Equity Division
Supreme Court
New South Wales

Case Name:	In the matter of Plutus Payroll Australia Pty Limited (in liquidation)
Medium Neutral Citation:	[2019] NSWSC 1171
Hearing Date(s):	9 July 2019; 27 August 2019
Date of Orders:	6 September 2019
Date of Decision:	6 September 2019
Jurisdiction:	Equity - Corporations List
Before:	Black J
Decision:	Direct that the Liquidators would be justified in determining that claims in the liquidations of the Companies submitted by Workers are not claims by employees of the Companies if the specified criteria are satisfied. Orders as to notice made and the costs of the application be costs in the winding up.
Catchwords:	CORPORATIONS – winding up – application for directions that liquidators are justified in determining claims of individuals claiming to be employees – where agreement evinces intention to exclude employment relationship – where other persons exercised practical control of activities of workers – whether workers were employees of companies – whether directions sought should be made.
Legislation Cited:	- *Corporations Act* 2001 (Cth) ss 9, 479(3), 511, 555, 556, 556(1)(e), 556(2), 579E, 579G(1); Sch 2, s 90-15 - *Insolvency Law Reform Act* 2016 (Cth) - *Trustee Act* 1925 (NSW) s 63
Cases Cited:	- *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3 - *Austin v Honeywell Ltd* [2013] FCCA 662; (2013) 277 FLR 372 - *Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 42 ALR 598 - *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR

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- *Gothard Re AFG Pty Ltd (recs and mgrs apptd) (in liq) v Davey* [2010] FCA 1163; (2010) 80 ACSR 56
- *Jones (Liquidator) v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; (2018) 354 ALR 436
- *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341
- *Performing Right Society Ltd v Mitchell & Booker (Palais de Danse) Ltd* [1924] 1 KB 762
- *Re Broens Pty Ltd (in liq)* [2018] NSWSC 1747
- *Re C&T Grinter Transport Services Pty Ltd (in liq)* [2004] FCA 1148
- *Re Go Energy Group Ltd* [2019] NSWSC 558
- *Re ICS Real Estate Pty Ltd (in liq)* [2014] NSWSC 479
- *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* [2016] NSWSC 106
- *Re Magic Aust Pty Ltd (in liq)* (1992) 7 ACSR 742
- *Re Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041
- *Re Plutus Payroll Pty Limited* [2017] NSWSC 1360
- *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179
- *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16
- *Textile Footwear and Clothing Union of Australia v Bellechic Pty Ltd* [1998] FCA 1465
- *Walley; Re Poles & Underground Pty Ltd (admins apptd)* [2017] FCA 486
- *Warner (liquidator), Re Sakr Bros Pty Ltd (in liq)* [2019] FCA 547

Texts Cited:

Category: Procedural and other rulings

Parties: Deputy Commissioner of Taxation (Plaintiff)
Timothy Norman and Salvatore Algeri as the joint and several liquidators of the First-Tenth and Twelfth Defendants (Applicants)
Plutus Payroll Australia Pty Limited (in liq) (First Defendant)
PPA Contractors Australia Pty Ltd (in liq) (Second Defendant)
PPA Services Australia Pty Ltd (in liq) (Third Defendant)
PP AUS Holdings Pty Ltd (in liq) (Fourth Defendant)
PP Australia NSW Pty Ltd (in liq) (Fifth Defendant)

PP Services (WA) Pty Ltd (in liq) (Sixth Defendant)
PPA (SA) Pty Ltd (in liq) (Seventh Defendant)
PPA NT Pty Ltd (in liq) (Eighth Defendant)
RAM Enterprises Australia Pty Ltd (in liq) (Ninth Defendant)
SAI Solutions Australia Pty Ltd (in liq) (Tenth Defendant)
Synep Pty Ltd (Eleventh Defendant)
BRW Services Pty Ltd (in liq) (Twelfth Defendant)

Representation:

Counsel:
C T Ensor / W Vuong (9.7.19) (Solicitor) (Plaintiff)
J Hynes (Applicants)

Solicitors:
Australian Government Solicitor (Plaintiff)
MinterEllison (Applicants)

File Number(s): 2017/169447 (010)

Publication Restriction:

JUDGMENT

Nature of the application

1 By Interlocutory Process filed on 14 November 2018, the Applicants, Messrs Norman and Algeri as the joint and several liquidators ("Liquidators") of Plutus Payroll Australia Pty Limited (in liq) ("PPA") and associated companies ("Companies") ("Liquidators") initially sought an order under s 90-15 of the Insolvency Practice Schedule (Corporations) (being Schedule 2 of the *Corporations Act* 2001 (Cth)) that they would be justified in determining that claims submitted by specified persons ("Workers"), in the liquidations of the Companies, are not claims by employees of the Companies and that those claims were not required to be paid in priority under s 556 of the *Corporations Act*. The application was heard on 9 July 2019 and, briefly, continued on 27 August 2019.

2 The Liquidators reformulated the directions sought at the continuance of the hearing on 27 August 2019 to seek a direction under s 479(3) of the

Corporations Act (relying on transitional provisions, since that section was repealed by the *Insolvency Law Reform Act* 2016 (Cth)) that they would be justified in determining that claims in the liquidations of the Companies submitted by Workers were not claims by "employees" (within the meaning of s 556(2) of the *Corporations Act*) in specified circumstances, namely where:

> "(a) the Companies operated only a payroll service business and were contracted to provide payroll services to external clients;
>
> (b) the Workers were listed on the Companies' payroll system maintained for the purpose of operating the Companies' payroll service business;
>
> (c) the Workers have confirmed to the Liquidators (or the Liquidators are otherwise satisfied) that during the period in which they were paid by one of the Companies:
>
> (i) they provided services to a business other than one of the Companies;
>
> (ii) they were not introduced to the host business by one of the Companies;
>
> (iii) they never attended the premises of any one of the Companies;
>
> (iv) they did not report to any representative of the Companies including on a day-to-day basis;
>
> (v) if the worker took a planned or unplanned absence from work, they did not notify a representative of the Companies about the absence;
>
> (vi) if the worker indicated that they received feedback about their work performance, they did not receive this feedback from a representative of the Companies;
>
> (vii) the length of their placement or contract (whether it was extended or ceased early) was not determined by one of the Companies;
>
> (viii) the rate of pay, pay frequency and method of payment, or the negotiation and agreement in relation to pay was not determined or undertaken solely by one of the Companies; and
>
> (d) the Worker appears to have entered into a Payroll Services Agreement with one of the Companies which provided that the Worker was not an employee of any one of the Companies."

3 The matters set out above are in the nature of assumed facts, adopting a similar approach to that which would be taken in an application for judicial

advice under s 63 of the *Trustee Act* 1925 (NSW). The Liquidators confirmed, in submissions, that each of these assumed facts is cumulative, so that the direction sought would only be applicable if each of the matters specified in paragraphs (a)-(b), each of the sub-paragraphs in paragraph (c) and paragraph (d) are satisfied. Although that approach requires that a number of facts be established to conclude that a Worker is not an employee of the Companies, for the purposes of s 556 of the *Act*, the Liquidators' present assessment is that those facts are established in respect of a substantial number of Workers and the direction sought has utility. It would be a matter for the Liquidators, if the direction sought is made, to make a factual assessment of the circumstances of each relevant Worker, with the benefit of that direction, to adjudicate his or her proof of debt. That Worker would, in an appropriate case, have an opportunity to appeal such a determination to the Court. The Liquidators do not seek a direction as to the position where only some of those facts are established, and accept that situation would need to be addressed on a case-by-case basis.

4 It is not necessary to determine, for present purposes, whether the application is properly brought under s 90-15 of the Insolvency Practice Schedule (Corporations) or former s 479(3) of the *Corporations Act* since the Court has jurisdiction under one or other of those provisions and similar principles apply. The Court's power to give a direction under s 90-15 of the Insolvency Practice Schedule (Corporations) is the same as, or is likely wider than, its powers under former s 479(3) of the *Act*: *Walley; Re Poles & Underground Pty Ltd (admins apptd)* [2017] FCA 486 at [41]; *Warner (liquidator), Re Sakr Bros Pty Ltd (in liq)* [2019] FCA 547 at [18]; *Re Go Energy Group Ltd* [2019] NSWSC 558 at [16].

5 I recognise that, as Mr Hynes, who appeared for the Liquidators, accepted, there are circumstances in which the Court should not make a direction to the effect that a liquidator would be justified in admitting or rejecting a particular proof of debt where that would not be determinative of the validity or otherwise of the claim that is the subject of that proof and would not preclude a subsequent appeal to the Court from the liquidator's decision in compliance

with the direction; however, these matters do not exclude the possibility of a direction as to issues arising in determining proofs of debt in an appropriate case: *Re Magic Aust Pty Ltd (in liq)* (1992) 7 ACSR 742 at 745; *Re Broens Pty Ltd (in liq)* [2018] NSWSC 1747 at [36]ff, [48]ff, [55]. The matters to which I refer in paragraphs 6-7 below support making such a direction in this case.

6 Mr Hynes submits, and I accept, that the Liquidators' application plainly does not concern the making of a business or commercial decision, as distinct from the proper characterisation of the Workers' relationship with the Companies and the Companies' obligations to the Workers. The Liquidators fairly recognise that a decision to reject the Workers' claims (or, more precisely, allow those claims as unsecured debts without the priority afforded to employees) would be a significant decision in the liquidation and would affect the interests of those persons, who may have limited means or lack the knowledge of how to challenge the Liquidators' decision. It seems to me the Liquidators can fairly look to the Court to assist them in making that decision, and indirectly assist the Workers to secure a decision that is appropriate even if adverse to them, where that decision raises difficult questions and would, as Mr Hynes points out, be based primarily upon the Companies' limited books and records including material which presents a conflicting picture as to whether the Workers are employees of the Companies or have some other status.

7 Mr Hynes submits, and I accept, that the directions sought in this application have the capacity to allow a more just, efficient and less costly approach to the resolution of the claims, although any Workers who are aggrieved with the Liquidators' determination of a proof of debt will have a right to appeal that determination. Those directions will also, appropriately, protect the Liquidators from personal liability in acting in accordance with those directions. I am satisfied that this is a proper matter in which such directions should be made, given the complexity of the issues raised. I will return below to the matters that arise in determining the direction that should be given.

Factual background and affidavit evidence

8 I will first set out the factual background to the application, which I have drawn from the affidavit evidence led by the Liquidators, to which I refer below, their substantial exhibits and Mr Hynes' helpful submissions. The approach now adopted by the Liquidators, in seeking a direction by reference to assumptions as to the relevant facts, means that it is ultimately not necessary for the Court to reach findings as to the relevant facts, either generally or in any particular case. However, the evidence led by the Liquidators is relevant to show that the assumed facts would likely be established in respect of a substantial number of Workers, and points to the utility of the direction that is sought.

9 Until they ceased business, the Companies operated a payroll services business and were contracted to provide a number of payroll services to external clients. The Liquidators' investigations have established that PPA was the main trading entity among the Companies and that the other Companies received funds from PPA and distributed those funds to Workers. It appears that, when the Liquidators were appointed as provisional liquidators of the Companies, in excess of 4,500 persons were regularly paid by the Companies. Some of those persons were employees of the Companies who worked in their payroll business, such as management and administrative staff who were employed under employment contracts, and this application does not concern those persons. I will refer below to the affidavit evidence led by the Liquidators in respect of the two primary services provided by PPA, or PPA and the Companies, and as to the process for payment adopted by PPA for payment of wages to Workers and the contractual arrangements in place in respect of Workers within "Individual Services" arrangements.

10 Prior to the Liquidators' appointment, the Australian Federal Police commenced criminal investigations in relation to certain former and current directors, employees and associates of the Companies. On 6 June 2017, the Deputy Commissioner of Taxation ("DCT") applied to wind up the Companies, and contended that each of the Companies was indebted to it for large amounts of unpaid taxes and penalties: *Re Plutus Payroll Australia Pty*

Limited [2017] NSWSC 1041 at [6]. On 9 June 2017, Brereton J appointed the Liquidators as provisional liquidators to the Companies. Subsequently, on 9 October 2017, the Court ordered that the Companies be wound up and the Liquidators were appointed as liquidators of the Companies: *Re Plutus Payroll Pty Limited* [2017] NSWSC 1360. On 12 June 2018, the Court ordered that the Companies constitute a pooled group for the purposes of s 579E of the *Act* and the property of the Companies was to be combined in a single fund pursuant to s 579G(1) of the *Act*. On 16 June 2017, 10 July 2017 and 3 November 2017, the then provisional liquidators issued circulars to potential creditors who had submitted claims in the provisional liquidations. In response, some 317 claims for unpaid wages and superannuation were received from persons who claimed to be Workers and who had performed work for third parties. The total value of the claims now amounts to $1,006,932.84.

11 Turning now to the affidavit evidence, the Liquidators relied on the affidavit dated 14 November 2018 of one of the Liquidators, Mr Timothy Norman. Mr Norman there referred to the difficulties faced by the Liquidators in determining Workers' claims, including that there is missing and conflicting information and documentation received from Workers and contained in the Companies' books and records regarding the Workers' employer (Norman 14.11.18 [7]). Mr Norman also noted that, based on the information contained in the Companies' books and records and supplied by Workers to the Liquidators, it appeared that many of the Workers were not employed by the Companies and were employed by either third party host businesses or labour hire companies (Norman 14.11.18 [8]).

12 Mr Norman also there referred to the circumstances of the appointment of provisional liquidators and subsequently liquidators to the Companies and to the history of the liquidation. Mr Norman also referred to the structure of the payroll business operated by the Companies. First, PPA provided payroll management services to third party businesses for a fee. Mr Norman's evidence is that this service was in the nature of a traditional payroll service, where PPA acted only as paymaster for third party businesses that had

outsourced their entire payroll function to it. Second, PPA also outsourced payroll management to individual Workers on a no fee basis. In that situation (which Mr Norman describes as "Individual Services"), those Workers were usually recruited by recruitment companies ("Labour Hirers") to provide services to third party businesses or government departments ("Host Businesses") but were paid by the Companies.

13 Mr Norman also gives evidence of two forms of arrangements in place for Workers under the "Individual Services" arrangement, namely a tripartite arrangement involving a Worker, a Labour Hirer and one of the Companies by which the Labour Hirer would recruit the Worker to carry out work at a Host Business, however the Worker would be paid by one of the Companies; or a different tripartite arrangement involving a Worker, a Host Business and one of the Companies where the Worker would be recruited by the Host Business (rather than the Labour Hirer) and the Worker would be paid by one of the Companies. Mr Norman's affidavit evidence is that the process adopted by PPA to pay Workers within the second form of arrangement involved the Worker submitting a weekly timesheet to PPA, PPA then calculating pay as you go ("PAYG") and any other applicable taxes to be withheld, and PPA invoicing the total value of these amounts to the Labour Hirers (Norman 14.11.18 [24]). Wider difficulties arose, but are not presently relevant, to the extent that amounts payable in respect of PAYG were not remitted to the DCT.

14 Mr Norman also addressed the steps taken by the Liquidators to obtain access to the Companies' books and records, the financial position of the Companies, claims made by Workers in the liquidation and steps taken by the Liquidators to determine Workers' employment status, including the issue of a questionnaire to all Workers who had (at that time) submitted claims in the liquidation ("Worker Questionnaire"). The Worker Questionnaire sought to obtain documents and records from each Worker describing the nature of their engagement agreement and information as to their practical relationship with the Companies. The Liquidators received 121 responses to the Worker Questionnaire, but 201 Workers who submitted claims in the liquidations did

not respond to the Worker Questionnaire. The Liquidators then sought to locate documents potentially relevant to the responses received from Workers by conducting further electronic searches of the Companies' books and records.

15 By a second affidavit dated 1 February 2019, Mr Norman referred to notification of this application to Workers who had submitted claims in the liquidation for wages and entitlements, to the Fair Entitlements Guarantee Branch of the Department of Jobs and Small Business and to the Australian Securities and Investments Commission. Ultimately, the DCT appeared on the application but made no substantive submissions. One Worker, Mr Paul Johnston, made a written submission to which I will refer below. By his further affidavit dated 21 February 2019, Mr Norman further updated the position in respect of notification of the application to Workers who had claimed in the liquidation.

16 By his fourth affidavit dated 17 June 2019, Mr Norman referred to the outcome of further investigations concerning the Companies' payroll business and the employment of persons to provide administrative and management services to the Companies as part of that business. Mr Norman noted that, unlike the Workers who are the subject of this application, those persons appeared to have been directly employed by PPA and had provided services to the Companies during the course of their employment. Mr Norman also referred to further correspondence with Worker creditors, and additional claims by several Workers. Mr Norman referred to the review of responses to the Worker Questionnaire and the preparation of a detailed schedule summarising information submitted in those responses. Mr Norman also noted that, at the date of swearing that affidavit, some 201 Workers had submitted claims in the liquidation and not responded to the Workers Questionnaire, and to further inquiries which had been made to identify documents relating to those persons.

17 The Liquidators also drew attention to an affidavit of Mr Mark Taylor dated 24 March 2019, which was not read but marked for identification (MFI 1). Mr

Taylor's affidavit indicated that he was a former "employee" of PPA and he stated that he was "employed" by PPA "as an employee" and it met his pay roll obligations; that he did not claim GST or any other benefit as a sole trader; and that it would be:

> "exceptional that the law would see [him] as [an] employee for tax purposes but then not so when it comes to inconvenient liquidation events."

An obvious difficulty with that proposition is that it was PPA (and possibly also Mr Taylor) rather than "the law" that treated Mr Taylor as PPA's employee for tax purposes, and the mere fact that it (or they) did so does not establish the correctness of that approach.

The first question in the application

18 The primary question that arises in the application is, broadly, whether certain Workers were "employees" of the Companies as defined in s 556(2) of the *Corporations Act* so as to rank as priority creditors under s 556 of the *Act.* The total value of claims in the liquidations by the Workers exceeds $1 million and the Liquidators have formed the view that the preponderance of evidence points to a determination that the Workers (or at least the substantial majority of them) were not employees of the Companies. I have set out the revised form of direction sought by the Liquidators and noted its scope above.

19 Section 556 of the *Act* modifies the pari passu principle under s 555 of the *Act* by specifying the order of priority in which specified unsecured debts are to be paid from the realised assets of an insolvent company. A relatively high priority is given by s 556(1)(e) to wages, superannuation contributions and any superannuation guarantee charge payable by a company in respect of services rendered by employees before the relevant date. As Mr Hynes fairly recognises, the priority afforded to employee claims under that section protects employees of a company in insolvency: *Jones (Liquidator) v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; (2018) 354 ALR 436 at [112]. The term "employee" is defined in s 556(2) as a person who has been or is an employee of the

company, whether remunerated by salary, wages, commission or otherwise; and whose employment by the company commenced before the relevant date. Mr Hynes also fairly points out that there is authority that independent contractors are not employees for the purposes of s 556 of the *Act*: *Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2)* [2016] NSWSC 106 at [21]; *Re ICS Real Estate Pty Ltd (in liq)* [2014] NSWSC 479 at [39].

20 Mr Hynes draws attention to the matters that are relevant to determining whether a person is an employee for the purposes of s 556 of the *Act*. Mr Hynes rightly points out that the test for distinguishing between employer and employee on the one hand, and an independent contractor or some other engagement arrangement on the other, is somewhat imprecise: *Austin v Honeywell Ltd* [2013] FCCA 662; (2013) 277 FLR 372 at [90]. Mr Hynes nonetheless identifies several matters that are relevant to determining whether a person is an employee or contractor. A relevant factor is the degree of control that the principal has over the worker: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24; *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341 at [204]. A second relevant factor is whether the parties treat their relationship as one of employment or independent contracting: *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3 at [36]. Mr Hynes points out that, if the contract is directed towards a person achieving or producing a particular "result", that will be an indication that the relationship is that of independent contractor rather than of employer and employee: *Performing Right Society Ltd v Mitchell & Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at 768. Mr Hynes notes that, on the other hand, an inability to work for a person other than the principal, and the deduction of income tax from a worker's payments by a principal, are indicators that the worker is an employee rather than an independent contractor: *Stevens v Brodribb Sawmilling Co Pty Ltd* above at 36-37, 39. Mr Hynes also points out that, while parties may choose the nature of the contract which they will make between themselves, their characterisation of it will not necessarily be conclusive and a court will look at all the terms of the contract to determine its true essence: *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184.

21 In *Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 42 ALR 598 at 606, the fact that a person's salary was paid by a particular company and the tax group certificates issued to her showed that company as her employee did not establish that that company was her employer. In *Textile Footwear and Clothing Union of Australia v Bellechic Pty Ltd* [1998] FCA 1465, a first company was held to be the employer, notwithstanding that a second company's name was shown on payslips and group certificates, where the first company made the employee's services available to the second company on condition that it pay their wages and attend to relevant tax deductions. In *Re C&T Grinter Transport Services Pty Ltd (in liq)* [2004] FCA 1148 at [20], Finn J pointed to several considerations that were relevant to identifying which of two or more possible entities was the employing company and noted, inter alia, that the totality of the circumstances surrounding the relationships of the various parties including conduct subsequent to the creation of an alleged employment relationship is relevant to the assessment of that matter and that documentation created by one or more of the parties describing or evidencing an apparent employment relationship will be relevant to, but not necessarily determinative of, the true character of that relationship. His Honour also emphasised that, in determining the identity of a disputed employer, the Court is entitled to consider "the reality of purported contractual arrangements"; that conversations and conduct at the time of the alleged engagement of the employee is of considerable significance; and the employees' beliefs as to the identity of their employer is admissible and is entitled to weight.

22 Mr Hynes also refers to *Gothard Re AFG Pty Ltd (recs and mgrs apptd) (in liq) v Davey* [2010] FCA 1163; (2010) 80 ACSR 56, where Edmonds J observed (at [52]), in respect of the identification of the employer entity, that:

> "Unsurprisingly, the outcome in cases which have been concerned with identifying an employer of a person or group of persons from two or more possibilities, whether from within the same group of companies or otherwise, has turned on their own facts and, in consequence, the case law in this area is of limited assistance. Nevertheless, it is possible to discern certain general principles that the courts have applied in the identification process. The courts have adopted the position that in undertaking this exercise, they are entitled to take a wide view of the putative relationship, beyond the terms of the

> contractual documentation, to examine how the parties conducted themselves in practice and whether, where there is contractual documentation, the reality of the situation accords with the terms of that documentation or whether it points to another entity being the employer."

23 His Honour also referred (at [60]), following a detailed review of the authorities, to the "practical realities of the relationship" that are relevant when considering whether an entity can be regarded as an employer of a worker, including whether the entity (a) had practical and legal control and direction of the employees; (b) made decisions about hiring; (c) made decisions about disciplinary issues; (d) made decisions about the level of remuneration; (e) actually paid remuneration; (f) communicated with employees about leave; and (g) made decisions about termination of employment. The Liquidators have given particular attention to investigating these matters in this case, and they are reflected in the form of declaration that they seek.

24 Mr Hynes also refers to *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346 (rev'd on other grounds [2015] HCA 45), which involved a suggestion that the relevant contracts were a sham. The Full Court of the Federal Court there referred to a "triangular" labour hire arrangement, and North and Bromberg JJ observed (at [135]-[142]) that:

> "Triangular contracting arrangements are also used to provide labour to end-users. These arrangements involve a third person intermediary. Sometimes, the intermediary will be an agency which merely facilitates (by way of recruitment, introduction and like services) the engagement of an employee by an employer. An agency of that kind may also facilitate the engagement by one business of the labour services provided by another, including where the provider business is that of a self-employed independent contractor.
>
> Other intermediaries contract with the end-user business as a provider of labour. That is commonly known as labour-hire and usually involves the intermediary providing the labour of a natural person that the intermediary employs as its employee. Another form of labour-hire is where an intermediary provides the labour of an independent contractor to an end-user business. Finally, an intermediary may be found between a natural person who provides labour and an end-user where one company in a group of related companies provides the labour of its employees to other companies within the group.
>
> The many and varied ways in which the labour of an individual may be provided to an end-user have facilitated the provision of labour through

> arrangements which do not create an employment relationship between the provider and the end-user. The use of such arrangements may be real or artificial. Where artificial, the external form, appearance or presentation of the relations between the parties may cloak or conceal either an underlying employment relationship or the identity of the true employer. This is what is commonly referred to as a disguised employment.
>
> ...
>
> The prevalence of disguised employments may serve to explain why appellate courts in Australia and the United Kingdom have been particularly alert, when determining whether a relationship is one of employment, to ensure that form and presentation do not distract the court from identifying the substance of what has been truly agreed. It has been repeatedly emphasised that courts should focus on the real substance, practical reality or true nature of the relationship in question." [citations omitted]

25 Turning now to the relevant agreements and the practical arrangements between the Companies, the Workers and relevant third parties, Mr Hynes points to Mr Norman's evidence that the Liquidators have collated and reviewed the Companies' books and records, which reveal missing and conflicting information about the Workers' status with respect to the Companies; there are documents that identify Workers as employees of one of the Companies and being paid by one of the Companies; and, on the other hand, there are other documents that expressly provide that Workers are engaged to provide services to a third party entity, and the Workers were not directed in the performance of their work by the Companies or attended the Companies' premises (Norman 14.11.18 [7]).

26 Mr Hynes rightly recognises that there is some evidence that might support a characterisation of the Workers as employees of one of the Companies. Mr Norman's evidence is that a significant number of the Workers were party to tripartite agreements, and, in some of these agreements (between the Worker, a Labour Hirer and one of the Companies, or between the Labour Hirer and one of the Companies in respect of the provision of the Worker's services) the parties acknowledged that the Worker was either an employee or otherwise engaged by one of the Companies (Norman 14.11.18 [56]-[57]).

27 However, Mr Hynes also draws attention to the fact that 67 responses to the Worker Questionnaire attached a copy of a contract with PPA titled a "Payroll

Services Agreement" ("PSA"), and 36 of those responses were made by Workers who were also party to tripartite agreements (Norman 14.11.18 [59], [63]). As Mr Hynes points out, the terms of the PSA tend against a conclusion that the Companies or any of them were employers of the Workers. The PSA relevantly provided (cl 3.2) that"

> "The Contractor[1] warrants that:
>
> (a) The Recruitment Company[2] and the Client[3] selected the Contractor without the assistance of the Company;
>
> (b) The Contractor acts as a representative of the Recruitment Company when providing its expertise or services to the Client;
>
> (c) The Company is not responsible for supervising the Contractor at the Client's site;
>
> (d) The Company has no obligations with the Client directly; and
>
> (e) The Contractor has agreed to the terms of the Labour Hire Contract[4] and that the terms of that agreement are to be managed by the Contractor and not the Recruitment Company."

28 Clause 10.2 of the PSA in turn provides that "[t]his Agreement does not form an employer and employee relationship between the Company and the Contractor" and cl 10.3 provides that:

> "The Contractor acknowledges that:
>
> (a) the Recruitment Company or the Client is the employer as specified by the *Fair Work Act 2009*; and
>
> (b) the Contractor is not entitled to any of the benefits of permanent conditions of employment from the Company and shall make no

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[1] The term "Contractor" is defined as "the natural person who has engaged the Company to provide payroll management services via the relevant labour hire contract between the Contractor and the Recruitment Company to provide the Contractor's expertise and services to a client."

[2] The term "Recruitment Company" is defined as "an organisation or business that sources staff and contractors on behalf of clients. This covers organisations otherwise known as Labour Hire businesses."

[3] The term "Client" is defined as "an organisation (Government body, private company or otherwise) that selected the Contractor to provide its expertise or services by way of a labour hire agreement with the Recruitment Company." That definition also states that the Client "is responsible for supervision and management of the Contractor on a day to day basis."

[4] The term "Labour Hire Contract" is defined as "the contract entered into between the Contractor and a Recruitment Company to facilitate the provision of services by the Contractor to a Client. This contract may refer to the Contractor in a variety of ways including, but not limited to, the Specified Person, the Contractor, the Consultant, or any other term or set of terms with similar meaning."

> claims on the Company for annual leave, sick leave, and other forms of leave or similar Payments."

As Mr Hynes points out, cll 10.2 and 10.3 of the PSA point to a contractual intention to exclude an employment relationship between the Companies and the Workers, and that is not a surprising result where the Companies were purportedly providing payroll services only.

29 Mr Hynes also draws attention to the responses received to the Worker Questionnaire, which he submits reveal the practical realities of the arrangements between the Companies, the Workers and the other businesses with which the Workers were involved. Mr Hynes points out that responses to the Worker Questionnaire generally indicate that the Workers reported to an employee of a Host Business and received feedback and performance counselling from the Host Business and Labour Hirer, and none of those responses indicated that the Workers reported to an employee of the Companies or attended the Companies' premises, or that the Companies provided feedback or commented on the performance of the Workers. Those responses also generally indicated that the Companies had no involvement in any decision-making about the initial engagement of the Worker or the length of the Worker's engagement with the Host Business and, while the Workers were working at a Host Business and were being paid by the Companies, that was generally the only work they performed. The majority of those responses also indicated that Workers did not communicate their leave arrangements to the Companies. The Workers were generally paid an hourly or daily rate, rather than for a "result", and PAYG tax and superannuation contributions were withheld from their earnings. Mr Hynes notes that there is no evidence that the Workers could delegate their work to others or generate any goodwill in relation to their work, and the Workers were generally not required to supply tools to carry out their work at a Host Business. Mr Hynes also notes that, after the Companies' business operations ceased in April 2017, the majority of the Workers continued to perform the same work with a Host Business, and the responsibility for paying their wages was assumed by the Labour Hirer; a different payroll company, either on their own initiative or with

the assistance of the Labour Hirer or the Host Business; or directly by the Host Business.

30 Mr Hynes refers to these matters as supporting the Liquidators' view, noted in Mr Norman's affidavit evidence, that the Workers were not employees of the Companies and appear to have been employed by the Host Business or the Labour Hirer. Mr Hynes in turn submits that the reference in some of the tripartite arrangements to the Workers being employed by one of the Companies is not determinative or conclusive evidence of the nature of the engagement, and the Court must focus on the "real substance, practical reality or true nature of the relationship in question": *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* above at [142]; see also *Re C&T Grinter Transport Services Pty Ltd (in liq)* above at [20(3)]. He submits that the responses to the Worker Questionnaire indicate that the Companies had no material oversight of the Workers, no involvement in any decision-making about their initial engagement, or the length of their engagement with the Host Businesses.

31 I am satisfied that the form of the direction sought by the Liquidators is appropriate, so far as it applies to an assumed state of facts and leaves the Liquidators to determine whether those facts are established in respect of a particular employee. I am also satisfied that, if each of the assumed facts are established in respect of a Worker or Workers, then the Liquidators would properly proceed on the basis that he, she or they were not employees of the Companies. I reach that conclusion for the reasons identified by Mr Hynes, and because (on those assumptions) the existence of an employment relationship would not then be established in the context of the Companies' provision of payroll services, the contractual provision in the PSA recording the parties' intent not to create an employment relationship and, most importantly, the practical realities of the relationship, namely that (on those assumptions persons other than the Companies exercised the practical control of the Workers' activities that is consistent with an employer's role.

32 In reaching this conclusion, I have not neglected the submissions made by Mr Paul Johnston, who is a potential creditor of the Companies and claims to be owed a total of $4,360.96 of entitlements from work performed as a software engineer at a Host Business through a Labour Hirer which utilised the services of one of the Companies. Mr Johnston indicated he did not disagree with the proposition that:

> "there is a category of workers for whom their relationship with [the Companies] was not one of an employee and employer, but rather of a worker whose employer utilised the payroll services provided by one of the [Companies]."

Mr Johnston submitted that he was such a person and that it would not be a just outcome to "adjust" the status of such persons from priority claimants to ordinary creditors, and submitted that such persons should not be considered claimants in the liquidation in any capacity. I should note that no question of "adjust[ing]" the status of a creditor arises, because that depends upon the proper application of s 556 of the *Act* in the relevant circumstances and not on the exercise of any discretion by the Liquidators or the Court.

33 Mr Johnston also submitted that such persons should be considered employees of either the Host Business or the Labour Hirer, and that proposition may also be implicit in the Liquidators' submissions. Mr Johnston submits that "the true Employer remains responsible to the employee for any and all unpaid entitlements" and that:

> "[A]ny Order from this Court that has the effect of declaring that individual workers are ordinary creditors to a payroll service in liquidation when their true Employer is held unaccountable and uninvolved would be unjust to those same workers and at odds with the legislative intent to protect [employees'] entitlements pursuant to s.556 of the Act."

Mr Johnston also submitted that the Court should find that the Workers are not employees or contractors of any of the Companies and have no claim in the liquidation as a result.

34 I cannot reach the findings for which Mr Johnston contends and it would not assist him or other Workers if I did reach those findings. First, it is a matter for each Worker whether he or she brings a claim in the liquidation of the Companies, or does not do so on the basis that he or she considers that he or she is in fact a creditor of a Host Company or Labour Hirer or other third party. If such a Worker brings a claim in the liquidation of the Companies, because he or she considers themself a creditor of the Companies, then the Liquidators will need to determine that claim on its merits. Second, the proposition that the Workers were creditors of the Companies, albeit they did not have the priority afforded to "employees" under s 556 of the *Corporations Act*, does not exclude the possibility that they were *also* creditors of third parties including a Host Company or Labour Hirer in respect of any amounts that they ultimately do not recover from the Companies. Third, the Court cannot reach a finding as to whether a Worker has a claim against a Host Company or Labour Hirer in a particular case, because the evidence does not and realistically could not extend to the range of such cases. Fourth, there would be no utility in the Court reaching such a finding even if it could do so, because the relevant Host Companies, Labour Hirers and third parties are not party to these proceedings and would not be bound by that finding.

The second question in the application

35 The Liquidators also sought further advice that:

> "Pursuant to subsection 479(3) of the *Corporations Act 2001* (Cth), the Liquidators of the Companies would be justified in determining that claims in the liquidations of the Companies submitted by the Workers are not claims by employees (within the meaning of subsection 556(2)) of the Companies in circumstances where:
>
> (a) the Worker is yet to provide a response to the Questionnaire appearing at pages 400-409 of Exhibit TBN-3 (Questionnaire); and
>
> (b) the Worker does not provide a response within 28 days from the date of the Liquidators issuing a copy (or further copy) of the Questionnaire to the Worker."

36 Mr Hynes fairly recognises, in oral submissions, that the request for that advice was "ambitious". It does not seem to me that advice should be given.

First, that advice has no regard to other information that might be held by the Liquidators concerning the position of a particular Worker, where they have not received a response to the Worker Questionnaire by that Worker. The evidence indicates that, at least in some cases, the Liquidators at least have copies of documents relating to such Workers. Second, it seems to me that direction would wrongly intrude on the process for determining proofs of debt in respect of individual Workers. If the Liquidators consider the information they hold in respect of a particular Worker does not establish that he or she is an employee of the Companies, including in the absence of a response to the Worker Questionnaire by that Worker, they may well determine the Workers' proof of debts on that basis. Any question as to the correctness of that determination can then be determined on any appeal brought by that Worker to the Court in respect of that determination.

Other matters

37 The Liquidators also seek orders that, within 3 business days of the date of the orders made by the Court, they send (by either email or post) to Workers a notice which advises of the making of these orders; and publish on their office website a notice which advises of the making of these orders; and that the costs of this application be costs in the winding up of the Companies. I am satisfied that those orders should be made.

Orders

38 Accordingly, I make the following orders:

1 Pursuant to subsection 479(3) of the *Corporations Act* 2001 (Cth) ("*Corporations Act*"), or alternatively s 90-15 of the Insolvency Practice Schedule (Corporations) (being Schedule 2 of the *Corporations Act*), direct that the Liquidators of the First to Tenth Defendants and the Twelfth Defendant ("Companies") would be justified in determining that claims in the liquidations of the Companies submitted by workers ("Workers") are not claims by employees (within the meaning of subsection 556(2) of the *Corporations Act*) of the Companies if:

(a) the Companies operated only a payroll service business and were contracted to provide payroll services to external clients; and

(b) the Workers were listed on the Companies' payroll system maintained for the purpose of operating the Companies' payroll service business; and

(c) the Workers have confirmed to the Liquidators (or the Liquidators are otherwise satisfied) that during the period in which they were paid by one of the Companies:

(i) they provided services to a business other than one of the Companies; and

(ii) they were not introduced to that business by one of the Companies; and

(iii) they never attended the premises of any one of the Companies; and

(iv) they did not report to any representative of the Companies including on a day-to-day basis; and

(v) if the Worker took a planned or unplanned absence from work, they did not notify a representative of the Companies about the absence; and

(vi) if the Worker indicated that they received feedback about their work performance, they did not receive this feedback from a representative of the Companies; and

(vii) the length of their placement or contract (whether it was extended or ceased early) was not determined by one of the Companies; and

(viii) the rate of pay, pay frequency and method of payment, or the negotiation and agreement in relation to pay was not

determined or undertaken solely by one of the Companies; and

(d) the Worker appears to have entered into a Payroll Services Agreement with one of the Companies which provided that the Worker was not an employee of any one of the Companies.

2. Within 3 business days of the date of these orders, the Liquidators:

(a) send (by either email or post) to Workers a notice which advises of the making of these orders; and

(b) publish on their office website a notice which advises of the making of these orders.

3. The costs of this application be costs in the winding up of the Companies.

****

I certify that this and the preceding 22 pages are a true copy of the reasons for judgment herein of his Honour Justice Black

Associate
Date: 6 September 2019