IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 24/2004

IN THE MATTER	of a Civil Appeal	
BETWEEN	**JAMES BRYSON**	
	Appellant	
AND	**THREE FOOT SIX LIMITED**	
	Respondent	
AND	**NEW ZEALAND COUNCIL OF TRADE UNIONS**	
	First Intervener	
AND	**BUSINESS NEW ZEALAND**	
	Second Intervener	

Hearing 8 April 2005

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel M E Gould and T J Anderson for Applicant
P M Muir and L S Jenkins for Respondent
L J Taylor and C P Chauvel for First Intervener
B A Corkill and S J Davies for Second Intervener

CIVIL APPEAL

10.03 am

Gould May it please the Court, Counsel's name is Gould, I am appearing for the appellant with my friend Mr Anderson.

Elias CJ Thank you Mr Gould, Mr Anderson.

Muir May it please your Honours, Ms Muir and Ms Jenkins for the respondent.

Elias CJ Thank you Ms Muir, Ms Jenkins.

Taylor May it please the Court, Taylor with Mr Chauvel for the first intervenor.

Elias CJ Yes thank you Mr Taylor, Mr Chauvel.

Corkill May it please the Court, Corkill with my learned friend Ms Davies for the second intervenor

Elias CJ Thank you Mr Corkill, Ms Davies. Right, Mr Gould.

Gould Thank you Your Honour. The relatively simple question in this case Your Honours is, what was the real nature of the working relationship between the appellant, Mr Bryson, and the respondent, Three Foot Six Limited? That of employment or services? The Court of Appeal overturned the Employment Court's holding that Mr Bryson was an employee. I ask this Court to consider the reasoning that the Court of Appeal had for doing that. And in summary form it appears to be this. Mr Bryson appeared to the Court of Appeal, to the Majority in the Court of Appeal, and the Minority, on the facts to be an employee. Most of the terms of a Crew Deal Memo, the contract between the parties entered into some months after the agreement started, was held by the Court of Appeal that those terms could equally have appeared in a contract of employment. Thirdly the Court of Appeal said if one applies the fundamental test, the market investigations test enunciated by Cooke J, Mr Bryson appears to be an employee. Fourthly the Court of Appeal said the real nature of the relationship between these parties is not controlled by the contractual terms between them, written contractual terms between, I assume the Court was referring to. And fifthly, Mr Bryson's taxation arrangements are not determinative of his status, said the Court, because those arrangements flow from the system put in place by the putative employer.

Then the Court's next step appears to have been to say, but notwithstanding all those factors, because there are a lot of people, an overwhelming majority, almost an invariable practice I think was the words of the Court, because lots and lots and most of those people are not employees in this industry, and because there are statements in that Crew Deal Memo that say the parties intended to contract not as employment, therefore Mr Bryson was not an employee.

That analysis I submit is further supported by statements from the Court of Appeal at other places in the Judgment to which I haven't yet referred. Firstly in paragraph [111] of the Court of Appeal's Decision, that's Tab 12 of Volume 1 of the case, the Court of Appeal indicated that Mr Bryson didn't carry on business or he agreed that in reference

to the Employment Court's Decision, because Mr Bryson didn't carry on business in the same way as a self-employed contractor might, there was therefore no reality to his purported status. That conclusion doesn't sit comfortably, are the words of the Court of Appeal, with the hundreds or thousands of other people who work as contractors.

Tipping J How did the Court of Appeal know that for the purposes of the relevant Act these hundreds and thousands were contractors?

Gould You've brought me Your Honour immediately to another point that I wish to make. Is that.

Tipping J I don't want to take you out of your order but.

Gould No that's fine Your Honour. We had in my view no evidence of any single other relationship in this industry before either the Employment Court or the Court of Appeal. We had evidence that the industry typically deals with its workers as if they are independent contractors. But we had no application on s.6 to any other worker in the industry. And my submission on that is that we don't have significant evidence of industry practice that the actual relationship between engagers and workers is one of employment. We had significant evidence that most often they are called independent contractors.

Keith J You first said Mr Gould that there was no evidence and then you said there was no significant evidence. Which are you saying? You just said then there is significant evidence that they were called independent contractors. But so far as their actual status.

Gould So far as any other, there was no other evidence of another worker in the industry.

Keith J So it's no evidence, you're saying?

Gould And in light of that, the Court of Appeal moved, its analysis is because, if I can repeat, because Mr Bryson didn't carry on business in the same way as a self-employed builder or contractor or plumber might, but we can't find him, said the Court, an employee because of the fact of the hundreds or thousands of people, and I use the word "fact" in inverted commas, working in the industry as contractors. And rather, I submit, strangely a statement that in light of industry practice, there is no basis for holding Mr Bryson's relationship with the applicant was other than that contained in the statements as to the nature of that relationship in the Crew Deal Memo. What it appears the Court of Appeal is saying is that these two factors outweighed all of the other evidence in terms of what kind of working relationship this was. Factor one, there are many hundreds, perhaps thousands of people in this industry who we call contractors. Factor two, there are statements in the written Crew Deal Memo signed six months after Mr Bryson commenced work, there are statements in that Memo clearly stating that the parties intend their

relationship to be one of contractor and engager, not one of employment. And the Court of Appeal has in my view and in my submission given dominant relevance to those two factors over the others.

Keith J Just on the metaphor you are using at the moment Mr Gould. You've talked about giving something dominant weight. By contrast I notice that at the end of, well two sentences, three sentences from the end of [111] the Court of Appeal says in effect the Employment Court Judge ignored the external reality. So the different words being used here about whether it was ignoring something or giving it insufficient weight.

Gould Giving it too much weight.

Keith J And that really takes me back I think to a prior question with this case, it seems to me at least at this stage to raise, and that is the relative function of the Court of Appeal and this Court for that matter and the Employment Court. Because I notice that early in the discussion in paragraph [94], the Court of Appeal says that they thought it inescapable that the Judge's conclusions turned sufficiently on issues of law for the applicant to have a right of appeal and apparently you didn't seek to argue to the contrary. But it's still necessary isn't it for the Court of Appeal to identify particular errors of law in the Employment Court Judgment for the appeal to succeed. And ordinarily they don't include matters of weight do they? And there's no reflection here of the special role which has been emphasised in employment legislation for 100 years of the role of the employment institutions.

Gould Indeed Your Honour. The application for leave to appeal to the Court of Appeal was opposed.

Keith J Mm.

Gould In terms of the weight factor and I guess we're also talking about s.216.

Keith J Yes.

Gould The special jurisdiction.

Keith J Yes.

Gould It seemed that the Court of Appeal, the Court of Appeal seems to have said that Her Honour Judge Shaw either took no or insufficient notice of industry practice. Which is a conclusion I submit can't be drawn from a reading of Her Honour's Judgment. That.

Keith J Well if they're right on the no point then they've got a point of law haven't they? But if it's not sufficient, is that a question of law?

Gould In terms of the weight attributed to that factor?

Keith J Mm, mm.

Gould No, it's generally a matter for the Court to decide on the weight to be given.

Tipping J Well she discussed industry practice over some pages didn't she?

Keith J Mm.

Gould Indeed Your Honour, yes indeed. And it's surprising that the Court of Appeal has concluded in some way that she ignored, Her Honour ignored industry practice. But I'm not sure it answers Justice Keith's question.

Keith J Sorry I was really putting it in two different ways. Let's assume that the Judge did ignore it, which is what they say at the end of paragraph [111].

Blanchard J Although that is surely qualified by paragraph [110].

Keith J Yeah sure. Well I was making an assumption for the moment. I mean then you would have a harder case to argue wouldn't you, because then that would be an error of law if she'd ignored something that was relevant.

Gould Indeed.

Keith J And whether she did or didn't depends, as my two brothers have said, on what she actually did.

Gould Yes.

Keith J And then on the other things the Court of Appeal say.

Gould Yes it did Your Honour.

Keith J But if in the end she did consider it and she did weigh it but didn't give it over the main weight.

Gould She hasn't made an error.

Keith J Then that's a matter for her isn't it, would be your argument.

Gould Indeed. Yes indeed.

Keith J And that's what the Court of Appeal's been saying down the years hasn't it in **NZ Van Lines** (**NZ Van Lines Ltd v Gray** [1999] 2 NZLR 397) and cases like that?

Gould Indeed Your Honour.

Elias CJ But the submission however doesn't really emerge from your written submissions very clearly Mr Gould.

Gould No, I'm hoping it would emerge more clearly today Your Honour.

Elias CJ Right.

Gould In fact that is my significant submission.

Elias CJ That the Court of Appeal exceeded its jurisdiction effectively?

Gould Yes.

Tipping J Well if you read the two paragraphs [110] and [111] together, aren't the Court of Appeal saying that she ignored industry practice in their view, save for its relevance to intention? They somehow or other saw it as having a wider relevance than intention. I think the word "ignored" has to be read in the context, as Justice Blanchard has said, of [110]. That's what they're really saying. They confined it, she confined industry practice in relevance to her assessment of the intentions of the parties. And the word "ignore" presumably is to be read according to that introductory observation. I'm not saying I'm against you, but I'm just saying you've got to get this in complete perspective.

Gould Mm, yes, yes I understand Your Honour. And I guess to do so we need to look back at what Her Honour said in her Judgment.

Tipping J What was the error or errors of law identified for the purposes of the leave? Alleged error or errors of law?

Blanchard J Leave in the Court of Appeal?

Tipping J In the Court of Appeal, yes.

Elias CJ Do we have that? Yes one.

Keith J Oh that's here.

Elias CJ That's here.

Gould That's at Tab 10 Your Honours.

Elias CJ Sorry, which Tab?

Gould Page 50 of the case.

Elias CJ Oh yes.

Gould The Court failed to give s.6 its intended meaning.

Keith J Well that would be an error of law if that was established, wouldn't it?

Gould Indeed. The Court's finding that industry practice was of little use was also alleged to be wrong in law.

Keith J But both in B and C there's a complaint about correct application which again raises questions about whether that's a question of law doesn't it?

Gould Indeed yes, of little use would imply its application rather than its.

Keith J Mm.

Gould Finally that it was contrary to the evidence before it.

Keith J Well that's again not ordinarily thought of as a point of law is it?

Gould Not normally Your Honour, no.

Gault J Could you just help me for a moment. The Court of Appeal Majority Judgment in paragraph [94] finds jurisdiction because it involves interpretation of s.6 of the Employment Relations Act. Is there anywhere in the Judgment which identifies what was incorrect in the Judge's interpretation of s.6?

Gould No, I don't believe there is Your Honour.

Gault J Went on to the application of s.6.

Gould Mm, indeed it did.

Gault J It seemed to me.

Gould Mm.

Gault J Rather than its interpretation. Yet they've found their jurisdiction as a matter of interpretation.

Gould Yes indeed Your Honour.

Tipping J Once they'd opened the door by that rather vague reference, they went head first into the merits.

Gould The facts, the merits and so forth. They did Your Honour.

Tipping J And indeed all the Judges in the Court of Appeal with respect seem to have done that.

Blanchard J Well they did revert to s.6 in paragraph [101]. We consider the phrase real nature of the relationship is not just a shorthand. The result of an analysis. I must say when I read that I jotted beside it, well did Judge Shaw say any such thing. And I don't think she did.

Gould Not at all, Your Honour. If one reads Judge Shaw's, the start of her Judgment in which she decided the things she needed to look at, they certainly weren't restricted to those matters raised at that paragraph to which Your Honour's referred.

Blanchard J Mm, because she expressly went on then to deal with the other matters which the Court of Appeal turns to a little later.

Tipping J Which was the paragraph that's being referred to, I'm sorry I missed it.

Blanchard J [101].

Tipping J [101].

Blanchard J The opening of [101].

Gould And from there to take Your Honour's point, one of the errors of law that I submit the Court of Appeal made was in that very use of the, towards the end of the Judgment, that it was somehow wrong for individual working relationships to be considered.

Keith J [115] was it?

Gould Well [115] through to [117] Your Honour.

Keith J Right.

Tipping J There are two issues in this case aren't there? The Court of Appeal's method and, if one moved beyond that, the actual way they analysed the various competing factors. We're talking now about the methodology.

Gould Yes.

Tipping J You were present at the hearing. What was said to be the key error that Judge Shaw had made in her interpretation to s.6.

Gould That the, I guess the key error was that Her Honour seemed to see it more of a change in the rules about, or in the tests for whether someone's an employee or not where the Majority appeared to think

that a nudge of the test in a certain direction. That, from memory Your Honour, is the flavour of the.

Elias CJ We've got the appellant's submissions here haven't we?

Keith J Yes.

Gould In the Court of Appeal.

Blanchard J Where does the Court of Appeal address the question in the Judgment, address the question of whether it was a nudge or a change?

Elias CJ Or a wink.

Blanchard J Because in itself those terms aren't very helpful.

Gould Not at all Your Honour, not at all. And it seemed the argument proceeded initially in the Court of Appeal as to whether or not Her Honour was right in a relatively bald statement that s.6 has changed the law.

Tipping J [78] of the Court of Appeal seems to be this nudge business.

Gould That's right, yes Sir. [78] appears to be a recognition that there has been a change of the law but not a particularly significant one and that the change alleged that the real nature of the relationship needs to be examined now was not something that was examined before. That proposition does not hold, that previously Courts were of course looking at the real nature of the relationship. That was the argument that proceeded in that case.

Keith J And [101].

Gault J Because the Court of Appeal rather saw error by the Judge in down-playing the significance of the contract between the parties. [103] and [109] seem to indicate that.

Gould That's, yes Your Honour. My view of that is that the Court of Appeal is saying Her Honour down-played those statements in the contract that were as to the nature of the relationship and I say that because the Court itself says that it accepts that the contractual terms are no longer determinative.

Gault J Well certainly.

Gould But then says that Her Honour down-played them.

Gault J They were produced some months after the arrangement began.

Gould Indeed they were Your Honour.

Keith J And s.6 anyway says that labelling is not determining.

Gould Absolutely and that's where Your Honour I think you come to my submission as to the error of law, that the label given to it not to be determinative, in my submission a reading of this, the Court of Appeal's Judgment, the flavour of it is that the pairing of the label and the supposed industry practice were determinative. It seems to me that's where the Court of Appeal has erred in either weighing when it needn't have done because the Employment Court was entitled to. Not finding the same relevance.

Tipping J The sentence I think in paragraph [103] to which Justice Gault has drawn your attention, attracted my attention and slightly puzzled me when I was reading the Judgment. This approach would appear to leave little scope for significant weight to be placed on contractual intention. Well of course if the contractual intention doesn't reflect the reality, then I don't know what they meant by significant weight. I mean the two in many instances are going to be divergent. If the facts show that the real nature was contrary to what appears to be the contractual intention at least ex facie the contract, then there's bound to be a dissonance. I found that a rather difficult sentence I have to say.

Gould Yes indeed Your Honour. And it would seem to me in those circumstances the contractual intention is clearly not the answer to the true nature of the relationship and therefore if all other factors for example pointed the other way, one would have to say you may well have intended to do this but you haven't achieved that intention.

Tipping J And the earlier sentence saying you disregard it is not really very easy either because you regard it but then if it is outweighed, then it ceases to be determinative.

Gould Indeed, well it is never determinative Your Honour.

Tipping J No. Well sorry, yes, that wasn't very well put was it.

Gould But if regard, I submit, is given to it, must be given to it.

Keith J Just a moment ago Mr Gould you said you may have intended something or other but you haven't achieved that. When you say "you", are you talking about?

Gould That's the plural "you" Your Honour. Both parties.

Keith J Both parties. Because the reference in s.6 is to the intention, contractual, what is it, the intention.

Gould Of the parties.

Keith J Of the parties. So it's got to be the shared intention.

Gould Indeed Your Honour, I would say shared intentions. So the singular.

Keith J The singular there is significant. And in those [110] and [111] is a reference to intentions in the plural isn't there? And I don't want to quibble about plurals and singulars but there may be a significant difference.

Gould Yes well it may be significant Your Honour and it was significant in the Employment Court as Her Honour found that there was an intention on the part of the Company, 3 Foot Six.

Keith J Yes.

Gould But perhaps not on the part of the contractor, Mr Bryson, the employee, putative employee.

Keith J Right. Well as I think my brother Gault said earlier, he didn't see the document did he for some months so.

Gould Not for six months Your Honour.

Keith J Mm.

Tipping J And while we're looking at [103], is it really right to characterise Judge Shaw's approach as they have in the first sentence there? She didn't say that you derive the real nature of the relationship only by the controlled integration and fundamental tests.

Gould J Not at all.

Tipping J Which is rather the implication of the sentence.

Gould She gave quite a fulsome list of the things that she thought were important and there certainly were not, the Court must determine the real nature of the relationship Her Honour said, the intention of the parties was still relevant but no longer decisive. The real nature can be ascertained by analysing the historical tests.

Blanchard J Where are you reading from?

Gould I'm reading, I beg your pardon Your Honour, from page 26 of the case.

Blanchard J Paragraph?

Gould It's at Tab 7. Paragraph 19 of Her Honour's Decision. And interestingly her last point then, to refer Your Honours back to the discussion on industry practice, was that very matter. Another matter which may assist in the determination of the issue is industry practice,

although far from determinative. Which is Mr Justice Keith's point about where the Employment Court is entitled, because of it's specialist jurisdiction, to do the weighing necessary.

Keith J So there in that list of six points, you've got the three sort of standard tests and references to the statutory tests.

Gould Indeed. And the statutory tests bear some examination in terms of the relatively, apparently relatively wide phrase of considering all relative matters, all relevant matters. Everything is relevant to everything else in this world to a certain extent.

Keith J Yes, well.

Gould At subs (3)(a), must consider all relevant matters. One has to look at what the legislator is asking that the matters are relevant to. And are matters that must be relevant, in my submission, for the purposes of subs (2). The purposes of subs (2) is to determine the real nature of the relationship between person A and person B. And the spirit and wording of s.6 I believe focuses the inquiry onto that particular relationship.

Gault J And it still must be a contract of service under the Act mustn't it?

Gould Indeed Your Honour, that's the first part of the definition.

Gault J Whatever that may mean but that's a pretty well established concept in the law and presumably has been used in this section according to its well understood meaning. So when you're talking about the nature of the relationship, is that relevant to contract of service?

Gould Perhaps Your Honour in a way the section derogates slightly from the traditional definition of contract of service. Because it directs the inquiry, when in deciding whether a person is employed under a contract of service the historical wording, the Court or authority must determine the real nature of the relationship between them.

Gault J Well that doesn't give rise to any difficulty. You have to turn to the real contract between them. Not just something they might have written down, if it doesn't reflect a real contract between them.

Gould Oh indeed, certainly Your Honour.

Elias CJ Yes, I'm bothered about this antithesis between the intention of the parties and the real nature of the relationship. Because applying orthodox contract principle, you discern the intention of the parties from the whole contract which is objectively assessed in context. So I'm not really sure that there is such a divergence between the intention of the parties. Because that is an objective inquiry.

Gould Indeed Your Honour.

Elias CJ To be undertaken in context.

Gould Yes it is and specifically by statute one of the relevant matters in deciding what the real nature of their relationship was.

Elias CJ Well I would have thought, I'm not quite sure whether, Justice Gault I think was saying exactly this too, but I would have thought that the real nature of the relationship is a contract of service.

Gould Well.

Keith J So what does subs (2) add is the question, isn't it?

Gould Yes.

Elias CJ Well that's an issue yes.

Tipping J I think what it adds is an emphasis that intention doesn't necessarily reflect self-description.

Elias CJ Well it's a statutory expression of **Prenan Finance**.

Gould Mm.

Tipping J But you must beware of labels.

Gould Indeed.

Tipping J You must not be seduced into thinking that the real nature is necessarily the way they have labelled it.

Gould Indeed. Even.

Tipping J That's the way I read it.

Gould Yes, even if the contractual intention was to create the real relationship of employer and employee.

Tipping J If at one superficial level they have described it in this way, that might suggest that that's what they, might suggest that that's what they're aiming to achieve. But if they have not achieved it in their actual dealings and relationship and so on, then you go with the reality rather than the intention if you like.

Gould Indeed. And perhaps that's not at odds with the suggestion that s.2 hasn't added a huge amount in terms of, the looking for a contract of service perhaps has always had that emphasis on the reality of the relationship. What it appears to me s.6 does is in a nudging kind of

way, please look less at the form of the relationship, and more at the substance of the relationship.

Gault J Isn't that what the law always did? Even if you look at **TNT**, the Judges there were very careful to say you look at the contract if that is what is in operation (**TNT Worldwide Express (NZ) Limited v Cunningham** [1993] 3 NZLR 681).

Gould If that is what is in operation Your Honour.

Gault J Yes, in other words it reflects the reality. If it doesn't reflect the reality, then it's not a contract of service.

Gould Indeed and that requires an inquiry into the reality of the relationship between the parties.

Gault J That's what I say, I don't think there's anything very new.

Keith J The employment law from the 1890's at least has had provisions against contracting out hasn't it? And this is an aspect of that I suppose.

Gould Contracting out of an employment relationship.

Keith J Yes or out of any of the entitlements under, you know, industrial legislation back to the 1890's and as I say maybe earlier. It would be a standard provision near the back that you can't contract out of your rights to workers compensation or to safety.

Elias CJ Well in fact I would have thought that was almost the starting point of your case.

Keith J Mm, mm.

Elias CJ That the Employment Relations Act applies to all employees and employers and can't be contracted out of. And its application follows from employment status under a contract of service.

Gould Yes it does Your Honour but your opening proposition, one has to be an employee for the Act to apply to one. And that's the threshold issue.

Elias CJ Yes but it's a pointer to the fact that the form of the, or the label can't be determinative because that would enable you to contract out.

Gould Indeed, we agree Your Honour.

Elias CJ Yes.

Keith J Mm, and I see s.238 says that. So the provisions of the Act have effect despite any provision to the contrary in any contract.

Gould Indeed, indeed. But I would not resile from the submission that the wording of s.6 arose in a policy manner from a perception, perhaps wrong Your Honour, that **TNT** was not as focused on the substance of the relationship as Parliament wanted the inquiry to be.

Gault J Well if it's read correctly, the Judgments are read correctly, I'm not sure that's right but I can understand that over time it may have been regarded as placing too much emphasis on a written document. But if you read the Judgments they carefully say, if that is what is operating.

Gould Indeed. But we do have s.6 now Your Honour and whether it was borne from a misperception of the **TNT** Judgments or not, it's there and that's what we have to look at.

The question of relevant matters, I'm not sure whether the Court requires me to look at the relevant matters that were seen. The implication of the section. I'm happy to do so.

Elias CJ What did you intend to do there?

Gould Take the Court through the matters that the Court of Appeal saw as relevant to the status, to the application in question. I'm referring Your Honour to section, the paragraph in which the Court of Appeal clearly saw and agreed with Her Honour's assessment that a view of the way the relationship worked was one in which the conclusion was he was an employee.

Elias CJ Yes, that's which paragraph? I recall it but I can't recall where the paragraph is. The Court of Appeal doesn't identify any relevant consideration not identified by the Judge.

Gould No it doesn't Your Honour. No.

Elias CJ No.

Gould I have to come back I think simply to the Court of Appeal's Decision that this supposed industry practice, coupled with the statements in the contract as to its nature, were determinative. That pairing was determinative.

Gault J Before you do that, I would be helped by being taken back to the Employment Court Judgment to see what was said about the significance of the form of contract. Because that seems to be the point of departure.

Gould Her Honour at paragraph 24, which is page 26 of the case, the written terms and conditions of employment are no longer determinative but they remain an element to be considered.

Keith J Well that effectively repeats the provision of s.6 doesn't it?

Gould Yes although Your Honour I think there is a little confusion or misunderstanding as to the contractual terms. I believe in some references both the Employment Court and the Court of Appeal was referring not to all of the contractual terms but the contractual terms as to the nature of the contract.

Keith J Yes, yes.

Gould It would appear from paragraph 24 of Her Honour's Decision that although she says the contract, the written terms and conditions are no longer determinative, she goes on to talk about written terms as to the nature of the relationship.

Keith J Well the immediate quote is labelling isn't it?

Gould Indeed. Indeed.

Keith J So that's.

Gault J And that quote says, expressly.

Gould Mm.

Gault J But it cannot be disregarded if it reliably indicates the real nature of the relationship.

Gould Mm. Reliably I emphasise Your Honour, yes.

Keith J Yes, sure.

Gould Her Honour was not convinced that in this case it was reliable. In fact she was convinced to the contrary. And similarly in respect to the other terms and conditions of the contract, both the Employment Court and the Court of Appeal said that all of those other terms could have appeared in both kinds of contract and were not therefore particularly helpful in the analysis as to the real nature of the relationship.

The way the relationship worked in practice was accepted by the Court of Appeal to lead to the conclusion that Mr Bryson was an employee. No doubt about that. The Court of Appeal resiled from coming to that conclusion based on this assumed or this alleged industry practice but also, importantly, and we haven't touched on it yet in my submission, some matters that were not relevant to take into account.

Keith J So the Court of Appeal was saying that the conclusion that he was an employee might be thought to follow, that's [102] again.

Gould Yes indeed it is.

Keith J Right.

Gould And also the earlier [78] I think it is, outlines all of the working relationship.

Tipping J I thought that the first sentence of paragraph [97] was extremely significant Mr Gould, if it's any help you. Because it demonstrates both what it was that overwhelmed them and it also demonstrated that that's the view they would have taken as to how the engagement worked out in practice.

Gould Mm.

Tipping J I mean something's come along to deflect them from how it worked in practice.

Gould Indeed. And my only submission is that the Court of Appeal appears to agree initially that Mr Bryson's an employee. Let's look at the facts, let's look at the market investigations test. And he makes the employee's argument for him, he was paid by the hour and so on and so forth. And the matters that deflected the Court of Appeal from the conclusion that would follow from that analysis, namely that in fact the real nature of the relationship was one of employment, the Court was deflected by that pairing of matters to which I've previously referred.

Keith J They're not really, in terms of your argument Mr Gould, they're not really two matters are they? But you say they're just one. The standard practice is put on that label to use that term for the moment.

Gould The second matter that the Court of Appeal pairs with that Your Honour is the statements in the contract as to its nature.

Keith J Yeah, well, but they're the same thing generalised aren't they? That this particular contract says he's an independent contractor and so do all the others.

Gould Indeed, mm.

Keith J So in a way it's a single point isn't it?

Gould It is, it's expressed by the Court of Appeal throughout as a pairing but I agree it is a single point. And then the further error that is submitted is the taking into account of irrelevant matters. And the submission for the applicant here is that the Court of Appeal seems to have been significantly influenced by its perception of a finding to the contrary.

A finding that in fact Mr Bryson was an employee. And if I can refer Your Honours to paragraphs [55] through [61] of the Decision.

Elias CJ Which one, which Decision?

Gould Of the Court of Appeal Decision.

Elias CJ Yes.

Gould Just to repeat. It appears from, it's my submission that the Majority has been significantly influenced by the implications it perceived that would arise from a finding to the contrary. Paragraphs [55] through to [61], the Court is very careful to talk about the protection needed for the industry and the problems that might be raised if it could no longer have employees and if it could not have contractors and have to have employees. Although the Court does say those concessions were not determinative.

Then goes on to say, nevertheless the problem is acute and it's not inconceivable that our industry, the ability of our film industry to compete, may be adversely affected. That significant time given to that issue by the Court of Appeal, accompanied by the statements through at paragraph [116] and [117], it's submitted that those concessions were weighed heavily or significantly in the Court's Decision. And in my submission that's contrary to the spirit and intent of s.6 in the preliminary paperwork from the Department when the section was being promulgated, that the emphasis must be on an examination and a determination of the real nature of the relationship between Mr Bryson and 3 Foot Six Limited.

Gault J Well I don't have any difficulty with that but it's very hard to say that these things are irrelevant considerations such as to give rise to some sort of error of law if they're considered because the whole structure of the industry must bear upon an objective determination of what these parties might have intended to do. I can't see it's wholly irrelevant to that point.

Gould The nature of the relationship between Mr Bryson and 3 Foot Six I submit must be unaffected by the nature of the relationship between a film company in Auckland and its employee.

Gault J It may or may not be. It seems to me that if the parties are shown to have intended to operate in accordance with certain industry practices then that would be relevant.

Gould The first point I guess Your Honour is that I'm not convinced there was an industry practice.

Gault J But that's a different point. You're talking about irrelevant considerations. Presumably meaning that there's an error of law.

Gould Well it's further demonstrated I think Your Honour in paragraph [117] where the Court of Appeal appears to be saying, because we have a perceived practice in this industry, you may not look at the mere contract of engagement.

Keith J Well that's a different point isn't it?

Gould Well it's focusing.

Keith J You're not really answering my brother Gault's point about the relevance of the industry practice. You're saying that it's the consequence that the Court of Appeal's drawing from that that is causing an error.

Blanchard J I wonder if we're drifting ahead of ourselves here. It seems to me that, it's for you to argue the case, but the first thing to look at is Judge Shaw's Judgment to see whether arguably she's committed any error of law. If she didn't commit an error of law, the Court of Appeal had no jurisdiction.

Gould No, indeed Your Honour. The Court of Appeal obviously has claimed.

Blanchard J And you haven't really taken us yet to the critical parts of Judge Shaw's Judgment, the only ones that are being impugned by the Court of Appeal Judgment.

Gould Your Honour is referring to which particular parts?

Blanchard J Well as I understand it, and you have a better knowledge of this than I, it's what she said about the intention of the parties and what she said about industry practice that the Court of Appeal took a different view on.

Gould Your Honour, Her Honour's view of the intention of the parties was that it is relevant but no longer decisive, in paragraph 19 of her Judgment, at page 4 of her Judgment. It was submitted to Her Honour that industry practice was relevant as to the intention of the parties only and Her Honour stated that she wasn't prepared to go that far and say that industry practice should be completely disregarded.

Blanchard J Well has any criticism been made of those passages in the Employment Court Judgment?

Gould No, none Your Honour.

Blanchard J Right.

Tipping J Part of your problem is that the Court of Appeal did not discretely identify where it was they thought Judge Shaw went wrong. There are flavours but there's nothing precise.

Gould Mm.

Tipping J I think that's part of your difficulty.

Gould Yes indeed Your Honour. And the flavour, the pervasive flavour was that the Court of Appeal did not like the fact that Her Honour had not given enough attention to the perceived industry practice.

Tipping J They do not say anywhere, we see the Judge as having made an error of law in that, or in the following respects, as I read it. There are implications but there's nothing very express.

Blanchard J Therefore we need to consider Judge Shaw's Judgment to see whether in fact there might be an error of law. And hence you need to take us through it.

Gould Indeed. Happy to do that Your Honour. And we can go through that. Her Honour began by giving the background facts and then, as we've referred to, paragraphs 19.

Elias CJ Could you, I'm sorry to interrupt but I have a regrettable fascination with facts and I would like you to take me to the written agreement and I have a few questions about it, in Volume 3. Not the extra.

Gould The Crew Deal Memo Your Honour.

Elias CJ Page 472. I'm just a bit curious because on the face of it the Crew Deal Memo says that the standard terms are incorporated herein by reference but they're clearly not all imported because they're standard terms applying to a number of different situations and they have concepts of permanent contractors, weekly contractors and daily contractors. But Mr Bryson was in fact a two-weekly person.

Gould Mm.

Elias CJ Which is all a bit odd.

Gould With a daily rate, indeed.

Elias CJ Subject to termination with two weeks notice whereas the standard terms and conditions don't seem to contemplate that sort of animal. So they have to be modified by the context of the actual relationship in this case in any event.

Gould Yes Your Honour, indeed.

Elias CJ I just wondered what a permanent contractor is in terms of the standard terms and conditions.

Gould I'm not sure if there is such an animal, Your Honour.

Elias CJ Right. Alright, that's fine thank you.

Gould Unless I've missed a notation to permanent contractor. One would expect in the nature of the film industry for there really perhaps not to be anyone who is ever given a permanent contract either for life or until the time. But Your Honour was …

Elias CJ Well it's just that it covers such a range of people and one can see that someone employed on a daily basis might well be in a very different position from a permanent contractor, whatever that is.

Gould Yes, indeed. And of course the one size fits all contract leaves that kind of analysis to be made.

Elias CJ Yes, alright, sorry, thank you.

Keith J Just on that point about one size fits all, there's quite a lot of discussion at various points of the industry as a whole and then the individual. That issue that you were just discussing with Justice Gault raises that. Is anything to be made of the fact that the provision that was in the Bill for a collective ruling on status was removed? Because the Act now provides doesn't it only for one by one by one determinations, although obviously some of them will have knock on effects.

Gould Well I'm not sure Your Honour if it does. It provides, the Court may on the application of a Union, Labour Department or one or more persons by order to declare etc.

Keith J Mm, but there was, the previous, the Bill provided didn't it for a much more general collective determination as I.

Gould It appears from the reading of the pre-passing of the legislation.

Keith J Right.

Gould That it caused fear among people that.

Keith J Yes.

Gould Whole industries or whole kinds of practices were going to be, and I think the main fear was, without their consent, turned into something that they didn't want to be turned into. I'm not sure.

Keith J Mm. But anyway there's a flavour here that may help you a little bit or may not.

Gould Indeed, indeed.

Keith J It sort of heads a bit in your direction doesn't it?

Gould Yes.

Keith J Individual determinations or focused determinations are to be made.

Gould Mm.

Keith J With the consent of those affected.

Gould Mm. That was the point I was coming to in terms of the surprising conclusion by the Court of Appeal that the merits of individual cases shouldn't be looked at.

Keith J Mm. But you were about to go through Judge Shaw's.

Tipping J That's paragraph [115].

Gould Indeed Your Honour.

Keith J Yes.

Gould It's just surprising given the flavour of subs (5) as it now is. Now Your Honour was interested in the examination as to whether or not we could.

Elias CJ No that's fine, I just, you were jumping over the recitation of the facts which just jogged me that I wondered if there was anything to be said about the actual form of the contract before we got onto looking at the reasoning of the Judge. But carry on with that now.

Gould Thank you Your Honour. So an analysis of Her Honour's Decision starts with her list, her bullet points at paragraph 19 of what she saw as what it was that she was required to do or the principles that she thought were applicable to the case. And it's hard to have any disagreement with the way those have been stated in terms of an error of law. It appears to be quoting from the section itself and finding that, because one assumes the continued use of the phrase contract of service, that the tests that have been developed for those must still be relevant and indeed that was, the Court of Appeal agreed with her on that.

Tipping J The irony is that if she'd accepted your submissions in paragraph 21, she would have made an error of law.

Gould Indeed Your Honour. I'm very grateful to Her Honour for not having done so.

Keith J Well it's the sort of general contract law approach isn't it? You've got to read the contract in context.

Gould Indeed.

Keith J **Simmons** and so on.

Gould Indeed. And then Her Honour went through the legal principles and discussed them. She talked about the way that payment was organised for Mr Bryson.

Blanchard J Where are you at now?

Gould I beg your pardon Your Honour, I've moved past paragraph 24 onto paragraph 25. We've seen that at 24 Her Honour made the point that she couldn't treat the statements as determinative. Simply repeating what the section says. Then she comes to there a discussion about, paragraph 25, how Mr Bryson was paid, the crew time card with a tax invoice on the back of it, he had to fill in his time to secure the payment. Then Her Honour came to the point which was of some significance in that she examined, she refers to Mr Bryson's evidence as to his understanding of his status. And that's referred to further on. And she rejects the allegation that he may have signed that under duress, albeit perhaps under pressure. Her Honour then walks through those parts of the Crew Deal Memo that did contain statements as to the nature of the contract. That is that Mr Bryson was in fact a contractor. And then through on paragraph 31 analysed the terms and conditions of that.

And I guess her first conclusion on legal principles is at paragraph 32 of her Decision. It's questionable whether this Memo reliably indicates the real nature of the contract. The guidelines impliedly recognise that standard conditions of employment do not fit easily within the normal status of independent contractors. She came eventually to a conclusion that this Memo was unhelpful because it didn't indicate particularly one kind of relationship or the other.

And then, in concluding that part of her Judgment in terms of the contract or the written material, Her Honour pointed out again that pursuant to s.6 she was unable to take the statements describing the relationship as determinative.

Keith J And in paragraph 32, although she's referring to the guidelines as well, she's reached a position comparable to the Court of Appeal's but not as firmly I suppose.

Gould Well indeed almost the same. I believe the Court of Appeal said something like the terms and conditions could equally have been found in both kinds of contract.

Keith J Yes, mm.

Gould Really they were on the same page on that issue.

Keith J Mm.

Gould Then Her Honour commences the discussion of intention of the parties.

Tipping J Well the first sentence in paragraph 34, addressed as it is to common intention, which means intentions in the plural, is very significant isn't it in the light, that's a factual finding which the Court.

Gould I'm not sure if it does Your Honour. I believe the word intention is still in the singular. It's one intention common to two parties.

Tipping J Well that's what I mean.

Keith J Yeah, mm.

Tipping J The same intention.

Gould Yes.

Tipping J Well isn't that quite significant when the Court of Appeal are basically saying that there was some shared intention that should have been strongly weighed. Do you see what I mean?

Gould Yes, yes indeed. But is that an error of law? I'm not sure that it is Your Honour.

Tipping J No, no, I'm not suggesting it's an error of law at all. I'm suggesting on this review of the Judgment it is a point which, and I know you've been asked to traverse the Judgment for certain purposes. But I couldn't resist drawing attention to that which seems to me to be a very significant finding of fact which you cannot go behind.

Gould Indeed.

Tipping J Which no-one can go behind.

Gould Indeed.

Keith J It's also relevant to those sentences that at least two members of the Court called attention to earlier in [110] and [111] of the Court of Appeal isn't it, that she saw the industry context as having limited significance. She seems to have confined it to her assessment of the intentions plural of the parties. Well at this point she's saying there is no shared intention.

Gould No indeed, that's what Her Honour is saying.

Keith J So what, so it's hard to say that she confined it to something when she said it didn't exist.

Gould As a finding as to that. Her Honour then proceeds to find out, to discover why she came to that finding and in terms of the evidence that she saw from Mr Bryson, he was not au fait with the difference between the two and so on and so forth. And repeats it I guess in paragraph 36. In the absence of a written record of engagement at the commencement, of course which is many months before the Crew Deal Memo was signed, means there was no evidence of a mutual turning of minds to the true nature of the employment at that stage. It must be so of course. Although Her Honour accepted and I accept, and I think we've traversed this, that 3 Foot Six certainly had an intention that its workers including Mr Bryson would have been one of those. And the conclusion I guess is the same as the opening paragraph. No common intention has been found. I'm not helped particularly by that Crew Deal Memorandum in that particular aspect of the relationship.
Then Her Honour moved to control.

Blanchard J Well just on paragraph 36. It's curious that two-thirds of the way through 36 she says, on the facts of this case industry practice is of little use in establishing the intention of both parties. Whereas the Court of Appeal at [110] said, Judge Shaw saw the industry context as having a limited significance. She seems to have seen it as confined in relevance to her assessment of the intention of the parties.

Gould I think we'll find that Her Honour comes back to industry in another context outside her heading of intention of the parties.

Blanchard J Mm, it just struck me as an odd thing to say when Judge Shaw has actually said, well it's of little use.

Gould Mm, mm.

Blanchard J On intention for the reasons that she's giving.

Gould Mm.

Keith J But in terms of 37, she's giving it some other significance isn't she?

Gould Yes.

Keith J 3 Foot Six's assumption. I mean the intention of one party cannot be taken as determinative of.

Gould Indeed Your Honour, exactly. Then Her Honour moved to this vexed question of control. And traversed quite a lot of evidence in terms of

what Mr Bryson did on a day by day basis and came to the conclusion that there was a sufficient element of control exercised by 3 Foot Six and it was the sort of control that characterises a contract of service. I submit that that appears to be a conclusion of Her Honour.

Blanchard J Did the Court of Appeal differ from that?

Keith J Don't think so.

Gould I'm not sure that it was addressed.

Blanchard J It's a factual finding anyway.

Gould Mm. In paragraph [97] of the Court of Appeal.

Tipping J I think by implication they agreed with it.

Blanchard J Yeah, that's what I …

Gould Well perhaps more by explicitly saying on a day to day basis he did what he was told. A kind of more positive way of saying, yes this chap was under quite strict control. So perhaps that obviates the need to go further through those paragraphs of control Your Honour.

Keith J Yes.

Gould We seem to have a conclusion there.

Tipping J I got the distinct impression that on all the standard tests the Court of Appeal would have been with you.

Keith J Mm.

Tipping J But that other things came along and displaced that.

Keith J Mm.

Gould Indeed. Other things being the two that we've discussed.

Keith J Yes, yes. So integration they're not disagreeing with either.

Gould Mm.

Keith J And fundamental tests they essentially agree with don't they?

Gould And tools and so forth I think they agree as well.

Keith J Mm.

Gould There appears to be no disagreement there. Fundamental test.

Keith J Well they pick up on that in [111] don't they?

Gould Mm.

Elias CJ You're not arguing in this case for any different approach than these tests suggest are you? You're not, nobody's really inviting us to reconsider these tests and their utility?

Gould No, not at all Your Honour, no.

Elias CJ No.

Gould They are now in the matrix of relevant matters.

Elias CJ Mm.

Gould To determining the question.

Keith J For they are part of service or contract of service or part of.

Gould Indeed.

Keith J The real nature.

Gould Mm.

Elias CJ Test is probably the wrong word really. Construction.

Gould I'm sorry Your Honour, I didn't.

Elias CJ No, I was just making the remark that perhaps tests is the wrong idea. These are necessarily relevant approaches and considerations. Tests sort of suggests you apply a formula, you get a result.

Gould Indeed. Indeed.

Elias CJ Or as the Court of Appeal says in its Judgment in a passage I have some difficulty with, you have to look for a standard. Because you may not have a standard. You may have a spectrum of considerations and you have to make a value Judgment as to where something falls.

Gould Indeed. Indeed.

Keith J Well it's the list in her paragraph 19 isn't it that is not in dispute really.

Gould Mm, no, no it's not Your Honour.

Elias CJ Yes.

Gould And it's also referred to I think in one of the cases in the respondent's bundle, **Hall v Lorimer** (**Hall (Inspector of Taxes) v Lorimer** [1992] STC 599 (Chancery Div)) that the idea one needs to look at everything relative to the issue, all of the detail, then stand back and ask oneself what picture it's painted rather than weighing these factors against these and so forth which perhaps is the same way of saying the same thing.

We come then I guess Your Honours to industry practice. Which is I guess where the Court of Appeal didn't agree with Her Honour. And the evidence of industry practice is in evidence that this industry, the form or the framing as McGrath referred to, is of independent contractor status. That's the framing of the relationships. I note it's the framing of perhaps two years ago, one in 29 and 30 relationships according to the evidence for the respondent and in the subsequent year, perhaps when the film industry moved down a little, it was the relationship in 9 out of 10 cases according to the answers given to the survey questionnaire by the producers.

Tipping J But that wouldn't necessarily have been the answer if you'd applied employment law principles.

Gould Absolutely Your Honour, that's the point.

Tipping J To the issue. We don't know what the touchstone was for reaching this conclusion.

Gould No and in fact we know that the conduct of the survey was done by simply asking producers to tell us how many contractors you've got. I stand to be corrected on that, but that's how it appears in the exhibit, the survey from which those figures came. So I guess we've come back a full circle. We didn't really, in either the Employment Court or in the Court of Appeal, have any actual evidence of one other relationship. We had evidence that people want or people think that that's the nature of their relationship.

Elias CJ And a huge range of contracts would be covered, a hugely.

Gould A range of work.

Elias CJ A range of work.

Gould Indeed Your Honour.

Elias CJ I mean that would cover extras and people like that wouldn't it?

Gould Cleaners and actors and all sorts of things.

Elias CJ Yes.

Gould Perhaps not actors, I'm not sure whether Crew Deal Memo includes actors.

Elias CJ Oh yes.

Gould Her Honour then canvassed that evidence before the Court, that evidence of the views of the industry as to the types of relationship it had. And she made some points that perhaps the Court would find relevant. Specifically in examining Mr Osbourne, who was the producer of the movie. A very experienced man in this industry. Under questioning during the hearing she was able to elicit from Mr Osbourne an admission that it certainly wouldn't be impossible to run a film with employees. And the evidence was clear that is done in the majority of cases in other jurisdictions. In the USA the crew are employees and so forth. So what else did Her Honour say about that.

Keith J Well in 68 she refers to the concern of the industry, the real and genuine concern.

Gould Yes which is kind of not really on the point I guess. At this point the issue is how much, if that practice is established, did Her Honour take account of that as a relevant consideration in coming to her determination.

Keith J Yes.

Gould And by implication I think it's clear Her Honour did take account of that. She addressed it considerably and then, as Your Honours pointed out, moved into the implications of a finding to the contrary.

Then perhaps rather abruptly Her Honour moves straight to her conclusion. Following the discussion about the motion picture industry. The IRD status. And the concern that the industry has. And moves to the conclusion that, in light of the facts, I'm of the view that the real nature was of a contract of service.

There is some talk further on in paragraph 72 which Her Honour gives in support of coming to that conclusion. Although there might be perhaps minor matters, the training and so forth, that she saw as relevant and of course it is significantly relevant. One doesn't normally train a contractor to come to work for one.

Tipping J Isn't this just a summary of what she says is the key points?

Gould It is indeed.

Tipping J Mm.

Gould And I guess importantly at paragraph 75 she says, my Decisions about Mr Bryson and 3 Foot Six, accept people will be nervous and

conscious and may well revisit the way they operate, again she refers to her discussion with the witness Mr Osbourne and in fact it would be perfectly possible to run a movie, make a movie with employees. So I hope that's helpful to Your Honour in terms of.

Blanchard J Yes, thank you.

Gould I haven't myself, in that quick overview, been able to discover any clear error of law in Her Honour's Decision. And wonder perhaps whether the Court of Appeal assumed a jurisdiction it may not have had.

Keith J Well it does go back to their [110] and [111] doesn't it Mr Gould and that's where they say they're identifying the most significant aspect of the case on which they differ from the Employment Court Judge.

Gould Mm, they differ in factual matters.

Keith J Well then in terms.

Blanchard J Perhaps the starting point's [109] where they talk about disagreeing with the way in which the Judge downplayed the significance of the contract.

Keith J Yes, yes.

Blanchard J Which is really a weighting point.

Keith J Mm.

Blanchard J And then industry context.

Keith J Mm.

Gould Although in disagreeing, accepting that she was right in that the contract and its implementation by the Inland Revenue Department are not necessarily determinative of the issue.

Tipping J Don't they necessarily follow from the label? If you're going to label it, you don't go around making it look as if it's something else for tax purposes.

Gould Indeed. That's putting the horse before the cart isn't it?

Elias CJ Well it's simply another characterisation.

Gould Mm. It's a statement indeed Your Honour. Now there's one further matter Your Honours which may be appropriate to raise now. And that was, an application was made in terms of the framing of the grounds of the appeal to whether the Court, we were invited to make submissions

if necessary on that matter. If there are no other questions in terms of the Decision, perhaps we could address that now.

Elias CJ Yes, I'm not sure what the point is that you're now moving on to address.

Gould The grounds for appeal were rather narrowly framed.

Tipping J In the Order, giving leave.

Gould In the Order for leave.

Blanchard J Oh, is this the point about the time question?

Gould Yes Your Honour.

Blanchard J Well the Registrar was directed to pass a message to you to indicate that your concern about the grounds was an unnecessary concern. It was never intended to pin it down that precisely. They're not, as we have to say to Counsel, the equivalent of a case stated question.

Gould Thank you Your Honour. So the Decision under appeal is not, the answer is not going to be the status of Mr Bryson as at.

Gault J There's no suggestion that the relationship was different on the date it ended from what it was throughout the period.

Gould I'm not suggesting that Your Honour, but the framing of the.

Gault J Well I.

Blanchard J It was only framed that way because the Court didn't understand that there was any question of the relationship having changed.

Gould Indeed. Perhaps that's as far as I need to take that Your Honour.

Elias CJ Yes you don't need to address that Mr Gould thank you. Thank you Mr Gould.

Gould Thank you Your Honour.

Elias CJ Yes Ms Muir.

11.22 am

Muir May it please Your Honours. One of the first points I would like to take you to relates to the questions you've been addressing to my friend in relation to what were or what was the error of law. And did the Court of Appeal correctly isolate those errors of law in their Decision. And to do that I would like to take you back if I may first of

all to the policy behind s.6. Because it is in my submission relevant to the error of law by Judge Shaw in the Employment Court Decision. And the history of that has been set out by my friend for the Intervener, Business New Zealand, in the attachments which were provided with that. And were certainly in the submissions that I made in the Court of Appeal in relation to the original drafting of clause 6 of the Bill through to the submissions at Select Committee stage and then how the clause was reframed after that Select Committee stage.

Elias CJ Can you, before you embark on that however, just express for us what you say the error of law was?

Muir I'll turn you to my submissions if I may then in the Court of Appeal because there were three or four of those. And they are at 10 in the Tab of the white bundle. And it's on the first page in the summary of the grounds of appeal. And there were four of them. The first being 2A that the Court failed to give.

Tipping J Which one were we talking about?

Muir The white, first, volume 1 of the case.

Tipping J Oh the case on appeal. Yes sorry.

Keith J Tab 10.

Muir It's Tab 10 page 50 of the case.

Tipping J I have it thank you.

Muir Paragraph 2A, that the Court failed to give s.6 its intended meaning.

Elias CJ Yes but can you tell us what you contend its intended meaning is?

Muir That it did not move away significantly from the law under **TNT**. That the approach should be to look first and foremost at the written contract. To look at the intention of the parties under that.

Keith J So you disagree with the Court of Appeal … and open textured.

Muir No I'm not Sir and I believe the Court of Appeal.

Keith J So it did move away then?

Muir All it said was not significantly. It was a nudge.

Tipping J You say you should look primarily, was that the word you used?

Muir Significantly. Did not move away significantly, you should primarily focus, yes, on the written contract. That should be the starting point. Because that was effectively **TNT**.

Gault J On the written contract, why not on the contract?

Muir Well yes Sir. Perhaps if we start.

Gault J An arrangement may not be reflected in the written contract.

Muir That's true Sir. I guess I'm looking at the facts of this particular case. You're right, it may be just whatever the terms of the contract are. But here, as in **TNT**, as the Court of Appeal found there, there was a comprehensive written contract which said it was the entire agreement and this Crew Deal Memo did as well.

Elias CJ Is this a four corners argument? Within the text is the complete contract.

Muir No, not entirely Ma'am because I accept that under s.6 it does say you then have to look at all relevant matters to look at the real nature of the relationship. My submission is that the contract, and if it is reduced fully to a comprehensive written contract, is the starting point and then you look to see how it operates in practice to see if that's consistent with it. And my submission is that Judge Shaw erred in saying, in really placing virtually no emphasis at all, she ignored **TNT**. There's not one mention of **TNT** in the Decision. And that seems to have come from the earlier two Employment Court cases which she effectively followed which said the law changed the tests, are Judge Shaw's words.

Gault J Didn't she say a finding, presumably it was a fact, that the written document did not reflect the arrangement?

Muir Well she did Sir, and that's another one of the.

Gault J That's a finding of fact isn't it?

Muir Well if it's one that couldn't be reasonably held, a sort of **Edwards v Barstow** type argument, and that's one of the other four planks of the errors of law that were addressed in my submissions (**Edwards v Barstow** [1956] AC 14).

Gault J That's a very hard argument to run when the document didn't appear for months after the arrangement began.

Muir Well Sir that's an important aspect of it because Mr Bryson came over as a contractor from Weta Productions. He'd worked in different roles for different companies as a contractor. He came over as a contractor. He started for 3 Foot Six and the evidence.

Gault J Are you arguing fact Ms Muir?

Muir Pardon Sir?

Gault J Now you're arguing facts.

Muir No I'm not arguing, I'm trying to, what I'm trying to establish for you Sir is that Mr Bryson acknowledged in cross-examination that the relationship hadn't changed from that which he signed in the contract. That the relationship was the same throughout. So when he started at 3 Foot Six and the contract that he entered into reflected the arrangement. That was the cross-examination. And that's what he acknowledged.

Blanchard J But that wouldn't bind the Court though.

Tipping J He may not have been right.

Muir Well Sir when both parties are saying it must surely be a significant factor and my point takes you back to **TNT** where the Court has said if there is a comprehensive arrangement that is not a sham and that was a finding of the Court. I would submit that should be the starting point. And when you have all parties saying.

Gault J The starting point, the statute at least says that the label in a written contract is not determinative.

Muir And I'm not suggesting that the contract is just a label. That's my point Sir. It was a comprehensive contract intended to operate as an independent contractor. Mr Bryson came in as an independent contractor. He'd operated as such in the industry. And his own evidence was that he operated under this contract in that way.

Elias CJ Ms Muir, sorry, I don't want you to get your argument out of sequence, but I was hoping that you would be able to identify for me the errors of law and you've gone into the **Edwards v Barstow** type point which is your paragraph D.

Muir Yes.

Elias CJ But when you say as one of the errors of law that the Court failed to give s.6 its intended meaning, I had hoped you would tell us what the meaning of s.6 is so that we have the, we can see what you say the error of law was.

Muir What I say section.

Elias CJ Or is it just the application of s.6 that you're taking issue with. Because when you say in 2A that the Court failed to give the

legislation it's intended meaning, you must have some meaning you say s.6 comprises.

Muir Well as my friend submitted to you earlier on, s.6 there's really a form of a methodology for interpreting whether someone is an employee or a contractor. And so it's the way the Court interpreted that by effectively disregarding **TNT** and saying, as Her Honour did in that Judgment, that s.6 changed the tests.

Elias CJ Well that sounds to me as if it's not, that 2A is not a distinct argument. You're not arguing that anyone got the meaning of s.6 wrong. You're arguing that it wasn't applied in accordance with legal principle.

Muir Well I am, I'm saying that as Her Honour approached s.6 to give it its intended meaning, which is to determine whether someone is a contractor or not, she disregarded the meaning of it. She disregarded the fact that you look at the, if I can turn to.

Elias CJ Look at section 6 perhaps.

Muir You look at whether someone is an employee. Whether the person is employed under a contract of service. And you must determine the real nature of the relationship. And the words, the real nature of the relationship are the words in at least two of the Judgments of **TNT**. That is the meaning of s.6 in my submission. To look at the real nature. That's the way the Judges have approached it, their Honours approached it in **TNT**.

Elias CJ But did the Employment Court Judge not do that?

Muir No she didn't your Honour. That's my point. She effectively moved away, well ignored the approach in **TNT** and came at it from the new perspective, going back to look at all of the tests instead of saying, as **TNT** changed the law, that you needed to, if there is a written contract, that that was significant in terms of identifying what the parties intended.

Keith J So you say her paragraph 19 was the beginning of her error. That list she had.

Muir Yes, that's where Judge Shaw said changed the tests Sir.

Keith J Well you accepted it did change the test. I mean you accept but not significantly, and you accept nudging, and you accept the other phrase the Court of Appeal used. So there was some change. You agree don't you? But what in that list is wrong is the really significant issue I suppose.

Muir I don't disagree with the list that Judge Shaw then put on the top of page four. But what I do then take issue with is that Her Honour didn't

then interpret s.6 in accordance with **TNT** and with the looking at where there is a document wholly in writing.

Gault J You've still got to get over the first sentence in her paragraph 32.

Muir Well, and this is where I come down to the fourth point of my errors of law. That there was no reasonable basis for Her Honour to make such a finding for a number of reasons. First the agreement was wholly recorded in writing and it says in one of the clauses it is the entire agreement. Secondly, it was acknowledged by Mr Bryson that nothing had changed from when he started to when he agreed to work under that contract. And indeed the reference then to the Guild's guidelines. They supported the fact that everyone in the industry wanted to be working there as contractors. So there was no basis on the evidence before the Court for Her Honour to say they didn't indicate a relationship of contractor when the parties before the Court operated in reliance on the contract. And that's one of the points where the Court of Appeal said Judge Shaw had erred in law.

Keith J So your paragraph D is really the Court made findings which had no, for which there was no evidence.

Muir Yes Sir.

Keith J Because I thought when I read 2D it sounded rather like a general appeal rather than.

Muir No Sir, no.

Keith J You really mean, not contrary to the evidence, but for which there was no evidence.

Muir Or, yes, or contrary to the evidence Sir and I will further on in my submissions take you to both of those. One, in relation to the taxation ones, the evidence around taxation. And secondly also in relation to the industry practice where.

Keith J Well there's a lot of reference to the tax practice isn't there in the Judgments. But that's not decisive is it?

Muir Well in my submission it is Sir because.

Keith J So you disagree with the Court of Appeal on that?

Muir No, the Court of Appeal found that the tax practice was one of the issues that were a relevant factor.

Keith J Yeah, but not decisive.

Muir Well no, and I'm not suggesting that they needed to say any factor was decisive.

Keith J Well you did a moment ago.

Muir Well only insofar as saying it's a matter that needed to be given the requisite weight.

Keith J Yes.

Muir And Judge Shaw hadn't given it, hadn't given it, had said that the taxation issues were, her findings were contrary to the evidence on that point.

Keith J Mm.

Elias CJ Morning tea, yes, we'll take a 15 minute adjournment thank you.

Court adjourns 11.36 am
Court resumes 11.58 am

Elias CJ Thank you Ms Muir.

Muir Your Honours I was just answering a question from Justice Keith about the principles that Judge Shaw in her Decision had outlined at paragraph 19 of her Judgment, which is page 26 of the first volume of the case. And whether there were any errors of law in relation to that. And if I could just take you to the fourth bullet point there where Her Honour said the real nature of the relationship can be ascertained by analysing the tests. That of course was submitted by 3 Foot Six that that was an error of law because of course that is not what **TNT** held where the Court, the then President, stated in the end when the contract is wholly in writing, it's the true intention and effect of the written contract on which the case must turn. And in the same paragraph, which was page 687 of the Judgment, that this is a question of law. And that is Tab 1 of the bundle of authorities for the appellant.

Gault J How does that fit with the stricture in the Employment Relations Act, that there's no appeal on construction of an individual contract.

Muir Well Sir this isn't about the construction of the contract. And there certainly wasn't under the old Act.

Gault J That's what you're saying is the question of law.

Muir Well that was precisely the same situation under the Employment Contracts Act Sir. And the Court there held that was a question of law. The interpretation of the written contract is traditionally regarded as a question of law. I think the ultimate question in the present case is in essence one of law and fully open to appeal.

Gault J There seems to be a question of law that is precluded by s.215.

Muir Well but Sir this is a question of interpreting s.6, as with the Court of Appeal in **TNT** it was a question of interpreting s.2. It's not the construction of a contract. It's the Court determining the real nature of the relationship and therefore how that is to be determined must be the question of law. And did the Judge err in the principles that she outlined at paragraph 19 of her Judgment. And I point you first of all to the one where, at bullet point 4, Her Honour says you need to analyse the tests. And that is an error of law based on **TNT**. And also point 6 where Judge Shaw.

Elias CJ Well she just says, such as. And she's talking about historically applied such as. And are you, I mean I don't understand the Court of Appeal to be saying that that's an error of law to look at issues such as control, integration and so on.

Muir What Judge Shaw did was go back to the traditional tests and put the focus, the primary focus on control. Whereas **TNT** shifted the approach to one of putting the primary focus, as the President said, where the contract's wholly in writing, the true interpretation and effect must be the written terms. And Judge Shaw's effectively relegated that to a minor consideration.

Elias CJ The written terms?

Gault J No the written terms would indicate what the control was.

Muir Well yes but what Her Honour has done here is relegate that to a minor consideration. and give no regard to what happened in effect. Because of course the parties acted in reliance upon that. Mr Bryson did operate for tax purposes as a contractor. Had done before he came here. Did bring tools. There were some terms which were neutral but then Her Honour, and says it both here at point 6 and later in her Judgment, says the industry practice is of little use. When of course the industry practice from all of the witnesses was very significant and was obviously a relevant factor that should have been taken into account. And that's where the Court of Appeal also found there was an error of law.

Keith J Well they don't say she didn't take it into account. They complain about her weighing don't they?

Muir Well she effectively hasn't taken it into account because she says it's of little use. She's effectively disregarded it.

Keith J Right.

Muir When, and I would say that is an error of law, when you look at the totality of that evidence Sir because.

Elias CJ This is a different point though isn't it?

Muir Yes it is.

Elias CJ I mean you're running these points together Ms Muir. I'm just trying to be sure that I'm getting your distinct propositions. And perhaps carry on and deal with the points you were discussing with Justice Keith but I'd like you to come back to the **TNT** test and why you say it's not applied here.

Muir Certainly Ma'am. In relation to the evidence of the industry practice, it's significant in my submission that the witness for Mr Bryson, the only witness, was the Guild representative, the former President and a member of the Guild, effectively the Union, it's an incorporated society that represents the crew members in the film industry. And he himself conceded he was a contractor. So there was some evidence from someone else working in the industry. And importantly he also accepted that it was the industry practice to operate in this way. So to say, as the Judge did, that the industry evidence was of little use when the effectively Union representative confirmed that it was the way everyone operated in practice and there was no attempt by Mr Bryson, in the way his case was put, to say that this was merely a label argument at that time, this is something that's really come on appeal.

And of course another factor relevant to that, before I come back to the **TNT** issue, is that there were guidelines that came out which were a result of a working party between both the Guild, the incorporated society acting for the members and the SPADA, the Producers Association. Effectively a form of collective bargaining to find a benchmark and that's of course the blue book which has been produced as well. And there was an earlier version of guidelines before the case arose. And then the blue book that was produced in the hearing came out after Mr Bryson was terminated and after section 6 was introduced, after the Employment Relations Act came into effect. And that also confirmed that the parties operated in an industry as independent contractors.

Keith J This is the blue book, I don't want to delay on this, but is that Tab 26, is that?

Muir The best version of the blue book Sir is actually behind Mr Osbourne's evidence and it's in the yellow volume 2, and it's page 205. You see at this stage it was a consultative draft. But in my understanding it has been now implemented. But if we turn to the first page, the preface, you can see it's there drafted after meetings between the Guild and SPADA in 2002 and refers to the fact with the changes in Employment legislation. And changes in the screen industry history. And then in

the second paragraph, on the second line, "Take a bow Dave Madigan" who'd represented the Guild. And now Mr Madigan was the witness for the Guild in the hearing.

Keith J Yes, yes.

Muir And if you turn to the very next page, page 207 of the case, the fourth paragraph. Screen production workers in New Zealand are mostly independent contractors as distinct from Employees.

Keith J Right.

Muir And there are some distinctly unique industry practices. And the final paragraph, and this is of course relevant to the submissions from CTU, that of course from a policy perspective Mr Bryson needs to be held to be an Employee because of course there's no freedom of association, no, you know, collective bargaining, there's a strong history of good will between producers and crew. This is joint guidelines that's come out. This isn't a situation or a case before you of some sort of sweatshop or lack of minimum conditions. The evidence was Mr Bryson and crew were paid significantly above market rates. Nobody complained. But Mr Bryson didn't argue he was an employee during the term of the contract. Again, significant. Everybody acted in reliance, until some eight months afterwards, when he decided he wanted to try and bring a case. And I think that policy perspective in relation to interpreting this case, how it came in, what is the policy behind this legislation according to Parliament, according to the Select Committee report back, is to protect workers in terms of affording their minimum conditions for holiday pay or for minimum rates. All of the evidence here was they were paid significantly above the market. And that's where I would with respect direct your Honours, that this is a case where all of the parties were happy to contract on that basis. It's consistent, the arrangement was.

Elias CJ I'm really adrift in trying to see how this can assist us.

Muir Because in my submission the Court of Appeal's role here, one of it must be, when interpreting s.6, to look at the policy intention of the legislature.

Tipping J Are you effectively saying that he didn't need the protection of the Act, therefore he shouldn't have it?

Muir No, I'm saying, I'm not saying it quite that far.

Tipping J I thought that was very much the drift of the argument.

Muir No Sir. What I'm saying is the intention is to ensure that there is protection for workers who cannot bargain properly, who aren't afforded minimum protections. That's what.

Elias CJ No, protection for all those engaged under contracts of service.

Muir Yes but Ma'am I am taking you to what was said by Select Committee in terms of what it says the intention was. That's what the policy statement that we've produced does say. That's what the Minister of Labour and the Associate Minister of Labour said in their statements at the time that it was introduced to Parliament.

Elias CJ You don't need to go so far do you? You need to demonstrate to us that the Judge made an error of law in saying that industry practice was of little use.

Muir And that is certainly one of my points. And the other one is of course on the changing of the tests.

Elias CJ Yes well you have to come back to that too.

Muir Yes.

Elias CJ And it may be that what you're saying about the legislative history bears on that, I don't know.

Muir That was bringing it back round, it was relevant to the end of the industry practice one. It really does join it back round to the interpretation of s.6 because of course the industry practice is very relevant here. You know something's been made of the fact that the industry has never applied to be exempt from the legislation. It doesn't, it was never sought to. The industry.

Keith J I thought I read in all of that legislative material we were given that the issue did arise.

Muir There was one submission I think from somebody in relation to it.

Keith J Oh, okay.

Muir That, you know, in the 20,000 or so that came in.

Keith J Yes, yes.

Muir Yes, I think this is, the evidence I would submit shows that this is a settled industry. This is the only complaint. And it arose well after the contract ended.

Tipping J Could we just sort of move from the emotional to the analytical? I understand you to be arguing that there are three errors of law that the Judge made and please tell me if there's more than these. The error implicit in the reference to the change in the test. The error implicit in

the industry practice of little use. And the error implicit, as you say, in the fourth bullet point in the Judge's paragraph 19.

Muir That's correct Sir.

Tipping J Now, are there any others?

Muir No Sir.

Tipping J Right.

Muir Two of the ones, of the four errors of law that were outlined in the submissions, two of them are much the same. Those are the three errors of law Sir.

Tipping J Well that's extremely helpful to me, I have to say. Because now we've got something to focus on. And which one are you going to address further first?

Muir I had started your Honours by looking at my submissions where I pointed to first of all the change, the change to the test. And in relation to that, I took you to page 26 of the first volume of the case and where Judge Shaw made the point about the real nature being based on analysing the tests. And if I could then take you perhaps to the Court of Appeal Decision in relation to that and what the Court of Appeal held.

Tipping J So we're not talking in the sense that the Judge erred when she talked about the changing of the test?

Muir Yes Sir.

Tipping J And did I understand you to say that the fourth bullet point was really a subset of that point?

Muir Yes Sir. Because she is influenced, as you can see from the beginning of that paragraph, with the two cases that have come out from the Employment Court which Her Honour says established the principles for interpreting s.6. And the fourth bullet point is an error in saying that the real nature is ascertained by analysing the tests.

Tipping J In relation to that, you're not suggesting are you that the Judge is saying that the real nature can be analysed by only one process, namely analysing the tests? Because this appears in a list of a number of indicators. Surely the tests are relevant. Are you suggesting that the Judge was somehow or other directing herself that that's all you look at?

Muir No, I'm saying that the Judge erred by saying that, because the starting point under the section is to look at the real nature of the relationship. That's what the Court determined.

Tipping J Yes.

Elias CJ That's where she starts.

Tipping J That's where she starts.

Muir And what Her Honour has done is said to start, to do that, she has to analyse the tests. And my submission is that is an error of law because of course what Her Honour must do is start with the written contract. And she's effectively.

Blanchard J That's what she did.

Muir She's effectively relegated it to.

Keith J In paragraph 24.

Muir Yes but she's effectively relegated it then to, if you go further on to saying, at paragraph 32, it's questionable whether it reliably indicates the real nature of the contract.

Tipping J Are you saying that the error lies in the order in which she'd arranged her bullet points?

Muir The bullet point, no Sir. I'm saying that the error is in looking at the tests. She shouldn't be looking at all of the tests any more. What she should be doing is looking at, if there is a written contract, pursuant to **TNT**, that written contract first of all, and then look at all other relevant matters.

Tipping J Just pause, you're going very fast. I'm sorry, but are you saying that the tests are no longer, the so-called tests are no longer relevant?

Muir No, I would suggest that Her Honour has really stepped back before **TNT**.

Tipping J Well can you just answer my question simply?

Muir Yes, yes.

Tipping J You are saying that? That the tests so-called of control and integration and fundamental are no longer relevant?

Muir Are no longer relevant in terms of equal weight to all of them. Where there is a written contract, wholly in writing that, as **TNT** found, that is the starting point. **TNT** said that all of the tests were no longer

relevant. And that the starting point should be the written contract and then you look at other relevant matters.

Tipping J Well I'm sorry, we're talking.

Gault J Where does **TNT** say those matters are no longer relevant?

Muir When the contract is wholly in writing, it is the true intention of the written terms.

Blanchard J Sorry, where are you reading from? I haven't got **TNT** in front of me.

Muir If you turn to the bundle of the appellant, Tab 1 is **TNT**. And if you turn to page 686 on the left hand side, the paragraph that starts, when the terms of the contract are fully set out in writing which is not a sham, the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined.

Gault J But that doesn't exclude determining whether these matters such as control and the fundamental question and the like are no longer relevant.

Muir No Sir and I'm not suggesting they're not of relevance. I'm suggesting that you start with the contract and they may be some of the relevant factors. But what Her Honour has done is.

Elias CJ But it's not either/or is it? I mean you apply these sorts of guides such as control to whatever the agreement between the parties is.

Muir Well yes but.

Elias CJ And they may be, as the then President says, they may be, the contract may be entirely captured by the written agreement or it may not be.

Muir Yes but at the end of the day my submission is that what all of the five Judgments of the Court of Appeal in **TNT** are saying is that you do need to obviously look at the true nature of the relationship and those are the words that in fact Justice Robertson uses in his final, in the final Judgment here. But the way that is interpreted where the contract is wholly in writing is … contract.

Gault J Yes, you find out what the contract provides and then you relate it to the general tests that are established in the cases such as control, the fundamental tests and those other factors. What does the contract say about those matters?

Muir Yes but I would suggest Sir that what the Court of Appeal in **TNT** did was actually give primary focus to the written contract. You obviously do need to look at all other relevant matters. And that's.

Gault J You have to find out what the contract is, what the terms of the contract are. You can't really apply those tests until you know what the contract provides.

Muir Correct Sir. And where it is in writing, surely that must be what you go to first of all to look at that. I appreciate.

Elias CJ Well she does.

Muir Pardon?

Elias CJ The Judge does.

Gault J The Judge does.

Muir Well except that she has, what she has effectively done is give weight to all factors and only has the written contract as one of the factors instead of giving primacy to that which is in my submission what **TNT** says.

Blanchard J Because she says it's not reliable as a guide to the real nature of the contract. Which is a factual determination.

Muir Which contradicts what Mr Bryson said, that the contract that he entered into was consistent with the relationship as it operated.

Elias CJ Well is this a no-evidence submission now on that?

Muir Well it's one of the ones that comes, I do come onto at the end and I'm not wanting to jump to that yet.

Elias CJ Well it's just it would help us if you are able to indicate what your submissions are directed at in sequence. Because you've moved now to a different point.

Muir And I appreciate that Ma'am, I'm sorry.

Blanchard J But in terms of interpretation, if it was open on the evidence, it surely can't be a misinterpretation of s.6 for the Judge to say in this case the written terms which I've gone to first aren't reliable as a guide to the real nature.

Muir There may be cases where that would be the case Sir.

Blanchard J Yes.

Muir But this is not one of those cases.

Blanchard J But she's not misinterpreting the section.

Muir Well she has.

Blanchard J She might be guilty of making a finding of fact with no evidence. But that's a separate point.

Muir But what she has done Sir, and I am really going back to the first point which I've probably taken as far as I can, is to not direct her primary attention first of all, as I would submit **TNT** should be interpreted, to that written contract.

Blanchard J But she has. But she's decided it's not reliable. Correctly or incorrectly deciding that.

Muir Well.

Blanchard J But she has gone first to the conditions of employment.

Muir All she has said under paragraph 24 is they remain an element to be considered. An element. And I would submit that that is not the approach, that that's an error of law. Because it's not the approach that should be taken to interpreting s.6. When one looks at how it operated, yes there are factors.

Tipping J She should have said, remain a primary element or.

Muir Yes Sir.

Tipping J Or an overwhelmingly important element or something like that.

Muir Where she has erred Sir is just disregarding **TNT** entirely. She has, that's where she's come from this point that s.6 has changed the tests. And as I say, she's referred to those two cases from the Employment Court and seems to have come at this from an erroneous view that so long, this is just one factor that goes into the mix. Which is not what **TNT** says.

Tipping J Where she should have said, but they remain the primary element to be considered.

Muir Yes Sir.

Tipping J Is that a sharp encapsulation of your point?

Muir Yes Sir.

Keith J And are you saying that's what the Court of Appeal said?

Muir I do Sir.

Keith J In paragraphs [110] and [111] or thereabouts?

Muir Yes. Where I can certainly, first of all on [103]. Paragraph [103] the Court of Appeal said, on Judge Shaw's approach, the real nature of the relationship can be ascertained by control and integration of fundamental tests.

Keith J Well she didn't say that only, did she?

Muir Well she did Sir, at bullet point four.

Keith J No, she's got.

Muir They've quoted her.

Keith J The fact that it's point four indicates that there are three others and another two following.

Muir Well all they really do, all the other bullet points really seem to be related to that fourth one. The fourth one is her key one. And.

Keith J Well hardly. The last one is the industry practice on which she placed considerable weight.

Muir The key one in terms of the first step. There are two steps to s.6 Sir. The first is, what is the real nature of the relationship. The second part is, you assess this by looking at all relevant factors. And that's where I come to the industry point.

Keith J Mm.

Muir But in terms of the first one.

Keith J But you've left out the very first one in subs (1) haven't you in saying that?

Muir That looking at the contract.

Keith J Is there a contract of service.

Muir Is there a contract of service.

Keith J Mm, mm.

Muir Yes well on the face of it, in writing there's a contract for service it says.

Keith J Mm, sure, sure. That's the first point.

Tipping J I wonder what the Judge meant in paragraph 24 by the written terms and conditions. I'm rather inclined to think Mr Gould might have had

a point when she was really, when he said she was really there meaning the stated intentions. Because when you look at these written terms and conditions, they're all over the place. There are some that clearly indicate, if you take them at face value, one thing and lots of others that indicate the other. And if you take it as she meant primarily stated intention, then it is simply an element to be considered. You wouldn't elevate the intention to the primary would you? The primary element to be considered?

Muir Sorry, the intention or the written?

Tipping J The written statement of intention. That is to say we want this.

Muir No it's got to be fully looked at on the true nature.

Tipping J Yes, yes.

Elias CJ But she does go on to rely on the written form because a lot of the arrangements encapsulated in that are ones she looks to for control and integration and matters such as that.

Muir Well except she does that in terms of, she looks on at the intention of the parties and puts enormous focus on control, unreasonably so in my submission, instead of looking at it from the perspective of what was the written contract the parties entered into.

Elias CJ But the only element, as I understand it, please correct me if I'm wrong, the only element of the written contract that you are basing this submission on is the characterisation of the nature of the relationship.

Muir No Ma'am. Absolutely not. There's an awful lot in that Crew Deal Memo that is consistent with a contract arrangement. And that was how it operated in practice. And I can take you to all of those sections if you like. There are a number, a huge number of aspects, in the written form and the way it operated in practice, which are entirely consistent with the contract arrangement.

Elias CJ The Court of Appeal didn't accept that.

Muir They did by implication Ma'am. What they said is there are some aspects which could go either way. I'd disagree with how my friend interpreted the Court of Appeal's Decision on that.

Elias CJ But the only element of the written terms that the Court of Appeal relies on is the characterisation.

Muir No, I don't believe that's the case Ma'am. If you look earlier on in the Court of Appeal's Decision, they.

Elias CJ Well what element of the written terms of the contract does the Court of Appeal.

Muir If you look Ma'am at page 112 of the case, of the white book, volume 1. It starts at the bottom there with the terms of the contract. And then the top of the page, refers to the scheme and this I would submit is really the second page and what's covered on there. Payment, tax, ACC, arrangements provided for are consistent with that status. They're looking at the written terms there and then how they operate it. It may not be set out as clearly as Your Honour would wish in terms of showing. But this is it, summarised in a paragraph.

Elias CJ No, I'm sorry, I'm probably not making myself clear. What I'm indicating is that the Judge does look at the written terms of the contract in terms of assessing the relationship between the parties and applying the tests of control and so on to them. So does the Court of Appeal. But the only element, when you say that the Judge disregarded or didn't start with the terms of the contract, what provision is there apart from the characterisation of the contract as one of you know, a self-Employed contractor?

Muir Those were the provisions that I was referring to that the Court of Appeal outlined at paragraph [49] of their Decision. And they are set out in the Crew Deal Memo. Issues such as there's an, and there are plenty more, they have to provide a guarantee, there's provision for arbitration, they have to provide their own ACC levies, they're responsible for expenses, have to provide their own tools, private, these were all that related to Mr Bryson. There are some others that related to others. If they're, you know, having vehicles, they have to provide their own insurance. Statutory days, there are limited statutory days covered. Again, more than many contractors get, different to employment provisions, but there are some provisions for them in there which are different. These are all very specific to contractors. You would not find any of these in an employment arrangement. And they operated in accordance with those provisions. Mr Bryson acknowledged he provided ACC levies. And operated in accordance with these terms.

And that was what the Court of Appeal was confirming. So for Judge Shaw to find that the terms weren't determinative is consistent with my view that she has erred in her one approach.

Elias CJ But what I'm referring to is in paragraph [49], the Court of Appeal view that the terms of the contract as a whole.

Muir Leaving aside those we've mentioned.

Elias CJ Leaving aside those you just mentioned, could equally have appeared in a contract of employment.

Muir Well, but they are the majority. If you took out all of the ones that relate to a contractor, yes there are some that are neutral. And that's consistent with the cases that look at industry practice. And consistent with the kind of control in this industry. Multi-million dollar budget. Need to be there on time. Those sorts of things. And the Court of Appeal accepted that. But unlike Judge Shaw, who gave unreasonable weight to control, the Court of Appeal has said we need to start with this contract and then we can look at all other relevant matters like control in the industry.

Tipping J Ms Muir, your fundamental submission of yours, if not the highest level, is focused on paragraph 24 of Judge Shaw's Decision, as I understand you. This is this question of the change. Or it's a combination of paragraph 19 where she says that the test has changed. And then we were looking at the reference in 24 to the written terms and conditions of employment are no longer determinative but they remain an element. And you say that it is an error of law because she's seriously understated the nature of the element. Now she immediately goes on, as the full Court in **Koia** said, labelling. (**Koia v Carlyon Holdings Ltd** [2001] ERNZ 585) I wondered whether you could help with the thought I had that that really suggests that by written terms and conditions in the context she was referring to the parties' self-description of their relationship rather than the broad sweep of all the written incidents of the written contract.

Muir Well Sir I'd say two things to that. First of all, if it is an approach of labelling then that's an error of law because she should be directing herself to the written terms and seeing whether, how they applied and operated. Whether that was consistent. And if she just looked at it from the label perspective.

Tipping J I'm not sure that you've got my point. But I don't know that I can put it any more clearly. You're saying that she should, that the Judge should have said that they, that's the written terms, remained the primary element to be considered. Now if she's only referring to the parties' self-description of the arrangement, I'm not sure that you'd be right. On any view of it.

Muir But she's not Sir. Because if you go down to, this is all under her conditions of employment and she's looking at the written terms. If you go down to paragraph 31, she has actually listed a lot of the ones that, or ones that are indicative of contractor arrangement.

Tipping J Yes, yes, alright, well let's move on.

Keith J Well perhaps, sorry, if I could just ask a question about that? I'd read paragraph 24 as just a very specific point. And then she was, as you've just said, looking at all the other points in the contract. Because I thought when I read 24 she's referring, isn't she, to s.6 when it says, something is no longer determining. Isn't she picking up on the

language of s.6 about any statement that describes the nature of their relationship? I mean that's of course what the Full Court quote is about. It's just about labelling. So I thought that paragraph was simply on that specific point and then she picked up the rest of the contract …

Muir But I would submit that it has influenced her interpretive approach of s.6, she has come at it from a basis that the written terms are no longer determinative instead of, as I was discussing with Justice Tipping, that they are.

Keith J Well except that when she, she's referring to the Employment Relations Act and saying that it says that something is no longer determining or is not determining, more accurately.

Muir That's the label.

Keith J Then that is just the labelling point isn't it?

Muir Yes, well it's only the label, but that's not what s.6(3) says in relation to B. It just says not to treat as a determining matter any statement. So sorry, yes, in relation to the label.

Keith J Yes.

Muir But it has influenced the way she has then.

Keith J Well that's a different argument.

Muir That's my point.

Keith J That's a different argument, development of the argument. Sorry, I distracted you.

Tipping J No, no you're quite right. But I think Justice Keith has obviously put more elegantly and succinctly what I was trying to get at. That's my clear impression of what the Judge is talking about there. Notwithstanding she then goes on quite rightly to look at the whole sweep of the contract. As recorded in writing.

Muir Well except it would be perhaps arguable that she was only talking about the label at 24.

Tipping J Yes.

Muir If she hadn't said the written terms and conditions, which is I think the problem.

Tipping J Well it's not very elegant language but.

Muir You know if, and that's why I think my, with respect, submission has force here, because she is talking about written terms and conditions. Not a clause that just says contractor.

Keith J Sure, sure.

Tipping J Well you may be right. Maybe she slipped from that confined premise in the Act to a wider premise which would be wrong.

Muir Which is the force of my primary submission.

Tipping J I understand the point entirely.

Muir Yes, yes. So that's the first error of law. Turning to the error of law which I submit relates to the Judge's finding, for example at paragraph 36 of her Judgment, case page 29, that industry practice is of little use when the test now is to look at all relevant factors when determining that real nature of the relationship. And on the facts I would submit, and I can't put this too strongly, that the evidence was all one way on industry practice. Even the witnesses for Mr Bryson said the industry practice was for having contractors. Not labelling them as such but this is the way they operate it. And the witness for the Guild was himself a contractor and gave evidence on that basis.

Tipping J But how could that help if the Judge was of the view, after an appraisal, it has to be a weighting argument doesn't it? She hasn't given enough weight to industry practice. She has not ignored it or said it's irrelevant.

Muir Well, I know I need to put it above a weighting for it to be effectively an error of law. And effectively my submission is that she has ignored the evidence in relation to it so her finding must be an error of law to say on the facts of this case. Because of course the facts of this case all went one way.

Gault J She is purporting to summarise evidence in that paragraph 36 by reference to the preceding paragraphs where she is looking for a common intention and she concludes that industry practice is of little use in establishing the intention of both parties. And she does point to Mr Bryson's evidence so that she does seemingly make a finding on evidence.

Muir Well Mr Bryson operated as a contractor coming into it.

Gault J Well I understand that but she's made a finding on the evidence that he didn't turn his mind to it and that therefore there was no common intention and industry practice doesn't help. Now you clearly think that's wholly wrong. But it's not without evidence.

Muir Well Sir I'd make a couple of points on that. First of all, the evidence of Mr Bryson was that he had turned his mind to contractor status because he was one at Weta; that he knew certainly before this contract had ended, had turned his mind to whether he was a contractor or Employee in March 2001 in relation to ACC matters. Conceded he'd certainly turned his mind to it. The evidence does not support this finding by Judge Shaw. The other point I'd make about that Sir is that this is all under the heading "intention of the parties". Judge Shaw narrowly considered this in relation to the intention of the parties. And of course industry practice is a relevant factor according to case law. Not just what the two parties considered.

Keith J That's paragraph 57 and following?

Tipping J 57 and following.

Keith J And she listed it as the sixth of her points in paragraph …

Tipping J You see the little use observation which has attracted your client's anxiety is in a limited context. She doesn't say it's of little use generally.

Muir But then she makes no finding under the industry practice from paragraph 57 onwards. So I would.

Gault J She makes a series of findings going through that. She refers to the evidence and says, well that's not really the situation.

Muir Well but Sir in my submission the case law on industry practice is that it is relevant if the evidence shows this is the way the industry operates. And the evidence from both sides was this is how the industry operated. And she refers to the IRD at paragraph 66. And saying that she refers to paragraph 68 it's clear from the evidence … film industry is a genuine concern here. The only effectively, and she then goes on at the end of paragraph 68, top of page 36 of the case, my friend attributed this to the witnesses but I think this is in relation to Mr Binny's submissions for 3 Foot Six, at that time to say that his submissions on industry practice were overstated. But not the evidence. She makes no conclusion about industry practice as a relevant matter under s.6. And that's what the section requires her to do.

Tipping J I find it with respect very difficult. It seems to me she's looking at industry practice for two purposes. One so far as it illuminates common intention. And the other so far as it illuminates real nature. She says it doesn't help much with intention for the reasons she gives. And in real nature she's weighed it and found that it doesn't take the real nature the way your client would like it to be.

Muir Well Sir where does she, with respect, where does she make that finding? She doesn't say anything.

Tipping J Well she's discussed it.

Keith J 75 isn't it?

Tipping J She's discussing it at some length from 57 onwards. And then.

Gault J The last sentence in each of 59, 60 and 61 constitute assessment of that evidence.

Muir Well she says this evidence is not doubted.

Gault J But.

Muir She says the evidence is not doubted Sir. She doesn't anywhere say, I'm going to disregard this evidence or I'm not going to give it weight. She does not approach this as she should have under s.6 in assessing it as a relevant matter. There is no finding on that basis.

Gault J I'm sorry, but she says, while the evidence is not doubted in the case of Mr Bryson, he was not within that particular bit of the evidence.

Muir Sorry, where Sir?

Gault J At the end of 59. The end of 60, again this did not apply to Mr Bryson. End of 61, similar. The evidence could be interpreted. So she is making a finding on the evidence as she goes through assessing it.

Muir Well, but she hasn't, she has said that he worked for over a year. But I mean I don't submit Sir that this is relevant to a finding on whether or not industry practice can be regarded as a relevant factor when you look at the totality of the evidence.

Keith J Well she's considering it, isn't she? And she's saying that the particular feature of the evidence that she's looking at in those paragraphs don't apply in the concrete case of Mr Bryson. And that's the general sort of point that she makes in 75 as well isn't it, when she gets to the conclusion.

Muir Well, only in relation to the one issue that he'd worked for over a year and that some people invested considerable plant. It's not being suggested for Mr Bryson's case that that was the situation. The plank here of course is that it's a relevant factor because this is the way the industry wants to operate.

Keith J Mm sure.

Muir It's the way it has operated through the Guild and SPADA . And this is the way Mr Bryson had operated for others before he came in. It is a relevant factor and the case law I would submit supports that and I don't believe Judge, with respect, Judge Shaw has made a finding on that. She's made a couple of.

Tipping J I would have thought she has when she says in paragraph 76, the very last paragraph of this section, as far as Mr Bryson is concerned, in spite of all that's been discussed about industry practice, it's clearly implicit because it comes at the end of this long discussion, as far as Mr Bryson's concerned, this is my conclusion.

Muir Well Sir that's under the conclusion. But there's a heading on the previous page for conclusion. It isn't under the heading "industry practice".

Tipping J Well yeah, but I mean she's already gone through the industry practice. I mean it's getting down to how people arrange their Judgments. One's got to look at this in a sort of broad common sense point of view. I agree with you, she hasn't expressly said. But what other implication can one take from it? She hasn't been just doing the industry practice survey for fun.

Muir Well, no Sir.

Tipping J She's been doing it because she's looking to see what effect it has on the real nature of the contract.

Muir But if one does stand back, as you were saying, and look at the totality of the evidence, there was not a shred of evidence.

Tipping J Oh well that's a different point.

Muir From an industry perspective saying that, against the industry practice. Not a shred of evidence.

Tipping J Well it's an evaluative question.

Muir Pardon Sir?

Tipping J It's an evaluative question as to what is the real nature. And she is saying, in spite of all this evidence about industry practice which I don't disagree with, it is necessarily general and when I direct myself to the specifics of Mr Bryson's case, I don't think his real nature was in accordance with industry practice. I can't see any error of law in that at all.

Muir Well I can Sir because what Her Honour has done is merge the two issues. Looking at the facts of Mr Bryson's situation and taking account from a s.6 all relevant matters perspective, industry practice

separately. We're not saying that Mr Bryson operated the same as another crew member might have or as all people in the industry did. This isn't about trying to get a finding for the whole of the film industry here. This is the facts and saying the relevant factor here is the way he came into this, having been a contractor, the way the whole industry operated and the way the effective Union supporting them operated, it is a relevant factor and Judge Shaw has, against the weight of all of that evidence, really ignoring that evidence, well I can't say that because she has set it out, but she has, there's no basis for her finding.

Tipping J Without wishing to prolong this Ms Muir, are you saying effectively that no reasonable Judge could have come to any view other than that the answer to this was driven inexorably by industry practice?

Muir On the factor of one of the relevant factors.

Tipping J No, no, on the whole balance of all the factors?

Muir No Sir because I'm not saying that.

Tipping J Don't you have to say that?

Muir No Sir I don't believe I do. The way, because the approach to s.6 has to be to take into account all relevant factors. And one of the, you know, as I've said, starting point the contract. And one of the important relevant factors of which there was significant evidence was industry practice.

Blanchard J Well she took it into account. But she didn't see it as being of significance.

Muir Well, and my point on that is that no reasonable Judge could have done so on the evidence when that was, all of the evidence was all one way.

Tipping J Your client is really saying that she should have given much more weight to it than she did. That really it should have led her to a conclusion that the real nature was independent contractor.

Muir Sir, I'm not going that far.

Tipping J I think you have to. You have to.

Muir It's a significant factor in terms of the relevant factors. But there are all sorts of other factors because that's just the industry perspective.

Tipping J Yes.

Muir There's the way Mr Bryson operated in practice both in terms of how he worked as an independent contractor and then also, and had done previously, and also in terms of his taxation arrangements.

Tipping J Right so never mind, don't just focus it on industry practice, you're really saying that no reasonable Judge, on a weighing of all the relevant factors, could have come up with the answer this Judge did.

Muir Yes Sir.

Tipping J You can't shy away from that can you?

Muir No Sir.

Elias CJ Well that isn't the way the Court of Appeal dealt with it.

Muir They, yes Ma'am they have. They have taken into account industry practice which I would submit Judge Shaw put to a side. And what they have said.

Elias CJ They haven't said that this was a conclusion that no reasonable Judge could come to. They've said they've done it on the relevance of the evidence.

Tipping J They've done it on their own weighting.

Elias CJ Yes. They've come to, yes well that's the case.

Tipping J That's calling a spade a spade.

Elias CJ Yes.

Muir Effectively if you look at paragraphs [110] and [111] there appear to be two bases on which they have found an error of law here. One at [110] on the second line when they say Judge Shaw seems to have confined industry context in relevance to assessment of intentions.

Elias CJ So that's a relevance point. They've said she hasn't taken into account a relevant consideration.

Muir Of the whole industry.

Elias CJ Yes.

Muir She's looked at it from the perspective of just the parties. Which was a point I made earlier too.

Keith J Well except that's not the structure of her Judgment is it?

Muir Well Sir.

Keith J You'd have to say to support that, all of the final part where she does talk about industry practice is not serious, that her only real consideration of it was under the intention heading.

Muir Well I believe it probably, it was Sir because she doesn't make a finding at the end. She then goes, she effectively reaches her conclusions early on both on the changing of the test.

Keith J Mm.

Muir And you look at industry practice for intention. She sets out the evidence in relation to it. Makes no finding.

Keith J Well paragraph 75, she goes back again to Mr Osbourne's evidence doesn't she about the way in which the industry could adjust.

Muir Well that's really more from a, this isn't going to be quite as significant because others could cope.

Keith J Well.

Muir That's not in my submission weighting it for relevance for Mr Bryson's case which is the point that needs to be done. Is the way the industry operates, the way he's operated before, a relevant factor? She hasn't done that job.

Keith J Okay, so that's their first error.

Muir That's their first. And then it also in relation to industry practice at the next paragraph, [111], about half way down or just over half way, they say in light of that it seems to us the Judge adopted the wrong standard of comparison which in effect ignored the external reality which is the general industry practice approach that I was just talking to Your Honour Justice Keith then about.

Keith J Well isn't that the same point?

Elias CJ Yes.

Muir Well no, because the first is just the intention of the parties. That's what.

Keith J Yeah, but if she's confined it in that way.

Muir Yes.

Keith J Then she's, I mean that's justice.

Muir They've covered both aspects which I addressed with them as well.

Keith J Mm, mm.

Muir And that's where I'm saying they have shown the error of law.

Elias CJ What? The error of law they identify is a failure to take into account a relevant consideration that she had to take into account. You're now arguing to us that on the evaluation she's come to a conclusion no reasonable Judge could come to, which is a different error of law.

Blanchard J So's poor Justice McGrath.

Muir I've effectively argued both of those points in the alternative. One that she did limit it only to, Her Honour limited it only to intention and also that on the evidence no reasonable Judge could have come to that conclusion. So I have argued both.

Elias CJ Yes but the point I'm putting to you is that the Court of Appeal didn't conclude no reasonable Judge could come to that conclusion. They've dealt with it as a relevance matter. And then they've done their own evaluation.

Muir They haven't. It's implicit I would submit Your Honour by the way they've so strongly said what the evidence was. I think that is implicit. It certainly was a plank of the then appellant's case in the Court of Appeal. And by analysing the evidence, and so strongly, it must in my submission be implicit.

Tipping J I'm not at all persuaded that the Court of Appeal Majority were right when they said that the Judge was wrong in treating industry context as confined solely to what the intention of the parties were. It seems to me she clearly brought it in for that purpose and for the wider purpose. Are you able to assist me there? The only reason you say she didn't bring it in for the wider purpose is that she didn't come to an express conclusion within that section of her Judgment.

Muir Yes Sir and all she's really done is outline what she'd already come to a conclusion on earlier on. She has effectively made a number of findings earlier on and then set out some facts and then concluded again at the end.

Tipping J You see that's the nub of the Court of Appeal's Decision isn't it, that she's confined her industry practice consideration to intentions. Which.

Keith J And therefore she hasn't considered it in the wider context.

Tipping J She hasn't considered it in the wider context. So she was really just beating the air in all those paragraphs from 70-something onwards.

Muir Well I think she was Sir. Because there was no evidence contrary to, and that comes back to my point.

Tipping J That's a no evidence point. This is a relevance point.

Keith J Mm.

Tipping J The Chief Justice keeps rightly pointing out.

Muir And again I say it is, you know, I do acknowledge the Court of Appeal hasn't made findings along the lines of what I'm submitting to you and I submitted before them. But it is, I would submit, implicit on a full analysis of the evidence on industry practice which was all one way.

Gault J Could I just ask you something Ms Muir about the next section of the Court of Appeal Judgment on the implications of the Decision. One would have thought that if problems arose, the practices simply could be adjusted. If they truly want people to run their own businesses in providing services to the industry, they could require that. Why is this such a problem about the implications?

Muir Can I approach that in two ways? First of all on the general to say I don't believe the Court of Appeal needed to go this far. The evidence on the implications was really just to show this is the way the industry was and you know, it's obviously a significant factor. But this case relates to Mr Bryson obviously. But the second point I'd make, in terms of the implications of the Decision, that the industry has operated in practice, and this was all in the evidence, for a very long time in this way and there would be significant issues obviously in terms of IRD practices for all of these contractors. And Mr Madigan for the Guild acknowledged this, that they've all claimed expenses for years. They've all set themselves up in a way. Many of them have bought, you know, not just large tool kits like Mr Bryson but others have, camera crew and so on.

Gault J They may be independent contractors.

Muir Well they may be and that's why I'm saying that while it was relevant in terms of showing this is the way the industry has set itself up, it's in fact not necessary for a determination in favour of 3 Foot Six.

Gault J Well I don't think it, as the Court of Appeal says, it reinforces their consideration at all.

Muir The key point of the industry practice evidence was really to raise it to show that this is the way a party operates and why the contract is offered on this basis and that nobody else is unhappy with this arrangement and nor was Mr Bryson at that time.

Gault J Yes thank you.

Tipping J If this is the correct answer in fact and in law, should the Court be concerned with its implications? I know you might bring the implications in as to whether it's the correct answer. But once you've determined that it is the correct answer, what relevance have the implications?

Muir Well I suggest Sir that implications could possibly be a relevant factor in some cases.

Tipping J Oh yes in determining.

Muir Where there's a class action for example. Yes, for example. This isn't one but I'm speaking hypothetically.

Tipping J Yes, mm.

Muir Obviously, that would obviously be a situation where it could come in in determining it under s.6. And there was significant evidence obviously on the implications of this for others.

Keith J Well there's a lot of discussion at the beginning of the Judgment as well isn't there? The industry background passage from 53 on.

Muir Yes Sir. And that's in my submission consistent with the Court's careful analysis on industry practice as a relevant matter.

Keith J Mm well it's part of, in general contract law, it's part of just reading the contract in context.

Muir Yes Sir. Yes. The only final point was the third of the errors of law on the no evidence. And I've covered the industry practice issue, which was a part of that. The other one is the finding of Judge Shaw's, if I can take you back to the Employment Court Decision. At paragraph 72 on page 36 of the case. Paragraph 72 on the third line at the end, that there was no evidence, no evidence that Mr Bryson was acting as a separate business entity. And my submission before the Court of Appeal was that this was an error of law because there was substantial evidence before the Court, some of which of course has been set out in the Court of Appeal's Decision and is outlined in my written submissions. And I'll just refer you to the paragraphs in relation to that. Particularly paragraph 9.6 showing he was engaged. A lot of those were in relation to his tax status but there were, 9.6 of my written submissions, sorry 9.5 first of all showing he was engaged in business on his own account. In my submissions where I've referred to his ACC levy. He invoiced the respondent.

Blanchard J Sorry, this is 9.5.

Muir Sorry, my written submissions, submissions of the respondent.

Blanchard J Right yes.

Muir Paragraph 9.5, the ACC levy, the way he invoiced, he could work for others. He'd done some of the work on a self-employed basis for others. The length of time he'd spent working on this basis in the industry. And then of course the tax arrangements which supported all of this as well.

Elias CJ All of those are considered of course by the Judge and say clearly or not what she's driving at when she refers to a separate business entity. Contracting independently. Isn't she there referring to the sort of tests of integration and operating from different premises and matters of that sort.

Muir I don't believe she is Ma'am. When she's talked about it earlier on she has referred to the, she has referred to these factors, I accept. She's listed some of them in the evidence. And then she's reached this, which again has coloured her Decision, this finding which cannot be supported on the evidence that there was no evidence to show it. I mean he set himself up, as the Court of Appeal said when addressing this point, he was set up from the tax perspective independently, he was, you know, registered self-employed.

Elias CJ Yes but those are the factors that she said really reinforce the characterisation of the terms of the relationship in the written terms. They're just consistent with that. And they're another form of characterisation.

Muir But they can't be Ma'am. They're not a label and if they, it's the way he operated. And he operated in practice by claiming expenses. The expenses he was claiming were just volumes.

Elias CJ Well she's clearly referred to all of that. So when she says there's no evidence that he was acting as a separate business entity, it seems to me that she must be referring to things like operating out of premises and having the trappings of independence. It's part of the integration and control consideration.

Tipping J I think what she probably meant was there's no evidence that he was really acting or that the real nature was as a separate business entity. That's the impression I got from the passage.

Muir Well.

Blanchard J Yes wel, isn't that just a factual finding?

Tipping J It's just a conclusion from.

Muir Well it is and Sir, it's in her conclusions of all the facts, she's saying there's no evidence. And on the evidence.

Blanchard J Yes but to say there's no evidence is a factual finding.

Keith J But if there is evidence, you're saying.

Muir But there is evidence. There was.

Blanchard J Well she's factually wrong.

Muir That's my point Sir.

Blanchard J Yeah. If she'd said there's very little evidence and you are able to point to a whole lot of evidence, you wouldn't characterise it as an error of law.

Muir No Sir.

Blanchard J That's my point.

Muir And I agree with you Sir.

Tipping J She's really saying there's no evidence that satisfies me.

Elias CJ Yes. Yes it's a conclusionary statement.

Tipping J It's a conclusory statement really. It was a mixture of fact and conclusion.

Muir Well Sir I don't believe she said that. I don't believe, again.

Tipping J Well no, she doesn't literally. But I mean.

Elias CJ This isn't a statute we're construing here.

Muir I appreciate that. But on the evidence, you know we must stand back and look at how this man operated in practice.

Keith J Yes.

Muir And happily operated.

Elias CJ But she's looked at those factors. She's looked at the way he submitted invoices, how he was paid, the ACC levy. There's nothing that you could point to that she hasn't taken into account.

Muir Well.

Gault J I think she's just looking, it's elaborated on the next sentence. What she means by acting as a separate business entity was, if one were doing that and operating a separate business, one would tender, not just simply take up a position, that's what she's talking about.

Elias CJ Mm.

Muir But Sir that's, that's not the way all independent contractors operate.

Gault J That's what she's talking about there.

Muir I know but Sir this again.

Gault J Well you might say she's wrong.

Muir I do Sir.

Elias CJ It's not enough.

Blanchard J This is not a general appeal.

Gault J This is just a consideration.

Muir No but Sir if there is no evidence to support, if she's wrong in the finding because the evidence.

Blanchard J No, no it's simply a factual error on her part if it's an error.

Muir Well you do get.

Blanchard J I'm not disagreeing from the Chief Justice's interpretation incidentally. But if it was interpreted the way you are interpreting it, it's still just a factual question that she, you say, has got wrong.

Muir Well it can't be Sir, don't we get into the realm though, I would suggest, as I talked earlier, of the **Edwards v Barstow** situation where it's not a finding that the Judge could reasonably have come to on the evidence. To say there is no evidence of a separate business entity. It isn't a finding.

Gault J If this was a statement of the determination made by the Judge, that might be appropriate. But it is referring to a circumstance or a factor. There wasn't any evidence of a separate business entity offering and agreeing to provide services. This was not a tender, it was someone taking up a position and it was not a short term position at that. Now it's only an element in the overall finding. And your **Edwards v Barstow** could only apply to the overall determination.

Muir Well I am, and I appreciate I'm in the lunch break, would you wish me to.

Elias CJ No we will take the luncheon adjournment. But do you want to respond now?

Muir No I'm happy to finish that point when we come back Your Honours.

Elias CJ Alright, we'll take the lunch adjournment now and resume at 2.15.

Court adjourns 1.07 pm
Court resumes 2.15 pm

Muir No further submissions to be made.

Elias CJ Decision will be reserved.