COLLEGE OF LAW

WORK PLACE RELATIONS RE-VISITED

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REMEDIES FOR INDEPENDENT CONTRACTORS

1. In New South Wales legislation providing specific statutory remedies for independent contractors has existed for over fifty years. The *Industrial Arbitration Act* 1940 by amendment in 1959 provided for conciliation committees to declare void or vary work contracts done by other than employees if those work contracts were relevantly unfair. That provision was the starting point of the extensive unfair contracts jurisdiction, which jurisdiction was exercised by the Industrial Commission and later by the Industrial Court of New South Wales. It developed a significant body of jurisprudence as to how persons, who perform work other than as employees, ought to be treated. However, save for an important aspect of State legislation, that jurisprudence has been supplanted by the Commonwealth *Independent Contractors Act* 2006.

2. Like the State legislation which took some many years for any reported decision to come about, the incidence of reported decisions under the *Independent Contractors Act* which has been operative since 1 March 2007, has not been extensive. The reason why such statutory intervention has occurred in relation to contracts for services is perhaps on account of a suggestion that the common law and equity did not provide sufficient remedies for persons who provide their labour by way of independent contract. This is not to denigrate the traditional remedies of the law found in breach of contract or in equitable principles. More often that not when one is presented with a difficulty in relation to an independent contract, it probably is in essence a breach

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of contract or offensive against some equitable principle. It is not the purpose of this paper to deal with such occurrences but to consider the use of the *Independent Contractors Act* as a means of providing a remedy or a defence in relation to an impugned independent work contract.

3. In dealing with a definition of independent contracts, the Act itself under s.5 provides a general meaning of a services contract being:

   (i) A services contract is a contract for services:

      (a) to which an independent contractor is a party; and

      (b) that relates to the performance of work by the independent contractor; and

      (c) has the requisite constitutional connection specified in sub-section (2).

4. The requisite constitutional connection relates to that of a constitutional corporation. This perhaps also gives the origin of this Act as one coming out of the success of the constitutional basis for the Work Choices Legislation, which has had such profound impact upon industrial relations in Australia.

5. This definition provides the same distinction between a contract of service or a contract for services as is found in the common law. The best treatment of the distinction between those two contracts, one just needs to have regard to Joellen Riley's book "*Independent Work Contracts"(Thomson Reuters 2007)*, chapter 2 entitled "The Contractor/Employer distinction".

6. Likewise, it is not for the purpose of this paper to examine that distinction other than to accept that such a distinction exists and to proceed with examination of the remedies provided to a disgruntled independent contractor who has provided services..

7. One of the reasons perhaps why there has been so few reported decisions on this Act, even though it has been now in existence for four years, is that no one likes to be a test case. When one considers the history of the unfair contracts jurisdiction within the jurisdiction of New South Wales, that legislation was bedevilled with jurisdictional and technical objections. Similarly, the cases which have been before the federal arena dealing with this Act, have also met a firm and targeted response from defendants. The case most in point is one called *Keldote Pty Ltd v Riteway Transport Pty Limited,* ultimately decided by Federal Magistrate Cameron in June of last year in [2010] FMCA 394 ; [2010] 195 IR 423. Examination of that case's history shows that three earlier decisions had been made by the Federal Magistrates Court prior to the final one. They are found at [2007] 168 IR 152; [2008] 176 IR 316; [2009] 185 IR 155. Even with the final decision of Federal Magistrate Cameron, an appeal was lodged, although the matter was settled before the appeal was heard.

8. I shall return to examination of those cases, but before I do so, I will look at the statutory basis as to what the Court may do. Under s.12 of the *Independent Contractors Act*, a Court may review a services contract either on the basis that the contract is unfair or harsh (s.12(1)(a) and (b)) and in so reviewing such a contract, the Court must have regard to the terms of when it was made and to the extent that this part allows, the Court may consider other matters in existence at the time when it was made (s.12(3)). As to what is the unfairness ground, one can have regard to s.9 and one sees the familiar words which had previously been found in the unfair contracts jurisdiction in the New South Wales legislation, such as a contract being unfair, harsh or unconscionable, unjust, against the public interest or was designed or did avoid the provisions of the *Fair Work Act* or a State or Territory industrial award or an award agreement or other instrument made under such law and, that the contract provides for remuneration less than the rate of remuneration for an employee performing similar work or such other ground which is substantially the same as those contained above.

Because of the use of similar words as defining the unfairness ground, the jurisdiction as it developed in the New South Wales Industrial Court is not irrelevant and indeed has been relied upon in the federal arena.

9. In reviewing a services contract, the Court is to have regard to the relative strengths of the bargaining positions of the parties to the contract and if applicable any persons acting on behalf of the parties, whether any undue influence or pressure was exerted or unfair tactics employed and whether the contract provided a total remuneration of less than what an employer performing similar work would have performed in any other matter the Court thinks relevant. (See s.15)

10. The orders which a Court may make in recording the opinion of s.15 are ones whereby the whole or part of the contract can be set aside or an order varying the contract (s.16(1)) and in making such an order it may not only be made for the purpose of placing the parties to the services contract is nearly as practical on such a footing that the ground on which the opinion is based no longer applies (s.16(2)), the Court may make an interim order if to do so it is found to be desirable to preserve the position of the parties to the services contract pending final order (s.16(3)).

11. One important distinction between the *Independent Contractors Act* and the State unfair contracts jurisdiction is the restricted nature of the costs orders which may be made. Section 17 of the *Independent Contractors Act* provides that costs may only be ordered where a party institutes the proceedings vexatiously or without reasonable cause or when the Court is satisfied that a party to a proceeding has by unreasonable act or omission caused another party to the proceeding to incur costs in connection with the proceeding, the Court may order the first party to pay some or all of those costs (s.17(2)). This is in stark contrast to the provision under the Industrial Court of New South Wales regime where costs follow the event and it also included the power to award indemnity costs. The point of distinction here is that victory may be somewhat Pyrrhic if it does not have attached to it a costs order. A contract might

be set aside or varied, which may provide a certain sum of money which may in no way reflect the costs of the litigation. This may consequently have the effect that contingency matters may less likely occur, although it certainly takes the risk of litigation for an applicant who is ultimately unsuccessful of being at risk of paying the other side's costs.

12. The Keldote suite of cases arose out of a number of trucking contracts between three owner drivers who were incorporated and who had agreed to provide trucking services for Riteway Transport between Sydney and Melbourne in 1998. In February 2007, Riteway informed the owner drivers that it required them to replace their trucks used on that route as and from August 2007, otherwise the contracts would come to an end. The owner drivers were required to upgrade their rigs to then comply with the demand made by Riteway.

13. The first decision in the series was in August 2007 by Federal Magistrate Cameron. Those proceedings sought an injunction stopping the purported terminations. The injunction sought was interim relief pending final order pursuant to s.16(3) of the *Independent Contractors Act.* Riteway had given six months notice of this change in the manner in which the respondent's were to provide these nightly linehaul operations between Sydney and Melbourne. The drivers were given two options, that is, adopt the new proposal and change their trucks and trailers or cease their services for which they would receive $20,000.00. The unfairness alleged by the owner drivers was by way of comparison to the freight rates offered by Riteway and those offered by other companies to sub-contractors. The additional finance in running costs associated with the changing of the trucks and trailers, the length of the business relationships they had had with Riteway and the costs associated with those businesses and the way the market price for truck and trailer work was calculated and the costs in upgrading. In considering the interim relief, Federal Magistrate Cameron did not read that provision to mean "*the preservation of the position of the parties to the services contract is to be assumed is something which ought to be*

achieved." Rather, he saw it as an interlocutory injunction preserving the position generally pending the outcome of the principal proceedings [19]. Perhaps like the power enlisted in a *Mareva* style injunction.

14. In considering this he asked the normal questions a judicial officer asks in granting an interlocutory junction, that is, was there a real question to be tried and would damages be an adequate remedy if the injunction is not granted and also the balance of convenience [21]. In rejecting the interlocutory injunction, he said that it could not be said that the problem was not compensable in damages. This was because although the Act does not provide for damages to be awarded, damages could be awarded in the Court's associated jurisdiction and in the context of commercial arrangements such as these, if the respondent is found to have breached the contract even after any unfair terms have been remedied, that can sound in damages [23]. He also, on the balance of convenience, declined the interim relief on the basis that the respondent had given notice of about six months of the change to the manner in which the freight was to be carted. Also, because the freight company had engaged another contractor which was to start work the following day, that was equally something which militated against the balance of convenience in favour of the owner drivers.

15. The next decision by Federal Magistrate Cameron in the *Keldote* saga was delivered on 22 August 2008, exactly one year from the first one. In that case he held that he had a jurisdiction to hear and review the matter under the *Independent Contractors Act* even though at the time of the hearing the contract was no longer on foot. He said by reason of s.12(3) of the Act the assessment as to whether a contract was fair or unfair is to be assessed at the time it was made. He found a contract cannot become unfair or unharsh as a result of subsequent events and that finding depends upon the facts in each particular case. The contract may be unfair as to its terms or alternatively, may be found to be unfair for the procedural reasons in relation to the circumstances in which it was formed. The provision was unfair in that the respondent

had the power to stipulate to the applicants the use a particular type of vehicle without an obligation to compensate the applicants for additional expenses which they might incur in complying with such a requirement. This was so in the context that the respondent did not offer an increased contract rate as it was under no obligation to do so and effectively the respondent had control by a "take it or leave it" offer. However, he did find that the contracts were not unfair because of a lack of a contractual mechanism for determining the price for a run, nor that the contracts were not entirely reduced to writing. However, he did not find any unfairness on the basis of a lack of valuation of the asset, nor that there was a lack of a mediation clause or arbitration clause, nor that there was any evidence that the contracts provide the total remuneration less than that of an employee performing similar work, nor was there any evidence of inequality of bargaining power or unfair tactics or undue influence. Ultimately, he said this:

> *"I have concluded that the contracts were unfair because they permitted Riteway to require the applicants to renew their vehicles with replacements which were materially different from the vehicles which they had previously been acceptable, and did not require Riteway to make a commensurate increase in payments to the applicants such that the necessary additional expenses would be offset by such increased payments. Having reached that conclusion having regard to the principles set out above at [96], it is appropriate that I exercise the power which the ICA confers on the Court to address that unfairness and that I make an order which places the parties on a footing such that the unfairness I have identified no longer obtains. With this in mind, I conclude that clause 5 of the Riteway-TW Agreement should be varied in each of the applicants' contracts so that Riteway's power to require the applicants to replace their vehicles is limited to a power to require replacement with like.*
>
> *139 The applicants suggested or sought various alternative orders which would involve complex and impractical terms providing for the calculation of the costs of any change required under the contracts. In my view, the better approach would be a variation of the contract preventing Riteway from unilaterally imposing material change in vehicle specifications.*
>
> *140 Consequently in respect of each applicants' contract with Riteway the fourth paragraph of clause 5 of the Riteway-TW Agreement will be varied as from the time when the contract was*

> *made by inserting the word "vehicle" where second appearing the following words: having specifications reasonably equivalent to the vehicle being replaced."*

16. The claim for contractual damages could not be disposed of in these proceedings and was stood over for further hearing on the issue of damages and injunctions [147].

17. The next case which came before Federal Magistrate Cameron was decided on 5 May 2009 in 185 IR 155; [2009] FMCA 319. In that case, the learned Federal Magistrate found that the considerations which caused him to vary the contract would be best made effective from the date the contracts were made [32]. Contrary to Riteway's submission he concluded there was no impediment to the Court making an order in these proceedings which had a retrospective quality. He relied upon earlier proceedings dealing with a similar provision found in s.127(a) and s.127(b) in the *Industrial Relations Act* 1988 and considered the Full Court authority of the Industrial Relations Court of Australia that such orders, notwithstanding the contract had terminated, could nevertheless be made retrospectively. He quoted *Gerrard v Mayne Nickless* as authority, being [1996] 135 ALR 494 at 505-506 when the Full Court said:

> *"Technically it is incorrect to say that an order made by the Commission in respect of a terminated contract has retrospective operation; s.127B(4) provides that an order takes effect from its date or a later date specified in the order. However, in a practical sense an order will always involve an element of retrospective activity. The rights and obligations of parties to a contract crystallise on termination. If an order varying the contract is subsequently made, it must affect those rights and obligations."*

18. In dealing with this aspect of the claim, the Federal Magistrate said:

> *"Riteway is entitled to operate its business in the lawful manner most suitable to it including by, from time to time in accordance with clause 5 of the Riteway – TWU Agreement, stipulating the sort of vehicles used to perform its work. It is not unfair that contract drivers should meet such requirements. What is unfair is that drivers already performing that work at agreed rates should be required to meet such stipulations without being entitled to*

> *compensation for the additional expenses which they might thereby incur."* [37]

19. The judgment on final relief was given on 16 June 2008. In it the Magistrate made orders for damages for the three companies. For Keldote $30,800.00, plus interest of $8,272.12l. For the company L&D Low Transport $29,000.00, plus interest of $7,788.68 and the company Tambo orders $38,000.00, plus interest of $10,205.87. No orders were made in relation to costs. When one considers that this case had been in Court for seven days, a no costs order does not make such proceedings entirely attractive for applicants when one considers the level of damages realistically available. The damages were awarded based upon the expert evidence provided by a forensic accountant called by the applicants. In making these orders, it was based upon the variation to the contract as made by the Court which effectively created an enforceable right to sue for damages for breach of that variation. If the contract had not at that point after the retroactive date of the variation being performed in accordance with its terms as varied, in awarding damages under the associated jurisdiction, the Magistrate relied upon s.18 of the *Federal Magistrates Act* which provides:

> *"To the extent the constitution permits, jurisdiction is conferred on the Federal Magistrates Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Magistrates Court is invoked."*

20. In rejecting the jurisdictional challenge to the Court's power to award damages, the Magistrate said this:

> *"The claims for relief under the ICA and the claims for damages for breach of the contracts as varied plainly arise out of the common transactions and facts. In these proceedings, a set of facts has led the Court to the conclusion that the contracts were unfair. Essentially the same set of facts will form the basis of the Court's finding on whether a repudiatory breach occurred. Moreover, the most relevant evidence on that latter question was adduced in the second stage of these proceedings, when the Court was asked to determine whether the contracts were harsh or unfair. Not only do Riteway's arguments fail to acknowledge the factual commonality of the ICA and the damages claims but, if accepted, would necessitate the institution of separate proceedings to deal with the*

> *damages claims which would only delay the final determination of the dispute between the parties and duplicate costs."*
>
> *132 All these considerations lead to the conclusion that the applicants' damages claims and their claims that the contracts were harsh or unfair are part of the same controversy ---within the Court's accrued jurisdiction."*

21. A debate as to the calculation of damages arose as to who terminated the contract. In the alternative, Riteway said that if it was found to have terminated the contracts that it did so on reasonable notice with the letters advising the need to upgrade the vehicles. However, it was found by the Magistrate that those letters were not sufficient to provide reasonable notice that the contracts were terminated on 23 August 2007. As a consequence, the applicants were not precluded from claiming damages for termination on reasonable notice [183].

22. The Magistrate relied upon the authority of *Crawford Fitting Company v Sydney Valve and Fittings Pty Limited* (1988) 14 NSWLR 438 for the authority as to the implication of a term requiring in cases of commercial agreements of indefinite duration that termination be on reasonable notice and in particular, what McHugh JA said at [448] that the reasonable period of notice was to:

> "*enable the parties to bring to an end in an orderly way a relationship which, ex hypothesi, has existed for a reasonable period so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship."* [194]

23. Regard must be had also to the contractual context in which the parties had operated in order to work out what is reasonable [198]. The decision goes to some length as to how to calculate what would be reasonable in the circumstances for owner drivers of these trucks to put themselves right after the termination of their contracts. One important matter in considering the ending of the relationship was the ability of the applicants to:

> *"obtain the fruits of the extraordinary expenditure incurred by them within the scope of their contracting arrangements with Riteway.*

> *Consequently, the extraordinary expenditure represented by the applicants' prime movers and trailers must be taken into account in determining what amounts to a period of reasonable notice in each case."* [213]

24. The Magistrate concluded that what was reasonable notice from 23 August 2007 was three months [221]. The applicants also made a claim for the loss of goodwill of $20,000.00, that loss being the loss of the opportunity to sell that goodwill of the truck in work. The claim for goodwill was rejected by Riteway on the basis that there was no evidence that there was anybody prepared or interested in purchasing the vehicles and paying $20,000.00 for the runs and that there was no interest in Riteway in contracting with drivers who only used trailers like the ones used by the applicants, nor was there any evidence adduced which demonstrated the runs would have realised $20,000.00 as goodwill [241-242], nor could the applicants point to any term of the contract which required Riteway to pay out the goodwill on termination. However, the Magistrate found that as a consequence of Riteway's repudiation, the contract has been its failure to pay to each applicant the agreed figure representing the goodwill they would have in their runs. In such circumstances, he found the relevant loss suffered by each of the applicants was $20,000.00 [249].

25. A search reveals that there has only been a couple of other cases dealing with the *Independent Contractors Act* and they are: *Bank of Queensland v Industrial Court of New South Wales* [2008] 170 IR 457; *Rossmick No. 1 Pty Limited v Bank of Queensland* [2008] 176 IR 161; *Fabsert Pty Limited v ABB Warehouse (NSW) Pty Limited* [2008] 176 IR 169; *Kheirs Financial Services Pty Limited v Aussie Home Loans Limited (No.2)* [2009] 185 IR 473, all of which are proof of what I have said at the beginning of this paper that the jurisprudence in this area will develop slowly and will heavily rely upon that which has previously existed in the Industrial Court of New South Wales, because of the associated accrued jurisdiction of the Federal Court, the common law and ultimately the courage of applicants to bring forward such proceedings in a non-costs jurisdiction.

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