# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Suncorp Metway Insurance Ltd v Grant & Anor* [2005] QSC 320 |
| PARTIES: | **SUNCORP METWAY INSURANCE LTD**<br>ACN 075 695 966<br>(applicant)<br>**v**<br>**EDWIN ROBERT GRANT**<br>(respondent)<br>**JOHN JAMES CLEARY**<br>(intervenor) |
| FILE NO/S: | BS 6184 of 2005 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court, Brisbane |
| DELIVERED ON: | 4 November 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 31 October 2005 |
| JUDGE: | de Jersey CJ |
| ORDERS: | **1. Declaration that the claim of the respondent, notified to the applicant under the *Motor Accident Insurance Act* 1994 (Qld) by means of a "Notice of Accident Claim Form" dated 30 September 2003, falls within the cover provided by the compulsory third party Policy of Insurance applicable to a Toyota Tarago vehicle registration number 038-DFA**<br>**2. The originating application of the applicant filed 29 July 2005 is otherwise dismissed**<br>**3. The applicant pay the costs of the respondent to be assessed on the standard basis**<br>**4. Costs as between the applicant and the intervenor are reserved, with liberty to apply** |
| CATCHWORDS: | EMPLOYMENT LAW – THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE – where applicant was the compulsory third party insurer of a vehicle registered in the name of the intervenor – where, while the respondent was driving that vehicle, pursuant to his calling as a chauffeur, there was an accident in which he suffered injuries – where the Policy of Insurance excluded coverage by insurance in this case if respondent was an employee of the intervenor – |

where there was no written contract of service between the intervenor and respondent – where there were a number of factors for and against a finding that the respondent was employed by the intervenor under a contract of service – whether there was a contract of service between the intervenor and respondent – whether the respondent's insurance claim fell within the cover provided by the applicant's Policy of Insurance

*Motor Accident Insurance Act* 1994 (Qld), s 23(1)
*WorkCover Queensland Act* 1996 (Qld), s 12(2)

*Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079
*Commissioner of Taxation v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507
*Grice v State of Queensland* [2005] QCA 272; No 10818 of 2004, 5 August 2005
*Hollis v Vabu Pty Ltd* (2001) 207 CLR 21
*Humberstone v Northern Timber Mills* (1949) 79 CLR 389
*Narich Pty Ltd v Commissioner of Payroll Tax* (1983) 58 ALJR 30
*R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138
*Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16
*Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561

COUNSEL: R B Dickson for the applicant
R J Douglas SC, with P de Plater, for the respondent
D A Reid for the intervenor

SOLICITORS: Jensen McConaghy for the applicant
Schultz Toomey O'Brien Lawyers for the respondent

[1] The applicant ("Suncorp") was at material times the compulsory third party insurer of a Toyota Tarago wagon. On 4 February 2003, while the respondent ("Mr Grant") was driving that vehicle, pursuant to his calling as a chauffeur, it unexpectedly veered off the highway, the Coolum-Yandina Road, and he suffered injuries. Mr Grant lodged with Suncorp a "notice of accident claim form" dated 30 September 2003 under the *Motor Accident Insurance Act* 1994 (Qld).

[2] At the time of the accident, the Tarago was registered in the name of John James Cleary ("Mr Cleary"). In his claim form, Mr Grant attributed responsibility for the accident to Mr Cleary, for having failed to maintain the vehicle properly. There is an allegation the tread on the tyres of the vehicle was unduly worn. Mr Cleary was given leave to intervene at the hearing of this application.

[3] Also in that claim form, Mr Grant nominated, as his employer at the time of the accident, "JJ and MJ Cleary", which was the business name under which Mr Cleary operated. That prompted consideration of the exclusion provided for in cl 3(2) of

the Policy of Insurance set out in the schedule to the *Motor Accident Insurance Act* (cf. s 23(1)):

> "(2) This policy does not insure an employer against a liability to pay damages for injury to an employee if –
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> (a) the injury arises from the employer's failure to provide a safe system of work for the employee or the employer's breach of some other duty of care to the employee; and
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> (b) neither the employer nor another employee of the employer was the driver of the motor vehicle at the time of the motor vehicle accident out of which the injury arose."

[4] On 23 December 2003, the solicitors for Suncorp wrote to the solicitors for Mr Grant contending that exclusion applied, and suggesting Mr Grant should be pursuing WorkCover Queensland. While in their response of 19 January 2004 Mr Grant's solicitors suggested Mr Cleary (who had been personally negligent, it was alleged) was not the employer, but that "JJ and MJ Cleary" was the employer, so that the exclusion did not operate, the position later taken – and developed now – is that Mr Grant was not at the relevant time employed by either Mr Cleary or JJ and MJ Cleary: the relationship between them was not one of employment, but was defined by a contract for services, or should be characterized as involving a bailment.

[5] Mr Grant has not proceeded with an employment based claim, and I was informed that the time within which he might have done so, has expired.

[6] Suncorp has applied for a declaration that the provisions of the *Motor Accident Insurance Act* 1994 do not apply to Mr Grant's claim notified in his Notice of Accident Claim dated 30 September 2003. Mr Douglas SC, who appeared for Mr Grant, sought a contrary declaration, that is, that Mr Grant's claim is within the cover provided by the compulsory third party Policy of Insurance scheduled to the Act.

[7] I proceed now to describe the circumstances of the relationship between Mr Grant and Mr Cleary, and Equity Transport Pty Ltd (from whom Mr Cleary held a franchise). They were agreed upon orally in early 2000, at a meeting attended by Mr Grant, Mr Cleary and Mr Howard Holmes, South East Queensland Regional Manager of Equity Transport.

[8] Mr Grant had responded to a newspaper advertisement for a position paying a "commission based salary". The arrangement was that Mr Grant would perform duties as a chauffeur, driving a vehicle provided by Mr Cleary. (That turned out to be the Toyota Tarago wagon.) Mr Cleary would pay for the servicing and maintenance of and repairs to the vehicle, and fuel costs. It was Mr Grant's obligation to keep the vehicle in as close to "showroom condition" as possible.

[9] Under his arrangement with Mr Cleary and Mr Holmes, Mr Grant was required to purchase and maintain a uniform, at his own expense. He also had to acquire a fax machine, in order to receive details of jobs, etc, and have his mobile phone available for use for the purposes of his duties, again at his own expense.

[10] The driving duties were allotted to Mr Grant by Equity Transport which fulfilled a "booking agency" type role. Mr Grant was entitled to remuneration equal to 35 percent of Equity Transport's fee to its client. On a weekly basis, Mr Grant would provide Mr Cleary with details of the jobs carried out. Sometimes, a client may pay Mr Grant directly. In that case, Mr Grant would pass on the payment to Mr Cleary. JJ and MJ Cleary paid Mr Grant, by cheque, the amounts to which he was entitled, and was effectively a conduit for payment from Equity Transport to Mr Grant. Mr Grant did not provide tax invoices to JJ and MJ Cleary.

[11] Mr Grant was obliged to account for his own taxation liability. JJ and MJ Cleary did not make superannuation contributions on Mr Grant's behalf. He had no entitlement to holiday pay, leave loading or sick leave.

[12] If Mr Grant wished to take a break from his driving duties, he did not necessarily have to check first with Mr Cleary. He would arrange for a "relief driver" to take over. But if he intended taking a substantial break, then he would notify Mr Cleary. After he had been working for 18 months or so without a break, Mr Grant took two months off. During that period, the Tarago vehicle was returned to Mr Cleary.

[13] Mr Grant gave oral evidence in addition to his evidence on affidavit. He was a credible witness. He was pressed by Mr Dickson, who appeared for Suncorp, to reconcile, with his present position, certain statements in his notice of claim and a statutory declaration of 18 May 2004. In the Notice of Claim, as I have said, he nominated, as his "employer", JJ and MJ Cleary, adding, though, the description: "casual – commission basis". In his statutory declaration, he said:

> "As at 4 February 2003, I was in an employment relationship with JJ and MJ Cleary in that they provided me with the vehicle for use and I obtained each job through Equity Limousines who JJ and MJ Cleary contracted with to provide chauffeur services. However, there was no contract of employment place."

Mr Grant told Mr Dickson, in cross examination, that by that last reference, he meant no contract in writing. Mr Grant also said in his oral evidence that it was his solicitor who had prepared both the claim form and the statutory declaration, although Mr Grant did not seek to disavow them.

[14] Although Mr Dickson unsurprisingly, and not unreasonably, laid emphasis on those particular characterizations of the relationship, they do in the end amount to no more than opinions on the matter, and are of themselves not determinative of the true nature of the relationship. That reality falls to be determined by reviewing all relevant circumstances, and particularly of course, the circumstances of the arrangement reached in early 2000. See *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 150-1; *Narich Pty Ltd v Commissioner of Payroll Tax* (1983) 58 ALJR 30.

[15] In determining the question of fact (*Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, 568-9) whether Mr Grant was employed under a contract of service, it is "the totality of the relationship" between the parties which must be considered: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29; and see also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [44]. A potentially important consideration

favouring the existence of employment is if "ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions" (*Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404), though recent authority has stressed that is but one of the many possibly relevant considerations. In *Stevens v Brodribb*, Mason J, as he then was, mentioned, as other relevant matters, "the mode of remuneration, the provision and maintenance of equipment, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee" (p 24). See also *Commissioner of Taxation v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd* [1998] FCA 361.

[16] The following circumstances favour the view that the relationship between Mr Grant and Mr Cleary/Equity Transport was not one of employment: Mr Grant was not paid a salary, his remuneration being a percentage of the fees paid to Equity Transport by clients; Mr Grant paid his own tax; Mr Grant was not entitled to superannuation contributions, holidays or sick leave, and was not given any "group certificate"; it was Equity Transport which allocated the jobs to Mr Grant, with the capacity in Mr Cleary to exercise little if any control over Mr Grant; Mr Grant retained the capacity to order his own work – for example, he could to an extent take time off without first securing Mr Cleary's permission; to an extent Mr Grant could delegate his duties – for example, if he took time off, he arranged for his work to be done by a relief driver; Mr Grant retained possession of the relevant plant, being the vehicle; Mr Grant was obliged to maintain the vehicle in near to showroom condition; and Mr Grant was obliged to provide and maintain, at his own not insubstantial expense, some facilities necessary for the work, being the fax, the mobile phone and the uniform.

[17] On the other hand, these are the principal considerations tending the other way: that Mr Cleary paid for the maintenance and fuelling of the vehicle; that it was Equity Transport which effectively determined when and where Mr Grant worked; that a right to terminate the arrangement remained with Mr Cleary (though its being of indeterminate duration, it was probably commensurately determinable by Mr Grant); that Equity Transport required Mr Grant to work under a name other than his own (Hughes Transport); and that the capacity of Mr Grant to delegate his work was limited, to the relief driver situation when Mr Grant took time off.

[18] The preponderance of all of these considerations (paras [16] and [17]), seen in the aggregate, strongly favours the conclusion that Mr Grant was not employed by Mr Cleary or Equity Transport.

[19] In summary, the object of the arrangement, with the vehicle being in effect bailed by Mr Cleary to Mr Grant, was to afford both those persons the opportunity to profit financially from limousine work. Mr Grant was obliged to keep the vehicle serviced and fuelled, at Mr Cleary's expense, but with Mr Grant to bear all other expenses, both direct (uniform, mobile phone, facsimile, cleaning agents) and indirect (his "own time" communication for jobs, daily cleaning, vehicle storage). Mr Grant's expectation, of course, was that his labour would produce income, by way of percentage commission, afforded by whatever jobs were provided by Equity Transport, but with no guarantee any particular quantity of work would come his way. Also, there were none of the trappings or benefits of ordinary employment: overtime or waiting time, sick leave, holidays, long service leave, superannuation

contributions. And in addition, any capacity in Mr Cleary or Equity Transport to "control" Mr Grant was quite limited: essentially, Mr Grant carried out his work remotely from them, and in his own way, subject only to directions as to time and places of work. This was not the relationship of employer-employee.

[20] As to the significance of Equity Transport's directing Mr Grant as to jobs to be undertaken, I refer to two passages from the decision of the New South Wales Industrial Commission in *Yellow Cabs of Australia v Colgan* (1930) AR (NSW) 137, adopted by the Full Court of the Federal Court in *De Luxe Red and Yellow Cabs* (pp 11-12):

> "... in all arrangements where the parties occupy a relationship in the nature of that of joint adventurers, there is necessarily involved a certain degree of direction and control arising out of the nature of the relationship created by the agreement itself. But this does not necessarily create the relationship of employer and employee, that question, all the surrounding circumstances having been taken into consideration, being mainly determined by the degree and extent of the detailed control vested in one party over the acts of the other party in the actual execution of the work contemplated in the joint venture.
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> …
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> Such a system does not appear to establish that the drivers were subject to the commands of the company as to the manner in which they shall do their work, but were independent in that, though they embarked upon the carrying out of a joint enterprise, each driver was substantially in the position of an independent contractor 'who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.'... Moreover, this system was necessary to further the interests of both parties to the joint adventure, and 'in order to ensure compliance with the statutory rules, as well as to secure the due ascertainment of the sum properly payable each day to the proprietor.'..."

[21] Mr Dickson drew attention to s 12(2) of the *WorkCover Queensland Act* 1996 (Qld) which, by reference to schedule 2 to that Act, includes, as a "worker", "a person who works under a contract, or at piece work rates, for labour only or substantially for labour only". By amendment in 1999, the scope of the s 12 definition of "worker" was enlarged by removing the previous requirement that the employed person be a PAYE taxpayer. Mr Dickson submitted that because of the close relationship between that Act and the *Motor Accident Insurance Act*, the term "employee" in the latter should be given the same meaning as the term "worker" in the former.

[22] There is no justification for taking that course. The term "employee" is not defined in the *Motor Accident Insurance Act*, but there is a wealth of common law to guide the determination of when that relationship exists. Had the legislature intended to retreat from that body of well-established law, and equate the two concepts, it could be expected to have done so expressly, when amending the schedule in 2000 to

insert the exclusion set up by cl 3(2); and especially if thereby reducing individual rights. See *Grice v State of Queensland* [2005] QCA 272, [26].

[23] Clause 3(1) provides: "This policy does not insure an employer against the liability to pay worker's compensation." The Explanatory Memorandum says, of the newly introduced cl 3(2):

> "The intent of the legislation has been to exclude liability of an employer for worker's compensation. The clause strengthens the exclusions under the policy of insurance to specifically exclude a failure of an employer to provide a safe system of work."

[24] There is nothing in any of this to justify the court's now equating these two concepts. *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 79 ALJR 1079, in which the High Court was essentially concerned with an issue of causation, does not in my view advance the applicant's position.

[25] In these circumstances, there should be a declaration that the claim of the respondent Edwin Robert Grant, notified to the applicant under the *Motor Accident Insurance Act* 1994 by means of a "Notice of Accident Claim Form" dated 30 September 2003, falls within the cover provided by the compulsory third party Policy of Insurance applicable to a Toyota Tarago vehicle registration number 038-DFA. The originating application of the applicant filed 29 July 2005 is otherwise dismissed, and the applicant is ordered to pay the costs of the respondent, Edwin Robert Grant, to be assessed on the standard basis. Costs as between the applicant and the intervenor John James Cleary, are reserved. In respect of those costs, liberty to apply.