SUPREME COURT OF QUEENSLAND

CITATION:	*Hays Personnel Services (Australia) P/L v Motorline P/L* [2008] QCA 375
PARTIES:	**HAYS PERSONNEL SERVICES (AUSTRALIA) PTY LTD** ACN 001 407 281 (plaintiff/respondent) **v** **MOTORLINE PTY LTD** ACN 077 303 523 (defendant/appellant)
FILE NO/S:	Appeal No 7084 of 2008 DC No 1911 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2008
JUDGES:	Keane and Holmes JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where respondent, a recruitment service, had previously provided employees to the applicant – where, in previous dealings, a 'Terms of Business' had accompanied a confirmation letter – where the "Terms of Business' stipulated that a placement fee must be paid if an employee was hired by the applicant or a 'related business' – whether the 'Terms of Business' incorporated into contract by virtue of previous dealings – whether the relevant employee was employed by a "related company" – no substantial injustice or reasonable argument justifying leave to appeal *Corporations Act* 2001 (Cth), s 50 *District Court of Queensland Act* 1967 (Qld), s 118(3) *Magistrates Courts Act* 1921 (Qld), s 47 *Barrymores P/L v Harris Scarfe L* [2001] 25 WAR 187, cited

	Chattis Nominees P/L v Norman Ross Homeworks P/L (in liq) (1992) 28 NSWLR 338, cited *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, cited *Pondcil Pty Ltd and Starline Rentals Pty Ltd v Tropical Reef Shipyard Pty Ltd* [1994] FCA 1277, cited *Thornton v Shoe Lane Parking* [1971] 2 QB 163, cited
COUNSEL:	S C Fisher (*sol*) for the applicant C K Copley for the respondent
SOLICITORS:	Neumann & Turnour Lawyers for the applicant R B Lawyers for the respondent

[1] **KEANE JA:** I have had the advantage of reading a draft of reasons for judgment prepared by Holmes JA. I agree with her Honour's reasons and with the order proposed by her Honour.

[2] **HOLMES JA:** The applicant for leave to appeal, Motorline Pty Ltd, is a motor dealer. From time to time it engaged temporary employees through a recruitment service provided by the respondent, Hays Personnel Services (Australia) Pty Ltd. Hays sued Motorline in the Magistrates Court, claiming that it was liable to pay a placement fee of $6,645.67 in respect of a particular employee. It was, Hays said, a term of their agreement, to be found in a document entitled "Terms of Business – Introduction of temporary staff", that Motorline would pay a fee if a worker introduced to it by Hays was employed by a "related company" of Motorline within twelve months of the introduction. In this case, such an employee had been taken on by Motorway Grand Prix Pty Ltd, which, on Hays' case, was a "related company", within a very short period of the end of her assignment with Motorline. Motorline denied that it had received the Terms of Business document or that it formed any part of its agreement with Hays, and denied also that Motorway Grand Prix was a "related company".

[3] The magistrate rejected Hays' case, but Hays succeeded on appeal to the District Court and obtained judgment in its favour. Motorline now seeks leave to appeal against that decision pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). It does not now seek to maintain that it did not receive the Terms of Business. The issues which remain live on any appeal are whether the Terms of Business formed part of the agreement between the two and whether the company which subsequently employed the worker, Motorway Grand Prix Pty Ltd, was a "related company" in respect of Motorline. Motorline accepts that in order to obtain leave to appeal it must show that it has a reasonable argument that there is error in the decision below, producing substantial injustice which requires correction by appeal.

The Terms of Business and the case at first instance

[4] The Terms of Business document which was the subject of contention contained clause 4.1 which read:

> "4.1 SUBSEQUENT ENGAGEMENT OF A CONTRACTOR/OR TEMPORARY: If within twelve (12) months of the conclusion of an assignment of a contractor/temporary introduced to you by us, you

> engage that person for a limited or unlimited period, a placement fee will apply. The placement fee will apply to any contractor/temporary introduced to you by us who is engaged by you or any division, related company or associated firm on a permanent, contract/temporary, part-time or consultancy basis. Such a fee will also apply where our temporary employees/contractors are transitioned to another employment agency/business for whatever reason and in whatever manner."

The balance of the clause contained the mechanisms for calculation of the fee to be paid.

[5] Two employees of Hays gave evidence at the trial before the magistrate. The first said that she had placed the employee with Motorline on a temporary basis in December 2003. She said that it was her usual practice to discuss with clients their requirements for a proposed employee and Hays' charges, after which a confirmation letter was automatically generated and sent to the client. She identified such a letter sent to Motorline on 30 December 2003; it referred to the Terms of Business as being "attached… for your information". Hays pleaded that the Terms of Business were incorporated into its agreement with Motorline by their enclosure with that letter and Motorline's acceptance, by its conduct, of them; that argument did not succeed at Magistrates Court or District Court level and need not be considered further here.

[6] A second Hays employee said that she had on earlier occasions arranged temporary assignments of employees to Motorline. On each occasion she sent the standard confirmation letter enclosing the Terms of Business and referring to them as attached for Motorline's information. She identified nine such letters that she had sent between February and September 2003 in relation to different employees. This witness explained also that any temporary employee assigned to Motorline was given timesheets to complete. On the back of each of those timesheets were the Terms of Business. The front of the sheet was completed in each case with the hours worked by the employee and signed by a representative of Motorline under the words,

> "I hereby certify the total hours worked are … and are a correct record of the hours worked by the temporary worker and I accept the terms and conditions for the introduction of temporary workers by Hays Personnel Services".

[7] The financial controller for Hays, on the other hand, gave that he did not remember ever receiving a document called 'Terms of Business'. When he had signed the timesheets he did not think he was agreeing to anything but the hours worked. He had not read what was on the back of any sheet.

[8] Hays' alternative argument for the 'Terms of Business' forming part of the agreement relied on the nine letters sent between February and September 2003. It pleaded that the Terms of Business were incorporated into the agreement between the parties pursuant to

> "their having formed, on occasions of prior dealing between the Plaintiff and the Defendant, the terms of agreements for the

> provision of recruitment services by the Plaintiff to the Defendant for a fee when, on each such occasion, the Terms of Business were enclosed with a letter from the Plaintiff to the Defendant."

[9] The magistrate made the briefest of findings. There was

> "no evidence of any reference in the telephone conversation to the term [sic] of business agreement".

He would

> "accept that during the dealings – in the course of their dealings with the two companies, that the defendant company would have received a confirmation letter at some stage [but there was] no evidence of any discussion or conversation at any prior time in this instance or during the association of the two companies regarding the contents of any terms of business agreement."

Having made those findings, the magistrate concluded that the contract between Hays and Motorline was limited to what was agreed in the telephone conversation between the representatives of Hays and Motorline, its terms being confined to the agreement to provide staff and hourly rates. The Terms of Business document formed no part of the contract.

The District Court judgment on appeal

[10] The learned District Court judge hearing the appeal found that the nine letters enclosing the Terms of Business were sent to Motorline, and that on nine occasions Hays supplied Motorline with timesheets on the back of which those Terms were printed. Each timesheet had been signed by the financial controller or another employee of Motorline. Motorline had never made any objection to the Terms of Business. His Honour found that a reasonable person receiving a letter referring to, and enclosing, the Terms of Business would regard those terms as contractual in nature. The Terms of Business were identifiable and were supplied on sufficiently frequent occasions prior to the contract to raise a reasonable expectation that the same terms would be included in the contract which was the subject of the dispute.

[11] Motorline had argued that the Court should construe the term "related company" by adopting the meaning given to "related corporations" in s 50 of the *Corporations Act* 2001 (Cth); in other words, confining it to holding companies and subsidiaries. But the learned judge did not accept that the expression was a term of art. The undisputed facts were that the companies had a mutual director; a director of Motorline was the secretary of Motorway; and the two shareholders of the two companies gave the same address. The financial controller for both companies was the secretary of Motorway; he had signed an email as emanating from "Motorline Group", referring to the operations of both companies. The registered office for both companies was at the same address; the companies had the same registered principal place of business; each operated from its own building on a single block of land with a single landlord; the customers of each company used the cafe operated by Motorway; the companies had a common telephone system and website; and there was some evidence that each company, sold as used cars, the brand retailed by the other. On the basis of those findings, His Honour concluded that Motorway

Grand Prix was a related company with respect to Motorline. He gave judgment for Hays.

Substantial injustice

[12] On this application, the only injustice Motorline identified was that it was required to pay the placement fee. Counsel suggested that that injustice assumed a significance warranting leave to appeal because the Terms of Business were used widely by Hays in its dealings with clients throughout Australia. The construction question was thus an important one, with implications beyond the parties. There was, however, neither evidence that that was the case, nor any evidence, if it were so, that any of Hays' other customers had any particular concern about the Terms of Business or Hays' construction of them.

Incorporation of "Terms of Business" document

[13] Motorline contended that the District Court judge erred in finding that the Terms of Business document was incorporated into the contract. Its first argument was that his Honour was not entitled (given the limited nature of the appeal under s 47 of the *Magistrates Courts Act* 1921 (Qld)) to depart from (or "end-run", as counsel quaintly put it) what were said to be the magistrate's findings that the Terms of Business had not formed part of the contract by incorporation, either on the occasion giving rise to the parties' dispute or on the nine prior occasions on which they dealt. But that contention seems rather to seek to re-invent what the magistrate actually found.

[14] As to what had happened on the nine previous occasions, it was not incumbent on the magistrate on the issues raised before him to make findings as to what constituted the earlier agreements, but the fact is that he did not make any such finding. As to the contract the subject of the claim, Hays' argument was that there was a course of prior dealings leading to an inference that the parties intended the previously supplied Terms of Business to form part of it. Counsel for Motorline sought to suggest that one could infer, from the magistrate's finding that the contract was limited to the contents of the telephone conversation, that he had rejected that argument. But the reality is that the magistrate simply did not, in his reasons, refer to or deal with it. He seems to have regarded all of the relevant dealings between the parties as confined to telephone conversations, without reference to the evidence that the Terms of Business document had been provided on multiple earlier occasions. His failure to consider that evidence, or Hays' case for incorporation based on it, was an error properly addressed by the learned District Court judge on the appeal to him.

[15] Secondly, Motorline relied on *Thornton v Shoe Lane Parking*[1] for the proposition that terms not made known to one of the parties when the contract was entered could not form part of it. The Terms of Business sent on 30 December 2003, as a post-contractual document, could not, it said, constitute any part of the contract between it and Hays. But Hays' incorporation argument did not rely on that document, but on the course of dealing over time; the provision of the series of letters enclosing the Terms of Business. Given Motorline's failure to raise any objection to the Terms, the inference was, on Hays' case, that it had assented to their incorporation into the parties' agreements.

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1 [1971] 2 QB 163.

[16] Next, Motorline submitted that the Terms of Business document was, on its face, provided by way of information only rather than as intended to regulate future contracts between the parties. This argument, of course, relied on the reference in each of Hays' letters to the Terms of Business being attached "for your information". But the argument skirts the obvious question: what was the point of Hays repeatedly sending and Motorline repeatedly receiving information in the form of the Terms of Business if they had no relevance to any agreement between them? Unlike the timesheets, or documents such as job sheets[2] or delivery dockets[3], the Terms of Business document had no alternative function. There was no conceivable reason for providing it except to bring its content to Motorline's attention as terms and conditions upon which the parties were to operate.

[17] The learned primary judge properly applied an objective test: how a reasonable person would have responded to a series of letters enclosing the Terms of Business. That was an approach consistent with that articulated by Diplock LJ in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association*[4]

> "where …the parties have not agreed to embody their contract in a written document but have entered into an oral contract with the intention of thereby creating legal rights and liabilities and it is sought to rely upon a term contained in some written document as modifying respective rights and liabilities which would arise by implication of law from the nature of the contract. The only question is whether each party has led the other reasonably to believe that they intended the rights and liabilities towards one another which would otherwise arise by implication by law from the nature of the contract, namely, a contract for the sale of goods, should be modified in the manner specified in the written document"

Similarly, on appeal in that case, Lord Pearce observed:

> "The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other".

A similar approach has been taken in this country; see *Pondcil Pty Ltd and Starline Rentals Pty Ltd v Tropical Reef Shipyard Pty Ltd*[5], *Chattis Nominees Pty Ltd v Norman Ross Homeworks Pty Ltd*[6], *Barrymores Pty Ltd v Harris Scarfe Ltd*[7].

[18] Motorline's next argument was that the District Court judge erred in finding that the Terms of Business document became part of the contract by virtue of Motorline's employee signing timesheets containing those terms on their reverse. Those timesheets, it submitted, were post-formation documents which could not in any case dictate the terms of an earlier, concluded contract. That argument would have force if, indeed, that had been his Honour's finding. Instead, he had reference to the

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2 See e.g. *Eggleston v Marley Engineers Pty Ltd* [1979] 21 SASR 51.
3 See e.g. *Rinaldi & Patroni Pty Ltd v Precision Mouldings Pty Ltd* [1986] WAR 131; *Walter H Wright Pty Ltd v Hill & Co Pty Ltd* [1971] VR 749.
4 [1966] 1 WLR 287 at 339.
5 [1994] FCA 1277.
6 (1992) 28 NSWLR 338.
7 [2001] 25 WAR 187.

timesheets as part of the parties' course of dealings prior to the relevant contract. He found, correctly, that it was undisputed that they had been supplied to Motorline on nine occasions prior to the relevant contract, and at no stage had the latter taken objection to them. The learned judge was entitled to regard the inclusion of the Terms of Business information on the timesheets as relevant in an objective assessment of Motorline's state of knowledge and intent when it entered the disputed contract. He did not, however, make the mistake attributed to him, of treating the timesheets themselves as contractual documents.

"Related company"

[19] Motorline also contended that the learned judge erred in failing to define "related company", which led to his reasoning being insufficiently exposed. His decision had left prospective litigants none the wiser as to what the expression meant. The appeal ought to be allowed so the commercial community was provided with a definition of the term; and it should be confined by adopting the meaning given to "related corporation" in s 50 of the *Corporations Act*. The learned judge's wide reading of "related company" produced a capricious and unjust result: the "mere coincidence of [the employee] being engaged by another corporate entity" would give rise to the liability to pay the placement fee.

[20] But his Honour's reasoning is clear. He did not consider the expression "related company" to be a term of art, rejecting the proposition that the parties intended to import the *Corporations Act* definition into the contract. It follows that he regarded the term as having its ordinary meaning. He might have gone further and expanded on the ordinary meaning of "related" as connected or associated, but it hardly seems necessary for him to have done so. He identified a series of features which were sufficient to show that the companies were related in any ordinary use of the word Implicit in his findings is the need for companies to have common officers and/or operations in order to be "related".

[21] The learned judge needed only to give meaning to the expression "related company" within the context of the contract before him; it was not incumbent upon him to devise some definition that could be used at large. There was no reason for him to adopt the *Corporations Act* definition, given that he was interpreting the expression in the context of a particular contractual clause with a particular intent. It is clear enough that through clause 4.1, Hays intended to guard against the prospect of Motorline transferring the benefit of an employee who proved worthwhile to an associate without paying another placement fee. It overcame the difficulty of proving Motorline's precise role in the employee's transition by providing for liability if such an employee moved from Motorline to a "related company" within 12 months. That was a rational enough provision. The learned judge's cumulative list of features produced a narrow field of candidates for a related company. Although Motorline might feel some umbrage at having to pay the fee if it were not, in fact, involved in the employee's move to Motorline Grand Prix, it was not a capricious or unjust result, and it was one for which, on his Honour's findings, Motorline had contracted.

Conclusion

[22] I do not consider that Motorline has identified any substantial injustice to it, nor do its arguments as to error have substance. I would dismiss the application for leave to appeal with costs.

[23] **McMEEKIN J:** I have read the reasons for judgment prepared by Holmes JA in draft. I agree with her Honour's reasons and with the order proposed by her Honour.