

BETWEEN

JANET ELSIE LOWE

Appellant

AND

DIRECTOR-GENERAL OF HEALTH,

MINISTRY OF HEALTH

First Respondent

**CHIEF EXECUTIVE,
CAPITAL AND COAST DISTRICT HEALTH
BOARD**

Second Respondent

Hearing: 23 November 2017

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Arnold J

Appearances: P Cranney and S N Meikle for the Appellant
A L Martin and K L Orpin-Dowell for the
Respondents

CIVIL APPEAL – RECALL HEARING

MR CRANNEY:

If the Court pleases, my name is Cranney and I appear with Mr Meikle.

ELIAS CJ:

Yes Mr Cranney, Mr Meikle.

MR MARTIN:

E te Kōti, ko Martin ahau, kei kōnei māua ko Ms Orpin-Dowell.

ELIAS CJ:

Thank you Mr Martin. Yes Mr Cranney? I should say we're not expecting this to be a lengthy hearing because it is simply a recall hearing. We have read the submissions and really what we're after from you here is for you to emphasise anything that you think on reflection might not come through sufficiently.

MR CRANNEY:

Well, Ma'am, I really have very little to say on that basis. The submissions have been carefully prepared and they're either right or wrong in terms of the interpretation of His Honour Justice William Young's judgment, and so I really don't have much to say apart from what's in the submission. Unless there are any questions, I refer Your Honours to paragraph 16 of the submissions which sets out what we say is the reasoning of the judgment. That is a finding of a contract –

ELIAS CJ:

Sorry, my papers have been brought into Court and arranged into what I'm sure was thought to be a helpful way, but I haven't got a copy of your submissions.

MR CRANNEY:

It's quite a thin looking document.

ELIAS CJ:

Yes. Carry on because I do have them fresh in my memory, thank you. I've found them.

MR CRANNEY:

Thank you Ma'am. The appellant's, paragraph 16 Ma'am, the appellant's submission is that paragraph 16 is an accurate description of the reasoning of the judgment upon which the case turned in the end, and that the judgment found that there was a contract between the Ministry and Ms Lowe –

ELIAS CJ:

It was a pretty limited contract that was described, wasn't it, it was really just payment.

MR CRANNEY:

It was payment in return for work and filling in the forms.

ELIAS CJ:

Yes.

MR CRANNEY:

A Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (CA) type of contract.

ELIAS CJ:

But one view is that it was a contract on completion of the engagement by the primary caregiver. I suppose that's really the question.

MR CRANNEY:

Yes, and that's the dispute with my learned friend.

ELIAS CJ:

Yes.

MR CRANNEY:

So the judgment itself is in the bundle at tab 4.

GLAZEBROOK J:

Just before you go to that, can you just help me in identifying exactly which bit of section 16 you say the concession should have been mentioned in relation to?

MR CRANNEY:

After 16.2 we say –

GLAZEBROOK J:

But just because there's a contract, where does the concession come into your, the 16.1 to 16.6, where should it have been mentioned –

MR CRANNEY:

Straight after 16.12, which was what Your Honour's judgment did. Your Honour –

GLAZEBROOK J:

Well, but that was just setting the facts, from memory.

MR CRANNEY:

Yes.

GLAZEBROOK J:

So I'm really saying where does it bite in your 16.1 to 16.6?

MR CRANNEY:

We say as soon as the contract was found.

GLAZEBROOK J:

And why was that?

MR CRANNEY:

Because that point it's in the course of business.

GLAZEBROOK J:

Okay, thank you.

ELIAS CJ:

Unless the contract is the very limited one.

MR CRANNEY:

Yes.

ELIAS CJ:

In which case you'd have to go on to consider the nature of the engagement or other relationship.

MR CRANNEY:

Yes.

GLAZEBROOK J:

Which is really the point of my question because it seemed it might mean to come further down, but you say it's just a function of there being a contract, and that contract was in the course of business. Have I understood that right?

MR CRANNEY:

Yes and the – the contract is referred to at paragraph 81 of the judgment. there's an offer to pay providing they do the work and fill in the forms, and they haven't been paid, and this offer is accepted by the provision of work so –

GLAZEBROOK J:

Sorry, have we now gone to the actual judgment?

MR CRANNEY:

Sorry, yes paragraph 81 of the judgment Ma'am, sorry, it's tab 4. It's not just the existence of the contract which is described in 81, but also the nature of the terms of it, and when it is formed.

GLAZEBROOK J:

Sorry.

MR CRANNEY:

Tab 4 Ma'am, and it's paragraph 81.

GLAZEBROOK J:

So paragraph 81?

MR CRANNEY:

Paragraph 81, so the judgment there is saying, "As I construe the relevant material, the Ministry is offering to pay prospective carers providing: they (a) do the work; (b) fill in the forms; and (c) have not been paid," and, "This offer is accepted by the provision of work and the filling in of the forms." So by doing the work, and it goes on in the footnote to refer to *Carbolic Smoke Ball*, the offer is accepted at the point the work commences and the contract is formed and we say then the concession kicks in. On the issue of – so we say it comes in after 16.2 of my submission.

GLAZEBROOK J:

Thank you.

MR CRANNEY:

And then on the issue of to do work for, the "to do work for" issue, I think four Judges accepted that the work was done for the Ministry.

WILLIAM YOUNG J:

But that was never accepted by the Ministry though was it?

MR CRANNEY:

Possibly not, I have to accept that, I think it was possibly left up in the air, but it wasn't focused on.

WILLIAM YOUNG J:

I think it was, and my conclusion really is that the “to do work for” element was missing.

MR CRANNEY:

Yes, yes, there was two, well both, you say that both elements in your judgment were missing.

WILLIAM YOUNG J:

Where do I say it’s not in the course of trade or business?

MR CRANNEY:

In the last –

WILLIAM YOUNG J:

Sorry, I say that as a matter of syntax, “Trade or business applies to the verbs engaged, employed or contracted,” which is your argument?

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

And I accept that’s the syntax, but I construe the whole three elements together and conclude that “work”, the third element, refers to work in the course of its trade or business. Work that is a subset of a trade or business of the Ministry.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

I don’t think that is contrary to a concession, is it?

MR CRANNEY:

Well paragraph 85 of the judgment, as I understand the paragraph, Your Honour is there having found the existence of a contract, if I'm right on that point, then moves on to discuss –

ELIAS CJ:

Well and subject to the scope of the contract I suppose.

MR CRANNEY:

Yes, and I say it's described clearly in the paragraph Ma'am. It says –

ELIAS CJ:

Well –

MR CRANNEY:

In paragraph 81, it even identifies the point of acceptance.

ELIAS CJ:

Yes but it is –

GLAZEBROOK J:

It's probably a slightly truncated discussion because there was that discussion of agency in the, at least in my judgment, mine and the Chief Justice's judgment. I think this is probably a bit of a truncated reply to that isn't it?

MR CRANNEY:

The last, paragraph 85?

GLAZEBROOK J:

Because it is really talking about that agency relationship.

MR CRANNEY:

Yes, what I say about 85 is that it seems to me to be dealing with the issue of agency and saying that these, the primary carers are not agents and then saying on this basis the trade or business does not encompass, on the basis

of the fact they're not agents, that last sentence follows, because of the words "on this basis".

GLAZEBROOK J:

Well it might be wrong and you might say it's wrong but why is it against a concession. Because isn't the concession if it is work for the Ministry then we accept it's within the trade or business, but you have to get to that first point first.

MR CRANNEY:

Yes, we say we get to that first point earlier in the judgment.

ELIAS CJ:

Well you say you get there because of the finding of contract.

MR CRANNEY:

Yes Ma'am.

ELIAS CJ:

What the argument against you is, that there is a contract of payment and there is an engagement and that they are distinct things, and it's the engagement to do work that is the key thing in terms of the definition.

MR CRANNEY:

The difficulty, Ma'am, is that paragraph 81 is quite clear on the contract. It's not a contract to pay money or some kind, on behalf of someone else.

WILLIAM YOUNG J:

But what I was saying was that they weren't, while they were contracted, while Ms Lowe was contracted by the Ministry, it was not a contract pursuant to which she was working for the Ministry.

MR CRANNEY:

Well there's two aspects to that reasoning.

WILLIAM YOUNG J:

I know you probably think it's wrong.

MR CRANNEY:

No, I agree, I agree that –

ELIAS CJ:

We're not going to say that it's right.

MR CRANNEY:

I don't want to argue with that, but in the course of your reasoning, in the last paragraph Your Honour, you have overlooked the concession.

WILLIAM YOUNG J:

But I don't think it's, the concession is a sort of a different train of thought.

ELIAS CJ:

It's at a next step really –

GLAZEBROOK J:

If you were working for the Ministry is the concession.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Then we accept it's in the course of the Ministry's trade and business, but we don't accept that they were working for the Ministry, because all that was, is my understanding for the Ministry's argument at least at that first turn, because it was just a subsidy effectively and all of the relations were with the...

MR CRANNEY:

Yes but –

GLAZEBROOK J:

And in fact at the first hearing there wasn't even an acceptance that anybody would actually even have an ability to sue if they weren't paid, which I'm not sure is sustained now. Not that we're getting into that in any event.

MR CRANNEY:

Well my position on it Ma'am, and the position of the appellant, is that paragraph 81, the only fair construction of it is –

GLAZEBROOK J:

Yes, and I've now understood the argument, I can see that.

MR CRANNEY:

Yes, and you can't construe it any other way. My friend is saying it should be construed in a lesser way, to say it's not really a contract to do work, but it is.

WILLIAM YOUNG J:

But it's a contract to do work for it.

MR CRANNEY:

Well that, yes I –

WILLIAM YOUNG J:

And that's where your argument fail with me.

MR CRANNEY:

However, Your Honours reasoning includes a point which was conceded.

WILLIAM YOUNG J:

No, well I don't agree, but anyway.

ELIAS CJ:

Can I just say, it's perfectly possible in 81 to read (a) as providing that (a) they have done the work –

GLAZEBROOK J:

Or the primary carer.

ELIAS CJ:

Yes, yes.

GLAZEBROOK J:

In line with paragraph 85.

ELIAS CJ:

That does seem to me the sense of what is being said in this judgment that the Ministry, yes, has an obligation to pay, but that doesn't mean that it is engaging or employing the homeworker to do work for it, and if that's so then the concession doesn't bite because it comes in at the next stage.

MR CRANNEY:

Well I refer Your Honour to the second sentence. I understand the first (a) and (b) in the first sentence which doesn't really deal with the contract.

ELIAS CJ:

Well you see the first sentence makes it, does suggest that the next reference in (a), the next (a), is having done the work, because it's the primary carer who has already paid.

MR CRANNEY:

Yes, so paragraph 81, the first sentence deals with what's –

GLAZEBROOK J:

Who hasn't paid.

MR CRANNEY:

Yes it deals with –

GLAZEBROOK J:

The obligation is only if there's –

MR CRANNEY:

The primary carer has parted with money and it's entitled to get the money paid by the Ministry back to the primary carer, but the second bit says –

ELIAS CJ:

We'll pay the respite carer directly but surely it's in the same overall framework this is being posited.

MR CRANNEY:

Well that, the trouble with that, Ma'am, is the sentence, "The offer is accepted by the provision of work and the filling in of the forms."

GLAZEBROOK J:

Well the provision of work for the primary carer, so if you read paragraph 85 and 81 together, the work is being done for the primary carer, so really what you're saying is you read paragraph 81 and effectively ignore paragraph 85, what's being put to you really is you read them together and say that the work is done for the primary carer, and there is an agreement to pay if the work is done for the primary – if and when the work is done for the primary carer, and the forms are filled in properly.

MR CRANNEY:

However, the paragraph 81 says, "It follows that I accept that there is a contractual relationship between the Ministry and the respite carers." Now the terms of the contract identified in the paragraph, is they do the work and fill in the forms, the Ministry is offering to pay them. There's offer, acceptance and payment.

WILLIAM YOUNG J:

But it's not, I mean the point, it's a very narrow point, but it's not an acceptance that they were working for the Ministry.

MR CRANNEY:

Yes, I accept that.

WILLIAM YOUNG J:

And isn't that the point the judgment proceed on, the not working for the Ministry.

MR CRANNEY:

Well, I don't think it can be read that way Your Honour. I think – look, paragraph 81 –

GLAZEBROOK J:

Well you say logically it can't be that way because otherwise what are they paying for I suppose is your point, but that might be more of a point to take issue with Justice Young's reasoning rather than saying it didn't engage the concession.

MR CRANNEY:

Well I say that 81 says, let's presume, leaving aside who the work is done for, for the moment, which incidentally four Judges agreed that it was done for the Ministry, just looking at this judgment –

GLAZEBROOK J:

Actually I'm not sure actually that that's right in respect of Justice Arnold and Justice O'Regan because they say it's done for the primary carer with merely a subsidy, is my understanding of their judgment.

MR CRANNEY:

If you look at paragraph 16 of the judgment Ma'am it says, they expressly accept that it's done for the, paragraph 16, *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 (CA) resolves a number of issues, and then it goes on to say, "It is established that a carer who has been engaged by a public authority or its delegate to provide care to an aged or disabled person... is engaged in the course of the trade or business... or its delegate to do work." So I say that they've –

GLAZEBROOK J:

Although I thought one of the primary reasons was that it, in this case, that wasn't the case.

MR CRANNEY:

That they hadn't been engaged but if you look at the last four or five words of the paragraph it says "for the authority.

ELIAS CJ:

But it's predicated on it, again, on it being, on them having been engaged, and that, it seems to me, is the big issue here. Who engaged whom.

MR CRANNEY:

Yes, and I think the only fair way to read 81, Ma'am, is a contract. If you're –

ELIAS CJ:

But you can have contracts operating in the same sort of milieu, can't you, you can have more than one contract. I'm not, we're not engaging with the merit of the reasoning, but for myself it does, I think you're talking about a much more limited, or Justice Young's reasoning seems to be based on a much more limited contract to pay once work has been done in a different relationship. In a different engagement.

MR CRANNEY:

Well I just can't understand that proposal looking at the paragraph. The Ministry is offering to pay the workers providing they do the work and fill in the forms. It's just an ordinary contract.

ELIAS CJ:

Well –

GLAZEBROOK J:

I think we understand the argument.

MR CRANNEY:

And then it goes on to identify *Carbolic Smoke Ball* at the bottom of, in the footnote, and the offer is then accepted by the provision of work and the filling in of the forms. The acceptor is the respite carer referred to in the next sentence. There's an offer made by the Ministry and an acceptance by the worker and there's a contract formed, and later on in paragraph 85 there's a statement that there's no engagement, but it conflicts with the existence of a contract. You can't read paragraph 81 and 85 together in a way which is logical.

WILLIAM YOUNG J:

Let's just say he's wrong –

MR CRANNEY:

I agree, I agree we're saying it's wrong and that's not for here. However –

ELIAS CJ:

And the rest of, I think, are not inclined to say whether we agree or disagree.

GLAZEBROOK J:

Well I actually probably can read the two together because on the basis that you read a document as a whole and you don't just pick out little bits of it, and I've already said how I read the two together –

ELIAS CJ:

No, no, I was responding to the submission that it wasn't logical. It may not be.

GLAZEBROOK J:

It may be wrong, well that's what I said earlier, it may be totally wrong and illogical but it doesn't mean that it was contrary to a concession.

MR CRANNEY:

If the judgment had said, I find there's a contract, as it says, and I now move on, and it's been already agreed by everybody that's in the course of their trade or business.

GLAZEBROOK J:

I really don't accept that that's what is said in the judgment of Justice O'Regan and Justice Arnold.

WILLIAM YOUNG J:

They don't get that far do they?

MR CRANNEY:

No, no, they say that they accept that if they do get that far that would be it, in paragraph 16.

GLAZEBROOK J:

Okay so –

ELIAS CJ:

They're talking about a contract of engagement.

MR CRANNEY:

Yes, if there was engagement, they say they accept that it would be in the course of business, and it would be work for the Ministry. The other two –

ELIAS CJ:

Yes, yes. I think –

WILLIAM YOUNG J:

I don't think they say that at all, they say it's not, the primary carer is not the agent of the Ministry.

MR CRANNEY:

Yes, but they do say, I think if you look at the last sentence of paragraph 16, they say it's established a carer who has been engaged. Who has been engaged. Is engaged in the course of trade or business to do work for. That's pretty high authority, a Supreme Court, to do work for, and we've got to do –

WILLIAM YOUNG J:

Yes, but it presupposes an engagement by a public authority to provide care to an aged person in that person's home.

MR CRANNEY:

Yes, I fully accept that.

WILLIAM YOUNG J:

And *Cashman* did deal with people who were rather like employers.

MR CRANNEY:

Yes.

WILLIAM YOUNG J:

More so than, employment was a more applicable concept – sorry, a more analogous concept to what happened there than it is here.

MR CRANNEY:

My submission is that if paragraph 81 is the formation of a contract between the respite carer and the Ministry, then the judgment should be recalled. Because there is an existing contract found, the details of which are set out in that paragraph, and then a concession bites, and it wasn't dealt with. It was dealt with in reasoning about whether or not agency follows in paragraph 85. Almost in an unrelated part of the judgment. On what basis does it say that the trade or business does not encompass a provision of respite care. That's what the sentence of the –

GLAZEBROOK J:

Well it says it doesn't encompass merely a payment obligation under a unilateral contract that relates to the engagement by somebody else of a care worker.

MR CRANNEY:

Yes, but I don't think that's what that paragraph says in 81. I don't think it's –

ELIAS CJ:

I think we do understand the submission on that.

MR CRANNEY:

Yes, yes, well that is really the, that is the –

ELIAS CJ:

Well it's the crux of the recall application, yes.

MR CRANNEY:

The sole submission is, if there's a contract, should the concession have bitten. Now it's true that I may have still come unstuck on the word "for" point, because my friend that's not conceded, or wasn't conceded but –

ELIAS CJ:

Well in a way it's sort of part of the same thing. Is there a contract of engagement, and who were the parties to it. Justice Young takes the view that there wasn't a contract of engagement with the DHB, but it had an obligation to pay once work, pursuant to that contract of engagement, had been completed.

MR CRANNEY:

Well I don't accept that's what the judgment says.

ELIAS CJ:

No, I understand that. I understand that.

MR CRANNEY:

I mean that might be the position but the judgment itself is clear in its language about who the parties are to it. And they've always been the same parties. It's the respite carers and the Crown, and that's what this judgment finds. Correctly. And to me that's the end of the matter, leaving aside the "work for" issue, but I still think there should be a recall even if that issue is still open because the reasonings are tied up again. They work for the Ministry and, in the course of business, is tied up in the last paragraph, and the reasoning is one set of reasoning. So that's really what it is, whether the judgment is properly construed as forming an agreement between the Ministry and the carer, and I say it's unequivocal language. It can't be undone by the last paragraph because of the unequivocal nature of the language. Essentially those are my submissions. That is my submission.

ELIAS CJ:

Thank you Mr Cranney. Yes Mr Martin?

MR MARTIN:

E ngā kaiwhakawā o Te Kōti Mana Nui, tēnā koutou. I'm guided by Your Honours.

ELIAS CJ:

Well you've heard the admirably succinct submissions and we've read the arguments that have been put in the written submissions. So is there anything that you want to emphasise or add to what you've heard or what's in the written material.

MR MARTIN:

Ma'am, thank you for that opportunity. What I propose to do is very simply scope the three headings I would have covered actually briefly, but subject to there being points that I can assist the Court with, it's not consistent with the respondent's submission for me to begin arguing what might be the merits, so I will confine myself to indicating those headings and if it's all right inviting the Court to indicate where I may assist.

I would have started with the threshold for recall, not simply for completeness, but because the respondent submits that the threshold is a high one, and that that is a significant point for today's purposes.

The second topic I would have covered would be to submit that His Honour Justice Young's approach was open to him, and that submission encompasses that the scope of the first limb of the "homeworker" definition, so "engaged, employed, contracted" was intended to have practical boundaries, and it also encompasses a submission that the respondent's concession about trade and business doesn't arise and there's nothing that I've heard suggested this morning that I disagree with there. The respondent certainly submits that the trade and business concession is not engaged when there is no finding that is submitted of an engagement for the purposes of the first limb of the definition.

The third topic that I would have covered would have only been in the event that the Court takes a different view on the first two points and I would have submitted in relation to dwellinghouse, but the written submissions simply repeat submissions that Your Honours have already received in writing. So those are the three headings I would have addressed but I, with respect, am happy to take any questions.

ELIAS CJ:

Was there anything arising out of the discussion this morning that you wanted to comment on?

MR MARTIN:

I don't think that I need to Ma'am. As I say I'm reluctant to embark on what the respondent would submit is essentially an argument about merits, rather than anything that meets the high threshold for recall, and as I have submitted the concession does not arise on His Honour Justice Young's reasoning.

ELIAS CJ:

Thank you Mr Martin. Was there anything arising out of those headings?

MR CRANNEY:

I'm just wondering if it's a new record that we've reached by half past 10.

ELIAS CJ:

Yes.

MR CRANNEY:

But it's the nature of the...

ELIAS CJ:

It's the nature of the thing, and also I have to say that the submissions we received in writing were excellent and very helpful thank you.

MR CRANNEY:

Thank you Ma'am, and I think it's really the documents themselves and the construction of the judgment, and we all know how to do that. You don't need to have that explained to you.

ELIAS CJ:

Thank you very much, counsel. We'll take a little time to consider our decision in the matter.

COURT ADJOURNS: 10.30 AM