FEDERAL COURT OF AUSTRALIA

Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118

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| Appeal from: | *Moffet v Dental Corporation Pty Ltd* [2019] FCA 344 |
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| File number: | NSD 626 of 2019 |
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| Judges: | **PERRAM, WIGNEY AND ANDERSON JJ** |
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| Date of judgment: | 16 July 2020 |
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| Catchwords: | **INDUSTRIAL LAW** – whether Respondent an employee for purpose of annual leave under the *Fair Work Act 2009* (Cth) – assessment of totality of relationship – where Appellant purchased dental practice from Respondent – where Respondent continues to provide services – whether trial judge gave undue weight to various factors including control, subjective intent, terms of services agreement and taxation arrangements – whether trial judge misunderstood changes to Respondent’s role after the acquisition of the practice – relevance of goodwill – whether Respondent a worker under the *Long Service Leave Act 1955* (NSW)  **SUPERANNUATION –** whether Respondent an ‘employee’ under s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) – whether services agreement was wholly or principally ‘for’ labour |
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| Legislation: | *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 9-5  *Fair Work Act 2009* (Cth) ss 13, 14, 60, 86  *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12  *Long Service Leave Act 1955* (NSW) ss 3, 4 |
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| Cases cited: | *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3; 209 FCR 146  *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21  *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* [2011] FCA 366; 214 FCR 82  *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418  *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16  *Symbion Medical Centre Operations Pty Ltd v Alexander* [2010] NSWSC 1047  *Racing Queensland Board v Commissioner of Taxation* [2019] FCA 509  *Tattsbet Limited v Morrow* [2015] FCAFC 62; 233 FCR 46  *Zuijs v Wirth Brothers Pty Ltd* [1955] HCA 73; 93 CLR 561 |
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| Date of hearing: | 27 August 2019 |
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| Registry: | New South Wales |
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| Division: | Fair Work Division |
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| National Practice Area: | Employment & Industrial Relations |
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| Category: | Catchwords |
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| Number of paragraphs: | 118 |
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| Counsel for the Appellant and Cross-Respondent: | Ms J Batrouney QC with Mr J Darams and Mr D McInerney |
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| Solicitor for the Appellant and Cross-Respondent | King & Wood Mallesons |
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| Counsel for the Respondent and Cross-Appellant: | Mr M Gibian SC with Ms L Saunders |
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| Solicitor for the Respondent and Cross-Appellant: | HWL Ebsworth Lawyers |

ORDERS

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|  | | NSD 626 of 2019 |
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| BETWEEN: | DENTAL CORPORATION PTY LTD (ACN 124 730 874)  Appellant | |
| AND: | DAVID MOFFET  Respondent | |
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| AND BETWEEN: | DAVID MOFFET  Cross-Appellant | |
| AND: | DENTAL CORPORATION PTY LTD (ACN 124 730 874)  Cross-Respondent | |

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| JUDGES: | PERRAM, WIGNEY AND ANDERSON JJ |
| DATE OF ORDER: | 16 JUly 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the Respondent’s costs of the appeal.
3. The cross-appeal be dismissed.
4. The Respondent pay the Appellant’s costs of the cross-appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM AND ANDERSON JJ:

# Introduction

1. Dr Moffet is a dentist who has been practising since 12 December 1982. In early 1987 he purchased a practice at 152 Marsden St, Parramatta. From 1 July 2000 the practice traded under the name ‘Active Dental’. In time a second surgery was opened at 120 Victoria Rd, Parramatta. The business was conducted by Immediate Dental Care Pty Ltd (‘Immediate Dental’) which was the trustee of the Moffet Family Trust. In his affidavit, Dr Moffet said he was employed by Immediate Dental in the conduct of that practice and the trial judge made a finding to similar effect.
2. On 15 November 2007, Dr Moffet and Immediate Dental sold the practice to the present Appellant, Dental Corporation Pty Ltd (‘Dental Corporation’), but agreed with it that Dr Moffet would continue to work in the practice. This result was achieved by the execution of two agreements. The first was the Acquisition Agreement and the second, the Services Agreement. The parties to both agreements were Immediate Dental, Dental Corporation and Dr Moffet. Under the Services Agreement Dr Moffet was obliged to provide his services as a dentist at the practice (cl 3.1 and cl 3.2). Under its own terms the Services Agreement expired on its fifth anniversary, 15 November 2012, but after that the parties acted in accordance with it subject to some revised terms.
3. On 21 November 2014, Dr Moffet resigned. In his letter of resignation he made a number of assertions about the conduct of Dental Corporation and suggested that it had harmed his psychological health.
4. In the Court below he submitted that he had been employed by Dental Corporation and was entitled to be paid accrued annual leave and long service leave. He also claimed superannuation. Each, in slightly different ways, turned on whether Dr Moffet was an employee of Dental Corporation or an independent contractor. That question forms the central issue in the present appeal.
5. *As to annual leave*: Division 6 of Pt 2-2 of the *Fair Work Act 2009* (Cth) (‘the FW Act’) regulates annual leave. By s 86 it applies to non-casual ‘employees’. Section 86 is located in Div 6 of Pt 2-2 and, in that part, the expression ‘employee’ is defined to mean a ‘national system employee’: s 60. By s 13, a national system employee is an individual ‘so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer’. A national system employer is defined in s 14 to include a corporation within the meaning of s 51(xx) of the *Constitution* ‘so far as it employs, or usually employs, an individual’. There is no dispute that Dental Corporation is a constitutional corporation. The issue of Dr Moffet’s entitlement to annual leave therefore turns upon whether he was employed by Dental Corporation. Both parties approached the debate on the basis that its outcome was governed by the application of well-established common law principles which were not in dispute. Instead, they joined issue as to how those principles were to be applied. The trial judge found that Dr Moffet was not employed by Dental Corporation within the meaning of s 13 and therefore rejected his claim for accrued annual leave.
6. *As to long service leave*: There were two issues. First, whether Dr Moffet was a ‘worker’ within the meaning of s 3(1) of the *Long Service Leave Act 1955* (NSW) (‘the LSL Act’) which relevantly means asking whether he was ‘a person employed’. The second issue is contingent. It arises because an entitlement to long service leave does not accrue where an employee resigns (as Dr Moffet did) unless, by s 4(2)(a)(iii), that resignation is ‘on account of illness, incapacity or domestic or other pressing necessity’. The trial judge concluded that Dr Moffet had not been a ‘worker’ within the meaning of s 3(1) and, although that meant that the second question did not arise, he concluded that even if he had been, Dr Moffet had not resigned because of illness despite the assertions in his letter of resignation.
7. *As to superannuation*: Dr Moffet contended that Dental Corporation had been obliged to make superannuation contributions to a fund nominated by him as a result of the operation of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (‘the SGA Act’). The SGA Act operates by reference to the concept of an ‘employee’ in its ordinary meaning but this concept is extended by s 12(3) to a person who is working ‘under a contract that is wholly or principally for the labour of the person’. The trial judge found that Dr Moffet fell within that extended definition. As a matter of relief, his Honour granted a declaration to that effect.
8. Both parties have appealed. Dr Moffet contends that the trial judge should have found that he was employed by Dental Corporation for the purposes of his claim for annual leave under the FW Act and that he was a ‘worker’ for the purposes of his claim for long service leave under the LSL Act. He also submits that the trial judge erred in finding that he had not retired due to illness. For its part, Dental Corporation contests the trial judge’s conclusion that Dr Moffet fell within the extended definition of an employee in s 12(3) of the SGA Act.

# The Services Agreement and the Acquisition Agreement

1. The Services Agreement obliged Dr Moffet to provide and or procure the ‘Dentistry Services’ outlined in Sch 1. Relevant terms included, *first*, an obligation on Dr Moffet to provide dentistry services to patients of the practice to a standard which continued to maximise the profits of the practice (cll  3.1, 3.2 and Sch 1 item 1.1). But whilst Dr Moffet was bound to perform dentistry on the patients of the practice the agreement was explicit that Dental Corporation was unable to direct him in the exercise of his professional judgement in that regard: cl 14.2. Although that matter was left up to him, nevertheless cl 3.2 required Dr Moffet to perform his services with due skill and care and to the standard of an experienced dentist.
2. *Secondly*, consistent with that obligation, cl 3.5 bound Dr Moffet to undertake ongoing professional development for which he would, however, be reimbursed by Dental Corporation for an amount of up to $10,000 annually. It was Dr Moffet’s responsibility to obtain professional indemnity insurance in relation to himself (cl  4.1), although he does not appear to have been responsible for obtaining professional indemnity insurance in relation to the other dentists and health care professionals working in the practice. He was also obliged by cl 4.2 to cooperate with Dental Corporation in obtaining, for its benefit, a policy of life insurance naming him as the life insured (cl 4.2).
3. *Thirdly*, the Services Agreement contained no provision directing Dr Moffet either as to the days upon which he was required to work or as to whether he could take holidays and if so when they could be taken. This perhaps somewhat loose arrangement reflected the remuneration structure which, as will be seen, gave Dr Moffet commercial incentives to derive revenue both for the benefit of Dental Corporation and for himself.
4. *Fourthly*, there was an obligation on Dental Corporation to provide administrative services to Dr Moffet such as IT services, equipment support, recruitment support, accounting services, group marketing and so on to enable the provision of the Dentistry Services. Dental Corporation was to provide these services to the same or even to a higher standard than they had previously been provided to the practice (cl 6.1 and cl 6.2). On the other hand, Dr Moffet was obliged to maintain the dental records of patients who attended the practice but the intellectual property in these was to belong to Dental Corporation (cl 3.6). Dental Corporation’s ownership of the intellectual property in fact extended to any document produced by Dr Moffet (cl 10) and not just the patient records.
5. *Fifthly*, if requested by Dr Moffet, Dental Corporation was to acquire equipment or other assets reasonably required for the conduct of the practice (cl 6.3). In the same vein, Dental Corporation was to employ and pay for employees in the practice where reasonably required to enable Dr Moffet to perform his obligations under the Services Agreement (cl 7).
6. *Sixthly*, the remuneration provided for Dr Moffet in the Services Agreement had two components. The first was an amount calculated by reference to the revenue he personally generated by the practice of dentistry. There were several other dentists, associate dentists and hygienists employed in the practice, and the intent of this first element was to confer on Dr Moffet remuneration which was a function of his own fee-earning activities in contradistinction to the fees generated by the work of the other health care professionals in the practice. It was paid to him under a monthly mechanism which was subject to an annual adjustment. Dr Moffet’s monthly draw was calculated as a percentage of the preceding month’s revenue brought in by him (being professional fees earned less laboratory fees) and was set on a sliding scale:

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| **Monthly revenue generated and collected** | **Percentage applicable** |
| $0 to $20,832 | 0% |
| $20,833 to $83,333 | 40% |
| Above $83,333 | 45% |

(see cl 8.2(a) read with Sch 2 item 3 and the definitions of Monthly Revenue and Monthly Gross Revenue in cl 1.1).

1. Under the Services Agreement this monthly draw was to be paid each month for the first 11 months of every year (beginning on 15 November 2007). At the end of the twelfth month Dr Moffet was paid an annual adjustment, being the difference between the monthly draw payments he had received throughout the year and an annual draw amount. The annual draw amount was determined by reference to the annual revenue which had been earned by Dr Moffet and was also set by reference to a sliding scale contained in Sch 2 item 2:

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| **Annual Revenue generated and collected** | **Percentage applicable** |
| $0 to $249,999 | 0% |
| $250,000 to $1,000,000 | 40% |
| Above $1,000,000 | 45% |

1. These are the same as the figures as were set for the calculation of the monthly draw but now multiplied by 12. The operation of the annual mechanism was apt to smooth out any unevenness in cash flow which might have occurred during the year if payments were only calculated on a monthly basis. For example, if the revenues for 11 months of the year had been $20,000 and for the twelfth month $300,000, the monthly draw mechanism would have generated for Dr Moffet $135,000. But the effect of the annual draw mechanism was that he received instead ($300,000 + ($20,000 x 11)) x 40%, ie, $208,000. As noted above, the adjustment was implemented by varying the last of the monthly drawings under cl 8.2. Dental Corporation was required to pay the annual adjustment within 15 days of the end of the twelfth month.
2. Apart from Dr Moffet’s share of the revenues derived in consequence of his own work there was also a performance bonus which was a function of the revenues of the practice as a whole. The practice included several other fee earners apart from Dr Moffet: dentists, associate dentists and hygienists. The performance bonus was set at 40% of any increase in the annual cash flow of the practice above $700,000. The annual cash flow included all fees earned by the health professionals employed by Dental Corporation less the expenses of the practice (including remuneration) (cl 9.1 and Sch 2 item 4).
3. The Services Agreement also provided for an annual cash flow shortfall in cl 9.3. This clause contained a potential sting for Dr Moffet. Whilst his monthly drawings with the annual adjustment based on his own revenues could fall to nil in the event that he made less than $20,833 in a given month and $250,000 in a given year, the Services Agreement contemplated that if the revenues of the practice as a whole fell below a certain minimum figure then Dr Moffet would have to compensate Dental Corporation for the shortfall. The minimum annual cash flow requirement was set at $570,000 (Sch 2 item 1) and by cl 9.3 it was agreed that to the extent that the practice failed to achieve this minimum, the shortfall would have to be repaid by Dr Moffet out of his monthly drawings. This would occur at a rate of 50% of each monthly drawing until such time as the shortfall was paid down in its entirety: cl 9.3. Because it will be relevant later, it might be noted that the guaranteed minimum cash flow was a significant benefit that Dental Corporation obtained under the Services Agreement over and above the labour of Dr Moffet. He was, in effect, underwriting the performance of the practice.
4. *Seventhly*, the Services Agreement included two provisions which assumed that Dr Moffet was not an employee of Dental Corporation. The first of these was cl 8.4 by which the parties agreed that Dr Moffet would be responsible for paying all taxes in relation to the remuneration paid to him under the agreement. The clause also recorded the parties’ agreement that Dental Corporation was not responsible for Dr Moffet’s superannuation but, should it transpire eventually that it was, any superannuation contributions it was obliged to make would be deducted from his monthly drawings. The second was cl 14.1 by which the parties agreed that the relationship was not one of employment.
5. *Eighthly*, cl 7 provided that, following the acquisition, Dental Corporation would employ any new employees in consultation with Dr Moffet. Further, in cl 1.1 an employee was defined to mean a person employed by Dental Corporation ‘to provide assistance to [Dr Moffet]’. That provision must also be read alongside cl 12 of the Acquisition Agreement. Under it Dental Corporation was, on completion of the acquisition, to offer employment to all of Dr Moffet’s employees and by cl 12.2 Dr Moffet was obliged to end their employment relationship with him. The employees in question were listed in Sch 5 of the Acquisition Agreement and included a number of dentists, associate dentists, hygienists and other staff. Dr Moffet also appeared on the list in Sch 5.
6. *Ninthly*, the Acquisition Agreement provided by cl 4.3 for the payment to Dr Moffet of $2,127,998. In return, by cl 3.1, he promised to sell to Dental Corporation ‘the Assets’ which included the tangible and intangible assets of Dr Moffet’s practice including goodwill. At the same time, Dental Corporation promised to engage the employees who had formerly worked for Dr Moffet as its own employees. Simultaneously, restraints were imposed on Dr Moffet binding him not to engage in dentistry in competition with the practice: cl 20.2.

# How the Practice was operated after it was sold to Dental Corporation

1. The Services Agreement’s terms gave Dr Moffet incentives to run the practice profitably. The monthly drawings gave him an incentive to increase his own revenues and the performance bonus and annual cash shortfall gave him incentives to manage the practice profitably as a whole. Once the practice had been sold, the trial judge found that Dental Corporation permitted Dr Moffet to continue to conduct it and that in doing so he ran it in much the same way as he had before the sale: [74]-[75]. He continued to be responsible for the day to day management of the business including the supervision, recruitment and dismissal of employees (although subject to the approval of Dental Corporation). In addition, he continued to provide dental services personally and, at least until December 2012, worked exclusively for Dental Corporation in the sense that he was not performing dental services in any other practice and worked four days per week when not on leave.
2. It appears that at the close of the 2012-13 financial year (ending 30 June 2013) the revenues Dr Moffet had generated from the practice were not sufficient under cl 9.1 to entitle him to the performance bonus it contemplated. In fact, to the contrary, he incurred a shortfall under the Services Agreement and was required by cl 9.3 to pay Dental Corporation the sum of $291,125. Not many employment relationships require the employee to pay the employer such a sum.
3. The Services Agreement, as already noted, did not regulate when Dr Moffet might take his holidays or how long they would be. In the 2011 calendar year Dr Moffet took 15 weeks of holidays. He took this leave without seeking the permission of Dental Corporation (which he was not obliged to seek under the Services Agreement). Dr Moffet accepted under cross-examination that he, and not Dental Corporation, determined his days of work.
4. Another important feature of the way in which Dr Moffet operated the practice after the sale concerns GST. By cl 15.2 of the Services Agreement the parties agreed that, unless otherwise stated, references in the agreement to the consideration for a supply were to be taken as references to the consideration exclusive of GST. The provisions entitling Dr Moffet to be paid his monthly drawings were not expressed to be GST inclusive with the consequence that the amount Dental Corporation was to pay him was GST exclusive. The Services Agreement imposed on Dental Corporation an obligation by cl 8.3(a) to provide Dr Moffet with a revenue statement each month specifying the monthly revenue collected by the practice. Three days after receipt of this statement Dr Moffet was then obliged to provide Dental Corporation with an invoice. Each invoice was to set out his name, his ABN number and, inter alia, the amount of the monthly draw. Clause 8.3 then obliged Dental Corporation to pay that invoice if Dr Moffet presented it for payment. The effect of cl 15.2 was to require Dr Moffet to include in each invoice an amount of 10% for GST on top of the monthly drawings. Dr Moffet used the same ABN with Dental Corporation as he had prior to the sale of the practice.
5. As already noted, the Services Agreement had a duration of five years and was due to expire in November 2012 at which time it would automatically be extended for a further five years unless either party notified the other that it did not wish for it to do so at least six months before the expiration of the first period: cl 2.1. In compliance with that notice requirement, Dr Moffet informed Dental Corporation on 21 October 2011 that he did not wish the agreement in its present form to continue after its expiration. Negotiations then took place which related principally to the remuneration structure. Following an exchange of emails, agreement was reached in around February 2013. The email correspondence had begun in December 2012 when Dr Moffet progressively began to reduce the number of days he worked from four to three. At the same time he now began to provide dentistry services other than in the practice.
6. On 26 March 2014 Dr Moffet complained to Dental Corporation that both he and the staff at the practice had been bullied by an employee of Dental Corporation. Dental Corporation responded to this email on 7 April 2014 indicating that the matter was being investigated and that it would respond more formally later in the week. In this Court it was submitted by Dr Moffet that his complaint had never received a substantive response.
7. Dr Moffet gave evidence that in August 2014 he began to see a psychologist to seek treatment for a psychological illness said to have arisen from the alleged bullying. The psychologist was not called at the trial. On 21 November 2014, Dr Moffet terminated the agreement with Dental Corporation. In his letter of resignation, he asserted that the actions of Dental Corporation had ‘taken their toll on [his] health’, that the conduct of certain named employees of Dental Corporation had been ‘despicable and deplorable’ and that he was still receiving ‘treatment for the medical issues arising from their behaviours’.
8. The trial judge rejected this part of Dr Moffet’s case. His Honour thought at [84] that the claims made in the letter of 21 November 2014 were ‘no more than unsubstantiated assertions’. Insofar as Dr Moffet suggested that he terminated the arrangements because of the effect on his health, his Honour observed that it would have been a simple enough matter for medical evidence to that effect to have been led from a medical practitioner: [86]. Although his Honour did not think that counsel for Dental Corporation had challenged Dr Moffet about his account of bullying in his affidavit, his Honour did not think that this mattered because the evidence was not sufficient to make out the claim: [86].

# Was Dr Moffet entitled to be paid annual leave (Cross-Appeal Ground 1)

1. Dr Moffet accepted on the appeal that the trial judge had correctly stated the principles to be applied in determining whether one person was employed by another. These appeared at [10]-[20] of the trial judge’s reasons. In short, what is called for is a multi-factorial assessment of the totality of the relationship, as ascertained from the surrounding factual matrix with no one matter being determinative: *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; 160 CLR 16 (‘*Stevens*’) at 24. The contractual terms are part of that factual matrix but the nature of the relationship is not determined merely by reference to them: *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 (‘*Hollis*’) at 33 [24].
2. Dr Moffet submitted that the trial judge had made four errors in his approach to the question of employment and he submitted that, regardless of those errors the trial judge’s conclusion that he had not been employed by Dental Corporation was itself wrong and should be corrected by this Court.
3. Dealing with the specific errors first, these were specified as particulars to ground 1 of the notice of cross-appeal. They dealt with disparate topics.

## Control (particular (b))

1. Dr Moffet submitted that the trial judge had erred in giving undue weight to the question of whether Dental Corporation could, or did in fact, control Dr Moffet in the performance of his duties. The correct approach on the authorities, it was submitted, required a focus on Dental Corporation’s *right* to control Dr Moffet rather than an assessment of whether it, in fact, controlled him.
2. Dr Moffet’s submissions are supported by the observations of Mason J in *Stevens* at 28-29. In a modern post-industrial society:

…a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, “so far as there is scope for it”, even if it be “only in incidental or collateral matters”.

1. In making those remarks Mason J referred to *Zuijs v Wirth Brothers Pty Ltd* [1955] HCA 73; 93 CLR 561 (*‘Zuijs’*) at 571 where the Court said:

The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.

1. *Zuijs* was a case concerning an acrobat who was injured when the colleague from whose ankles he was suspended lost his own grip on the rope from which he in turn was suspended. Both the acrobat and his colleague fell hard, the acrobat harder since the colleague fell on top of him. The acrobat was injured and the question in relation to workers compensation was whether the acrobat had been an employee of the Wirth Brothers. The High Court held that he had been. In the passage we have just set out above, the Court was at pains to explain that whilst the Wirth Brothers could not meaningfully direct Zuijs on the intricacies of aerial acrobatics this did not mean that he was not its employee. What should be taken from this is that the mere fact a person has very considerable autonomy in the performance of their contractual obligations does not necessarily negative the existence of an employment relationship.
2. What then is the position in relation to Dental Corporation’s right to control Dr Moffet? Dr Moffet submitted that there were five matters which suggested that Dental Corporation did have the right to control his work and that it did, to some extent, actually control his work. The *first* of these was that Dental Corporation required him to perform at a certain level of skill. However, this was not something which the Services Agreement gave to Dental Corporation as a right which could be exercised against Dr Moffet. Rather, it was an express term of the Services Agreement itself: cl 3.2. *Secondly*, it was submitted that Dental Corporation had a right to compel Dr Moffet to engage in continuing professional development. Again, this was not a right that Dental Corporation could exercise against Dr Moffet. Rather, it was an explicit obligation imposed on him under the terms of the Services Agreement: cl 3.5. *Thirdly*, it was submitted that Dental Corporation had actually supervised him in the performance of his management duties. The trial judge considered a similar submission at [59] and made this finding about it:

The submission advanced on behalf of Dr Moffet that he was “*subject to supervision and control*” by representatives of Dental Corporation is, with respect, somewhat elusive. The submission is correct if confined to such matters as:

* that Dr Moffet was apparently “*required*” to attend meetings with a senior representative of Dental Corporation every 4 to 6 weeks “*to discuss the performance of the practice*”; and
* the provision to Dr Moffet of monthly reports setting out the “*Practice’s budget, expenses and performance*” with a view to ensuring “*profit and collections targets were being met*”.

But there was no “*supervision and control*” or the giving of directions by Dental Corporation to Dr Moffet with respect to the patients he was to treat, or directions as to the nature of the services he was to perform or the amounts to be charged to clients for the services provided. Dr Moffet accepted as much during the following exchange in cross-examination:

Dental Corporation at no stage during your engagement with them did they say you could only do this type of work, or you could only do that type of work in relation to patients, did they?––That would be beyond their scope as – of ownership.

Is that a roundabout way of saying, no, they didn’t do that?––They didn’t tell me what to do and what not to do on patients. They weren’t dentists.

I know that they didn’t tell you how to do a filling or how to – is it fix a crown or put in a crown or something along those lines. I know they didn’t do that, but whether or not you could do that work or not do that work they didn’t give you any direction one way or the other in respect of that, did they?––Dental Corporation didn’t look at the diagnoses that I made on patients.

You determined what work would be carried out in relation to a particular patient, correct?––As they needed. Yes.

The patient needed?––As the patient needed.

You determined, didn’t you, whether or not you wanted to do that work for a particular patient?––As a healthcare practitioner it’s my responsibility to treat patients.

… Now, in relation to the amount that you charged or decided to charge a patient, you were the person who could dictate that amount, correct, for the services you provided?––Yes.

At no stage during your engagement did Dental Corporation say, “Here’s a list of fees that you have to charge when you do this work,” correct?––No. They never did.

Irrespective of the absence of any contractual entitlement to give directions to Dr Moffet, as a practical matter Dental Corporation did not purport to give any directions to Dr Moffet – even in respect to “incidental or collateral matters”: *Zuijs* (1955) 93 CLR at 571 per Dixon CJ, Williams, Webb and Taylor JJ; *Brodribb* (1986) 160 CLR at 29 per Mason J. The submission advanced on behalf of Dr Moffet, that he was “*subject to supervision and control … in relation to the work he performed*”, is rejected.

1. It was not suggested that his Honour had erred in making that finding. Although it is not explicitly addressed to management duties, it is plain that the reasons encompass matters of management. For instance at [58] the trial judge referred to Dr Moffet’s management of the practice as one of the services that cl 14.2 prevented Dental Corporation from influencing. Consequently, his submission must be rejected. *Fourthly*, it was submitted that Dental Corporation had exercised control over Dr Moffet by allocating particular work to him (i.e. patients). In his written submissions, Dr Moffet did not identify any finding by the trial judge or any evidence to this effect. The cross-examination of Dr Moffet set out at [59] of the trial judge’s reasons above included evidence that it was Dr Moffet who determined what work would be carried out on a patient and that his obligation, as a health care practitioner, was to treat patients. We do not accept therefore that this submission is made good.
2. The fifth point was that Dental Corporation exercised control over him because it retained the right to terminate the Services Agreement if he did not perform adequately. In fact, this is not what cl 13.1 says. Rather it conferred on Dental Corporation the right to terminate the agreement if Dr Moffet ceased to be a dentist or had registration conditions imposed on him which were unacceptable to it or if he did something which might affect the reputation of the practice. This provision is far too narrow to bring about effective control. Any conduct falling short of that which would attract the attention of the dental authorities or otherwise damage the reputation of the practice was not something cl 13.1 could be used to deter. For example, a refusal by Dr Moffet to wear a particular uniform or to leave the practice kitchen clean would not have justified Dental Corporation in engaging cl 13.1. Nor can resort to cl 13.1(c) bring about a different result. It is true that this clause entitled Dental Corporation to terminate the Services Agreement if Dr Moffet breached it and did not remedy the breach within 30 days. But because the agreement did not confer any power on Dental Corporation to direct Dr Moffet in the performance of his work, his failure to carry out an instruction would not have enlivened the provision. It was therefore incapable of operating in the suggested manner.
3. We also reject Dr Moffet’s submission that Dental Corporation did exercise a degree of control over him because of the regularity of days and hours worked by him. It did not do so. Dr Moffet’s working hours were driven by the link the remuneration structure created between his earnings and how much work he did. His working hours did not arise from any obligation, whether legal or practical, to obey directions from Dental Corporation. It follows that Dental Corporation did not control his leave arrangements when he took 15 weeks leave in 2011. It was Dr Moffet who set his own work schedule. Like having to pay one’s employer $291,125, the right to do as little or much work as one wants and to take as many holidays as one feels like for as long as one wants, is not a common feature of employment relationships. We also reject Dr Moffet’s contention that control could be also discerned because during the negotiations which occurred after the end of the Services Agreement Dental Corporation sought to impose revenue targets. The submission overlooks the fact that what was taking place was a negotiation about the terms of a new agreement. This was not control by Dental Corporation of the amount of work Dr Moffet was required to do. It was Dental Corporation’s negotiating posture for a fresh agreement.
4. It was in that context therefore that the trial judge rejected the case put to him on control. In this Court Dr Moffet emphasised, as we have said, the distinction between actual control and the right to control. But the trial judge was alive to this distinction. His Honour referred at [14] to the passage we set out above from *Zuijs* and at [44] and [45] recorded the submissions of the parties on this issue. Dr Moffet had submitted that although he ‘obviously retained a degree of professional judgment and discretion in relation to his dental work, [he] was subject to supervision and control by representatives of [Dental Corporation] in relation to the work he performed and in relation to the performance of the practice’. Dental Corporation had contended that there was an ‘absence of a right of [Dental Corporation] to exercise any real degree of control over the manner in which [Dr Moffet] performed the services that he had agreed to provide.’ It was in light of the trial judge’s express consideration of the distinction between actual control and the right to control that his Honour then dealt with the control question at [59]. We would not be disposed to read [59] as if his Honour had not understood the distinction or considered it.
5. In any event, his Honour’s treatment of the issue is consistent with the terms of the Services Agreement which did not, as we have already noted, give Dental Corporation any entitlement to tell Dr Moffet how to do his job. It is only after his Honour had answered that question that he then turned to ask whether de facto control existed. We therefore do not accept that his Honour gave undue weight to the reality of control when he should have emphasised the right to control.

## Subjective intent (particular (c))

1. At [73] the trial judge set out the particular aspects of the relationship which he thought tended to demonstrate that Dr Moffet was an independent contractor rather than an employee. One of these was ‘the absence of any intent on the part of Dental Corporation to establish an employment relationship – such a structure being seen by Mr Evans from the outset as a business model which “*had not worked*” in the past.’
2. In the notice of cross-appeal this was alleged to have been an error in particular (c) to ground 1. However, in Dr Moffet’s written submissions there was perhaps some retreat from this. It was now said only to be ‘questionably relevant’ since the correct inquiry was into the nature of the relationship between the parties, not focused on the subjective intention of one individual. We do not accept the submission, to the extent that it is pressed, that evidence of subjective intention cannot be relevant to the totality of the relationship. For example, the fact that one party had a particular intention may help resolve uncertainty as to the correct interpretation of subsequent events. Such reasoning is unremarkable.
3. A variant on this contention was that it was not open to the trial judge to have found that Dental Corporation did not intend to employ Dr Moffet. Here the argument was that under the Acquisition Agreement, Dental Corporation had agreed to employ all of the current employees and Dr Moffet’s name had been included on the list of those employees. But pointing to the existence of contrary evidence does not make good the proposition that the finding was not open. In fact, the evidence went in both directions. Clause 14.1 of the Services Agreement suggested that the parties had not intended an employment relationship but the Acquisition Agreement suggested that it was intended to employ Dr Moffet (albeit to provide assistance to himself – an odd stipulation). Mr Evans’ evidence was consistent with the former but not the latter. The submission that it was not open on this inconsistent evidence to find one way or another cannot therefore be accepted.

## Statement in the Services Agreement that the relationship was not one of employment and taxation arrangements (particular (e))

1. In particular (e) to ground 1, Dr Moffet identified two errors. The first was that the trial judge had given undue weight to the agreement of the parties in cl 14.1 of the Services Agreement that the relationship created thereby was not a relationship of employment. The second was that the trial judge had given undue weight to the facts apparently disclosed in Dr Moffet’s tax returns.
2. We reject the first submission. The trial judge’s use of cl 14.1 in his reasoning did not involve giving it excessive emphasis. It is true that his Honour disclosed that it was one matter, amongst a number, which disposed him towards a conclusion that an employment relationship did not exist (at [73]). But that is only to say that he took it into account. We do not understand the law in this area yet to have developed to the state that such a clause is an irrelevant consideration and thus we do not think that his Honour can be faulted for having had regard to it. At [76] the trial judge expressed the view that recourse to cl 14.1 ‘only reinforces the conclusion reached’. This is not the language of primacy but rather of confirmation. It is unsurprising therefore to find that the trial judge then expressly adverted to the fact at [77] that cl 14.1 ‘is but one matter to be taken into account and is not “*determinative*”’ and to the correct principle that ‘no agreement can operate by reference solely to its own terms to be determinative of the nature of the relationship such as to preclude the entitlements and protections conferred by the *Fair Work Act* upon an “*employee*”’. His Honour’s treatment of the relevance of this aspect of the matter was correct.
3. The same is true of the trial judge’s treatment of the way in which Dr Moffet had described his income in his income tax returns. The returns showed that the fees Dr Moffet received from Dental Corporation were returned by him as business income, that the main business activity he disclosed to the Commissioner in his returns was that of a ‘Dental Surgeon’ and that he claimed deductions against that income in relation to expenses which were not reimbursed by Dental Corporation. For example, in one year Dr Moffet claimed a deduction of $11,610 in accountancy fees. Furthermore, in the same year he was obliged to refund to Dental Corporation some of money he had been paid as part of the shortfall and he was astute to claim that sum as a deduction against his returned business income.
4. The trial judge accepted that the returns tended to suggest that Dr Moffet was not an employee. But the contention that he gave them excessive weight is a submission which can only succeed by ignoring the language actually used by the trial judge at [77]. Having concluded that cl 14.1 could not be determinative, his Honour reached the same conclusion about Dr Moffet’s tax returns: ‘Nor can the manner in which Dr Moffet prepared and submitted his tax returns provide a complete or independently determinative description of his status… Again, these are but further matters to be taken into account’.
5. The submission, therefore, that the trial judge had given either of these matters excessive weight cannot be accepted.

## No change in the way the practice was run after the sale (particular (d))

1. Dr Moffet’s submissions described this error as the ‘central error in the primary judge’s reasoning’. The argument went as follows. At [74]-[75] the trial judge recorded this conclusion:

74. The reality of the situation was that Dental Corporation acquired the dental practice from Dr Moffet in 2007 and thereafter let Dr Moffet continue to conduct his own business. Dr Moffet got the capital sum on the sale of the practice and, after the sale, Dental Corporation received part of the monies he thereafter generated as a contractor.

75. The reality of the relationship was that Dr Moffet continued after the acquisition of the dental practice by Dental Corporation in 2007 to run his personal practice much the same as before. He continued using his own Australian Business Number when submitting tax returns and continued trying to grow his business.

1. It was submitted for Dr Moffet that in these paragraphs the trial judge had misunderstood that after the sale there had been significant changes to the nature of Dr Moffet’s role in the business. The trial judge’s statement that Dr Moffet had continued to run his personal practice in much the same way as he did prior to the sale was said to be deficient in three ways. *First*, it overlooked the fact that Dr Moffet no longer had the final say in a range of important decisions within the practice. The power to recruit and to dismiss staff no longer rested with him but, as a matter of formality, with Dental Corporation. So too, whilst prior to the sale he had complete control of strategic business decisions such as the conduct of advertising, after the sale this matter formally rested with Dental Corporation.
2. *Secondly*, it was submitted that the remuneration of Dr Moffet now came from Dental Corporation and not from the operation of the practice. At [74] (above) the trial judge recorded that it was Dental Corporation which received part of the revenue generated by Dr Moffet but this was factually incorrect as resort to the Services Agreement showed. In fact, all of the revenue generated by the practice was received by Dental Corporation which then remitted to Dr Moffet his monthly drawings and, where applicable, any performance bonus. This factual error by the trial judge suggested, so it was submitted, that his Honour’s characterisation of the situation after the sale was flawed.
3. *Thirdly*, it was submitted that his Honour’s statement that Dr Moffet continued to run the practice much the same way as it had been run before also overlooked a significant alteration in the position of the goodwill generated by Dr Moffet’s work in the practice. Prior to the sale Dr Moffet’s efforts generated goodwill in the practice and this had inured to his benefit. In a practical sense, the fact that the goodwill inured to him showed that the business being conducted was his business (We note for completeness that it was not suggested that the fact that the practice was owned by Dr Moffet’s family trust impacted upon this analysis). But under the Acquisition Agreement Dr Moffet had sold his goodwill to Dental Corporation (along with the practice) and had given Dental Corporation covenants which prevented him from competing with it for the provision of his services as a dentist. The effect of these arrangements was that whilst Dr Moffet might have continued to work in the practice (including by managing the practice) any expansion in the goodwill in the practice which those efforts secured accrued, not for his benefit, but instead for the benefit of Dental Corporation. This was to be contrasted with the trial judge’s statement at [74] that Dental Corporation had let Dr Moffet ‘continue to conduct his own business’ and a similar statement at [75] that after the sale Dr Moffet ‘continued trying to grow his own business’. According to Dr Moffet the fact that he did not have any goodwill in the business was an indicator that the business he was working in was not his own business but instead that of Dental Corporation.
4. We do not think that the trial judge erred in relation to the first of these matters but we do accept that he erred in relation to the second and third. As to the first, it is clear from the trial judge’s reasons that he appreciated the difference between the entitlement of Dental Corporation to direct Dr Moffet as to how to run the practice and whether it in fact did so. So at [59] the trial judge observed that ‘Irrespective of the absence of any contractual entitlement to give directions to Dr Moffet, as a practical matter Dental Corporation did not purport to give any directions to Dr Moffet’. Further, his Honour clearly understood the distinction between directions to Dr Moffet going to his actual performance as a dentist and directions as to collateral matters since, immediately following the statement at [59] he added the comment ‘even in respect to “*incidental or collateral matters*”’ citing *Zuijs*.
5. The reasons of the trial judge elsewhere exhibit an understanding that under the Services Agreement employment decisions about staff were to be made by Dental Corporation rather than Dr Moffet, albeit he was to be consulted in the process. This was the effect of cl 7 and his Honour referred to this clause at [32]. In that circumstance, we do not think it a tenable reading of his Honour’s reasons that he was unaware of, or failed to take into account, the fact that the Services Agreement relocated several strategic decisions with Dental Corporation and out of the hands of Dr Moffet. More is this so where the legal change wrought by the Services Agreement related to the rights Dental Corporation had rather than the exercise of those rights and where the trial judge was explicitly seeking to draw a distinction between the facts as they actually happened and the legal entitlements of the parties.
6. The second and third points concern the remuneration structures erected by the Services Agreement and the nature of the goodwill which inhered in the practice. In the case of the former, whilst the trial judge accurately described the remuneration arrangements in his initial remarks it is clear that when he came to consider the realities of how the Services Agreement in fact operated he departed from his own findings at [74] and inaccurately suggested that Dr Moffet continued to earn money in the practice which he then shared with Dental Corporation. To the trial judge this suggested that Dr Moffet was conducting his own business.
7. This was not, however, what the Services Agreement said. As we explain below when considering what it was that Dental Corporation obtained under the Services Agreement, although Dr Moffet may have collected the fees that the practice generated he did not do so beneficially but for Dental Corporation. Likewise, the Services Agreement did not impose an obligation on him thereafter to pay to Dental Corporation its share of the revenue. He collected the revenues for Dental Corporation and, to the contrary, it was Dental Corporation which then paid him his monthly drawings as part of the consideration for the provision of his services.
8. The difference between the true structure and the way in which the trial judge described it is not merely formal. For example, Dr Moffet was obliged on a monthly basis to issue a tax invoice to Dental Corporation for the services he provided under the Services Agreement. In doing so he obtained the benefit of GST input credits. That arrangement pivoted on the supply of his services to Dental Corporation being a taxable supply within the meaning of s 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and that, in turn, depended upon it being a supply ‘for consideration’. As the trial judge described the arrangement, Dental Corporation would have provided no consideration for the supply of Dr Moffet’s services. Dr Moffet would have been keeping his share and the only payment made would have been by Dr Moffet. This is clearly not how the Services Agreement operated.
9. Consequently, we accept that the trial judge erred in this respect.
10. We also accept that the trial judge gave no consideration to the question of who owned the goodwill in the practice (apart from referring to the relevant clause in the Acquisition Agreement). It was erroneous to approach the question of whether there was an employment relationship without having regard to goodwill for it was an important part of the totality of the relationship.
11. We accept Dr Moffet’s submission, therefore, that the trial judge erred at [74]-[75].

## Totality of the relationship (particular (a))

1. Having accepted that error is established on the part of the trial judge, it is then necessary for this Court to form its own view on the matter. There are aspects of the relationship between Dental Corporation and Dr Moffet which indicate that the relationship was that of principal and independent contractor:

* There was to be no withholding of income tax from the fees paid to Dr Moffet;
* The parties agreed that he would not be paid superannuation;
* Dr Moffet issued invoices to Dental Corporation and collected GST on those invoices;
* Dental Corporation could not direct him in relation to his performance as a dentist;
* Dr Moffet had promised that the practice would achieve a minimum cash flow and he agreed to underwrite that promise out of his own drawings if necessary;
* He was not obliged to work at any particular times or for any particular duration;
* He determined the timing and duration of his own holidays;
* He maintained his own professional indemnity insurance;
* He claimed deductions for expenses incurred in the conduct of the practice which were not reimbursed by Dental Corporation; and
* He determined the fees that patients would be charged.

1. There are, on the other hand, some features which suggest a relationship of employment:

* The goodwill apparently inured for the benefit of Dental Corporation;
* Dental Corporation provided the premises from and the equipment by which the practice was conducted;
* Dental Corporation had the right to hire employees and to terminate their employment (albeit in consultation with Dr Moffet);
* Dental Corporation paid the other employees;
* Dr Moffet was found by the trial judge at [3] to have been an employee of Immediate Dental as trustee for the Moffet family trust prior to the sale.

1. Were it not for the matter of goodwill, we would readily arrive at the same conclusion as the trial judge did. Whilst there were some aspects of the relationship which might have suggested employment these do not predominate. We are disinclined to give too much weight to his Honour’s statement at [3] that Dr Moffet had been employed by his family trust. This is for two reasons. It is inconsistent with his Honour’s later statement at [75] that Dr Moffet continued to work after the sale as he had worked before. It is also inconsistent with the evidence at trial. There was some evidence of a conclusory nature in Dr Moffet’s affidavit that he had been employed by his family trust but this was rejected on objection. He then gave oral evidence at T24 which showed that he was one of two directors of the trustee and that the trustee paid him drawings out of the business.
2. However, the matter of goodwill does require some further consideration. The fact that goodwill inures for a party seeking the provision of personal services from another, will often be an indicium that the business being conducted is that of the former rather than the latter: *Hollis* at [48]. Such reasoning proceeds on the assumption, very often correct, that only one business is being conducted. If there is only one business being conducted and it is that of the party seeking another’s services, it may be difficult in practice to avoid the conclusion that a contract of employment is present. As the High Court observed in *Hollis* at [48] the idea that the bicycle couriers involved in that case were conducting their own businesses was ‘intuitively unsound’.
3. But there can be situations where one business is being conducted within another and some of these will obviously not involve employment. For example, a person who conducts their own business as a management consultant on a full time basis from a client’s place of work will generally not be an employee. On the other hand, there are cases where even though the person is providing services in their own business it has nevertheless been held that they are employed by the person obtaining those services. The facts of *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3; 209 FCR 146 (‘*ACE Insurance*’) illustrate this. There the insurance agents had their own businesses, cars and issued invoices for GST for the services they rendered (although these were prepared by the insurer). Nevertheless, they were held by the Full Court to be employees.
4. In cases of this kind, it can be useful – as *Hollis* shows – to inquire whether the person providing the services obtains any goodwill in their own personal business. If they do not acquire any goodwill this may suggest, as it did in *Hollis*, that in fact the person providing the services is really working in the other party’s business. In all of this, however, one must keep in mind that the central question to be answered is whether the person is employed. Considerations of who is conducting what business and for whom does the goodwill inure are but aids to that analysis. They must not supplant that central question: *Tattsbet Limited v Morrow* [2015] FCAFC 62; 233 FCR 46 at [61] per Jessup J (Allsop CJ and White J agreeing). Nevertheless, goodwill is often an important piece of the puzzle.
5. Confusingly, sometimes two sets of distinct goodwill may simultaneously exist side by side. This is illustrated by the cases concerning the conduct of medical centres. Often these centres are conducted such that each doctor in the centre conducts their own business as a general practitioner and pays fees to the owner of the medical centre for the use of the premises and for administrative support. It has been established in cases of that kind that *both* the doctors and the medical centre have a separate goodwill in the two businesses being conducted from the same premises: *Symbion Medical Centre Operations Pty Ltd v Alexander* [2010] NSWSC 1047 at [132]-[135] per Gzell J; *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 at [66] per Young JA (Beazley JA and Basten JA agreeing). The fact that the medical centre has its own goodwill in the operation of the centre is what grounds its entitlement to the restraint covenants preventing the doctors working in competition with it. But at the same time, each doctor practising on their own account, albeit from the medical centre, can have a goodwill in that practise.
6. These kinds of situations are, perhaps, not the usual but they are more likely to arise where there is a divesting by a professional person of their back office operations to an agglomerated service provider. The architecture of that kind of situation may lead to the existence of two businesses each with its own goodwill. It will in each case depend on a close analysis of the relationship which has been created.
7. In this case, the trial judge made no finding as to whether Dr Moffet continued to generate his own separate goodwill in the business. There was evidence which suggested that he did although the matter is not free from doubt. For example, Dental Corporation submitted that Dr Moffet utilised a business name ‘Dr Moffet’s Active Dental’ and protected that brand from complaints. Dr Moffet thought under cross-examination that this was the name he had used before the sale of the practice although the evidence was not all one way on this issue. In any event, it is difficult to reconcile the existence of the goodwill Dental Corporation now contends for with the trade restraints it had imposed on Dr Moffet under the Services Agreement.
8. Dental Corporation also pointed to Dr Moffet’s tax returns in which he disclosed he was a dental surgeon and claimed expenses as deductions in that business. In our view these are rather too thin to conclude that a goodwill for Dr Moffet existed. The conclusion we would reach is that this evidence does not safely sustain a conclusion that Dr Moffet had his own separate goodwill distinct from that of Dental Corporation’s in the practice.
9. Ordinarily, this would be a factor which was in Dr Moffet’s favour because it would suggest that only one business was being conducted and that Dr Moffet was working within it as an employee. Both *Hollis* and *ACE Insurance* would suggest a result in his favour. On this view, Dr Moffet would be like the bicycle couriers in the courier business in *Hollis* who were said to be operating their own businesses but who generated no goodwill in any of those businesses and who drove around the city on their bicycles wearing Vabu’s livery. He would then also be like the indentured life insurance agents who conducted their own businesses as insurance sales personnel albeit with only one insurer, ACE. In the case of those agents too, they generated no goodwill in their own businesses and were found to be employees.
10. Was Dr Moffet employed by Dental Corporation? We think that question should be answered in the negative. Dr Moffet was not like the bicycle couriers in *Hollis* or the insurance agents in *ACE Insurance*. Dr Moffet worked as much or as little as he wanted. This state of affairs was satisfactory to Dental Corporation because the fees it paid to him were linked both to the fees he earned personally and the fees earned by the practice as a whole. Dr Moffet could take as many holidays as he wanted for as long as he wanted. Most importantly, Dr Moffet was underwriting the minimum cash flows which he had promised Dental Corporation the practice would achieve.
11. Granted that it would be possible for a dentist to sell his practice to a firm such as Dental Corporation and the next day be rehired as its employee, we do not think that is what has happened in this case. The liberties which the parties reserved to Dr Moffet under the Services Agreement are just too wide to sustain a conclusion of employment. Ground 1 of the cross-appeal should be dismissed.
12. It was common ground that if Dr Moffet was not an employee for the purposes of the FW Act he was not a ‘worker’ for the purposes of the LSL Act. Consequently, ground 2 of the cross-appeal must also be dismissed

# If Dr Moffet was a worker within the meaning of the *Long Service Leave Act 1955* (NSW), did he resign from Dental Corporation because of illness? (Cross-appeal ground 3)

1. This question does not arise since Dr Moffet was not a worker under the LSL Act. Had it arisen, we would have detected no error in the trial judge’s conclusion that Dr Moffet did not resign due to ill-health. It is clear that the trial judge was not overly impressed with Dr Moffet as a witness and was not prepared to accept the assertions about his physical and mental health contained in his letter of resignation or in his affidavit without some attempt to prove their truth with real medical evidence. It was, in our opinion, open to the trial judge not to accept this tenuous evidence. We would reject Dr Moffet’s contention that whether he was actually suffering from a mental or physical condition was the wrong question and that the right question was whether he resigned for reasons of illness. It is perhaps an interesting question whether an employee may resign for imagined reasons of illness and still fall within the LSL Act. However, that is not what has happened in this case. Rather the trial judge held that Dr Moffet had not proved anything substantive about his reasons for resigning.

# Was DR Moffet an employee under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (Appeal ground 1)

1. Section 12(1) of the SGA Act provides that ‘employer’ and ‘employee’ have their ordinary meaning in the SGA Act but that the meaning of those terms is expanded on by s 12(2) to s 12(11). Only the extension in s 12(3) is relevant to this appeal but the other extensions in s 12(2) to s 12(11) have some bearing upon the proper construction of s 12(3) so it is useful to set the section out in full:

**12 Interpretation: employee, employer**

(1) Subject to this section, in this Act, ***employee*** and ***employer*** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

(2) A person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate.

(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

(4) A member of the Parliament of the Commonwealth is an employee of the Commonwealth.

(5) A member of the Parliament of a State is an employee of the State.

(6) A member of the Legislative Assembly for the Australian Capital Territory is an employee of the Australian Capital Territory.

(7) A member of the Legislative Assembly of the Northern Territory is an employee of the Northern Territory.

(8) The following are employees for the purposes of this Act:

(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;

(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

(9) A person who:

(a) holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory; or

(b) is otherwise in the service of the Commonwealth, of a State or of a Territory (including service as a member of the Defence Force or as a member of a police force);

is an employee of the Commonwealth, the State or the Territory, as the case requires. However, this rule does not apply to a person in the capacity of the holder of an office as a member of a local government council.

(9A) Subject to subsection (10), a person who holds office as a member of a local government council is not an employee of the council.

(10) A person covered by paragraph 12‑45(1)(e) in Schedule 1 to the *Taxation Administration Act 1953* (about members of local governing bodies subject to PAYG withholding) is an employee of the body mentioned in that paragraph.

(11) A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work.

1. The trial judge asked himself the question posed by Bromberg J in *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* [2011] FCA 366; 214 FCR 82 (‘*On Call’)* at 146 [306]. Bromberg J was of the view that s 12(3) would apply where an independent contractor provided personal services in an employment-like setting which was not of a domestic or private nature. In determining what an employment-like setting was, Bromberg J thought it was appropriate to ask whether ‘in all the circumstances, the labour component of the contract in question could have been provided by the recipient of the labour employing an employee.’
2. With respect to Bromberg J, whose views always command our respect, we think such an approach is erroneous because it has no textual anchor in the provision and constitutes a gloss on the provision. We share Logan J’s view that it is preferable not to put a gloss on the language of s 12: *Racing Queensland Board v Commissioner of Taxation* [2019] FCA 509 at [74] (rev’d on other grounds).
3. As a matter of text, s 12(3) does not refer to employment, the concept of an employment-like setting or personal services whether domestic or private or otherwise. As a matter of structure, s 12(3) is an ‘if then’ statement. By contrast, the approach in *On Call* calls for the assessment of the plausibility of a counter-factual viz the provision of the same labour under a hypothetical contract of employment. The test in *On Call* therefore differs markedly from the statutory language and is conceptually more complex.
4. In our opinion, what s 12(3) requires is that: (a) there should be a ‘contract’; (b) which is wholly or principally ‘for’ the labour of a person; and (c) that the person must ‘work’ under that contract. There is no doubt that Dr Moffet provided his work under the Services Agreement so the requirements of (a) and (c) are met.
5. So far as (b) is concerned, the word ‘for’ is purposive but even the simplest employment relationship has two purposes depending on the perspective from which it is viewed. From the employer’s perspective an employment contract is ‘for’ the provision of labour (in return for wages); from the employee’s perspective it is ‘for’ the receipt of wages (in return for labour).
6. Since s 12(3) poses the question of whether the contract is ‘for’ the labour of a person, this shows that Parliament was mandating an inquiry into the purpose of the contract from the perspective of the person obtaining the benefit of the labour (ie the quasi-employer). On no view could the question posed by s 12(3) be answered by asking whether the contract was wholly or principally ‘for’ wages.
7. What did Dental Corporation receive for entering into the Services Agreement? In particular, did it receive ‘wholly or principally’ the labour of Dr Moffet? In answering that question it is irrelevant to ask what Dr Moffet might have received from Dental Corporation. This is *not* so on the approach required by *On Call* – there the question of whether the relationship was framed in an ‘employment-like setting’ by no means makes irrelevant a consideration of what the person providing the labour obtains from the quasi-employer. It is no surprise, therefore, that in this appeal Dental Corporation focused, in relation to *On Call*, on services received by Dr Moffet from Dental Corporation such as the provision of premises, the ‘Administrative Services’ and the assistance of other health care professionals employed by it. In our view, however, none of these can be relevant to the question posed by s 12(3).
8. The question of what the Services Agreement was ‘for’ from Dental Corporation’s perspective is to be determined by reference to its terms. Clause 3.1 provides:

**3.1 Provision of Dentistry Services**

The Practice Principal must provide and or procure with the consent of the Dental Corporation, the provision of the Dentistry Services during the Term at the Premises. The Practice Principal acknowledges that he or she must provide the Dentistry Services personally during the Term.

1. There were two obligations in this clause. The first involved the personal services of Dr Moffet in the form of the provision of the ‘Dentistry Services’, whilst the second involved the procurement by Dr Moffet of those selfsame services. The clause does not literally say this but it is clear enough that the procurement it contemplated was in the form of other health care professionals providing the Dentistry Services. The words ‘and or’ would ordinarily suggest that Dr Moffet could choose which of these two options he was going to pursue but the last sentence of the clause shows that he had no choice about providing his own services. The words ‘and or’ must therefore be construed as meaning ‘or in addition’ so that the option contemplated by cl 3.1 was one where it was left up to Dr Moffet to decide whether he would, in fact, procure other persons to provide the Dentistry Services.
2. Next Dr Moffet was required by cl 3.2 to ensure that the Dentistry Services were provided to a particular standard. By cl 6.1 Dental Corporation was bound to assist him to do so by providing him with the ‘Administrative Services’. These were defined to be ‘the head office and all other administrative services provided by Dental Corporation including information technology services, equipment support, recruitment support, accounting and group marketing in accordance with clause 6’. For the reasons we have already given, what Dental Corporation was to provide to Dr Moffet could not be relevant for ascertaining what the Services Agreement was ‘for’ from Dental Corporation’s perspective.
3. Despite that and perhaps somewhat confusingly, the ‘Dentistry Services’ which Dr Moffet was obliged to provide were defined in Sch 1 in a way which makes the ‘Administrative Services’ provided to him relevant to understanding what he was providing to Dental Corporation. Schedule 1 provided:

**Schedule 1 – Dentistry Services**

**1. General Requirement**

**1.1 Dentistry**

The Practice Principal must provide diagnostic, remedial, specialist (including cosmetic) and preventative dentistry services as appropriate to patients of the Practice at the Premises.

**1.2 Practice management**

The Practice Principal, in consultation with Dental Corporation, must manage the Practice in a manner in which performance and operations are consistent with or of a better standard than the Practice enjoyed immediately prior to Completion and in accordance with the terms and scope of this agreement.

**1.3 Consultation with Dental Corporation**

The Practice Principal must provide all reasonable assistance to, and consult with, Dental Corporation where required by Dental Corporation for the provision of the Administrative Services.

**2. Patient Fees**

The Practice Principal must determine in consultation with Dental Corporation the fees to be charged by the Practice Principal for rendering dental treatment to patients.

**3. Patient Records**

The Practice Principal must maintain Patient Records in accordance with clause 3.6.

**4. Excluded Activities**

Nil.

1. What Dr Moffet was therefore to do for Dental Corporation was to provide dentistry, practice management and, when requested, assistance to Dental Corporation to guide it on how it should provide the Administrative Services to him. He was also required to determine appropriate fees and maintain patient records. The effect of cl 3.1 was to require Dr Moffet to do all of these things personally but also to give him the option of procuring other people to do them as well. That option was given flesh by cl 7 which required Dental Corporation to provide Dr Moffet with persons employed by it to assist him in providing the Dentistry Services.
2. On no view, however, could it be said that the Services Agreement provided itself for the employment of these other health care professionals, as Dental Corporation submitted. Rather, the Services Agreement contemplated third party contracts between these persons and Dental Corporation. In any event, the Services Agreement was not ‘for’ the purpose of obtaining the labour of these other health care professionals to assist Dr Moffet. Their labour was not something which Dental Corporation obtained under the Services Agreement.
3. In a similar vein, although Dental Corporation was obliged to provide equipment to Dr Moffet under cl 6.3 this was not something which it obtained under the Services Agreement but something it gave.
4. It is then necessary to determine whether, in addition to the labour of Dr Moffet, Dental Corporation received any other benefit under the Services Agreement. As we have observed already, it is not relevant to inquire what it was that Dr Moffet received for his labour since this is not the issue to which s 12(3) is directed. Despite that, in this case there is a complexity which nevertheless makes it necessary to examine the remuneration structure which existed. We do this because, as will be seen, whilst that remuneration structure generally operated to cause Dental Corporation to pay Dr Moffet for his services, it also operated in certain circumstances to require Dr Moffet to pay Dental Corporation and those payments are another benefit which Dental Corporation received.
5. With that purpose in mind it is then necessary to turn to the Services Agreement. One begins with ‘Monthly Revenue’ which was defined in cl 1.1 to mean ‘the Monthly Gross Revenue generated and *collected* by the Practice Principal each month of the Anniversary Year less, any laboratory fees for the relevant month’ (emphasis added). ‘Monthly Gross Revenue’ was defined in the same clause to mean ‘the total revenue generated and *collected* by the Practice Principal each month of the Anniversary Year’ (emphasis added). Each of these definitions assumed that the revenue generated by Dr Moffet would be *collected* by him (ie the Practice Principal). Other clauses used this language too: cl 8.2(a), cl 1.1 definition of ‘Annual Gross Revenue’ and Sch 2 item 2. Moreover, one of the Administrative Services provided to Dr Moffet by Dental Corporation was accounting services.
6. The definition of ‘Monthly Gross Revenue’ assumed, as we have noted in the preceding paragraph, that Dr Moffet would ‘collect’ the revenue that he personally generated. The Services Agreement stated that the other revenue generated by the practice was to be ‘collected’ but was silent on who was to collect it: ‘Annual Cash Flow’ definition cl 1.1. It seems likely that Dr Moffet’s management duties would have included collecting the practice’s revenue. Nevertheless, both cl 8 (which determined Dr Moffet’s drawings in relation to his own services) and cl 9 (which determined his drawings in relation to the practice as a whole), proceeded on the assumption, not elsewhere explicit, that the revenues generated by the practice were to be *received* by Dental Corporation. It must follow that the revenues collected by Dr Moffet were collected by him on behalf of Dental Corporation and not for himself beneficially. Only such a reading can make sense of the fact that Dental Corporation then had an obligation to pay Dr Moffet the monthly drawings and, where applicable, any performance bonus.
7. It is tempting to think, at first glance, that the Services Agreement delivered to Dental Corporation the obvious benefit of the revenues (generated by the entire practice including Dr Moffet) which Dr Moffet was obliged to ‘collect’ on its behalf. But it was not the Services Agreement which provided for those revenues. The revenues were collected either as a result of his own labour (as a dentist) or by his management of the other dentists and health care professionals within the practice. If there had been no other dentists and Dr Moffet had refused to take the chair, no revenues would have passed through to Dental Corporation.
8. Viewed in that light it is apparent that the revenues derived were merely the consequence of the application by Dr Moffet of his labour under the Services Agreement. This underscores that the revenues themselves did not derive from the Services Agreement. Subject to what shortly follows, Dental Corporation had no entitlement to call for the practice revenues under the Services Agreement. If Dr Moffet had done no work, Dental Corporation could not have sued for them.
9. This might suggest that Dr Moffet could have devoted his time exclusively to leisure were he minded to do so (and if he were unconcerned by the fact that such a course of action would also have deprived him of the tangible benefit of his monthly draws) without penalty. However, the Services Agreement was never likely to, and did not, operate this way because of a provision in it dealing with minimum annual cash flows. This was contained in cl 9.3:

**9.3 Annual Cash Flow Shortfall**

The parties acknowledge that the Practice is expected to generate an Annual Cash Flow each Anniversary Year which is equal to or greater than the Minimum Annual Cash Flow. If the Annual Cash Flow is determined to be less than the Minimum Annual Cash Flow in any Anniversary Year, the Practice Principal agrees that each payment by Dental Corporation of the Monthly Dental Draw in the subsequent Anniversary Year will be reduced by 50% each month until Dental Corporation has recovered the Cash Flow Shortfall.

1. By cl 9.3 the parties agreed that it was expected that the practice would generate a minimum cash flow and it required Dr Moffet to reimburse Dental Corporation if it did not. The consequence of cl 9.3 was Dr Moffet secured to Dental Corporation a minimum amount of revenue. It was that obligation which, combined with the incentive constituted by his monthly drawings and performance bonus, meant that Dental Corporation knew that it was not just acquiring a practice but an income stream.
2. It is evident therefore that the Services Agreement procured for Dental Corporation two sets of benefits. One related to Dr Moffet’s personal services as a dentist, as a practice manager, as a consultant both in relation to the administration of the practice but also in relation to fees and as a maintainer of medical records (ie the ‘Dentistry Services’ contained in Sch 1). The other was his promise that the practice would achieve a minimum cash flow which was backed up by a right in Dental Corporation to reduce his monthly drawings by 50% until any shortfall was made good.
3. In our opinion, these two benefits which Dental Corporation received under the Services Agreement were what it was ‘for’ insofar as s 12(3) is concerned. Dr Moffet’s obligation to provide personal services as a dentist, manager and so forth may be said to be ‘for labour’; his promise – secured against his monthly drawings – that the practice would generate the minimum cash flow, may not.
4. Section 12(3) requires one to ask whether the labour component was ‘wholly or principally’ what the Services Agreement was ‘for’ so far as Dental Corporation is concerned. To answer that question in the negative would require one to conclude that the fact that Dental Corporation also received the important benefit of the minimum cash flow promise meant that the labour component could not predominate (ie was not the whole or principal benefit that the Services Agreement was ‘for’).
5. Like the dancer and the dance these two benefits cannot be disentangled although they remain conceptually distinct. It was the minimum cash flow requirement which took up the slack in the somewhat amorphous promise he had made to work. They were two sides of the same coin and must therefore be dealt with together.
6. For that reason, the question of whether the Services Agreement, from Dental Corporation’s perspective, was wholly or substantially ‘for’ Dr Moffet’s labour should be answered in the affirmative. It was substantially for that purpose.
7. This was the trial judge’s conclusion too although he arrived at it by asking himself the question posed by Bromberg J in *On Call*. Although this does not matter, if the approach in *On Call* were the correct approach (contrary to our conclusion that it is not), we would have accepted Dental Corporation’s submission that his Honour erred in his application of that test. In particular, his Honour failed to have regard to the fact that Dr Moffet gave Dental Corporation a guaranteed minimum cash flow. A situation where the person providing the labour underwrites the revenues of the business out of their own income stream from the business is not an employment-like setting. This case then perhaps highlights why we do not think that the *On Call* approach is the correct one.
8. That said, insofar as the *On Call* approach is concerned we would have rejected Dental Corporation’s submission that there was no employment-like setting because Dental Corporation provided Dr Moffet with premises from which to conduct the practice. If by this it is meant that Dental Corporation provided Dr Moffet with a lease of its premises, the submission is wrong. Dr Moffet assigned his lease of the premises to Dental Corporation under the Acquisition Agreement and it did not sub-let them back to him. If the submission means only that Dr Moffet had an implied licence to be in the premises leased by Dental Corporation then we do not think that such a licence is inconsistent with an employment-like setting. It is difficult to think of a workplace in which an employer does not grant its employees a licence to be at their desk (save perhaps in the last few moments of the relationship when the employee is shown, box in hand, to the door).
9. We were also unpersuaded by Dental Corporation’s allied submission that the fact that it provided Dr Moffet with other health care professionals to assist him in running the practice tends to suggest the absence of an employment-like relationship. The provision by one person of employees to assist another person with their work is neutral on the issue of whether there is an employment-like setting. The fact that an employed lawyer has an administrative assistant provided by their employer does not suggest that such a lawyer is not in an employment-like setting.
10. Finally, we would have rejected Dental Corporation’s submission in this Court that the employment-like setting test should be answered by reference to the same kinds of indicia, especially control, which govern the general issue of whether one person is employed by another. This would collapse s 12(3) (on the assumption that *On Call* is correct) into the ordinary test of employment. It is clear that is precisely what s 12(3) does *not* mean.
11. Ground 1 of the notice of appeal should be rejected.

# Result

1. Both the appeal and cross-appeal should be dismissed with costs.

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| I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram and Anderson. |

Associate:

Dated: 16 July 2020

REASONS FOR JUDGMENT

WIGNEY J:

1. I agree with Perram and Anderson JJ that both the appeal and the cross-appeal should be dismissed. Subject to what follows, by way of brief elaboration, I agree with their Honours’ reasons.
2. As for the cross-appeal, a multifactorial assessment of the totality of the relationship between Dr Moffet and **Dental Corporation** Pty Limited, based on the evidence that was before the primary judge, compels the conclusion that Dr Moffet was not Dental Corporation’s employee at any time. While Dr Moffet continued to supply services to the dental practice which Dental Corporation acquired from him in November 2007, he did so not as an employee, but effectively as an independent contractor pursuant to the terms of a services agreement.
3. The relationship between Dr Moffet and Dental Corporation was a bespoke relationship which was the product of carefully negotiated and drafted commercial agreements entered into upon the acquisition of Dr Moffet’s practice. It bore few, if any, of the usual hallmarks of an employment relationship. In particular, Dental Corporation had no real right to control the manner in which Dr Moffet provided dental services pursuant to the services agreement. Dr Moffet was subject to little, if any, supervision in the provision of his services. He was free to decide how much or how little he worked each week and how much or how little leave he took, though of course his remuneration, or lack thereof, hinged on the cash flow generated by the practice and his participation in it. Few employees have the luxury of being able to unilaterally decide to work only three days a week, or to take 15 weeks annual leave. The terms of the services agreement that Dr Moffet freely signed also told against him being an employee: Dr Moffet invoiced Dental Corporation and collected GST in respect of the provision of his services and there was to be no withholding of income tax.
4. While, as Perram and Anderson JJ have noted, there may have been some flaws in the primary judge’s reasoning, the conclusion ultimately reached by the primary judge was the correct one.
5. As for the appeal, I agree with Perram and Anderson JJ that the construction of s 12(3) of the *Superannuation Guarantee (Administration)* ***Act*** 1992 (Cth) should not be approached by applying a gloss to the language used in the provision, particularly a question-begging gloss such as “employment-like setting”: cf ***On Call*** *Interpreters and Translator Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; [2011] FCA 366 at [306]. Nor should the application of s 12(3) of the Act be approached by posing a counterfactual about whether the labour provided by the person under the relevant contract could have been obtained by the other party to the contract by that party employing the person as an employee.
6. The obvious intent of s 12(3) of the Act is to expand the ordinary meaning of “employee” for the purposes of the Act to include a person who “works under a contract” where that contract is “wholly or principally for the labour of [that] person”. Dr Moffet was such a person. He worked under a contract because he provided personal services pursuant to the terms of the relevant services agreement, which was, of course, a contract. That services agreement was also a contract which was at least “principally” for the “labour” of Dr Moffet because its terms reveal that its predominant purpose was to secure Dr Moffet’s provision of the relevant services. While the services agreement of course had other provisions, some of them quite complex, concerning revenues, remuneration and Dental Corporation’s obligations to provide Dr Moffet with, amongst other things, administrative services, the predominant purpose of those other provisions was to secure and facilitate Dr Moffet’s provision of the relevant services.
7. While the primary judge approached the application of s 12(3) of the Act by applying the *On Call* gloss and counterfactual, his Honour nonetheless ultimately came to the correct conclusion.
8. The appeal and cross-appeal must accordingly be dismissed. I agree with the orders proposed by Perram and Anderson JJ.

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| I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 16 July 2020