



## HIGH COURT OF AUSTRALIA

### NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 30 Aug 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

#### Details of Filing

File Number: P5/2021  
File Title: Construction, Forestry, Maritime, Mining and Energy Union &  
Registry: Perth  
Document filed: Form 27F - Outline of oral argument  
Filing party: Appellants  
Date filed: 30 Aug 2021

#### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN: **Construction, Forestry, Maritime, Mining and Energy Union**

First Appellant

**Daniel McCourt**

Second Appellant

and

**Personnel Contracting Pty Ltd**

Respondent

10

## **APPELLANTS' OUTLINE OF ORAL SUBMISSIONS**

### **PART 1 INTERNET PUBLICATION**

1. This outline of oral submissions is in a form suitable for publication on the internet.

### **PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

2. The contract between Mr McCourt and Personnel Contracting required him to submit to the control of the on-site builder (Hanssen).

- **Appellants' Submissions (AS) [23]-[26]; Reply Submissions (RS) [6], [8]**
- **Core Appeal Book (CAB) 103 (cl.4(a), (c) ASA)**
- **Respondent's Book of Further Materials (RBFM) 38 (p.1 Safety Induction)**

20

- **CAB 57 (cl.4 Terms of Business (LHA))**
- **Full Court (FC) [27],[29], [175]**

3. The contractual requirement to submit to the control of a third party does not militate against a finding of employment. What matters is lawful authority to command so far as there is scope for it, even if only in incidental or collateral matters.

- **AS [27]-[34]; RS [9]-[10]**
- ***Zuijs v Wirth Brothers* p.571**
- ***Stevens v Brodribb* pp.24, 36**
- ***Hollis v Vabu* pp.44-45, [57]**

- **FC [88]**
4. Mr McCourt was not conducting his own independent business.
- **AS [8]-[10]; RS [5]-[7]**
  - **Trial Judge (TJ) [156]**
  - **FC [31], [181]**
5. The finding that Mr McCourt was not conducting his own business should be determinative of the question of whether he was an employee in the circumstances. The rationale underpinning the doctrine of vicarious liability turns on this distinction.
- **AS [11]-[12]**
- 10
- ***Hollis v Vabu* p.36, [32]-[45], [48]**
  - ***Marshall v Whittaker's* p.217**
6. Alternatively, the finding that Mr McCourt was not conducting his own business should have been accorded significant weight in the multifactorial approach. The inquiry into whether a person is an employee requires the Court or Commission to look at the totality of the relationship.
- **AS [13]-[21]**
  - **FC [89]-[96]**
  - ***Stevens v Brodribb* p.29.**
  - ***Hollis v Vabu* [24], [44]**
- 20
- ***R v Foster* at p.157 (Williams J).**
7. The terms in the documentation which sought to characterise Mr McCourt as a “contractor” were labels. The term of the contract in which Mr McCourt warranted that he was “self-employed” is contrary to the finding at [4] above, and to other terms of the contract which indicate employment.
- **AS [32]-[37]; RS [11]**
  - **CAB 103 (cl.3(b) ASA)**
  - **FC [31], [170], [182]-[184]**
  - ***R v Foster* at pp.150-151**
  - ***Hollis v Vabu* at [58]**
- 30
- ***Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163 (Dixon J)**

8. The Act serves a beneficial purpose. It places collective enterprise bargaining at the heart of the workplace relations system, but does not provide for statutory individual employment agreements. The Act provides minimum conditions of employment to ‘employees’ through National Employment Standards and Modern Awards, and assists and encourages low-paid employees “who have not historically had the benefits of collective bargaining” to make enterprise agreements.

- AS [21]; RS [1]
- s.241 and Parts 2-2 to 2-4 of the Act

10 9. “Employee” is defined in the Act by its “ordinary meaning”. The characterisation terms had the intended effect of taking Mr McCourt outside of the ‘ordinary meaning’, and in doing so, undermining the beneficial purposes the Act directed towards assisting and protecting low paid workers.

- AS [39]
- TJ [177]-[179]
- FC [31], [170]
- *R v Foster* at p.156 (McTiernan J).

20 10. Because he was not treated as an employee, Mr McCourt was not able to utilise the beneficial provisions of the Act to collectively bargain with other workers for improved terms and conditions. Mr McCourt was paid c.25% below what he was entitled to under the applicable minimum rates Award. But for the characterisation term, the Court would have found Mr McCourt to be an employee.

- AS [7]
- TJ [177]-[179]
- FC [4], [31], [170]



**B W Walker**



**M A Irving**



**T J Dixon**

**30 August 2021**