IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 24/2004
[2005] NZSC 34

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

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: M E Gould and T J Anderson for Appellant
P M Muir and L S Jenkins for Respondent
L J Taylor and C P Chauvel for New Zealand Council of Trade Unions as First Intervener
B A Corkill and S J Davies for Business New Zealand as Second Intervener

Judgment: 16 June 2005

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. The decision of the Employment Court is restored.

C. Costs in favour of the appellant against the respondent will be fixed by the Court following receipt of written submissions.

REASONS

(Given by Blanchard J)

[1] Between 17 April 2000 and 28 September 2001 Mr Bryson did work for Three Foot Six Ltd in its miniatures unit which was filming special effects for the Lord of the Rings project. The issue before the Court is whether he did so as an employee or as an independent contractor. Only if he was an employee can he pursue his personal grievance claims against Three Foot Six under the Employment Relations Act 2000.

[2] The matter has been dealt with as a preliminary question. The Employment Relations Authority took the view that Mr Bryson was a contractor.[1] Mr Bryson elected to have the matter heard *de novo* by the Employment Court. In a reserved judgment delivered on 14 October 2003, Judge Shaw held that Mr Bryson had been employed under a contract of service and so had been an employee.[2] The Court of Appeal gave leave to appeal, saying that there was a qualifying question of law involved.[3] By majority (William Young J and O'Regan J; McGrath J dissenting) it allowed the appeal of Three Foot Six and restored the determination of the Authority.[4]

The Employment Court's decision

[3] Judge Shaw's decision was expressed with commendable brevity. We adopt her description of the background facts:

> [9] Mr Bryson has a 20-year history of model making as a hobby. He had worked for Weta Workshop in 1996 and 1997. In 1998 he was employed by Weta Workshops to make miniatures/models for the film The Lord of the Rings. He rejoined Weta Workshops model shop in February 2000 and continued working on The Lord of the Rings models.
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> [10] Weta Workshop has a close working relationship with Three Foot Six Limited (Three Foot Six). It is not unusual for staff to be seconded between the two companies. In 1999 Three Foot Six was established to administer the production of The Lord of the Rings. It had a miniatures unit

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1 Determination No. WA1/03, 7 January 2003 (Mr Stapp).
2 [2003] 1 ERNZ 581.
3 CA215/03, 8 December 2003.
4 CA246/03, 12 November 2004.

to film some of the special effects for The Lord of the Rings project. Up to about August 2001 approximately 42 crew including carpenters, engineers, camera operators, lighting and model technicians, assistant directors, continuity staff, camera technicians, and grips were engaged by Three Foot Six to work in this unit. Mr Walsh is the first assistant director of the miniatures unit, Mr Van Ommen is the head of department in charge of on set miniatures and special effects (FX) technicians. He manages the model technicians among other duties.

[11] In April 2000 Mr Bryson was seconded from Weta Workshop to Three Foot Six to work in its miniatures unit as a temporary model maker. At the end of the 2 weeks he was offered a permanent position with Three Foot Six as an on set model technician working on the production of The Lord of the Rings.

[12] Mr Bryson says he discussed the job offer with Paul Van Ommen and Rob Townshend, an FX technician at Three Foot Six. Mr Bryson was concerned about the long hours of work at Three Foot Six – 7.30am to 6.30pm – because his partner was expecting a baby shortly. It was agreed that he could work "*Weta-time*" - 8am to 6pm - until July when the baby was born. On that basis Mr Bryson agreed to leave Weta and work directly for Three Foot Six as a model technician.

[13] He was not given a written employment agreement or work contract when he began. For the first few weeks he received training. He worked fixed hours, 8am to 6pm Monday to Friday, until July when, following the birth of his child, he worked 7.30am to 6.30pm with a 45 minute break for lunch.

[14] In September he asked for and received a pay increase from $18 to $22 an hour.

[15] In October 2000 the Three Foot Six company supplied a written contract for all of its crew which refers throughout to "*Contractor*" and "*Independent Contractor*".

[16] Mr Bryson's employment continued on through 2001. He expressed some dissatisfaction about the work he was given or kept out of during that time although Mr Van Ommen approved another pay increase for him at the beginning of August 2001.

[17] On 23 August 2001 Mr Walsh announced that Three Foot Six had ordered the miniatures unit to downsize. In September Mr Van Ommen told Mr Bryson that he would be able to keep on two technicians but that Mr Bryson was not one of these. Mr Bryson was made redundant at the end of September and alleges unjustifiable dismissal. He can only bring such a claim if he is found to have been an employee.

[4] Section 6 is the relevant provision of the Act:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer.

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the Court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 1976 or the Sharemilking Agreements Act 1937.

(5) The Court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—

(a) employees under this Act; or

(b) employees or workers within the meaning of any of the Acts specified in section 223(1).

(6) The Court must not make an order under subsection (5) in relation to a person unless—

(a) the person—

(i) is the applicant; or

(ii) has consented in writing to another person applying for the order; and

(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

[5] Judge Shaw said that s 6 changed the tests for determining what constituted a contract of service. She summarised the principles she considered to have been established by Employment Court cases on that section[5] as follows:[6]

> - The Court must determine the real nature of the relationship.
> - The intention of the parties is still relevant but no longer decisive.
> - Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
> - The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test.
> - The fundamental test examines whether a person performing the services is doing so on their own account.
> - Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[6] The Judge rejected a submission made on behalf of Mr Bryson that under the Act evidence of industry practice should be completely disregarded, saying that it would be contrary to common law and would mean that the Court could not take account of matters which were important to the parties. She said that the ultimate decision in a case like this depended upon the entire factual matrix.

[7] Judge Shaw then examined the written conditions of contract, called a crew deal memo. It had been signed by Mr Bryson on 30 October 2000, some six months after he took up a permanent position with Three Foot Six. The Judge commented that under the 2000 Act the written terms and conditions of employment were no longer determinative but remained an element to be considered. Although Ms Muir submitted to us, for the respondent, that this comment was to be taken to refer to the crew deal memo in its entirety, we are satisfied from the context (and the immediately following reference to a passage from the judgment of the Employment Court in *Koia v Carlyon Holdings Ltd*)[7] that it was related only to the description of

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5 *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 and *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114.

6 At para [19].

7 [2001] ERNZ 585, 595.

Mr Bryson as a contractor and the stipulation that he was an independent contractor[8] and was no more than an acknowledgement by the Judge of the direction in s 6(3)(b) that the Court was "not to treat as a determining matter any statement by the persons that describes the nature of their relationship". As such, it did not misstate the law.

[8] After a detailed description of the terms and conditions, to which no exception is taken, the Judge said that it was questionable whether the crew deal memo reliably indicated the real nature of the contract. As the Authority had recognised, there were elements in the memo which were indicative of an employment relationship.

[9] The next section of the Employment Court judgment considered the intention of the parties. But Judge Shaw made a factual finding that it was not possible to establish if the parties had any common intention as to their working relationship. She set out her reasons for reaching this view. From Mr Bryson's account, the Judge concluded that he did not turn his mind to the matter when he began working for Three Foot Six. The absence of any written record of engagement at the commencement of his work meant there was no evidence of any mutual turning of minds to the true nature of his employment at that stage. It was clear from the evidence of the Three Foot Six witnesses that they did not contemplate at any stage that Mr Bryson was anything other than an independent contractor because that was the invariable practice at Three Foot Six or across the film industry. But, on the facts of this case, the Judge said, industry practice was of little use in establishing the intention of both parties. Three Foot Six's assumption could not be taken as determinative of the employment relationship.

[10] The Judge then considered the employee/independent contractor question under the control and integration tests and under the so-called fundamental test, found in the judgment of Cooke J in *Market Investigations Ltd v Minister of Social Security*,[9] of whether Mr Bryson was engaging himself to perform the services with Three Foot Six as a person in business on his own account. The Judge found that there was significant control imposed by the crew deal memo over Mr Bryson's

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[8] Clause 28 of the Standard Terms and Conditions on the reverse side of the Crew Deal Memo.
[9] [1969] 2 QB 173, 184-5.

work and how and when he did it. "It was the sort of control which characterises a contract of service".[10] She said that the evidence strongly pointed to his work being done as an integral part of the Three Foot Six business. Apart from the way in which pay slips in the form of invoices were prepared there was, the Judge found, no evidence at all of Mr Bryson operating a business on his own account. His income was not linked in any way to the profits or losses of Three Foot Six. He was paid "a regular wage" based on an hourly rate. The invoices were generated by Three Foot Six and appeared to be a device to record the hours worked.

[11] The Judge then spent some time reviewing the evidence of industry practice, noting the considerable number of independent contractors or freelancers, well outnumbering employees. The reason which had been given by witnesses for this practice was the project-based, intermittent nature of screen productions and the transferable skills of industry practitioners, almost all of whom work on several projects for several different producers during the course of the year depending on their skill base and availability of work. But while the Judge did not doubt this evidence, it was necessarily general. "In the case of Mr Bryson he worked continuously for over a year for one production with no outside work."[11]

[12] Judge Shaw recorded evidence that many production personnel made a considerable investment in their own plant and equipment and normally operated as sole traders or small businesses. "Again", the Judge said, "this did not apply to Mr Bryson. He had no investment in plant or equipment and did not operate as a sole trader."[12]

[13] The Judge noted the "real and genuine concern" of Three Foot Six and the industry in general that any changes to what she called the present employment arrangements would cause signification disruptions in the industry with potentially adverse outcomes both in economic terms and in terms of attracting overseas film companies to bring productions to New Zealand. But, whilst acknowledging the

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[10] At para [49].
[11] At para [59].
[12] At para [60].

concerns, Judge Shaw was of the view that "in the context of this case" they were overstated. Although the Judge did not expressly set out her finding, it is clear that she found industry practice of little or no assistance in determining the real nature of the particular relationship existing between Mr Bryson and Three Foot Six.

[14] The Judge found that the real nature of the employment was that of a contract of service. There was no evidence Mr Bryson was acting as a separate business entity. He had arrived by transfer from Weta and took up the position he was offered. It was not a short-term position and he had no other employment while he was with Three Foot Six. He had model making skills but no relevant experience for his new position. He required six weeks training. He could not be said to have been contracting his skills. Much of the crew deal memo read like a contract of service. Three Foot Six closely controlled his work. He was expected to work regular hours and was treated as an employee, being paid for downtime. The Judge emphasised that her decision was based solely on the individual circumstances of Mr Bryson's employment and was not to be regarded as affecting the status of any other employee in the film industry.

The Court of Appeal's decision

[15] William Young J, with whom O'Regan J concurred, noted that Judge Shaw had regarded her conclusion as turning on a question of fact but he said that her approach was so significantly affected by her interpretation of s 6 that it was "inescapable" that her conclusion turned sufficiently on issues of law for there to be a right of appeal.[13] It was in favour of the Judge's conclusion that the way in which the engagement worked out in practice "smacks very much of employment". Mr Bryson was in substance supplying his labour and skills, at least in part, taught to him by Three Foot Six. On the other hand, in the film industry services of the relevant kind were virtually always provided pursuant to contracts for services. Viewing Mr Bryson alongside others providing similar services and in light of the terms of the contract he signed, it was not unreal to regard him as a contractor.

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[13] At para [94].

Judge Shaw was said to have ascertained the real nature of the arrangement by the three traditional tests which, the majority judgment said, left little scope for significant weight to be placed on contractual intention. The Judge had downplayed this. The majority was also critical of the way in which she had seen the industry context as having limited significance. Her approach in effect involved "a claim to require the restructuring of the way in which the film industry operates."[14] It was an approach very much focused on the facts of the case so that each individual case would have to be dealt with on its merits with industry practice and contractual provisions no more than background factors.

[16] In his dissenting judgment, McGrath J said that the contract would not necessarily provide a complete picture of the real nature of the relationship under s 6(2).[15] He referred to the evidence of industry practice but said there were many features of the engagement and actual work practices which pointed to it being under a contract of service. McGrath J recognised that engagements of persons to perform services in the film industry were virtually always under contracts that had been framed as contracts for services. He had no doubt that in many instances that framework would be consistent with the 2000 Act. But to say that film industry workers were all independent contractors was a label argument. The principle stated in *Whitcombe & Tombs Ltd v Taylor*[16] that a well-established custom or practice might become part of a contract could not apply in a situation where individual circumstances were by statute the required basis of the determination. It was not open to the Court to reach a decision that had general application to the film industry.

Appellate jurisdiction in employment cases

[17] In the course of the hearing members of the Bench raised with counsel whether the Court of Appeal may have been incorrect in concluding that Judge

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[14] At para [113].
[15] At para [22].
[16] (1907) 27 NZLR 237.

Shaw's judgment contained any error of law which could appropriately have been the subject of appeal to that Court.[17]

[18] The regime established by the Act for disputes between employers and employees (and their representatives) provides, first, for a relatively summary determination by the Employment Relations Authority. A party who is dissatisfied with that determination may elect to have the matter heard *de novo* by the Employment Court. The decision of the Court stands in the place of the Authority's determination.[18] Although the decision of the Employment Court is therefore, in legal effect, a first instance determination, the Act makes no provision for any general appeal on both fact and law from the Employment Court.

[19] Section 214 of the Act limits appeals to significant questions of law:

> **214 Appeals on question of law**
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> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the Court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision; and section 66 of the Judicature Act 1908 applies to any such appeal.
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> …
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> (3) The Court of Appeal may grant leave accordingly if, in the opinion of that Court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[20] The construction of a document is a question of law. That rule has its origins in trial by jury in medieval times when juries were illiterate and most of the documents which came before a jury were deeds drafted by lawyers.[19] As Lord Hoffmann explained in *Carmichael v National Power PLC*,[20] the rule was carried

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[17] The problem of distinguishing questions of law from questions of fact and the techniques adopted by courts to distinguish them are helpfully discussed by Timothy Endicott, "Questions of Law" (1998) 114 LQR 292.

[18] Section 183.

[19] Lord Devlin *Trial by Jury* (1956) 97-98, cited by Lord Hoffmann in *Carmichael v National Power PLC* [1999] 1 WLR 2042, 2048.

[20] At 2049.

over into employment law in England but it applies only in cases in which the parties intended all the terms of their contract (apart from any implied by law) to be contained in a document or documents. It does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. Then the terms of the contract are a question of fact.[21]

[21] Leaving to one side for a moment the effect of the directions now found in s 6, the characterisation of the relationship – the determination of whether someone is or is not an employee – has generally been treated as a question of fact. Lord Griffiths gave the following explanation in delivering the advice of the Privy Council in *Lee Ting Sang v Chung Chi-Keung*:[22]

> Whether or not a person is employed under a contract of service is often said in the authorities to be a mixed question of fact and law. Exceptionally, if the relationship is dependent solely upon the true construction of a written document it is regarded as a question of law: see *Davies v. Presbyterian Church of Wales* [1986] 1 W.L.R. 323. But where, as in the present case, the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, it must now be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate court as a question of fact to be determined by the trial court. At first sight it seems rather strange that this should be so, for whether or not a certain set of facts should be classified under one legal head rather than another would appear to be a question of law. However, no doubt because of the difficulty of devising a conclusive test to resolve the question and the threat of the appellate courts being crushed by the weight of appeals if the many borderline cases were considered to be questions of law, it was held in a series of decisions in the Court of Appeal and in the House of Lords under the English Workmen's Compensation Acts 1906 and 1925 that a finding by a county court judge that a workman was, or was not, employed under a contract of service was a question of fact with which an appellate court could only interfere if there was no evidence to support his finding…

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[21] In New Zealand, by reason of the exception which appears in the parentheses in s 214(1), the appellate courts are also unable to disturb decisions of the Employment Court on the construction of an employment agreement even though it may involve a question of law. This limitation appears to be a relic of cases in which New Zealand courts of general jurisdiction declined to enter into the construction of awards: see, for instance, *Inspector of Awards v Fabian* [1923] NZLR 109, 121 and *Wellington Municipal Officers' Association v Wellington City Corporation* [1951] NZLR 786, 788. Some of the history of the limitation appears in the judgment of the Court of Appeal in *New Zealand Van Lines Ltd v Gray* [1999] 1 ERNZ 85, 92 and in the judgment of McGrath J in that Court in *Secretary for Education v Yates* CA116/03, 21 December 2004 at [5] to [19]. The limitation prevents an appellate court from construing a term or terms of a contract but does not prevent it from considering questions of interpretive principle: *Attorney-General v NZ Post-Primary Teachers Association* [1992] 2 NZLR 209, 215 and *Sears v Attorney-General* [1995] 2 ERNZ 121, 125.

[22] [1990] 2 AC 374, 384-5.

Other than in the exceptional situation to which Lord Griffiths refers, the task which the lower court is engaged upon is the application of the law to the facts before it in the individual case.[23] It involves a question of law only when the law requires that a certain answer be given because the facts permit only one answer. Where a decision either way is fairly open, depending on the view taken, it is treated as a decision of fact, able to be impugned only if in the process of determination the decision-maker misdirects itself in law.

[22] In a case under the Employment Contracts Act 1991, *TNT Worldwide Express (NZ) Ltd v Cunningham*,[24] the Court of Appeal appears to have proceeded on the basis that the employee/contractor question was open to appeal as a question of law because the case was of the exceptional kind. In a judgment with which the other members of the Court expressed agreement, Cooke P said that when the contract was wholly in writing, it was the true interpretation and effect of the written terms on which the case must turn. That is an instance of the law requiring a certain outcome, namely the correct interpretation. But Cooke P accepted that many, perhaps most, contracts of employment coming before the courts are not cases of relationships governed by comprehensive written contracts, and that in those more typical cases it has been held that the question of classification is one of what he termed "mixed fact and law".[25]

[23] The 1991 Act has now of course been replaced by the 2000 Act which stipulates in s 6 that, in deciding whether a person is employed by another person under a contract of service, the Employment Court or the Authority must determine the real nature of the relationship between them and in doing so must "consider all relevant matters". The Court or the Authority must therefore, even when the written contract is apparently comprehensive, take into account other matters which are relevant. Accordingly, s 6 mandates an inquiry by the Court or the Authority for the purpose of determining a question of fact. The ultimate conclusion reached by the Court in a given case concerning the nature of the relationship is thus not ordinarily amenable to appeal to the Court of Appeal under s 214.

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[23] As Endicott has pointed out, this does not *mix* fact and law: (1998) 114 LQR 292, 300.
[24] [1993] 3 NZLR 681.
[25] At 687.

[24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court. Later in this judgment we consider whether Judge Shaw has fallen into error in the view she took of the legal requirements of s 6.

[25] An appeal cannot however be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[26] Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. In *Lee Ting Sang* itself the Privy Council concluded that reliance upon dicta of Denning LJ in two cases "of a wholly dissimilar character"[27] may have misled the courts in Hong Kong in the assessment of the facts and amounted in the circumstances to an error of law justifying setting aside concurrent findings of fact. Their Lordships were of the opinion that the facts pointed so clearly to the existence of a contract of service that the finding that the applicant was working as an independent contractor was, quoting

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[26] [1956] AC 14, 36. Lord Radcliffe was adopting dicta of the Lord President (Normand) in *Inland Revenue v Fraser* 1942 SC 493, 497 and Lord Cooper in *Inland Revenue Commissioners v Toll Property Co Ltd* 1952 SC 387, 393.

[27] *Stevenson, Jordan & Harrison Ltd v McDonald & Evans* [1952] 1 TLR 101 and *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248.

the words of Viscount Simonds in *Edwards v Bairstow*,[28] "a view of the facts which could not reasonably be entertained", which was to be regarded as an error of law.[29] In *Lee Ting Sang* the facts demonstrated so clearly that the applicant was an employee that it was the true and only reasonable conclusion.

[27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination",[30] faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong: [31]

> It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the industrial tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option… .

[28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence." It could nonetheless lead or contribute to an outcome which is insupportable.

Error of law?

[29] Responding to the need to show an error of law by the Employment Court if

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[28] At 29.
[29] *Lee Ting Sang* at 388.
[30] At 36.
[31] [1992] ICR 85, 92.

the decision of the Court of Appeal were to be upheld, Ms Muir made five criticisms of the judgment.

[30] First, counsel said, Judge Shaw had erred in saying that s 6 changed the tests for determining what constitutes a contract of service. It was her submission that s 6 had to a very large extent followed the approach taken by the Court of Appeal in *TNT Worldwide Express (NZ) Ltd v Cunningham.*[32] Counsel supported the Court of Appeal majority when it had said that the departure from *TNT* intended by s 6 was "more in the nature of a nudge rather than radical change".[33] Ms Muir said it was implicit in the judgment of the Employment Court, read as a whole, and particularly from the omission of any reference to the *TNT* case, that Judge Shaw had departed from the correct approach.

[31] The real question, it seems to us, is whether the Judge correctly directed herself in accordance with s 6, not whether she was right to say that the section changed the tests to be applied or erred in omitting reference to *TNT*. We are unable to find in her judgment anything concerning s 6 which does not appear faithfully to reflect the words of the section. That section defines an employee as a person of any age employed by an employer to do any work for hire or reward under a contract of service[34] - a definition which reflects the common law. Particular relationships with which this case is not concerned are expressly included and excluded. The section then requires the Court or the Authority, in deciding whether a person is employed under a contract of service, to determine "the real nature of the relationship between them".[35] In doing so the Court or Authority is directed that it must consider "all relevant matters", including any matters that indicate the intention of the persons.[36] But it is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.[37]

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[32] [1993] 3 NZLR 681.
[33] At para [78].
[34] Subs (1).
[35] Subs (2).
[36] Subs (3)(a).
[37] Subs (3)(b).

[32] "All relevant matters" certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests. Hence the importance, stressed in *TNT*, of analysing the contractual rights and obligations. In the passage of her reasons quoted in para [5] above, Judge Shaw accurately states what the Court must do and lists the matters which are relevant. She completes her list with reference to industry practice, making the unexceptionable general comment that it is "far from determinative of the primary question". The only criticism which might fairly be made of the Judge's list is that it does not expressly direct attention to the substantive contractual terms upon which the *TNT* case places emphasis, but it is clear from the following section of the judgment, headed "Conditions of employment", that she was very much alive to the need to begin by looking at the written terms and conditions which had been agreed to by Mr Bryson and Three Foot Six. It was, however, open to her to conclude, as she did, that the crew deal memo did not give any reliable indication of the real nature of the relationship. As the Judge noted, s 6(3)(b) requires that the statement in the crew deal memo that Mr Bryson was an independent contractor is not to be treated as determinative. In that respect s 6 confirms what is to be found in *TNT*.[38]

[38] At 684 and 699.

[33] The second supposed error of law identified by Ms Muir was that the Judge fell into error in saying that the real nature of the relationship could be ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test. It will already be apparent that we see no error of law in this respect. The Judge obviously was not suggesting that these three customary indicia were to be applied exclusively. She correctly used them, in conjunction with the other relevant matters to which she referred, in an endeavour to determine the real nature of the relationship, as directed by s 6(2). No criticism was made by counsel of the way in which she approached these matters, other than the suggestion that she gave too much weight to the factor of control. The majority in the Court of Appeal considered that Judge Shaw's approach would leave little scope for significant weight to be placed on contractual intention but we do not read her judgment in that way. She considered the terms and conditions and sought to establish whether the parties had a common intention. But in the particular case, for the reasons she gave, she was unable to find one. The majority in the Court of Appeal disagreed with the way in which, as they put it,[39] the Judge "downplayed" the significance of the contract between the parties, but they accepted that, standing alone, that matter – one going to weight - could not be determinative.

[34] The third alleged error of law of which Ms Muir complained was that the Judge had disregarded industry practice. That was indeed the only error of law which, in the end, the majority in the Court of Appeal felt able to attribute to the Judge. They said that the Judge had seen the industry context as having a limited significance – "as confined in relevance to her assessment of the intentions of the parties".[40] And they said that, in effect, she had "ignored the external reality which is most obviously relevant to the situation of the parties".[41] In light of industry practice, the majority said, there was no basis for holding that Mr Bryson's relationship with Three Foot Six was other than what was provided for in the contract he signed. It seemed to them that the approach taken by the Judge "in effect involves a claim to require the restructuring of the way in which the film industry

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[39] At para [109].
[40] At para [110].
[41] At para [111].

operates".[42] The majority also expressed a concern that the Judge had dealt with the case as an individual case to be decided on its merits "with industry practice and contractual provisions no more than background factors of limited significance". Any worker whose situation was in any way atypical in the industry would therefore have a reasonable chance of establishing employee status.[43]

[35] The question for this Court is whether the Court of Appeal majority was correct in holding that what the Judge said in relation to industry practice amounted to legal error. We do not believe that it was. She did not overlook or ignore the evidence of industry practice. In rejecting a submission from counsel for Mr Bryson, she in fact said that it could not be completely disregarded, referring with evident approval to a case under the Employment Contracts Act where the Chief Judge had held that industry practice could go to establish the intention of the parties.[44] In the case before her, however, the Judge found that industry practice was not helpful in relation to establishing the common intention of Mr Bryson and Three Foot Six for the reasons given by her and mentioned in para [9] above. Later in her judgment she summarised the evidence on industry practice. It was, as she said, given in general terms. She found that it did not apply to Mr Bryson's situation. He had not been working on projects for several producers. He had not operated like a sole trader.

[36] As Mr Gould observed in his submissions to us, there was no evidence directed to any individual contract other than that of Mr Bryson. Ms Muir riposted that one of Mr Bryson's own witnesses was himself employed as an independent contractor but his situation – a sound recordist with his own plant valued at around $120,000 – was quite different from that of Mr Bryson. It is apparent that the Judge was of the view that Mr Bryson's position was not similar to that described by the witnesses of industry practices.

[37] Judge Shaw seems to have placed little significance on the evidence concerning taxation arrangements, both generally and particular to Mr Bryson, no

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[42] At para [113].
[43] At para [117].
[44] *Muollo v Rotaru* [1995] 2 ERNZ 414.

doubt because those arrangements appear to have been mere consequences of the contractual labelling of him as an independent contractor. It is true that the Inland Revenue Department had not challenged Three Foot Six's arrangements with cast and crew, as the Judge in fact noted, but there was nothing in the evidence concerning the Revenue's reasons.

[38] The Judge did not expressly state her conclusions about the influence, or lack of it, of the evidence concerning industry practice on her ultimate conclusion. But it is plain enough from comments made during her discussion of that evidence that she found it was of little weight in the case before her because Mr Bryson's working conditions did not appear to be typical of the industry. For that reason also, she considered that expressions of industry concerns were overstated. These were factual conclusions which were open to her on one facet of the inquiry required by s 6.

[39] Ms Muir's fourth alleged error of law was that the Judge was wrong to say that there was no evidence that Mr Bryson was acting as a separate business entity, since there was the evidence about the invoicing of his services and of the taxation arrangements. But, in fact, the Judge referred to the invoicing immediately before making this finding. She plainly, and in our view correctly, felt that it did not provide any support for the respondent's case, as we have already observed in para [37].

[40] Ms Muir's final submission was that no reasonable Judge could have reached the same overall conclusion as Judge Shaw in finding that the relationship between the parties was of employment by Mr Bryson under a contract of service. It will be apparent from what has already been said that we reject this view. Whether or not Judges in an appellate court might if sitting in the Employment Court have reached a different conclusion, as the majority in the Court of Appeal certainly would have done, it cannot be said that Judge Shaw has made a decision which is inconsistent with the evidence or contradictory of it or one which can properly be described as insupportable. The terms and conditions of the crew deal memo contained much that appeared to indicate a contract of service. The majority judgment in the Court of

Appeal actually said that the way in which Mr Bryson's engagement by the appellant worked out in practice "smacks very much of employment."[45] They also said that on a day to day basis he did what he was told and was "fully integrated" into the appellant's infrastructure. He was not able to delegate his work. His job was effectively full-time. On the evidence, the Employment Court could take the view that Mr Bryson was not in business on his own account, taking the profits and running the risks of a sole trader, despite being required by Three Foot Six to issue invoices to them and comply with taxation requirements on that basis. The evidence about the industry did not seem to describe relationships similar to that of Mr Bryson with Three Foot Six. On the basis of the evidence as a whole it was open to the Judge to find, for the reasons she gave, that the real nature of their relationship was one of employment.

Result

[41] We allow the appeal and restore the decision of the Employment Court, with costs to the appellant against the respondent to be fixed.

Solicitors:
Gibson Sheat, Wellington for Appellant
Simpson Grierson, Wellington for Respondent

[45] At [97].