in his tax return. The next page, at 447, is the next year's tax return. And if you have a look at the very same item at about point 4, under the heading Income, you will see professional fees from Marsden, Victoria. That's trickling out. It's down to about $5000 there, whereas the dental fee income is going up to 455-odd thousand.

You will see under Expenses there's a number of expense there: service fees, computer, business expenses, etcetera. Could I take your Honours briefly to the next year, 2010. You will see now we've only got Dental Corporation. So at point 4 on the page, under Income, we've got Dental Corporation and the income is about 548-odd thousand. You will see under Deductions, the fourth line under Deductions is insurance premiums. So Dr Moffet is paying his own insurance premiums. And the second line from the bottom of the expenses, we see business expenses of 478-odd thousand. Over the page, it's 2011, he's starting – this is the evidence – some of the evidence in relation to him – his consulting practice.

You will see under the heading Other Gross Income from Business Sources, the first one is a speaker's fee of 1762, and then the same figure from Dental Corporation of 587-odd thousand. And insurance premiums, the third line under Deductions, are again he's paying his own insurance premiums of 21-odd thousand. And so it goes on. The last one I wanted to take your Honours to is page 451. You will see the shortfall kicks in to the tax return. So at page 451, under Income, we just have Dental Corporation here of 407-odd thousand. Under Deductions, the third line of Deductions is insurance premiums of 12,000. And then you will see the second line under Other Expenses, Dental Corp income adjustment. You will see there's a deduction claimed of 291,125, and that's the shortfall kicking in, and him claiming a deduction for the shortfall. That shortfall is also set out in the reasons themselves. If we go back to appeal book 55, his Honour set out that last part of the income tax return I've just taken your Honours to. At appeal book 55, you will see there it is again, 291,125, Dental Corp income adjustment. And his Honour specifically draws attention to that at about point 4 on the page at AB55. He says:

> *Of present relevance is the deduction claimed for "Dental Corp Income Adjustment" of 291,125. Uncertainty as to what this amount actually represented was resolved in re-examination as follows:*
>
> *On your understanding at least, [the Dental Corp Income Adjustment] that was a loss adjustment; are you able to say what you meant by "loss adjustment"?– –That financial year, I was unable to produce a profit for Dental Corporation up to their target and so the shortfall was – I had to pay them back and that was part of that shortfall.*

His Honour goes on at paragraph 68, towards the bottom of AB55, to conclude:

> *In total, it is difficult to accept without considerable reservation, the submission advanced on behalf of Dr Moffet that he "was not undertaking or conducting his own business". During the initial five-year term of the Services Agreement and thereafter there is some evidence that Dr Moffet continued to promote his own dental practice. He thus accepted in cross-examination, when his attention was drawn to the tax return for the financial year ending June 2013, that he was "starting a consulting business". Such an inference is also supported by the fact that during the five-year term of the Services Agreement, his tax returns claimed deductions for expenses incurred in generating income*

as "dental surgeon", but the expenses separate and discrete from those for which he was reimbursed by Dental Corporation.

He goes on at AB56 to again refer to the consulting business. You will see there, your Honour, at appeal book 56 Dr Moffet – I think his Honour referred to him as gloating that the secret – at about point 5 of the page:

The secret weapon I've been using since 1996 that allowed me to personally bill one million, 800 etcetera last year, working only four days a week for 37 and a half weeks while I was vacationing all over the world the other 15 weeks.

And a similar thing is in the next item. His Honour at paragraph 70 cautions that not too much weight should be placed on the tax returns. You recall this is a complaint in my learned friend's cross-appeal. He says:

It may be accepted that inferences to be drawn from tax returns are but one of the matters to be taken into account and that care should be taken in too readily drawing such inferences.

He goes on over at AB57 to say:

It is, however, respectfully concluded that such documents provide some support for a conclusion that the relationship was more that of Dr Moffet being an independent contractor than employee.

And he goes down – at paragraph 73, he sets out the – sort of as a summary of what has gone before as to why he has reached his conclusion that Dr Moffet was an independent contractor. And these are the last two pages that I will take your Honours to, but they're very important. Paragraph 70, 73 he sets out why he has reached the conclusion that Dr Moffet was retained as an independent contractor. First he refers to the terms of clause 14.1 of the Services Agreement. Your Honours will recall – this is explained further over the page at paragraph 76 and 77, which I will come to. The second dot point, the absence of any degree of control. Third dot point, absence of any degree of control over the hours or days worked, fourth dot point, the absence of any intent on the part of Dental Corporation to establish an employment relationship. He goes on at the top of page 58, the monthly invoices prepared by Dental Corporation for Dr Moffet to enable payments to be made to him, the last dot point, the performance bonus and shortfall. He goes on point 5 of the page to say:

Neither of these aspects of the relationship have the hallmarks of an employment relationship. An employee is normally paid a salary or an hourly, daily or other periodic wage, free of deductions for expenses incurred in the performance of the work. The prospect of cashflow being less than otherwise anticipated is a risk normally borne by an employer.

And he concludes at 74:

The reality of the situation was that Dental Corporation acquired the dental practice from Dr Moffet in 2007 and thereafter let Dr Moffet continue to conduct his own business. Dr Moffet got the capital sum on the sale of the practice. That sum over $2 million. And after the sale, Dental Corporation received part of the moneys he thereafter generated as a contractor. The reality of the relationship was that Dr Moffet continued, after the acquisition of the dental practice by Dental Corporation in 2007, to run his personal practice much the same as before. He continued using his own ABN when submitting tax returns and continued trying to grow his business.

Now, these two paragraphs are the target of specific complaint by my learned friend. He goes on to say "Clause 14.1" – again, this is something that is subject to specific appeal by my learned friend:

Clause 14.1 of the Services Agreement accurately describe the relationship as not constituting an employment relationship. It did not seek to put a label upon the relationship different to that which it was in reality. In reaching this conclusion, however, it has not proved necessary to resolve any uncertainty or ambiguity by recourse to clause 14.1. Recourse to clause 14.1 it may nevertheless be noted only reinforces the conclusion reached. During his oral evidence, Dr Moffet presented as an astute business person. And he accepted that he had access to legal advice prior to executing the Services Agreement. Clause 14.1 it is considered was a contractual term which should be given the full effect the parties presumably intended. There was no evidence that Dr Moffet did not read and understand the terms of the Services Agreement and no evidence that he did not give consideration to clause 14.1 itself.

And he goes on to say – and I'm labouring this because, as I say, it is a point of appeal:

Clause 14.1 of the Services Agreement it must readily be accepted is but one matter to be taken into account, and is not determinative. No agreement can operate by reference solely to its own terms to be determinative of the nature of the relationship such as to preclude the entitlements and protections conferred by the Fair Work Act upon an employee.

And he goes on to say "Nor can the manner" – this is about point 4 of the page:

Nor can the manner in which Dr Moffet prepared and submitted his tax returns provide a complete or independently determinative description of his status. Again, these are but further matters to be taken into account.

And he goes on to say:

There must be care not to simply run through a checklist.

There endeth the gallop through the findings his Honour made below. Could I turn now to our appeal in relation to section 12(3). His Honour – if I could skip over to superannuation which is at appeal book 62. His Honour, at paragraph 90 at the bottom of appeal book 62 says:

> *It is concluded that the claim made by Dr Moffet in respect to superannuation is to be accepted. It is concluded that the Services Agreement was a, and I quote "contract that was wholly or principally for the labour of Dr Moffet within the meaning of section 12(3) of the Superannuation Guarantee Act.*

Now, as set out in our notice of appeal, it's submitted that his Honour did not perform the analysis that is required by section 12(3). His Honour did not enter into an analysis of what the contract was for. Over on AB63, his Honour simply refers to On Call. His Honour refers, at the fourth line, to say:

> *The effect of section 12 is to extend the reach of the Superannuation Guarantee Act to employment-like relationships.*

and cites On Call. He goes at about line 8 to say:

> *Bromberg J noted the potential width of operation of section 12 and concluded that parliament intended to cover employment-like relationships in which work is performed for remuneration or payment. Section 12(3) sought to facilitate occupational superannuation being paid out of the exchange of work for remuneration where an independent contractor provides personal services in an employment-like setting.*

Now, we say we submit that there is no warrant for that gloss on the statutory language. He goes on to say that – over on AB63 and AB64, he refers – he extracts numerous paragraphs from On Call and, indeed, the other aspect that he relies upon is set out at about point 8 on AB64, quoting from On Call where his Honour says:

> *The question is whether, in all the circumstances, the labour component of the contract in question could have been provided by the recipient of the labour employing an employee.*

And he concludes at paragraph 92 at the bottom of page 64:

> *On the facts of the present case, Dr Moffet performed services under a contract, namely, the Services Agreement and did so in an employment-like setting, and where the labour component of the contract could have been provided by Dental Corporation employing an employee.*

Could I take your Honours to our submissions which are in part C at A1, and they start at appeal book 1. We set out a number of the facts that we rely on which I've already taken your Honours through, that is, that Dr Moffet got paid nothing up to the first 249,000/250,000 – he got paid nothing. There was the possibility of a bonus

on the income of the practice and, of course, a shortfall. We set out some of the findings in relation to tax invoices, etcetera. Our submissions in relation to section 12(3) can be found at AB6 at paragraph 20. We submit in relation to the construction of 12(3) four matters. The first matter in relation to the construction of that section is that the contract to be construed is the contract as a whole.

It is not just the labour component of that contract that this court looks at. And in that context, of course, we say that there's a number of goods and services that are exchanged under that contract. Secondly, we say the section, 12(3), directs attention to what the contract is for. What is the contract for? And in our case we say it is not for the labour of Dr Moffet. It is for a number of things. And if one is to take a rude mathematical approach, it's 60 per cent for the provision of equipment by Dental Corporation of 40 per cent for the provision of labour by Dr Moffet. The third proposition is we agree with Bromberg J that principally ought to be read, that is, whether or not it's a contract principally – wholly or principally for the labour which we agree that that should mean chiefly or mainly. And finally, our fourth submission in relation to construction – and we set out the authorities there – is that it ought not to be construed broadly because otherwise it would have a very wide operation. I think as your Honour Justice Perram mentioned yesterday, a very broad application of section 12(c) could mean it would apply to a barrister providing services through a solicitor to a client.

And at AB 7 at paragraph (d) we refer to the finding of the New South Wales Court of Appeal in World Book that the phrase:

> *A contract that is wholly or principally for the labour of the person to whom the payments are made –*

was found by that court to not cover the extraordinarily wide range of persons that a plan reading might otherwise encompass. But in this case we do not need to go that far. We do not need to go into these sort of semantics about whether it's too broad or not. The plain fact of the matter is that this contract is not principally for the labour of Dr Moffet. It is for the exchange of a number of things, and we say it's definitely not principally for his labour. I would like to your Honours to three cases which have cast doubt on the validity of the approach taken in On Call.

Firstly, could I take your Honours to Tattsbet which is at tab 13. Tab 13, Tattsbet v Morrow and to the decision. I won't take your Honours to the decision of the Chief Justice because the Chief Justice simply doesn't refer to On Call at all. Jessup J refers to it at page 61 in Tattsbet at paragraph 59. Jessup J said:

> *In its notice of appeal dated 24 July 2014 the appellant's first ground was that the primary judge was in error to have found that the respondent was its employee. The appellant's second ground amounted to a 10-item litany of factual errors said to have been made by his Honour.*

Much the same might be said about this appeal. Then he goes on to say:

As conducted, the appeal was confined to the first ground in support of which the appellant submitted that his Honour had applied the wrong test, particularly to the extent to which he had relied upon the judgment of Bromberg J in On Call.

Now, his Honour goes through a number of factors there – and I won't go through it again because your Honours went through it yesterday, but the superannuation guarantee aspect comes up again at page 66; that's where it starts. But could I take your Honours to page 71 and paragraph 99. You will see Jessup J at paragraph 99 on page 71 says:

In the present case, none of this is controversial in relation to the circumstances of an employee in the common law sense of the word.

Then he goes on to say:

However, section 12(1) of the SG Act contains the following provision.

And then could I take your Honours to the middle of paragraph 100; he says:

For my own part, I would not regard it as self-evident –

and I'm sorry, it should be self-evident –

...that if she were not an employee as understood at common law she was within the extended definition of the word in section 12(3).

He said:

I would not regard it as self-evident at all. As mentioned above, the respondent's own net personal income represented only about a third of the gross receipts of the Logan Central Agency. Without the benefit of the assistance of counsel on the connotation of the word "principally" in section 12(3), I would not be prepared to assume favourably for the respondent that the agency agreement was a contract of the kind referred to in that subsection.

And then he goes on to conclude at paragraph 104 at about five lines down of 104:

It has not been established that the agency agreement was a contract of the kind referred to in 12(3) of the SG Act.

So I suppose in that sense it's damning of On Call in that his Honour simply did not refer to it. Could I take your Honours now to Whitby which is the decision below that you heard the appeal yesterday. Whitby is at tab 17 and could I take you to – tab seven – no.

PERRAM J: 36 in mine.

MS BATROUNEY: Sorry. I'm sorry, Whitby is at tab 36 of the joint authorities. I don't intend to take your Honours through this at length. I just wish to take you to one paragraph, paragraph 220. Because his Honour didn't really dwell on the superannuation guarantee either. The superannuation guarantee is dealt with at paragraphs 214 onwards. Could I simply take your Honours to paragraph 220 of Whitby where Thawley J says:

> *Secondly, the contract were not "principally for the labour of the person". The contracts were for equipment, delivery vehicles and labour. The applicant submitted that the contracts were principally for the labour of the person because less than 50 per cent of the applicant's gross income was used to pay their expenses. I reject that submission. The section focuses on what was provided under the contract, not what cost was associated with the provision of the relevant services and equipment. The contracts were plainly for the provision of substantial equipment and service and accordingly not principally for the labour of the person.*

And we would just say the same applies here. The last matter I would like to draw your attention to is the submission that I think your Honours received last night about the jockey cases. Your Honours, I apologise for the lateness of that submission. Those cases had only recently come to my attention. Your Honours will have the decision of Logan J in Racing Queensland Board. I understand that is at tab 10 of the book of authorities. Of course, this decision is on a appeal.

PERRAM J: Is that appeal listed in this Full Court sittings or a later one?

MS BATROUNEY: No, your Honour. As I understand it, it has been listed for – well, I'm not sure, your Honour, but it has been listed to be heard by Griffiths, Derrington and Steward JJ; probably November - - -

ANDERSON J: November.

MS BATROUNEY: - - - I'm told, your Honour. It's quite a different case – the jockeys case. Section 12(3) is mentioned in passing but the jockeys is really to do with performance. It's almost like a singing performance, the jockeys; they're paid to ride the horse from one end to the other. So it's not really an employee contract of a case like this. So I'm not sure that your Honours need to trouble yourselves too much, however, what I take from the decision of Logan J is an ambivalence towards – can I put it this way: towards the decision in On Call. At paragraph 73, his Honour refers – well, about paragraph 72 and 73, he refers - - -

WIGNEY J: It was all open, wasn't it? His Honour didn't need to go there.

MS BATROUNEY: Correct. Correct, your Honour.

WIGNEY J: Yes.

MS BATROUNEY: But as I say, it's our submission that the courts have been dancing around On Call and, unfortunately, it forced your Honours to fairly squarely face it. Can I say – can I take your Honours to the top of page 24 where- the first line at the top of 24 where Logan J says in relation to the reference to an employment-like setting, he says:

> *That may well be so but there is, with respect, quite some substance in the Commissioner's riposte that employment-like setting is a gloss on the text Parliament has employed in section 12 of the Act.*

And then he goes on:

> *At common law neither constables nor members of the military are employees of the Crown but they are paid by the Crown to perform their duties and subject to the overarching control of the Crown. So it is not difficult to see how that category may have inspired the observations made by Bromberg J. It is much more difficult to discern any such features with members of a parliament or local government council. Thus, with respect, the discerned unifying characteristic in respect of the extended class in section 12 of an "employment-like setting" is not apparent to me. That each might, in the vernacular, be termed a "servant of the people" does not make a parliament or local government chamber an "employment-like setting".*

So - - -

PERRAM J: Demonstrates his Honour's mastery of the vernacular.

MS BATROUNEY: So if I could take your Honours back to our submissions at page 7 of the appeal book. At the bottom of page 7 of the appeal book, we set out what we say is the error of the primary judge in relation to the super guarantee issue. We say, first, that the primary judge's analysis did not examine the whole of the service agreement but simply concluded that the respondent performed services under a contract without due regard, we say, to the exchange of the services that were provided under the Services Agreement. Over the page, at appeal book 8, paragraph 27, we say that the trial judge has failed to address the statutory test and, as we say, failed to have regard to the extensive and valuable goods and services provided by the appellant.

And we say that once regard is had to those services it – and equipment, it's not possible to say that the contract is wholly or principally for the labour. Secondly, we say that the Services Agreement related not only to Dr Moffet's labour but also to the labour of various other associate dentists, hygienists, etcetera, and the contract was for the labour of those people as well. Your Honours will recall that both the bonus and the shortfall was calculated by reference to the takings of the practice, which included these other people.

PERRAM J: How many of these other people were there?

MS BATROUNEY: There's a schedule of the number of employees that came across. Unhelpfully, Dr Moffet himself is listed as an employee, but there wasn't a lot of evidence about that.

WIGNEY J: So these were people that were formally Dr Moffet's employees - - -

MS BATROUNEY: Yes, yes, yes.

WIGNEY J: - - - or the employees of his practice?

MS BATROUNEY: Yes. That came across.

WIGNEY J: That came across. Yes.

MS BATROUNEY: Well, they became employees of Dental Corporation.

WIGNEY J: Yes.

MS BATROUNEY: I don't think there's any evidence, your Honour, as to how many employees there were during the course of the Services Agreement. But there's certainly a number of them. I will just see if I can find that. In the practice Acquisition Agreement, there was a schedule that set out the – it's such an enormous agreement – I'm sure that by the time I find it my learned junior will find – thank you. 100, I'm told very helpfully by my learned friend. If you could have a look at appeal book 100, which is schedule 5 to the Acquisition Agreement. There's a number of employees listed there – in fact, 19. As I say, unhelpfully, Dr Moffet himself is listed there as number 15 on page 101. Sorry, your Honours. I'm at page 100 of the appeal book, which is schedule 5 to the Acquisition Agreement.

PERRAM J: So quite a few people?

MS BATROUNEY: There's quite a few people. It wasn't illusory. There was quite a substantial practice there. And as I say, there wasn't any evidence about how that panned out during the court. Now, if I could go back. So there's only one more thing I would like to say, your Honours, before I will resume my seat, and that is I could take you back to appeal book 8 in our submissions. The last thing I would say, your Honour, is appeal book 8, paragraph 30, we say that even if it is right – which we dispute – that the court looks at whether or not the services are provided in an employment-like setting – as I say, which we dispute – at paragraph 31 we say, relevantly, the setting should include a number of those factors set out there.

So if we are looking at whether or not the services are provided in an employment-like setting, that setting should take into account the absence of control over the manner in which the respondent performed his service, the absence of control over the respondent's hours, days or holidays, deduction for expenses, the shortfall issue and the absence of the intent on the part of the appellant to establish an employment relationship. So even if one looks at the setting, we say that is the setting. But, of

course, our major point is that this was not a contract wholly or principally for the labour of Dr Moffet. It was wholly or principally a contract for a number of things, and if one was to take a blunt mathematical instrument to it, it was 60 per cent for the services that were provided by Dental – services and equipment provided by Dental Corporation. If your Honours please, they're the submissions on the appeal.

PERRAM J: Thank you, Ms Batrouney. Yes, Mr Gibian.

MR GIBIAN: May it please. As my learned friends indicated, there are really three issues that arise on the appeal on the cross-appeal – on the appeal, obviously, whether or not the trial judge was correct to find that Dr Moffet fell within section 12(3) of the Superannuation Guarantee legislation. On the appeal there are two issues – whether he was an employee in the more general sense for the purposes of the Fair Work Legislation and the Long Service Leave Act of New South Wales, and then a subsidiary issue in relation to the method of termination, and whether he fell within the entitlement under Long Service Leave legislation in that event.

Your Honours will apprehend that if we are right in the cross-appeal, the appeal falls away, in the sense that the – wholly or principally for the waiver issue is unnecessary to resolve, because he would otherwise fall within an entitlement under the Superannuation Legislation as an employee in a general sense. Nonetheless, I thought maybe just for the purposes of continuity of thinking, it might be best if I address the superannuation issue first and then the cross-appeal so that I can respond in a continuous way to what my learned friend has said. As your Honours will apprehend, though, that's in the event that the cross-appeal is not successful.

What I wanted to do was, in that respect – in my oral submissions, then, was to firstly just – I did want to go back to the background in a little more detail – the Acquisition Agreement and to the Services Agreement – a little more detail than my learned friend has done to give the context of the work that was performed by Dr Moffet in the practice after it was purchased by Dental Corporation – secondly, address the – as I foreshadowed – issues on the appeal in relation to the Superannuation legislation, and then progress to the cross-appeal. As is apparent, the context of the relationship between Mr Moffet and Dental Corporation is, in our submission, important in understanding both the Superannuation issue and the employee issue.

As your Honours will know, in broad overview, the context of it is that – the context of that relationship is that Dr Moffet had a dental practice which he agreed to sell and Dental Corporation agreed to buy and then operate as its own practice, but that it wished, for reasons that are not mysterious, to have him continue to perform work in the practice, and Mr Evans was cross-examined about this – on the expectation that it would retain the benefit of the goodwill that it had paid for by the customer connections with Dr Moffet. It wished Dr Moffet to continue to work in the practice that it had bought and was now Dental Corporation's practice, not Dr Moffet's practice – for him to perform work in that practice for the purposes of ensuring the value and the continued patronage by patients of that practice in circumstances in

which, again, unsurprisingly, it imposed restraints upon him operating his own business of a similar type or engaging in his own relations with clients distinct from the work that he was performing in Dental Corporation's practice.

And that's the context in which the appellant asked the court to say, "Well, no, actually, he was still running his own practice", whereas the truth of the matter was he had sold that practice. All the rights to the premises, the equipment, the rights, the goodwill, the intellectual property rights and the like associated with the practice were after the purchase owed by Dental Corporation, and Dr Moffet worked in the practice that was owned and operated by Dental Corporation. All of that is apparent from the terms of the Acquisition Agreement and the Services Agreement. Can I just take the court to that briefly? Firstly, I can go to the Acquisition Agreement relatively briefly. It is at tab 9.1.1, commencing at page 56 within part C.

PERRAM J: What was that page number again, sorry?

MR GIBIAN: I'm sorry; commencing at page 56 in the red numbers. Can I note, firstly, on the first substantial page at page 61 there's a heading Background. At the bottom of that page, which indicated the practice principal, being Dr Moffet ..... conducted a practice, and there is a service company that provides services, and at D at the bottom of the page the practice principal and the service company have agreed to sell those of the assets owned by the vendor, and the purchaser agreed to buy those assets in accordance with the terms of the agreement. The definitions then appear on page 62, and can I just note in the middle of that page at clause 1.1 the reference to assets, including goodwill, and what's called the "vendor IP" as well as plants ..... and equipment, property leases and the like.

I think my learned friend drew attention to the definition of "employees" on page 63 – about point 6 on that page – as referring to persons employed by the vendor in the conduct of the practice at the completion date being those listed in schedule 5, and, in answer to a question from your Honour the presiding judge, referred to page 100, which set out the list of those employees.

PERRAM J: What do you say about the submission that – he is on that list, as I understand it, so - - -

MR GIBIAN: He is.

PERRAM J: - - - this definition doesn't really work if he is an employee.

MR GIBIAN: Can I say two things about that? The first is there was a – there is a suggestion in the reply submissions that this wasn't an issue which was raised below. Sorry, perhaps – going back a step. We don't rely upon it as some kind of admission or matter of that nature.

PERRAM J: This is part of - - -

MR GIBIAN: There's an internal inconsistency, because the Acquisition Agreement otherwise requires Dr Moffet to execute the Services Agreement, which is annexed to it and contains the provision referring to him as a - - -

PERRAM J: Yes.

MR GIBIAN: - - - not in employment relationship. We did refer to it, and we do rely upon it as relevant to the question on the way in which Bromberg J, at least, approached, that is, whether the work could have been done by an employee, because the other dentists in the practice, at least, leaving aside the position of Dr Moffet, are listed here, and the undertaking is to provide them with – employ them in the – that is, Dental Corporation will employ them in what is, I continue emphasise, Dental Corporation's practice going forward.

WIGNEY J: They, curiously enough, if you look at the reference to him on in that schedule it's not suggested he's there. It's suggested he's a practice manager and provides administration and marketing for which he seems to get some salary sacrifice. So it seems to be - - -

MR GIBIAN: Yes.

WIGNEY J: - - - something – he's listed there in some capacity other than as a dentist.

MR GIBIAN: Yes. Look, I think it's suggested in my learned friend's reply submissions, and there is some accuracy to it that there was some uncertainty as to the precise arrangements that preceded the purchase.

WIGNEY J: He may have been being paid for administrative services by his previous service company or something.

MR GIBIAN: I think that's a reasonable inference.

WIGNEY J: It paid the lease on the car or something.

MR GIBIAN: Yes. But, as I say, we don't rely upon it as some kind of admission or matter of that nature, given the internal inconsistency there is within the Services Agreement. Can I just say, and I can provide the additional pages which – this is a reference to a part of the transcript which is not in part C at least, but at page 154 of the transcript I did in submission make reference to this list for the purpose that I've set out. I won't need to read it. Yes, I can provide copies. This is just of the oral submissions. I don't need to refer to it but if it's convenient enough for the court to have it, but I can just give that reference.

ANDERSON J: Thank you.

MR GIBIAN: Now, if I can return then to the Acquisition Agreement, the – and back to the definitions. At page 64 of the appeal book there's a definition of goodwill, meaning:

> *The goodwill in the practice including exclusive rights to carry on the practice in succession to the vendor.*

There's a reference at the bottom of page 64 to a definition of intellectual property and rights meaning:

> *All intellectual property and property rights including business names, trademarks –*

etcetera, associated with the practice. And the practice is defined on page 65 at about point 7 on the page to mean:

> *The dental practice, business conducted by the vendor at the date of this agreement at the premises including the assets.*

And finally, then, there's a reference at page 66 to a definition of the Services Agreement being:

> *The service agreement entered into between the vendor and the purchaser as was attached to –*

or a draft of which was attached at least to the services – to the Acquisition Agreement I should say. Can I then move to page 74 within the Acquisition Agreement and just note under clause 7 completion. At clause 7.2 there's a reference to various obligations of the vendor including, unsurprisingly, a delay to deliver all the assets, title, etcetera. That (d) to transfer duly executed assignments or transfers of any intellectual property rights. And at – I don't need to read it, but deal with the assets and the premises. At the top of page 75 at (k) a reference to executing a counterpart of the vendor's Services Agreement executed by the vendor.

That is, part of the arrangement was that Dr Moffet would execute such an agreement to thereafter perform work. The – at page 78 of the Acquisition Agreement, at the bottom of that page, clause 12, deals with the offers of employment and refers to schedule – refers to Employees with a capital E, meaning those that were listed in schedule 5 as per the definition, that is, the persons – the other dentists and support staff and the like were thereafter were employees of Dental Corp working within the practice owned by Dental Corporation.

PERRAM J: Did Dr Moffet get such an offer?

MR GIBIAN: No, he signed the dentist. There's no evidence that he signed the Services Agreement alone. Can I then move to page 84 which – and there, firstly, at clause 19 in the middle part of page 84 deals with the use of vendor's business name

and logo, and provides that the vendor acknowledges that the purchaser may, as at the completion date use or display at the practice premises any trade or service marks, trade or business names, registered designs, logos used or owned by the vendor or any other related body corporate of it including the active dental name. There is something made in the submissions – I don't think so much in his Honour's decision below, but in the appellant's submissions in relation to the continued use of the active dental name which was the business name that was being used by Dr Moffet prior to the purchase.

Of course, after the purchase it was Dental Corporation's business name, not his business name. And it was able to dictate what business name or logos or the like were used at the practice that it operated. And that does not support the idea, particularly in the context of the operating own business concept. Can I then note the restraints that appear at clause 20 at the bottom of page 84 and over on page 85, and particularly at clause 20.2, the covenants in relation to restraining the practice principal, being Dr Moffet, from – or prohibit persons who are defined at the bottom of page 84 at clause 20.1 to include the practice principal. And then at 20.2 on the top of page 85:

> …*restraining conducting any business or competition, solicit, canvassing or approaching or accepting any approach from any person who was a customer of the practice. (c) interfering with the relationship between the practice and its customers, employees and suppliers.*

And then:

> …*inducing employees, etcetera, to leave their employment.*

And the exception to that, of course, at the bottom of page 85 at clause 20.6 is that it doesn't restrict Dr Moffet from providing dentistry services under the Services Agreement, that is, for working for Dental Corporation. But that's all he could do within those limitations. The consequence then of the Acquisition Agreement was that Dental Corporation that bought the practice, the assets, the real and intellectual property rights in return for which there had been a purchase price but also Dr Moffet was required to agree to continue to work for Dental Corporation in the practice that Dental Corporation had acquired, and was constrained from running his own or similar businesses in competition with Dental Corporation.

Could I turn then to the Services Agreement which is under – there is a version of it that was annexed to the Acquisition Agreement, but the actual Services Agreement is under tab 9.1.2 commencing at page 230. In that respect, again, can I firstly go to page 233. At the bottom of that page there is a heading again Background which notes the context at (a), that is, that Dr Moffet had agreed to sell and Dental Corporation had agreed to purchase certain assets in accordance with the Acquisition Agreement. And at (b) that:

Dental Corporation wishes to engage the practice principal and the service company to provide the dentistry purposes at the premises on terms of this agreement, that is, to perform work.

And at (c):

To facilitate the provision of dentistry services Dental Corporation has agreed to provide the administrative services to the practice principal on the terms of this agreement.

As I will come to, this seems to be the major aspect which was relied upon in relation to the superannuation point by the appellant and what, as your Honours will have seen, we say a few things about that but it is plain, both from the context and the expressed terms of the Services Agreement, the provision of any what are called administrative services is facilitative, that is, it is for the purpose of the performance of work by Dr Moffet, and that says so, and the introductory parts to the Services Agreement say so, in so many words. It rather underlines, rather than undermining, the conclusion that this is a contract, wholly, we would say, for his labour, but at least principally. Then at page 234 and following, there are a number of definitions. I think my learned friend referred to the definition of administrative services and of annual cash flow.

Can I note the definition of dentistry services that appears at page 235, at around point 7 on the page. Dentistry services are defined to mean:

…*the dentistry services to be provided by the practice principal –*

that is, by Dr Moffet –

at the practice under this agreement and set out in schedule 1.

There were no excluded activities. Schedule 1, if I can just at that point go to it, is at page 250, and in a broad sense there are two types of dentistry services. The first is, at 1.1:

That the practice principal must provide diagnostic, remedial, specialist and preventative dentistry services to patients.

That's obviously involving his labour in treating patients. Then at 1.2, under the heading Practice Management, it's indicated that:

The practice principal, in consultation with Dental Corporation, must manage the practice in a manner in which the performance and operations are consistent with or at a better standard than the practice enjoyed immediately prior to completion and in accordance with the terms and scope of the agreement.

That also involves his work, that is, management of the practice, be it staff or billing arrangements or whatever it might be. It is him working in a management sense in addition to the dentistry work that he is performing in Dental Corporation's practice, which it has purchased and owns assets and rights to. Returning to the definitions, can I note the – at page 236, still within clause 1.1, the reference to monthly revenue at about point 6 on the page. I mean, it's a feature of both the monthly growth revenue and the monthly revenue. Can I just note that that's the revenue generated and collected by the practice principal, that is, by his work. And can I then note, at the top of page 237, the reference or the definition of total and permanent disability meaning:

> *…a disability, injury or illness that renders the practice principal unable to practise as a dentist on at least six consecutive months –*

etcetera. There are a number of provisions which make clear that what this agreement is about is his performing – Dr Moffet performing work, and it comes to an end if he is unable to do that.

PERRAM J: The remuneration structure for Dr Moffet is not a typical employment remuneration structure. Would you accept that?

MR GIBIAN: There are two parts to it. One is that he essentially works on commission, that is, he earns a proportion of the revenue that he derives from his delivery of dentistry services. He gets that money both for the dentistry work and the practice management work, but that is essentially what he is, and I will come to it briefly, but there is reference to commission payments as being a form of salary and wages for the purpose of the superannuation legislation.

PERRAM J: It's unusual to see a shortfall obligation, though, isn't it, where an employee has to pay something back.

MR GIBIAN: Yes. The second element of it – so the first element is he is paid by commission. We think, with respect, that that doesn't – that is, his ordinary earnings are a proportion of fees derived from his own work and that that's not an unusual arrangement, whether in part or in whole of the work of either employees or workers more generally. The second part of it is that there is a performance bonus – I was coming to this shortly, but there's a performance bonus arrangement and a shortfall arrangement so far as the performance of the practice as a whole is concerned.

In my submission, that's not – I'm not sure I can entirely disagree with your Honour that in my experience this may be slightly unusual, the way it works, but it is not unusual to have – where there is a worker, to use a neutral term here, who is conferred with management responsibilities with respect to a company or a part of a business, for them to have remuneration elements, and maybe very significant remuneration elements, which are dependent upon the performance of that business or part of business for which they have responsibility.

So both his earnings were a substantial part – well, his earnings – the income derived from his work was a substantial part of the practice as a whole, albeit there were other dentists as well, but the fact that he had management responsibilities with respect to – and was conferred with them by Dental Corporation, with respect to Dental Corporation's employees within the practice, it is not unusual to have remuneration arrangements which has either incentives or penalties which turn upon the performance of the business or the part of the business for which the person is conferred with such responsibility.

ANDERSON J: That might be right with bonuses. One can readily see, in the corporate world, there's bonuses payable, not only on the performance of the individual but on performance of a division or a section or part of the business.

MR GIBIAN: Yes.

ANDERSON J: But a shortfall to reimburse a failure to perform on a particular division of the business or part of the business? That's a pretty unusual thing, I would have thought.

MR GIBIAN: As I say, I don't think – in terms of my experience of employment matters, I didn't disagree with Justice Perram that it may be unusual, but we don't think it is different in type, in the sense that it is not unusual or atypical for significant aspects of the remuneration of works with management responsibilities to turn upon the performance, and how that is structured doesn't change fundamentally the nature of the arrangement.

ANDERSON J: I can understand that submission if it was connected to you received a performance bonus for achieving certain goals and it's thereafter found that the payment was made when it ought not have been made and you've got to reimburse the business for it, but that's not this case, is it? It's disconnected with the bonus. It's simply a stand-alone shortfall provision.

MR GIBIAN: Well, what there is is both a bonus provision and, essentially, a penalty provision if the practice doesn't perform as is - - -

ANDERSON J: Which does not bespeak an employee, I suggest.

MR GIBIAN: Well, as I say, in my submission, the way in which – at two stages. The first is that the – an arrangement whereby a worker's remuneration is, or elements of it, are dependent upon the performance of a business or part of it, or the like, is not inconsistent with there being an employment arrangement. And the way in which that is structured, that is, whether it's by way of a penalty or by way of a bonus or both, can't alter that fact, the nature of the way in which the performance of the business or part of it affects the remuneration can't alter the nature of it, where what we have is an arrangement where Dr Moffet, by contract, is working within the business of Dental Corporation and is constrained from running his own business

separate from that or deriving his own goodwill or the like separate from what he does for Dental Corporation.

PERRAM J: I suppose, in a sense, your submission is really the pointy end of Hollis v Vabu, isn't it, where you say he's certainly an independent contractor to start with, running his own business, then that business is sold to someone else but he's still in it, almost definitionally, I suppose you might say, in that circumstance, that he's not working in his own business because it had been his business. He's still working in it but it's not his business any more.

MR GIBIAN: Indeed. When – I mean, in relation to the cross-appeal, there were a number of faults that, with respect, we identify in the primary judge's reasoning, but the primary one is that the primary judge said, well, look, he continued to work in the business as he did before. That's only relevant if it's still his business, but it's not. It's their business. And that they – the extent to which Dental Corporation wish to structure the arrangement to give him a degree of autonomy, or the like, nonetheless he was working to derive income for their business to manage their employees in their business, not his own business. And in Hollis v Vabu, the constraints upon the bicycle couriers – or the concept that the bicycle couriers were running their own business or were able to derive goodwill or the like was practical, in a sense. It just was contrary to common sense to suggest they could do so. Here it was contractual. He was constrained by the Acquisition Agreement from doing that. And in that – in the same way, albeit for different reasons, he can't be said to have been working in his own business or conducting his own business.

WIGNEY J: Well, isn't one other way of looking at it, perhaps, that, having sold the business, as it were, he then is effectively carrying on his own business, albeit a different business to the one that he previously ran. The business is providing dentistry services, and he's now unburdened by all the administrative arrangements because he pays Dental Corporation 60 per cent of whatever he gets in to look after all of those administrative burdens. It's almost like a new service company for him. He wasn't an employee of his previous service company, was he?

MR GIBIAN: He – well, I think the evidence is a little unclear. He was, but as I think your Honour - - -

WIGNEY J: Yes.

MR GIBIAN: - - - inferred from the arrangement, for a limited purpose.

WIGNEY J: So it's really – it's a different – it's not the practice any more. He's carrying on a business as a dentist, as I said, unburdened by all the administrative arrangements and ownership of property and employment arrangements, because that's all looked after by Dental Corp. I'm ..... saying I've got a firm view about this, but that's one distant way of looking at it.

MR GIBIAN: No, no. I understand what your Honour says. I think the difficulty with that – and there are no doubt a variety of ways in which arrangements could be structured, but what happened here was that Dental Corporation purchased the assets, purchased the goodwill, purchased the intellectual property, purchased the business name, and Dr Moffet was retained to work in what was, on any view, then their business. Now, if he retained the equipment, if he retained the premises and the arrangement was, rather, that he contracted with Dental Corporation to use their business name, say, and to obtain the benefit of advertising, or whatever it might be that they conduct as a group, then that might be more closer to what your Honour contemplated.

But that's not what happened here. He was working in a business with other employees who were employees of – with other staff who were employees of Dental Corporation in a business – in the business premises and with equipment and using a business name that was all owned by Dental Corporation, and in a manner in which he couldn't derive his own goodwill or relationships with patients or the like that he could take on further in the future.

WIGNEY J: But it's not difficult to see why part of the arrangements was the shortfall arrangements, because in a sense, Dr Moffet had sold the goodwill of the practice, the goodwill perhaps primarily attached to his name as a dentist. And if there wasn't something like the shortfall thing, he could take even more than 15 weeks holiday per year, and having pocketed the money from selling the business, and so that would mean that Dental Corporation wouldn't be getting much from their side of arrangement. So I know that's just an - - -

MR GIBIAN: Yes.

WIGNEY J: I don't think it takes it any further, but you can readily see why it was included there.

MR GIBIAN: Yes. Well, look, your Honour, again those are matters that we think support our argument. That is, that the learned primary judge placed some reliance upon issues of control in relation to days of work and holidays and matters of that nature. And the evidence was what it was, that is, he wasn't told he had to work on this particular day or this particular hour. But he was imposed – or there were imposed upon him obligations in terms of deriving income and the like which had the effect of requiring him to work to a substantial degree to – in order to satisfy those obligations. So we don't think that that is antithetical to the submission we're advancing.

PERRAM J: He left as the manager in place - - -

MR GIBIAN: Yes.

PERRAM J: - - - which gave him quite a lot of latitude in what he did with himself. But that latitude was circumscribed by the shortfall arrangement.

MR GIBIAN: Indeed. And, look, there is some evidence about that the degree of latitude was not perhaps as great as was – as initially presented, in the sense that, particularly in the later period, there was intervention in the operation of the practice because Dental Corporation perceived it wasn't deriving the income that they wanted to derive. So the degree of intervention was perhaps less when things were going as they wanted, but if they weren't going as they desired, then there was a greater degree of interreference. I don't mean that pejoratively, but involvement in the operation of the business.

PERRAM J: So Hollis v Vabu tells us that the broad question we're trying to ask, when we're trying to work out whether someone is an employee, is whether they're working in their own business or whether they're working in someone else's business. And then we've got this long shopping list of factors which we trot out in every case. We look at those factors to work out the answer to that question, which is, are you working in your own business or someone else's? Is that how the factorial analysis works, or is it heading in some other direction?

MR GIBIAN: The way in which I would summarise the cases is that they require a multifactorial approach. You look at the various different considerations that might point in more than one direction. Some of those go to the question that your Honours raise, that is, whether there is an independent business or not, or are certainly relevant to that assessment. But certainly, following Hollis v Vabu – and it was – ACE Insurance followed the same line. The Quest South Perth Full Court judgment did emphasise the degree to which there has been an emphasis on the question of – as to whether it can be said the person is conducting their own business or working in the business of the putative employer.

PERRAM J: It seems to me a bigger – it seems the High Court seems to have said, well, this is a particularly important consideration.

MR GIBIAN: Yes. And some of the other considerations may be relevant to that matter.

PERRAM J: Well, they may be relevant directly to the employment question itself - - -

MR GIBIAN: Yes.

PERRAM J: - - - but they may also be relevant to the question - - -

MR GIBIAN: Yes, indeed. Or they may overlap, at least, with the general question which the High Court has said, look, that is – or it's rooted fundamentally in that distinction.

PERRAM J: So if that's right – you don't have to make a submission about this, but it just seems to follow as a corollary, then, the – it might be rather difficult to leave a former owner of a business in place in the business which has been bought in the

capacity as independent contractor. That might be difficult to do just because of the test in Hollis v Vabu.

MR GIBIAN: Well, I don't want to speculate as to the various different arrangements that could be entered into. But if the – but in this context what happened was, in broad overview, that Dental Corporation purchased and – the business and all aspects of it, including the goodwill, and it wished Dr Moffet, for understandable reasons, to continue to work in what was then its business, subject to constraints that he couldn't spirit away the – cut the patients or enter into competition. If that's what they want to achieve, then in accord with Hollis v Vabu it is difficult for them to achieve them, I accept, without there being a real question about an employment relationship. But there are no doubt various ways in which these things might be structured which might lead to different considerations. But that's the way that it was done here.

ANDERSON J: Mr Gibian, just before you go on - - -

MR GIBIAN: Of course.

ANDERSON J: - - - could I ask you, schedule 5 to the sale agreement – or the practice sale agreement at appeal book 100 lists the employees. In relation to the associate dentists which are items 1 through to 5, there's a column which is blank but when I turn over to the appeal book 101, it's a poor copy but it seems to say "contract/award". Do we know in relation to the associate dentists whether they had service agreements? The reason I ask that is because of the next column which seems to set out – if you turn over to page 101, remuneration benefits, bonus arrangements – I can't read the balance of it.

MR GIBIAN: Yes.

ANDERSON J: And there's reference to:

50 per cent, 100 per cent of IV sedation – no lab.

Do you know if there were service agreements for those?

MR GIBIAN: I don't think there was any evidence as to what the arrangements were prior to the purchase of the business by Dental Corporation.

ANDERSON J: Yes.

MR GIBIAN: The terms of the Acquisition Agreement are that they would be offered employment. I think that's all I can say about that.

ANDERSON J: But each of the other employees are under award, it appears.

MR GIBIAN: Yes. Well, it's certainly suggested that there was an award that applied to their employment and I read the final column in schedule 5 which – as referring to the arrangements that existed in the preceding – prior to the sale.

ANDERSON J: Thank you.

MR GIBIAN: And if I can return then, briefly, to the Services Agreement and your Honours have certainly taken me to the cross-appeal. I was just going to note at page 238 the reference – and your Honours will have seen this – and the reference to dentistry services at clause 3 and the requirement at clause 3.1 that Dr Moffet provide dentistry services personally, and that's obviously relevant to the both the employment question and the superannuation question. Clauses 3.2 and - - -

PERRAM J: And it's important from their perspective that the - - -

MR GIBIAN: Well, indeed.

PERRAM J: Yes. Because it's related to the goodwill issue.

MR GIBIAN: Yes. And that's why I say the context is important in understanding what the parties were trying to achieve here. They were trying to achieve him working. That's what they were trying to achieve for them in their practice. There's then at 3.2 and 3.3 there's the obligations in terms of the standard that he was required to undertake work with due care and skill and the like. At 3.4 and 3.5 over the page, there's a requirement, again, which emphasises that this is all about Dr Moffet undertaking work as a dentist, that he retain registration as a dentist, and undertake continuing – what's called continuing dental education during the course of the contract.

At the bottom of page 239 there's a reference to insurances which, at 4.1, requires him to maintain professional indemnity insurance. And at 4.2 - - -

PERRAM J: You accept that's a little bit against you, isn't it?

MR GIBIAN: It's equivocal so far as the appointment question is concerned. So far as the super question is concerned it again emphasises that this is all about him performing work as a dentist, giving rise to the need to have professional indemnity insurance. And life insurance has the same – the reference at 4.2 to life insurance – or facilitating Dental Corporation taking out insurance – life insurance with respect to Dr Moffet, again, emphasises that this is about him personally performing work in the practice. Can I then note – and my learned friend did read these provisions albeit extracted in the primary judge's judgment, at page 240 the reference to administrative services at clause 6. Clause 6.1 again emphasises and underlines that the provision of what are called the administrative services are for the purposes of and to the extent reasonably required to enable him to fulfil his obligations under clause 3.2, namely, to provide dentistry services to the requisite level.

And the same may be said of clause 7(a) further down that page in relation to the engagement of employees. I think I've probably – or your Honours are probably sufficiently assisted by – in relation to the payment arrangements that commence at clause 8 at the bottom of page 240 and over the page. I just note that, as has been said, at clause 8.2(a) the normal monthly draws are based upon the income generated and collected by him, by Dr Moffet himself in the preceding month. And the bonus and the shortfall matters which we have discussed are dealt with at page 242 at clause 9 which provide, as I've said, either a bonus or a penalty based upon the performance of the practice as a whole.

Can I note then at page 244, clause 13 deals with termination and, again, emphasises that the agreement is – the purpose of the agreement is the performance of work by Dr Moffet as a dentist. Relevantly, 13.1(a) permits termination if he ceases to be registered as a dentist, and at (c) if there's a breach of the agreement which would include failing to provide dentistry services personally and to the requisite standard. At 13.2 the agreement will terminate – or sorry, Dental Corporation will terminate the agreement if the practice principal dies or suffers total and permanent disability. Your Honours were taken to clause 14 which deals with the relationship at page 245. 14.1 is in a common form and seeks to avoid the consequences of an employment relationship.

Can I just note, with respect to 14.2, that it provides that:

> *Dental Corporation must at all times respect the independence of the practice principal and will not interfere with or seek to influence the practice principal's professional judgment in relation to the provision of dentistry services.*

I just note the limitation in that respect – or the express reference to professional judgment, that is, this is not about the management side; this is about the professional judgment in relation to dentistry work, and that goes to some degree to what the primary judge said in relation to control and supervision and the like. Finally, can I just note at page 247, clause 19 deals with assignment and permits him to assign the agreement only with the written consent of Dental Corporation. Now, that was the introductory references to the contractual documents to which I wished to take the court. As I indicated, I had intended to deal with the superannuation question for continuity purposes although we've obviously had some discussion in relation to the cross-appeal employment issue already, but I might stick with my plan in that respect unless your Honours have a different view.

Your Honours, I understand, had some discussion in relation to this legislation yesterday and may have been sufficiently taken to it. As your Honours will apprehend, the effect of the legislation is to, albeit somewhat – through a somewhat circuitous route, to provide for the payment of superannuation contribution for the benefit of employees as defined by, essentially, the imposition of a tax which can be avoided by the making of certain requisite superannuation contributions. Its operation extends beyond employees at common law as is – or under a common law

contract of employment as is plain from clause 12. And as your Honours know, the relevant – if I could just have a moment – the aspect of clause 12.1 provides that the terms "employee" and "employer" have their ordinary meanings, first of all.

Again, if we are successful in relation to the cross-appeal then it resolves the superannuation question as well. In addition, however, the meaning is either expanded or clarified to avoid doubt in the subsequent subsections of section 12 from 2 to 11, and the only relevant subsection relied upon in this matter was three which provides that a person is an employee if they work under a contract that is wholly or principally for the labour of the person. The submission, as we apprehend it, by the appellant on the superannuation question is that the primary judge failed to look at the whole of the contract and particularly the obligations that are imposed upon it with respect to administrative services.

In short, Dr Moffet submits on that question that the authorities support the view that the focus is really upon what the worker is obliged to provide in the context of the contract issue, but that, in any event, as I think I foreshadowed, the Services Agreement here, to the extent it make provision for what are called administrative services, does so for the purpose of facilitating Dr Moffet undertaking work and providing his labour in the practice then owned by and operated by Dental Corporation.

PERRAM J: But that agreement is doing a lot of other things. Even if there is an employment relationship, it is doing a lot of other things apart from that, so how can one – one certainly couldn't say it was wholly about the labour of Dr Moffet, so you really have to say it's principally about the labour of Dr Moffet, so it comes down to what the word "principally" means.

MR GIBIAN: Yes. Well, your Honour - - -

PERRAM J: I mean, isn't it principally a sale of business agreement? And - - -

MR GIBIAN: Well, there was two agreements, so the Acquisition Agreement was a sale of business agreement. It was an agreement for Dental Corporation to purchase the business. It happened when it purchased the business in 2007. The contract under which Dr Moffet performed work was the Services Agreement, not the Acquisition Agreement, so it was not an acquisition of business agreement, and, in my submission, it really was wholly, but, at the very least, principally for his labour, that is, the purpose of the agreement and the function of it was to provide for Dr Moffet to continue to work as a dentist in the practice owned by Dental Corporation and to perform work as a dentist and as a practice principal, providing some management and overview of the operation of the practice operated by Dental Corporation, and all of the elements of the Services Agreement support that view.

He was required to work personally. Obligations were imposed upon him in relation to standard of work and the like that he proposed. He was required to retain registration as a dentist. He was required to undertake professional education. He

was required to have professional indemnity insurance. The agreement would be terminated if he ceased to be a dentist or if he became incapacitated and unable to perform the work that was contemplated by the Services Agreement. The only matter that is put to the contrary really is that there was an expectation in the agreement that what were called administrative services would be provided to enable him to do work, which, as I say in my submissions, supports the view that this contract was all about him performing work.

WIGNEY J: It was 60 per cent of his – whatever he brought in was paid for the administrative services, effectively. That's a - - -

MR GIBIAN: Well - - -

WIGNEY J: - - - fairly large proportion of – to say that it's merely facilitative – that seems to underplay the 60 per cent figure, and if it's purely facilitative, why was Dental Corporation required to, for example, employ associate dentists. Necessarily, they might have had their own practice of some sorts. It seems that they did. It doesn't facilitate Dr Moffet from doing anything.

MR GIBIAN: The requirement to employ the associate dentists to take over the staff was in the Acquisition Agreement, not within the Services Agreement. Within the Service Agreement, there was an obligation to engage employees as in clause 7(a) on page 240 to enable the practice - - - - - -

WIGNEY J: I see.

MR GIBIAN: Yes.

WIGNEY J: Yes.

MR GIBIAN: Yes, to perform his or her obligations – so, no doubt, dental assistants or administrative staff or the like.

WIGNEY J: Yes.

MR GIBIAN: So, as I say, in terms of the apportionment of the income, well, it's not, with respect, right to say, well, the commission arrangements that he have – were that he would retain 40 per cent or the like of – or 45 per cent, depending on the amount of the fees generated by his dentistry work – that, therefore, 60 per cent was the administrative services. The situation was, after the purchase, that Dental Corporation owed the practice and owned the property – or leased the property and purchased equipment and the like generally for the practice, and one can't just simply say, "Well, 60 per cent was for administrative services provided to him". It was simply the remuneration arrangement which was entered into.

In terms of the cases – and I can come to it briefly, but in terms of the cases that are dealing with circumstances in which – both in employment context, but – and even,

perhaps, in this extended definition as well – dealing with the provision of equipment or the like, ordinarily, the circumstance of a worker providing equipment – and I think your Honours yesterday were dealing with trucks – would be more indicative of that worker operating their own business, or it not being a contract principally for labour, because it is a contract where the principal contractor is contracting to be provided with a truck and a driver, not just the driver.

We're in a circumstance in which the contract is that the principal contractor will provide the truck, and that, as I say, seems – or the equivalent in this case. That would seem to emphasise to us that this is all about his labour. It merely contains assurances that he will be provided with the equipment and the premises and the like that are necessary for him to do that work. Ordinarily, it's a circumstance in which the worker is providing the equipment that leads to doubt in this area.

WIGNEY J: You can conduct a business, can't you, by structuring it in such a way whereby another business provides all of the relevant services and equipment to enable you to conduct the business – service company, for example. That doesn't mean that you're no longer conducting a business. You're just conducting it in a way that someone else is providing all of the equipment and property and other services to enable you to conduct your business.

MR GIBIAN: Again, it would depend on the arrangements that were in place. The arrangements, as I – and I am, perhaps, repeating myself, but the arrangements here are – were that Dental Corporation owed the practice, owned the goodwill, owned the intellectual property and the like and provided the equipment and the services, and Dr Moffet worked in it. Now, if it was different – if the dentist owed the goodwill and owned the name and operated the business and merely had – was being – all Dental Corporation did was to provide the equipment and the premises, well, that might be a different situation, but that's not the situation.

WIGNEY J: So it would be a bit like a barrister's service company that owns his chambers, his books, employs the assistant - - -

MR GIBIAN: Yes, but the barrister, presumably - - -

WIGNEY J: The barrister's service company doesn't employ the barrister.

MR GIBIAN: No.

WIGNEY J: The only difference is goodwill, is it, and the name?

MR GIBIAN: Well, the operation of that business, that is, the barrister, presumably – well, the barrister is operating in their own name, presumably wishes to maintain their connections and derives the fees personally for the work that they undertake and are billed by the service company for the provision of services in the barrister's own business that they are conducting a sole trader.

PERRAM J: One could actually imagine a circumstance in which Dr Moffet's structure was actually used on a barrister. You could imagine one of mister – some entrepreneurial barrister could set up a business which provides chamber services in return for a cut of your fees.

MR GIBIAN: I don't know how that would play with the Bar rules, but there may be an issue about that. I hadn't turned my mind to it ..... independence, but, as I say, that was the arrangement here. If it were different, then it may be different, but, for the employment question, Hollis v Vabu and the following cases and the like do emphasise the ..... of goodwill and the capacity – the independence of the business and the like, so that is not an insignificant aspect for that purpose. And, certainly, for the superannuation question – that all of it is about him performing work and facilitating that – requiring and facilitating that occurring.

ANDERSON J: But, Mr Gibian, with the Service Agreement and the inclusion in the Service Agreement of the provisions which provide for making up a shortfall where your annual cash flow of the practice falls below an amount and the paying of a bonus, that suggests that the Service Agreement is not wholly for the performance of the labour of the person, doesn't it? It's about something else, which is making a profit for Dental Corporation, who acquired the business.

MR GIBIAN: Except that the labour for which the contract provided was the dentistry work that Mr Moffet was doing and the management work that Mr Moffet was doing.

ANDERSON J: But isn't it – am I – sorry to interrupt you.

MR GIBIAN: Of course.

ANDERSON J: You go ahead.

MR GIBIAN: That is so the management work that was required to be undertaken by Dr Moffet by the Services Agreement had within it the responsibility conferred by Dental Corporation for the performance of the practice, and the bonus and shortfall arrangements were for the purposes of facilitating and incentivising that work, as well as - - -

ANDERSON J: It was not small thing, though, was it, because I think Ms Batrouney took us to the tax return this morning which showed that there was a shortfall of some 229,000 is my recollection or something of that order.

MR GIBIAN: I think it was 290,000, yes.

ANDERSON J: 290,000.

MR GIBIAN: 291, I think. Yes, there was a shortfall in one year of a substantial amount. I think otherwise there were no other shortfalls, but - - -

ANDERSON J: Thank you.

MR GIBIAN: I don't say it's a small thing, but, as I say, it was a structure that was put in place to incentivise the way in which he would both derive income himself, that is, if he took more holidays, presumably it would be harder for the practice as a whole to derive income but also his management work in managing the practice.

ANDERSON J: Yes.

MR GIBIAN: In terms of the case law with respect to the superannuation question, there is actually relatively little in relation to the wholly or principally for the labour question. There are some older cases that – particularly Neale v Atlas in the High Court and World Book in the NSW Court of Appeal dealing with income tax legislation. Those cases - - -

PERRAM J: I think we're really the first court that has been required to have a proper look at this apart from Bromberg J, I think, aren't we?

MR GIBIAN: There are quite a few cases that refer to it in passing - - -

PERRAM J: In passing, but they're all - - -

MR GIBIAN: - - - without looking at it in great - - -

PERRAM J: But no one's actually - - -

MR GIBIAN: In great detail, yes. I think that's probably right.

PERRAM J: Can you just tell me how this Act works, because I notice I was looking at section 12 - - -

MR GIBIAN: Yes.

PERRAM J: - - - and I was asking myself, well, what is section 12 trying to do. I noticed that - - -

MR GIBIAN: I can. I think – if I can just have a moment.

PERRAM J: I noticed, for example, under section 12(9), the three of us appear to be employees.

MR GIBIAN: I can tell your Honour that there is a useful summary. Unfortunately it's in a case which – and it seems to have escaped part A at least of the authorities, which I think was just an error because what's included at tab 11 is the High Court decision Roy Morgan Research. There was a Full Court decision which is – the same parties, Roy Morgan Research v Federal Commissioner of Taxation 184 FCR

448 in which the then chief justice – sorry, no, the court as a whole described the legislation usefully from paragraph 3 to 14.

PERRAM J: Thank you.

MR GIBIAN: So that, in terms of going away, that may be of some assistance to your Honour.

PERRAM J: So the Charge Act imposes the charge, and it imposes it on an employer.

MR GIBIAN: The way in which the legislation operates is that there are two complementary pieces of legislation, I think done for constitutional reasons - - -

PERRAM J: Constitutional reasons, yes.

MR GIBIAN: - - - in relation to the imposition of taxation. The Charge Act imposes a tax upon an employer, using the broader sense that that term is used. The tax is by reference to what is called a Superannuation Guarantee Shortfall. That is calculated by reference to the Superannuation Guarantee Administration Act which sets out the methods by which that is done. In short, the shortfalls – so, as your Honour will see, paragraph – section 11 provides the definition of salary and wages in an inclusive sense including (a) commissions (ba) payments under a contract referred to in subsection 12(3). There's then section 12 which deals with what an employer and employee is and extends, or at least avoids doubt with respect to - - -

PERRAM J: But what's that – what's section 12 trying to do? What's the point of section 12?

MR GIBIAN: Well, it is defining the persons in relation to whom there may be a superannuation guarantee shortfall, and that is calculated, firstly, at paragraph – section 17 provides that a superannuation guarantee shortfall, if an employer has one or more superannuation guarantee shortfalls, they are aggregated. An individual superannuation guarantee is then defined in section 19 by reference to a calculation based upon total salary and wages versus – multiplied by the charge percentage which your Honours may know is - - -

PERRAM J: So the effect of the statute - - -

MR GIBIAN: - - - I think more slowly increasing.

PERRAM J: The effect of the statute is to collect any unpaid superannuation contributions which were made and to do that by means of imposing a security which is a charge directly onto the company.

MR GIBIAN: Yes.

PERRAM J: Is that the way it is?

MR GIBIAN: The charge can then be avoided by making superannuation contributions relevantly under section 22 - - -

PERRAM J: Okay.

MR GIBIAN: - - - which deals with - - -

PERRAM J: So - - -

MR GIBIAN: - - - defined benefits schemes, or section 23.

PERRAM J: So the charge comes first and then you discharge the charge by making the - - -

MR GIBIAN: Well, you can avoid an obligation to pay the charge, which is what any legislation hopes an employer will do by making superannuation contributions for the benefit of employees that are calculated in the way that section – and it deals with defined benefits and accumulation schemes separately in sections 22 and 23.

PERRAM J: But then here's the bit which puzzles me about section 12, which is quite a few of the people that are on the list in section 12 don't seem to me to be people who actually get the superannuation levy. I'm looking at, like, subsection (4) member of Parliament or the Commonwealth, member of the parliament of a State, judges, subsection (9). So how does - - -

MR GIBIAN: The charge can be avoided by various different arrangements, including defied benefits-type arrangements. I can't speak with personal knowledge about how the judges' arrangements or politicians' arrangements interact with that.

PERRAM J: But the - - -

MR GIBIAN: My general understanding is politicians actually and more recently earn much more interest from accumulation-type schemes.

PERRAM J: Yes, but there must be some provision in here which deactivates what is otherwise a pretty wide effect of section 12.

MR GIBIAN: Without being too specific on the run, if there are arrangements which are considered by the legislation to be an acceptable alternative, and defined benefits schemes and the like are one such – they are not based necessarily upon a particular level of contribution in a particular period, but they provide for a retirement benefit which is considered by the legislation sufficient to equip or avoid the charge.

PERRAM J: I'm not trying to be tricky about asking - - -

MR GIBIAN: No.

PERRAM J: - - - these questions, but I'm just trying to – when you look at this long list of 10 different types of person who the charge might be imposed in relation to, I just struggle to find some sort of kind of connecting thread between it all. What's it – what are they trying to do with it?

MR GIBIAN: Well, the purpose of the legislation is to provide or ensure for retirement savings for employees or people in other types of relationships, albeit they fall outside the strict common law concept, who for Parliament has decided is appropriate that there be such a protection. So I think that's the long and short of it.

WIGNEY J: It's endeavouring to require a broader range of companies or people to have to make provision for superannuation - - -

MR GIBIAN: Yes.

WIGNEY J: - - - one way or the other - - -

MR GIBIAN: Yes, and - - -

WIGNEY J: - - - beyond the traditional employee/employer relationship.

MR GIBIAN: Yes, and based, presumably, on a Parliamentary judgment that that's an appropriate social measure, and these provisions were introduced in the early 1990s by the Keating government, I think, in order to – as part of a compact with trade unions, I think, which partly offset against wage rises at that time on the basis that it was an appropriate social measure to ensure appropriate retirement savings - - -

PERRAM J: So that's the point of it.

MR GIBIAN: - - - for employees or similar persons as such.

PERRAM J: So then that's what we know when we come to retirement, work out what subsection (3) means.

MR GIBIAN: Yes. Just briefly in terms of the legislation, the charge is actually more than the contribution because there is an administrative component and an interest charge in the event that there is – that the contributions aren't made in a manner which avoids the charge and the tax office is required to remit – or the Commissioner is required to remit the shortfall component to the benefit of an employee in relation to whom a charge is collected into a compliant fund or the like.

PERRAM J: So one reading of subsection (3) is a very, very broad one which is it means what it says, but under that reading, I think, you would be an employee of your instructing solicitors. It's that broad.

MR GIBIAN: Well, that's something that Bromberg J was grappling with in On Call, and perhaps if I go to that. His Honour's decision is under tab 9. Just before I do, I don't need to take your Honours to it but I just note the earlier decisions in relation to taxation legislation, Neale v Atlas and World Book, seem to be primarily preoccupied with the related questions of whether a capacity to delegate the performance of a function or – means that the contractor is really one for a result rather than one for labour, and beyond that don't seem to be of great assistance in sketching out the limits of what is intended by section 12(3).

Bromberg J dealt with the issue – can I firstly – commencing, really, at paragraph 298 on page 143 of the report, and his Honour provides perhaps a briefer overview of the way in which the legislation operates at paragraph 300. At paragraph 301, at the bottom of page 144, his Honour goes on and deals with the interpretation of subsection (3), and he notes in the fourth line that:

> *Section 12(3) identifies an employee as a person who works under a contract that is wholly or principally for the labour of a person –*

and that:

> *The provision identifies that person as a person who "works" and also as a party to the contract that is "wholly or principally for the labour of that person" –*

and concludes, at the top of the following page, that:

> …*there must be a contract for the personal services –*

that is, for the person to perform work personally, which it is here. At paragraph 303- and my learned friend referred to this – his Honour refers to a circumstance perhaps more akin to the one your Honours were dealing with yesterday, that where there is payment for labour and something else, say, the provision of equipment, and uses the words "chiefly" or "mainly" to refer to the limitation of "principally" for the labour.

PERRAM J: We got that in yesterday's case, which is the provision of a truck and labour, so - - -

MR GIBIAN: Yes. And there's a question of what is "principally" in that context, if what is being provided is not just labour but labour and something else, and as his Honour says, clearly, the provision contemplates that such a contract may fall within this – within subsection (3), albeit that it will be an assessment of what "principally" means in that context. His Honour refers to the Explanatory Memorandum to a – in fact, a later amendment, the Taxation Laws Amendment Act No. 4 of 1993, which inserted section 11(ba), that is, in the definition of "salary and wages" for the purposes of clarity but in the course of which indicated that:

A contract is considered to be wholly or principally … if more than half of the value of the contract is for labour.

At paragraph 304 and 305, his Honour notes the potential – and I don't need to read them – but notes the potential breadth of the ordinary language of the provision. His Honour refers to a solicitor and a client, rather than a barrister and a client, as a potential example, but at paragraph 305 notes the context, that is, what is sought to be achieved in a broad sense by the legislation in providing for occupational superannuation.

PERRAM J: Yes.

MR GIBIAN: And it's on that basis that his Honour, at paragraph 306 on page 146, concludes that the provision can be:

…limited by the evident purpose of the legislation.

And in the middle part of that paragraph, that:

Parliament intended to cover employment-like relationships in which work is performed for remuneration or payment despite the fact that the relationship in question may not be recognised at common law as a relationship between an employer and employee –

and refers to the other subparagraphs in section 12 as being persons in a "employment-like setting". I notice Logan J did, in the Racing Queensland case - - -

PERRAM J: He didn't think that some of them were very employment-like, no.

MR GIBIAN: Didn't think some of them were very employment-like, particularly the political offices.

PERRAM J: Yes.

WIGNEY J: Military – his Honour always likes to slip in a military reference to these cases.

PERRAM J: Yes.

MR GIBIAN: I don't comment.

PERRAM J: Is that a – Mr Gibian, is that a convenient time?

MR GIBIAN: Of course.

PERRAM J: Have you got long to go?

MR GIBIAN: I do need to refer – I've covered some material - - -

PERRAM J: I'm not hassling you, I'm just curious to know.

MR GIBIAN: Indeed. I have a little while to go. I have a very short space to go on the superannuation question. I should refer to some of the evidence briefly in relation to the cross-appeal, albeit that your Honours have asked me a number of questions which have curtailed some of what I need to say in that respect.

PERRAM J: All right. Well, the court will adjourn until 2.15.

ADJOURNED **[12.46 pm]**

RESUMED **[2.15 pm]**

PERRAM J: Yes, Mr Gibian.

MR GIBIAN: Thank you, your Honour. I was just with On Call Interpreters, which is under tab 9 in the bundle and the passage at paragraph 306 on page 146 where his Honour, by reference to the context and purposes of the legislation, refers to employment-like relationships and poses a question of whether, in all the circumstances, the labour component of the contract in question could have been provided by recipient for labour employing an employee. Now, the appellant says that that's wrong. What is noticeable about it, of course, is that Bromberg J was applying that concept or that question as a limitation upon the scope of what would otherwise, in accordance with the ordinary language, fall within the confines of subsection (3) of section 12.

So in a sense it's not – at first instance, both parties referred to Bromberg J's decision, and I don't think anyone said he was wrong at first instance, so I don't want to depart from it now myself. But, in a sense, it's not for us – it's not in my client's interests to defend a limitation upon what would otherwise be the scope of the operation of the section. And, in my submission, if one simply applies the words "wholly or principally for the labour", then that does describe, for the reasons that I've explained, the Services Agreement that was in place after the purchase of the business by Dental Corporation. If your Honours are attracted to Bromberg J's formulation, then we would also say that plainly what Dr Moffet did could have done by a person employed. That's apparent from, at least, just as a matter of the application of the duties that he was undertaking.

It's also apparent from the fact that, as the court has been taken to, the Acquisition Agreement at page 100 contemplated the employment of dentists in the practice. So clearly that could have been done. Can I also just note in that respect at – and this is within an affidavit of Mr Evans who was referred to in – as a witness giving

evidence for Dental Corporation below – under tab 11 in part C. In his affidavit, he describes, at page 376 of the appeal book, some things that happened in the latter part of Dr Moffet's engagement, and including at paragraph 80 that a Dr Pilakis was engaged as practice manager, or practice principal – paragraph 80 and 81 as practice principal in place of Dr Moffet at a certain point in time. And Dr Pilakis was an employee of Dental Corporation, and that's a matter that was referred to in – I can just give your Honours the reference – page 122 of the transcript, lines 40 to 45.

WIGNEY J: What is an employment-like relationship? It's a rather begs to the question, doesn't it?

MR GIBIAN: It's - - -

WIGNEY J: I mean, if Dr Moffet was an employee, it's a rather unusual employment-like relationship here I would have thought.

MR GIBIAN: Well, I think what is endeavoured to be encompassed is some kind of continuity of engagement which I think addresses the concerns which are – underlie the questions about barristers or solicitors or the like and a client who the lawyer appears for from time to time. I think that is what is being contemplated there. But there is – the precise confines are not crystal clear, but if I were to interpolate, that's what I would suggest his Honour was getting at. And, in my submission, that's what we do have here. We have an ongoing agreement for Dr Moffet to perform work for Dental Corporation. And I think that's really what his Honour was getting at. As I say, on the appellant's submissions, I think I've really dealt with the two matters that are raised as to why, in their submission, the Services Agreement is not a contract for the labour of Dr Moffet, being the provision of administrative services and the payment arrangements. Just in relation to the administrative services, I think I need to clarify the sort of 40 per cent, 60 per cent issue, if it wasn't clear from what I said earlier. The arrangements under the Services Agreement was that all of the fees are paid to Dental Corporation, and Dental Corporation then prepares an invoice for Dr Moffet to provide to them, which it pays – and it pays some money to Dr Moffet.

There's no arrangement, as there would be in the service company type situation that Justice Wigney was raising with me, any invoicing by Dr Moffet of Dental Corporation for the provision of administrative services. That's not what the arrangement was. Neither is there any contractual arrangement that the 60 per cent, or the money that they retain that they receive from patients, is spent on administrative arrangements, nor was there any evidence as to what money was or was not spent on, and whatever administrative services are provided. So it's not – this was a contract for labour. The only payments for which the contract provided was payments to Dr Moffet from Dental Corporation.

WIGNEY J: Yes.

MR GIBIAN: Unless there's anything further, that was what I proposed to say on the superannuation point. I'm not sure I've suggested a test different to anything that

Bromberg J said. As I say, the "employment-like" reference is, as I read, an attempt by his Honour to impose a sensible understanding of the breadth of the words that are in subsection (3) of section 12, and it's rather the appellant that asks for them to be discarded, without suggesting any other approach other than simply reading the words "wholly or principally for the labour". In relation to the cross-appeal, in answer to questions from the bench, I have dealt with a good deal of the material I want to cover, but can I just deal with it in overview.

Firstly, just in relation to the standard of or the appellant – the nature of the appellant task in this context, my learned friend said something by reference to your Honour Justice Perram and the Chief Justice's judgments in Aldi about – to the effect that a sufficiently clear difference of opinion or matters of that nature. That approach is supportive of the idea that there doesn't have to be a particular identifiable error if there's just disagreement as to the result, subject to that type of wording. We have referred in the written submissions to a more recent High Court judgment in Minister v SZVFW (2018) HCA 3. I wasn't going to read – it's footnote 1 on page 2 of our written submissions.

What the members of the court said, particularly Gageler J, ultimately at paragraph 49, and Nettle and Gordon JJ ultimately around paragraph 149, was that the evaluative nature of a decision doesn't affect the standard of review. Either a decision is discretionary or it is not. If it is discretionary in the sense that the judge at first instance could have selected a number of different outcomes, all of which may have been lawful, then the House v The King type approach is to be applied. If a judge at first instance, albeit by a process that may involve a degree of weighing and evaluation, is making a decision in relation to which there is only one answer, then the decision is either right or it's not, and if the Full Bench forms a different view, then it cannot resolve an appeal simply by saying it was open to the judge at first instance to decide the matter in that way.

Their Honours there were dealing with, as your Honours probably know, a question of whether an administrative decision was unreasonable, which, as their Honours accepted, involves a degree of evaluation, and in relation to which minds might differ, but, nonetheless, if it comes on appeal, then either the decision was legally unreasonable or it was not. It was valid or it was invalid, and if an appeal court forms a different view, then it must give effect to that different view, and the type of decision that we're dealing with here is the same, in my submission, that is, Dr Moffet was either an employee or was not an employee. It involves weighing various factors, but either your Honours agree or disagree with the primary judge. Of course, we do say we point to errors in the way in which, with respect, his Honour approached the question, but, nonetheless, ultimately, that is the standard of review.

Can I also say my learned friend referred to findings in relation to credibility, by reference, firstly, to a number of passages in argument, or a number of observations by the learned primary judge in argument, which are not findings at all, of course. They are merely interactions with the bench. At paragraph 87 of the primary judge's decision, his Honour does make clear that to the extent that he has made findings of

credibility, they were relevant only to the long service leave resignation issue. He made clear that it wasn't – that he wasn't taking those into account, or they were not relevant to a finding in relation to the contractor/employee issue, and he says that at the commencement of paragraph 87. Can I move then to what we say in relation to the employee question more generally. Can I go to, very quickly, the decision at first instance.

The reasoning in that respect starts – this is under tab 5 in part A. It really starts at paragraph 48, and his Honour deals with the self-description of the relationship, really, from paragraphs 48 to 52, then the issue of hours and days of work from paragraph 53 to 57, the control issues in relation to the day-to-day operations of the practice from paragraphs 58 to 61, or 62, perhaps, the financial arrangements from paragraph 63 to sixty – well, perhaps a slightly different issue, but really through to 71, and then expresses his conclusions in relation to the assessment of the totality of the relationship from paragraph 72 onwards, and summarises, albeit expressly not exhaustively, the matters that his Honour considered significant in paragraph 73, including the express provision of clause 14.1 of the Services Agreement, the second and third dot points really dealing with issues of control.

The fourth dot point, towards the bottom of page 57 of the appeal book, his Honour expressly refers to the absence of an intent on the part of Dental Corporation, seen in the subjective evidence of Mr Evans, to establish an employment relationship, and there is an issue we raise in that respect. The top two dot points on paragraph 58 – sorry, on page 58, still within paragraph 73, his Honour deals with the payment arrangements including the bonus and the shortfall, and then at paragraph 74 and 75, there appear what, in my submission, appear to be the crucial findings that Dr Moffet was continuing to conduct his own business. As your Honours have apprehended from the discussion before lunch, we say that his Honour was wrong to suggest that Dr Moffet was continuing to run his own business because, quite to the contrary, it had been purchased by Dental Corporation, and he was indeed constrained from running his own business in the work that he was doing at the practice. In – the significance of whether or not it could be said that Dr Moffet was running his own business or not is made clear the authorities following on from Hollis v Vabu.

I don't want to take up too much time in reading from those. Can I just note that we, in the written submissions, made reference – or we've made reference to those primarily at footnote 6 on page 6 of our written submissions within paragraph 21, Hollis, Ace Insurance, Quest South Perth and Bywater v Appco, being a number of recent decisions in that area. I note that – and your Honours may have been taken to this in the other matter, but in Tattsbet, which is Tattsbet v Morrow, which is under tab 13, Jessup J at page 61 – in paragraph 61 indicated that, in his view at least, there wasn't a dichotomy between working, running your own business and working in another business, that it's not an entirely determinative factor. Now, to some respects, he expressed a difference of opinion to the members of the Full Court in the Quest South Perth matter.

WIGNEY J: Sorry, what paragraph was that at?

MR GIBIAN: Sorry, it's on – it's under tab 13, page 61 – at paragraph – both page and paragraph 61.

WIGNEY J: Yes.

MR GIBIAN: I think, where it was said that – the primary judge in that matter:

> *…ultimately saw the question as one which involved, in effect, a dichotomy between a situation in which the putative employee works in the business of another and a situation where he conducts his or her own business as an entrepreneur.*

And that was to detract from the central question essentially as to whether the person was an employee or not. In that respect, there is some difference in emphasis between what Jessup J said in Tattsbet and some of the other cases. In my submission, though, nothing that his Honour is saying is to detract from the proposition that it is a central consideration. I think his Honour seems to be disagreeing that it is an alternative test that it's determinative in itself, that is, whether or not a person would be said to be running their own business.

I don't think his Honour is suggesting that it is other than a significant and central consideration. And that's perhaps consistent with what Buchanan J said in ACE Insurance matter which is under tab 1 [2013] 209 FCR 146. And, again, I don't want to take up too much time, but I note at page 170 within the report at paragraph 93, his Honour – and his Honour's judgment was – well, Lander and Robertson JJ expressed agreement. At paragraph 93 his Honour, as part of his review of the authorities, suggested that it appeared to him that:

> *…to have been in Hollis that a real emphasis was authoritatively placed on the notion of working in the business of another, rather than working in the business of the individual.*

His Honour referred to that question at – returned to that question at page 182 of the report at paragraphs 128 and 129 where his Honour said that:

> *The second proposition was distilled from Hollis at 40, working in the business of another is not inconsistent with working in a business of one's own. The High Court in Hollis did not suggest to the contrary. Indeed, the High Court said at 40 that the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be sufficient to indicate that the person is an employee.*

And then at 129:

> *The importance of the subsequent analysis by the trial judge was, however, that it showed that the agents had no business of their own; they were working only in the business of Combined.*

So the distinction seems to be that to the extent there is one that Jessup J was – and Buchanan J were saying, well, it's possible to work within a business but to still be running the business of your own, but that it is – that the central consideration is whether it can be said the person is running a business of their own rather than working within the business of another. And as I've - - -

WIGNEY J: But that - - -

MR GIBIAN: I'm sorry.

WIGNEY J: - - - more or less comes back to the proposition I put to you before. And when I say proposition I was putting it to you for - - -

MR GIBIAN: Indeed.

WIGNEY J: - - - observation rather than having expressed any firm view about it that one or alternative here was that Dr Moffet was conducting his own business, albeit one different to the way he conducted it before, that business being conducting a dental – or providing dental services, albeit not burdened by administrative arrangements, which were now looked after by the Dental Corporation. So he is providing a business, in a sense, for the benefit of someone else's business as well, but, nonetheless, conducting a business. As I said, I'm not expressing any firm view about that.

MR GIBIAN: Yes.

WIGNEY J: It just seems to be one - - -

MR GIBIAN: Well, it's a question as to what are the indicators of a business in that context. If your Honours have the tab 6 – the Fair Work Ombudsman v Quest South Perth – in that matter, North and Bromberg JJ – and this is, really page 389 and 390 of the report. Their Honours, particularly at 177, note that:

> *…at least since Hollis, it may be accepted that the distinction between an employee and an 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".*

And at 178 a reference to a similar sentiment in Stevens v Brodribb and a number of other authorities, to which reference is made. At 179 on page 390 there is, by reference to an extract from On Call, albeit the employment question rather than the superannuation question that arose in that case – a reference to what might be a business in that respect, including the acquisition of tangible or intangible assets which would – and the pursuit of profit – business which would typically have value, goodwill and saleable assets beyond its physical aspects – common intangible asset, being the business – its name, brand reputation and goodwill and activities organised in a business-like manner. So when one looks at that, in my submission, Dr Moffet

wasn't operating his own business, because he was operating within a business the goodwill and name and customer relation of which was owned by Dental Corporation.

WIGNEY J: And he certainly couldn't – he couldn't develop his own name, brand, reputation or goodwill within - - -

MR GIBIAN: Yes.

WIGNEY J: - - - business, because - - -

MR GIBIAN: In that work that he was doing for - - -

WIGNEY J: That's right.

MR GIBIAN: - - - Dental Corporation, yes.

WIGNEY J: Because whatever he was doing was, in a sense, enhancing the goodwill of that – what – the business now owned by - - -

MR GIBIAN: That they owned – yes, that Dental Corporation owns, yes. So that's what I would say to your Honour's question, and that's the sort of indicia of – now, if he was able to advertise himself and take – was working at lots of different practice and the like and taking patient with him - - -

WIGNEY J: But he can't. He can only provide it for that one – at least dental services, anyway.

MR GIBIAN: Yes, at that location - - -

WIGNEY J: He can only provide it for that one - - -

MR GIBIAN: Yes. Yes. So that's – and that's the essential aspect of what seemed to be most persuasive to the primary judge, with respect. There were two additional matters in that respect beyond what I said before lunch, but obviously I reply upon the provisions of the services contract about providing personal service and the standard of service and the capacity to terminate if the work isn't being done to the standard that Dental Corporation requires. In terms of the conduct of a separate business, there were two additional matters that I wished to raise. One was – I think I maybe have said this before lunch, but the use of the name Active Dental – albeit it was the name that was being used before the purchase. It was then Dental Corporation's name.

The second additional feature was that there was reference to – in the primary judge's decision at paragraph 68 and 69 on page 55 and 56 of the appeal book to Dr Moffet starting a consulting business in two thousand and – or in the financial year ending 2013, and his Honour set out in paragraph 69 on page 25 a couple of articles

in relation to that matter. The nature of the consulting business is – seem to be assisting other dentists in their conduct of their practices. There are two things to be said about that. The first is that, for the purpose of working out whether or not – or for assessing whether or not Dr Moffet was an employee of Dental Corporation, one has to examine what he was doing for Dental Corporation.

If he's in the latter part of this engagement – is contemplating setting up a business which is not directly itself providing dental – undertaking dental work, but on a consulting basis to other dentists, that is, with respect, irrelevant to the question of whether or not, when he's working for Dental Corporation, he is an employee of Dental Corporation. The tax return seemed to indicate that, if any, he earnt very little money in the relevant period, at least, by use of that. There was reference to speaker's fees of $1700 or something on one of the tax returns, so it doesn't seem to be a significant feature in any event.

The second area of error that we have sought to emphasise is the reliance that was placed upon subjective intent of Dental Corporation, particularly in the fourth dot point of paragraph 75 of the primary judge's judgment of page 57 where his Honour identified as a matter he had taken into account the absence of any intent on the part of Dental Corporation to establish an employment relationship, and your Honours will understand that our submission is that in terms of the interpretation or characterisation of a contractual relationship, evidence of subjective intention is irrelevant. We are in the objective theory of contract arising from ..... long run of decisions of judgements of the High Court. That is equally true of whether a contract is an employment contract or not, and, in my respectful submission, it was an error for his Honour to take into account what Mr Evans said the intention of Dental Corporation was or was not in relation to the type of relationship it wished to establish.

The third area which seemed to weigh heavily on his Honour was the question of control, and that occupied two parts of – or two of the dot points in paragraph 73 on page 57, and there are, perhaps, two elements of the aspect of control. The first is in relation to the professional work of Dr Moffet, which was expressly referred to in clause 4.2 of the Services Agreement – that Dental Corporation was recognise the – or respect the professional judgment of Dr Moffett. In that respect, the fact that a person – and exercises professional skills in a manner which is either as a practical matter or, perhaps, as a legal matter incapable of being subject of the direction does not prevent that relationship being one of employment and, in that respect, I have referred to what was said by Mason J in Stevens v Brodribb, which is under tab 12 in the bundle at pages 28 and 29 of the report, where his Honour referred, in the paragraph commencing right at the bottom of the page – about point 7 on the page, that the traditional formulation have been – the control test had a long history of judicial acceptance.

Although it is true that there are criticisms of it, it has been said a test which places emphasis on control is suited – is more suited to social conditions of earlier times in which a person, engaged in another to perform work, could and did exercise closer

and more direct supervision than is possible today and it is said that, in modern post-industrial society, technological developments have meant that a person so engaged exercises ..... expertise in consistent with the retention of control by the person who engages him and, accepting that, the common law has been sufficiently flexible to adapt to change in conditions and it refers to control so far as there is scope for it and the fact that Dr Moffett was a professional and necessarily made his own decision about the treatment of patients does not determine matter.

WIGNEY J: But that does not mean that Dental Corporation couldn't come in and tell him that he should be performing more root canal therapy or something - - -

MR GIBIAN: Exactly.

WIGNEY J: - - - or less.

MR GIBIAN: Or the fact that they could not does not mean that it is not an - - -

WIGNEY J: Yes.

MR GIBIAN: - - - employment relationship developed. The trial judge did appear to refer to an absence of evidence that Dr Moffett was told to treat more of a particular type of patient or to apply particular types of treatment or the like as relevant and, with respect, we don't think that that is a correct approach. The second element of control was – to which his Honour referred – was in relation to hours of work and days and the like. I think maybe I dealt with that in answer to questions earlier. The fact – the situation was that Dr Moffett was imbued with a degree of managerial control and thereby a certain flexibility in that respect. That was the evidence.

The fact that a managerial level worker – to use a neutral term – has some flexibility in terms of hours or deciding themselves when it is – when they are able to make leave in the context of the business, again, does not disable or is not inconsistent with the concept of the person being an employee and this doesn't seem to be markedly different from that. As I've said, it's not that there was no controls. The service agreement itself imposed a certain standard, in terms of the standard of the work to be performed. The revenue measures were prepared on the basis of an expectation as to the amount of work or the amount of time that would need to be worked by Dr Moffett in order to meet those thresholds and, ultimately, Dental Corporation was able to terminate the Services Agreement if it was not satisfied that the work was being undertaken adequately.

There was also evidence – and it's probably sufficient – particularly towards the end of the engagement that Dental Corporation became more involved in more particular decisions. I note within the evidence of Dr Moffett – and this was in his initial affidavit under tab 9 at pages – sorry – page 48 – there was reference to requests for pay rise for employees in the practice as being refused by Dental Corporation. At paragraph 50 – sorry, page 52, paragraph 127, there was reference to a direction in

relation to the allocation of patients – that they would be allocated to a particular dentist, rather than to Dr Moffett. And within the evidence of Mr Evans of Dental Corporation, under tab 11 at page 376 from paragraph 78 onwards, he indicated that Dental Corporation had become more – had to become more involved in the running of the practice as a result of the decline in the practice's profitability.

So it became more involved in directing how things were done and ultimately appointed someone else as the practice principal as a result of a concern as to how the practice was being run or of, at least, its profitability. So it's not that there was no involvement or governance by Dental Corporation in relation to the operation of its practice, as you would expect. Finally, in the context of express – the fourth matter that we've referred to in the primary judge's decision is the weight that was given to the express stipulation in clause 14.1. I admit that his Honour has indicated expressly that he didn't find it necessary to rely upon that provision as determinative or to resolve any question of ambiguity, so it may be I can't take that too much further but can I just provide two references that are relevant to the weight to be attached to that matter and these are within the transcript at page 110 to 111.

Mr Evans indicated that this was a standard form contract, albeit he said there may some negotiation about it but it was a type of agreement that was rolled out across various practices that were acquired by Dental Corporation as one would imagine looking at it. And secondly, at page 113 of the transcript between about lines 20 and 30, there were proposed changes made to the arrangements in order to, among other things, address payroll tax issues. So there was a clearly a consciousness in terms of the construction of the relationship or the documents of obligations under various pieces of legislation. Unless there's anything further on the employee issue, that's what I propose to say.

Finally, with respect to – there is an additional issue in relation to the long service leave question, which is as to whether or not Dr Moffett was entitled to long service leave under the particular provisions of the New South Wales long service leave legislation, namely section 4(2)(a)(iii), which entitles a person to long service leave if they terminate their employment or if a worker terminates their employment on account of illness, incapacity or domestic or other pressing necessity between five and 10 years of service. This is an issue that arises only if your Honours find Dr Moffett would otherwise be a worker for the purposes of that legislation. The primary judge found that – or was not satisfied that Dr Moffett fell within that provision and his Honour's reasons in that respect are found or commence at paragraph 79 on page 59 of the appeal book and specifically at paragraphs 85 and 86 on page 61, his Honour appears to rely upon what is asserted to be an absence of medical evidence establishing a degree of illness or incapacity on Dr Moffet's part or the absence of some independent corroboration of the concerns about bullying or the claims about bullying and the like conduct made by Dr Moffet. The – his Honour appears to approach the issue as to whether or not a person terminated their employment on account of illness, incapacity or other pressing necessity by reference to whether or not those matters had been objectively determined rather than what in fact motivated Dr Moffet in order to bring his engagement to an end.

We've referred to a few authorities in that respect. Can I just note the extracts in the judgment under tab 8 in the bundle, a decision of the then New South Wales Industrial Commission Johnson & Johnson v Amalgamated Metals Union. Their Honours – or it's a decision of Watson J – can I just note the passage – the extracts that appear from page 369 and onwards – or right at the bottom of 368 – sorry, 468, I should say, his Honour refers to South Australian decision which examined whether or not the resignation might be justified where there was alternative work available, and then at the first paragraph in page 469 indicates that that approach is not open under the relevant provision, section 42(a)(iii) and refers to an earlier decision in British Motor Corporation v Chance where – and I don't need to read it but the extract there sets out the approach.

And commencing at about point 4 on the page the then Commission in court session said that:

> *When a worker is making a decision to terminate his services with his employer he is almost certain to take into account a number of facts and circumstances. It is open to the court in our opinion to find in an appropriate case that the worker's illness caused him to terminate his employment even although a factor other than his illness may have been taken into account by the worker.*

And then:

> *But in our opinion there is no warrant for construing the act as meaning to qualify for proportionate leave on illness ground a worker must show the illness necessitated the termination of the employment. The words used in the statue are plain, terminated by the worker on account of illness and we see no justification in adding a qualification to the word illness such as severe enough to necessitate the termination of employment.*

And over the page on 470 there's a reference to another decision in Computer Sciences of Australia Pty Ltd v Leslie [1983] 6 IR 188 where there is an extract setting out in question from 1 to 4 at about point 2 on the page of the approach to be adopted. In this matter, Dr Moffet gave evidence that he terminated his employment in part at least on account of the effect that the circumstances of his employment – or his engagement were having upon his health, that he was seeing a psychologist in that respect and whilst he was terminated as to whether – whilst he was, I should say, cross-examined as to whether or not he was – had had enough of working with Dental Corporation, it was not suggested that he was not in fact receiving medical treatment at the time or even that – to exclude that as part of the reason why he wished to terminate his engagement, and the approach, with respect, that the trial judge adopted as well in that respect. Unless there's anything further - - -

PERRAM J: Thank you, Mr Gibian. Yes, Ms Batrouney.

MS BATROUNEY: Your Honours, I have 15 matters in reply, most of them arising out of questions that your Honours have asked. The first matter arises in relation to

whose business was being operated, and this will necessitate some jumping around. I won't take you again to the passage in Tattsbet where it was said that operating in someone else's business is not inconsistent with operating your own business. But I would like to take you to the evidence about Dr Moffet operating his own business under the name of David Moffet's Active Dental throughout the course of the engagement.

So if we could start with the restraint, the restraint only restrained the use of two business names. Could we go to part C, page 102 which is schedule of the Acquisition Agreement. So appeal book 102, you see there, your Honours, is schedule 6 and it says Vendor IP and under number 1 – this is at AB 102 – practice names. The two practice names there are Active Dental Parramatta and Parramatta Dental Clinic. And if it matters, down at 4 there's a couple of domain names: activedentalparramattadentist.com and dentistparramatta.com. There is evidence in the transcript as to the operation of David Moffet's, that is, David Moffet's Active Dental. It in part C at tab 13.6. No, I'm going the wrong way. My junior is directing me to part C at page 476 to 478, which is tab 14, I'm sorry.

I think my learned friend highlighted my version of the transcript, I'm sorry. So I'm sorry, your Honours, page 84 of the transcript which is at appeal book 477. There's cross-examination about the use of the business name David Moffet's Active Dental. I won't drag your Honours through it now but perhaps if I could just leave you with the references. So it's appeal book 477 at page 84 from line 45; you will see the evidence – it's like pulling teeth but – I'm sorry, I didn't mean that pun. I really didn't mean that pun, I'm sorry. But it goes through – you will see at page 85 which is appeal book 478 at line 36, the evidence is then:

> *Just in relation to identity on the first page, Dr Moffet, Active Dental; do you recall whether you were the person responsible for identifying that business there as David Moffet Active Dental?---I used to call the business David Moffet's Active Dental.*
>
> *So you used to call it David Moffet's Active Dental?---That's what it was called when Dental Corporation purchased it.*
>
> *Just on that, could I actually – in fact, you and your wife continued to use that sign-off, did you not, during the time you were engaged by the respondent?---That was the name of the business.*

And it goes on over the page right through to appeal book 480 where the document is tendered and that tender document is exhibit R4, which is set out in tab 13.6. Now, your Honour, this is appeal book 377. You will see there's a series – it's just printouts from a website, and your Honours will probably do exactly what I did and say, well, this is – all those posts say over six years ago. If you go over to page 378, for example, there's a whole series of commentary going on over six years ago, etcetera. That's over six years ago from when my learned junior printed them out in 2011. So it is – '17. So it is during the course of the engagement. And you will see

that at one stage there's a complaint that Dr Moffet answer at page – appeal book 382, "Papaya Man" complains about a bad experience, and then Dr Moffet responds to that there.

Again, I won't drag you through it, but one wonders if it was only the goodwill of Dental Corporation why Dr Moffet would bother responding. So we say there was evidence to underlie his Honour's finding that Dr Moffet continued to build his practice. My second point, your Honours, is that Justice Perram mentioned that it's unusual to have a shortfall as an indicia of an employment relationship. Might I also add that it's also unusual to earn nothing up to where the practice brings in $250,000. So until the practice earn more than $249,999, Dr Moffet was remunerated for nothing. The third point is going back to the point that was made before the presiding judge.

Justice Perram mentioned that it was not Dr Moffet's business. Well, there seems to be some evidence that he was running a business. And it might well be that his business was supplying the dental services to Dental Corporation. You will see in the restraint, if we go back to the actual restraint, which is in the Acquisition Agreement, tab 9.1.1, the restraint is – starts at AB84. But then you will see at AB85, the very last line on AB85 is an exception at 20.6, and it says:

> *Exception. Clause 20 does not restrict a prohibited person from providing dentistry services under the Services Agreement.*

So it's open to this court to find that the business being carried on by Dr Moffet was the business – as I think foreshadowed by Justice Wigney, was the business of providing dental services to Dental Corporation. Again, I won't go – take your Honours through it, but again refer to that – the question of whose business enterprise is not critical to the question the court has to answer. And could I refer you to Allsop J, as he then was, in Tattsbet at tab 13, paragraph 5, and also to Jessup J at Tattsbet at paragraph 61. Your Honour Justice Perram mentioned that we're at the pointy end of Hollis when we're talking about whose business a person is working in.

Might I suggest that the correct test was referred to be Jessup J in Tattsbet at paragraph 60. He – paragraph 60 at Tattsbet, which is tab 13 of the joint bundle at about point 5 on the page on page 61 at paragraph 60, Jessup J says:

> *On the present appeal, it was not suggested that that review, or the authorities considered in it, cast any doubt upon the high-level articulation of the correct approach offered by the primary judge, referred to in para 53 above.*

And if your Honours go back to 53, Jessup J sets out the – what he says is the correct approach at paragraph 53. I won't read it all out:

> *The characterisation of the relationship … no one matter is likely to be determinative … some factors will attract more weight than others … and the*

test is multifactorial … all the relevant circumstances need to be weighed and the totality of the relationship identified.

I don't think there's really any dispute about that. The fifth matter I wish to raise is that there was some suggestion by my learned friend that the provision of the premises and the staff by Dental Corporation are simply provided separate to the engagement of Dr Moffet, much like a law firm would provide premises for their employee staff. It's our submission that that's simply untenable in light of the actual agreement itself. In particular, the agreement was that Dental Corporation would provide the equipment and the premises to the practice – to Dr Moffet. So it was a definite exchange of services and equipment. Could I take your Honours to – or perhaps I will just ask you to note the reference, which is at part C, appeal book 40, clause 6.1 states that – sorry. I'm looking at 240. Did I say something different? I said 40. I'm getting delusional. Appeal book – part C, appeal book 240, clause 6.1:

Dental Corporation provide administrative services to the practice principal.

Again, my sixth point is that the services are provided to Dr Moffet. It is like the solicitor providing premises to an employee solicitor. Your Honour the presiding judge said that barrister could perhaps – or you speculated that barristers could perhaps set up a practice similar to Moffet. Well, if your Honour pleases, in Victoria that is almost exactly what the situation is. For example, a barrister will pay for – I pay whatever percentage of my income to my clerk and my clerk provides, in exchange for that, telephone billing and mail services. There will be no suggestion that my clerk is my employee or that I am his employee, or its employee.

The eighth matter I wanted to raise is that my learned friend suggested that the labour that was being provided was dentistry and management – for dentistry and management service of Dr Moffet. It's important to emphasise that both the bonus and the shortfall were calculated by reference to the income of the practice, not by the work of Moffet alone. And it is possible, it's suggested, that Dr Moffet could have earned a bonus under the Services Agreement without lifting a finger. And, indeed, he did go away for 13 weeks. The ninth matter I wanted to raise was Perram J mentioned the extremely broad nature of section 12(3) and that it could in fact mean that my learned friend was an employee of his solicitor.

It's our submission that we do not need to solve that conundrum. It is not this court's task, if it could be done, to specify the meets and bounds of section 12(3) of the Superannuation Guarantee Act. This court simply has to decide, for present purposes, whether or not the Services Agreement was a contract principally for the labour of Dr Moffet. And, at the risk of seeking to seem like I'm ingratiating myself, could I refer to some – a paper delivered by Wigney J before he left the bright side, under the title of Text Context and the Interpretation of a Practical Business Tax, that subsequently was published in 2011, 40 ATR at 94. And I'm sorry, I do only have one copy, which I will hand up. But your Honour was - - -

WIGNEY J: I've got no recollection whatsoever.

MS BATROUNEY: - - - perhaps bemoaning the fact that tax lawyers, what I might say, had built up lore, l-o-r-e, in relation to the GST, it being said to be a practical business tax. And your Honour said as follows:

> *It must come as a matter of immense disappoint to some specialist practitioners when a judge, or worse still, a bench of judges, appear to sweep aside all this background and context and arrive at an interpretation of a particular provision of the GST Act by focus on, dare I say it, the text of the Act, that is, the words actually used in the legislation.*

And we suggest that that is all this court has to do in this case, is focus on the words actually used in the legislation. Is this a contract principally for the labour of Dr Moffet? In relation – my 10th matter is in relation to the suggestion that the test is whether or not the work could have been done by an employee, it's my submission that that test opens a Pandora's box by focusing on the activities that are undertaken rather than the relationship that underlies those activities. The 13th matter I wish to raise is that the – my learned friend suggested that this court should focus on the fact that all of the fees were paid to Dental Corporation and that Dr Moffet was simply handed out a percentage of those fees.

The statutory question, of course, does not focus on the contractual payments for labour. The statutory question is whether the entire contract is a contract principally for labour. The second last thing I would like to say in relation to the nature of an appellant review, and I know your Honours went through this uphill down dale yesterday, but I just wanted to make the point, as Allsop J as he then did made in Brania, that this not a re-hearing. This court must find error. So I will refer you to Brania, which is at tab 4, page 438 at paragraph 30. This court simply does not lay aside the findings of the primary judge. Before this court can enter into, this court must find error.

My last point I wish to make in reply is picking up the last point in relation to goodwill, it was suggested that the goodwill could only have been goodwill of Dental Corporation. Could I refer your Honours to the recent decision of the High Court in Commissioner of State Revenue v Placer Dome [2018] 93 ALJR 65 at page 78, paragraph 62, where the court, of course, refers to there being a number of different types of goodwill, and one of those could be, indeed, personal goodwill. And may I suggest that it is possible that the goodwill that Dr Moffet was generating, and continued to generate, was personal goodwill.

PERRAM J: I think it was personal goodwill. That's why they needed to chain him to the contract, because he actually did have – in a sense he was, to phrase they use in passing off cases, he was the attractive force of the business, and they needed to confine the attractive person of the business to their business, as in - - -

MS BATROUNEY: But they - - -

PERRAM J: - - - using the shortfall.

MS BATROUNEY: But, indeed, they weren't successful in that, because he continued to run Dr Moffet's Active Dental and continued to build his personal goodwill.

PERRAM J: I think he was allowed to do that outside the restraint area. There was a geographical restraint area and a temporal restraint, so I imagine he could run that dental business ten miles away.

MS BATROUNEY: In Melbourne or somewhere.

PERRAM J: In Melbourne or - - -

MS BATROUNEY: Yes. I think - - -

PERRAM J: Where clean teeth are needed.

MS BATROUNEY: I think - - -

WIGNEY J: It depends where Papaya Man was located, I suppose.

MS BATROUNEY: Could I quickly move to the cross-appeal. In relation to the employee – employer issue – the common law issue, it's our submission that Dr Moffet's case simply does not lead to a sufficient clear difference of opinion for this court to interfere with the findings of the primary judge. In relation to whether or not Dr Moffet was a worker under the Long Service Leave legislation, we say that would follow from the employee – employee – employee – employer question, and in relation to the resignation issue, we say that the findings of credibility do lead to this court having to, effectively, clear a higher bar of the Fox v Percy exception in relation to whether or not Dr Moffet's evidence that he resigned on account of illness ought to be accepted.

We point out, your Honours, that there was no medical evidence led by Dr Moffet in this regard. His Honour pointed that out at appeal book 61 at paragraph 85, and it seems that we are ad idem with the correct approach. We have referred to the Computer Sciences case. No, no, no. My learned friend referred to Johnson & Johnson case, and the Johnson & Johnson case itself referred to the Computer Sciences case, it being a later case. So, your Honours, if we can both refer to Johnson & Johnson – and we – my learned friend referred to page 469. Could we also refer your Honours over the page to where the court – or Watson J in Johnson & Johnson referred to Computer Sciences.

You will see there he said there is four questions to ask, and he said it is, in essence, a blend between a subjective and an objective test, and the objective part of the test is there on page 470 of the Johnson & Johnson case at tab 8 where he says:

The question is was the reason such that a reasonable person in the circumstances in which the worker found himself placed might have felt compelled to terminate his employment.

So it's a hybrid of both a subjective test and an objective test. If your Honours please, just – if your Honours please, unless you have any further questions, they are our submissions on the cross-appeal.

PERRAM J: Yes. Mr Gibian, are you going to reply on the cross-appeal? It's not an encouragement.

MR GIBIAN: No. Just on the resignation point, it really seems as if what his Honour has done at paragraphs 85 and 86 is say, "Well, there wasn't underlying medical evidence", and then he has made a credibility – observations about credibility. Any observations about credibility don't lead to a finding that illness was not – that Dr Moffet did not terminate his engagement on account of illness, unless his Honour goes on to find that there was some other reason, and it was not the absence of evidence, and, really, that is the fault in the reasoning. His Honour doesn't say, "Dr Moffet claimed to terminate his employment for this reason. I don't accept his evidence, because I think there was this other reason, and that's because I have doubts about his credibility". He refers to an absence of objective, underlying evidence, and then makes certain observations about credibility without turning back to actually make any findings to on what basis or on what account Dr Moffet did, in fact, terminate the engagement.

WIGNEY J: Have we got all of the relevant evidence about that issue in this appeal book? We've got the resignation letter. We've got some transcript.

MR GIBIAN: And the evidence that Dr Moffet gave in his affidavit in relation to his reasons.

WIGNEY J: Yes.

MR GIBIAN: There was also – and I don't think it is all in part C –a series of communications in relation to the complaints that were made by Dr Moffet in relation to the conduct of other people within Dental Corporation that he was dealing with. That's referred to – or those annexures are referred to in his affidavit, but I don't think part C has all of those – that documentation. I can identify where he has dealt with that issue in the affidavit but not all of the annexures are contained within part C. We can obviously provide those if it would be of assistance.

The only other thing I was going to say in – and I'm not sure whether this is in reply to reply – but my learned friend referred to the extract from the – it seemed to be referred to as the True Local website that referred to David Moffet's Active Dental. The origin of it is somewhat mysterious and it had been around for some period of time. Dr Moffet was unable to recall how it came to be created, although the inference seemed to be that it was before the sale, that it had just been hanging

around. There's no suggestion it was referring to anything other than the work being done at the practice that was then owned by Dental Corporation. It doesn't signify conducting some other business at all. It's a reference to the business that was owned and being worked in – owned by Dental Corporation and being worked in by Dr Moffet. Unless there's anything further.

PERRAM J: Thank you, Mr Gibian. The court is thankful to counsel and their instructing solicitors for the preparation of their very useful submissions and their submissions during the course of the appeal. Obviously, we will need to reserve our judgment in this matter.

MR GIBIAN: May it please the court.

PERRAM J: Please adjourn the court.

MATTER ADJOURNED at 3.27 pm INDEFINITELY