SUPREME COURT OF QUEENSLAND

CITATION:	*The State of Queensland v Whiteman* [2006] QSC 325
PARTIES:	**THE STATE OF QUEENSLAND** (Applicant) **v** **WILLIAM GRANT WHITEMAN** (Respondent)
FILE NO/S:	478 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	8 September 2006
DELIVERED AT:	Cairns
HEARING DATE:	15 June 2006
JUDGE:	Jones J
ORDER:	**1. I declare that as at 15 November 2002, for the purpose of the *WorkCover Queensland Act* 1996, the respondent was a worker employed by Hinchinbrook Island Ferries Pty Ltd.** **2. I adjourn consideration of the question of costs to allow the parties to make written submissions within the next 14 days.**
CATCHWORDS:	WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – PERSONS ENTITLED TO COMPENSATION – WHO IS A WORKER OR EMPLOYEE – GENERALLY – respondent instituted proceedings against WorkCover for damages for work-related injuries – respondent employed by two companies at the relevant time – respondent admits he was a director for one - where salary apportioned between the two companies - whether employed as contractor for the other company or whether dually employed – whether a worker WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – PERSONS ENTITLED TO COMPENSATION – WHO IS A WORKER OR EMPLOYEE – PARTICULAR OCCUPATIONS – COMPANY DIRECTOR – respondent instituted proceedings against WorkCover for damages for work-related injuries – WorkCover contends respondent is not a worker entitled to

compensation because he was a director of a company at the time – discrepancy in documentary evidence about whether he was a properly appointed director – respondent admits he was a director – whether respondent a worker

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

WorkCover Queensland Act 1996, Sch 2, Pt 2

COUNSEL: Mr G Houston for the applicant
Mr P Lafferty for the respondent

SOLICITORS: MacDonnells Law for the applicant
Roati and Firth for the respondent

[1] The issue which falls for determination is whether the respondent, William Whiteman, was, on 15 November 2002, a "worker" within the meaning of that term for the purpose of the *WorkCover Queensland Act* 1996 ("the Act").

[2] The applicant (hereinafter "WorkCover") seeks a declaration that he did not come within the definition because he was, and is, a director of the company by whom he was paid. Thus he is not a person, by virtue of Part 2 of Schedule 2 to the Act, entitled to seek damages for what was alleged to be a workplace injury.

Background facts

[3] On 15 November 2002 at Hinchinbrook Island the respondent suffered an injury to his right knee when negotiating a dune ladder which had been installed by Queensland Parks and Wildlife Service. He has commenced proceedings (Cns 478/05) to claim damages for personal injury from the State of Queensland representing the QPWS or from the companies for whom he was carrying out the work related tasks at the time.

[4] At all relevant times, the respondent appears to have been the designated general manager of the two companies – Hinchinbrook Island Resort Pty Ltd ("Resort") and Hinchinbrook Island Ferries ("Ferries"). This is found in two contemporary documents; the Agreement for Employment dated 17 May 2000[1] and again in a letter dated 18 October 2002 a short time prior to the date of the incident.[2] The more significant document is the Agreement for Employment which relevantly provides:-

> "William Whiteman will provide ongoing management services as General Manager of both the ferry company and the Hinchinbrook Island Resort, in accordance with the following agreed terms and conditions.
>
> The employment agreement period will be for five (5) years from 01 July 2000 to 01 July 2005.
>
> Working hours will be the hours which will be required to manage both businesses efficiently and effectively to achieve the

1 Ex "WW1" to the affidavit of respondent sworn 17 November 2005
2 Ex "WW4" to the affidavit of respondent (supra)

> performance targets outlined in the business plans. (Minimum 40 hrs/week)
>
> Provision for holiday leave (4 weeks), sick leave and superannuation (6%) will be in accordance with the statutory minimum industry standard entitlements, (except by mutual agreement) and any holiday periods will coincide with mutually agreed low business activity periods. Such provisions will apply to salary only and will not be paid on any bonus entitlements.
>
> Remuneration will be by way of a base salary plus a performance incentive bonus arrangement.
>
> The base salary will be fifty thousand dollars per annum. (No overtime or penalty allowance will apply). This salary may be reviewed annually at the discretion of the directors."

These terms reflect the language of employment rather than the provision of services.

[5] Prior to the coming into effect of this agreement, the manner in which remuneration for the work undertaken by the respondent was by invoice issued in the name of Whiteman Investments Pty Ltd for management services.[3] The invoice identified a "management fee" split between Resort and Ferries – eight months to Resort, three months to Ferries. Two such invoices were exhibited showing the arrangement prior to 30 June 2000. Thereafter, the respondent continued, as before, his work related tasks for both companies. He was paid by way of salary directly from Resort with Resort recouping 40% of those wages from Ferries.[4] Similarly, some employees working for both Resort and Ferries were paid by Ferries which then recouped a proportion from Resort. For example, this occurred in relation to the wages of Colleen Johns.[5]

[6] The decision to pay the respondent's salary from the Resort payroll and recoup part of it from Ferries by internal transfer was taken by Colleen Johns, payroll manager. Her reason for doing so was, "to simplify things and reduce paperwork".[6] Her decision in this regard is reflected in the Profit and Loss Statement of Ferries[7] which shows an item of "I/Company wages ($10,524.20)", which I infer is a reference to inter-company wages transfer.

[7] There is no suggestion that the respondent was consulted about this arrangement and Ms Johns stated that she never received any direction from management regarding which company would pay wages to individual employees. When the matter was investigated by WorkCover she identified the respondent's position with

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3 Ex "WW3" to affidavit of respondent (supra)

4 Ex "WW6" to affidavit of respondent (supra) and exs "YJN33-43" to affidavit of Ms McLaughlin sworn 7 November 2005

5 Exs "YJN7-18" to affidavit of Ms McLaughlin sworn 7 November 2005

6 Affidavit of Colleen Johns sworn 21 November 2005, para 4.

7 Ex "YJN31" to affidavit of Ms McLaughlin (supra)

regard to both companies in accordance with the documentation to which I have made reference.[8]

[8] WorkCover argues that as the wages records of Resort show that the respondent received all his remuneration from Resort he was employed by Resort alone. It contends that whatever arrangements Resort had with Ferries about the use of his time and whether characterised as labour hire or loan, the respondent remained at all times employed entirely by Resort.

[9] The manner in which remuneration is provided to a person who carries out work related tasks is but one indicator of the relationship of employer and employee and may in some circumstances determine the question of whether the work was done pursuant to a contract of service or a contract for services. In this instance, one could not characterise the internal arrangement as Resort providing respondent's labour to Ferries as being pursuant to a contract for services. There is no evidence of any GST component being charged. The apportionment to Ferries of the monthly salary is a percentage of the gross salary and superannuation contribution. This is indicative of a proportionally shared employment.

[10] Ultimately, whether there is found to be a relationship of employer/employee is a question of fact. One prominent factor in determining the nature of the relationship is the degree of control which one person can exercise over another. *Stevens v Brodribb Sawmilling Co Pty Ltd*[9]. That test is usually considered in determining questions of vicarious liability where a distinction between an employee and an independent contractor might be critical.[10] But the existence of control is not the sole criterion by which to gauge whether the relationship is one of employment. As explained by Mason J in *Stevens* –

> "The approach of the High Court has been to regard it merely as one of indicia which must be considered in the determination of that question…Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."[11]

[11] Here, however, there is an express agreement which provides directly that the respondent will be the general manager of Ferries; that he will be paid a salary; that he will be entitled to annual holidays, sick leave and superannuation; that he will have to work to achieve performance targets and that his minimum hours of work will be 40 hours per week. The agreement provides that he is to work for both businesses. There is no delineation between the two so as to suggest that one would be the sole employer and the other having some different relationship. The fact that the company staff adopted a procedure for paying the respondent's remuneration which was not reflective of the dual employment was not inconsistent with that being the position. Nor was such procedure determinant of the relationship of employer/employee. As to whether at any particular time the respondent was performing duties for one company rather than another, this again is a question of

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8 Ex "CJ2" affidavit of Colleen Johns (supra)

9 (1986) 160 CLR 16 at p 24

10 See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19.

11 Ibid at p 24

fact. The respondent indicated that initially he performed tasks only for Ferries. The tasks for the benefit of Resort commenced in May 2000.[12] There is no challenge to the suggestion that the work in which he was engaged when injured was of the kind performed for Ferries. I am satisfied by reason of the express terms of the agreement, the manner in which the respondent performed work for Ferries and the fact that his wages were proportionally paid by Ferries, he was, at all material times, employed by Ferries.

[12] Section 12 of the Act defines **worker** as "an individual who works under a contract of service". I am satisfied for the reasons mentioned above that the respondent fits this definition. Accordingly I decline to make the declaration sought by WorkCover.

[13] Notwithstanding this conclusion I should address the argument that if, contrary to my finding, the respondent was employed solely by Resort, he is excluded from the description of worker by reason of his being a director of Resort.

[14] In the original material relied upon by the parties, there is conflict in the documentary evidence. To resolve this difficulty I sought further submissions particularly as to whether the uncertified company search (ex "YJM 48") should prevail over evidence of a letter dated 23 October 2002 seeking the respondent's consent to be a director (ex "WW5").

[15] The respondent now asserts that he did not complete and lodge with ASIC a form 201B. If that is so, he could not validly be appointed as a director of Resort by reason of s 201D of the *Corporations Act* 2001. WorkCover draws attention to the fact that the respondent has admitted in paragraph 11(g) of his Defence that he was a director of Resort. Despite his protestations there that his appointment as a director was for a limited purpose, he was either a validly appointed director with all the obligations of that office or he was not. Nevertheless, WorkCover was entitled to rely on his admission as that brought him within the purview of Part 2. WorkCover also points to the respondent's acknowledgement in his Claim Form that he was a director and his conduct holding himself out to be a director.

[16] Mr Lafferty of Counsel on behalf of the respondent applied, extempore, for leave to withdraw the admission made in the Defence on the grounds that it was factually incorrect and made in ignorance of the respondent's true position. Given all the circumstances I was not prepared to entertain that application which would not, in any event, effect my disposition of WorkCover's application.

Orders:

[17]

1. I declare that as at 15 November 2002 for the purpose of the *WorkCover Queensland Act* 1996, the respondent was a worker employed by Hinchinbrook Island Ferries Pty Ltd.

2. I adjourn consideration of the question of costs to allow the parties to make written submissions within the next 14 days.

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[12] Affidavit of respondent sworn 17 November 2005, para [3].