Markellos v Baker **[2012] SAIRC 9**

INDUSTRIAL RELATIONS COURT (SA)

MARKELLOS, Arthur

v

BAKER, Neill Thomas

JURISDICTION: Full Court Appeal

FILE NO: 5755 of 2007

HEARING DATE: 1 August 2011

JUDGMENT OF: His Honour Judge J P McCusker
His Honour Judge P D Hannon
Her Honour Judge L J Farrell

DELIVERED ON: 29 February 2012

CATCHWORDS:

Appeal - Appellant charged under s 22(2)(b) - As an employer or self-employed person who failed to ensure safety of others at the workplace - Appellant master of the fishing vessel "Jean Bryant" - Deck-hand drawn into mechanically driven fishing net spool and killed - Whether the appellant was self-employed and within the scope of s 22 - Whether a deemed employee by reason of s 4(2) - Whether preventability proved beyond reasonable doubt - Appellant an employee - Conclusion that he was self-employed in error - Appeal allowed and conviction quashed - Finding of "not guilty" substituted – Ss 4(2), 19, 22 Occupational Health Safety and Welfare Act 1986.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21
Commissioner of State Taxation v Roy Morgan Research Centre Pty Ltd (2004) 90 SASR 12
Re Porter; Re Transport Workers Union of Australia (1989) 34 IR 179
Zuijs v Wirth Brothers Pty Ltd (1955) 93 CLR 561
Humberstone v Northern Timber Mills (1949) 79 CLR 389
Price v Grant Industries Pty Ltd (1978) 45 FLR 129
Police v A, TG [2006] SASC 299
Advance Resource Services Pty Ltd t/as Progress Couriers and Taxi Trucks v Charlton [2007] SAIRC 38
Lenzoot Haulage v Sinclair (1986) 42 SASR 514
Miller v Minister of Pension [1947] 2 All ER 372

Rejfek v McElroy (1965) 112 CLR 517
R v Boyle (2009) 26 VR 219
R v Fouyaxis [2007] SASC 335
Complete Scaffold Services Pty Ltd v Adelaide Brighton Cement Ltd [2001] SASC 199

On appeal from Industrial Magistrate Hardy [2010] SAIRC 33

REPRESENTATION:

Counsel:
Appellant: Mr G Algie SC with Mr R Zollo
Respondent: Mr C Jacobi with Mr B McCloud
Solicitors:
Appellant: Crown Solicitor's Office
Respondent: Coates Lawyers

McCUSKER and FARRELL JJ:

1 In this matter we have had the benefit of reading the draft reasons for decision of Judge Hannon. In respect to what he describes as the second and third grounds of appeal of the second appellant we agree with His Honour's conclusions and reasons he has given. However our view in regard to the ground based upon the issue of control is at variance.

2 In the reasons for decision appealed from the matter of whether the appellant was self-employed as charged or whether he was an employee was dealt with in paras [141] – [150]. The issue was an essential element of the prosecution's case.[1] On this appeal the Crown acknowledged it would fail if that finding was not confirmed.[2] The learned Magistrate stated:

> "145 His contract establishes that the first defendant would make no provision for workers compensation, would not retain PAYE income tax instalments, would not confer leave entitlements, and would not make superannuation contributions – all indicative that he was not an employee. Clause 22 of the contract makes provision for Mr Markellos to indemnify the first defendant for any financial loss claim or damage or demand *howsoever* arising. This is unusual for a contract of employment. The contract also makes provision for GST which would have no application to income in an employment relationship. The only payments arising under the agreement are for payment for the catch share of 22%. The returns to Mr Markellos as skipper could vary significantly.
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> 146 Further, Mr Markellos was a relieving skipper. He says as much in his own statement but that is confirmed by the regular skipper Mr Maczkowiak. Mr Markellos provided his own wet weather gear and personal flotation device. He had only signed his contract of engagement on 1 October 2005 and had only performed the one prior trip on the *Jean Bryant*. Following this particular trip Mr Maczkowiak was to resume control. In fact Mr Markellos owned his own boat and usually operated it and had done so for about 25 years. It therefore appeared that he operated his own business.
>
> 147 He had the autonomy and control commonly associated with the operation of a fishing vessel. He held specific qualifications relating to the task and accordingly brought skill and judgment to bear on the performance of its functions. He had control as to the crewing numbers and

[1] Para [142].
[2] Appeal tr 48.

> authority to give commands to the crew that they were required to obey by virtue of their own contracts of employment. He was to deal with misconduct and was able to counsel, reprimand and eject crew members. He exercised a certain specialised skill on behalf of the employer. There was indeed an element of the first defendant being able to direct Mr Markellos as to the objective to which he was to address his skills but the first defendant was not able to control the manner in which the skills to pursue the objective were to be exercised.

…

149 Nevertheless, there were certain indicia that Mr Markellos was an employee. It was submitted that there was a certain level of control exercised by the first defendant. Directions were given to Mr Markellos as to where the vessel was to go, when it would fish, and when it was to be handed over to Mr Maczkowiak. Mr Markellos had been directed to go to a certain national park area near Eucla when that fishing ground was re-opened on 1 November. It was therefore said that there was clear evidence of a capacity to control. The first defendant, and not Mr Markellos, provided the vessel concerned and all of the fishing equipment required including the spool, the nets and the safety equipment. It also provided all fuel and provisions which was said to have accorded more naturally with a contract of service than one for services. I have taken into account these and other factors. I do not consider that it makes much difference whether property in fish caught was vested and remained in the company or whether the crew or skipper were entitled to insist on retention of the fish *per se*. The agreement C6 would appear to confirm that, but the fact remains that the skipper was reimbursed on the basis of a percentage of the value of the catch. Mr Algie submitted that the operator had retained control over the vessel and over Mr Markellos and Mr Markellos was restricted in the work he was to undertake and the manner in which he was to do it. There is some validity in this, however when all factors are considered my view is that the indicia are strongly in favour of the fact that Mr Markellos was a self-employed person. The element of control is a significant one but apart from some directions about some fishing, the fishing activities were determined and conducted by Mr Markellos. Even though there was a direction to fish in a certain area the decision itself as to the deployment of the net was up to Mr Markellos. The incident involving Mr Salvemini occurred on the eighth shot retrieval and Mr Markellos had conducted all of these. Only the seventh or previous shot was directed by the first defendant. The first defendant also said through Mr Toumazos in

> relation to the conduct of the vessel, that the skipper was automatically responsible after the boat left port and in particular as to how exactly he wanted the crew to operate.
>
> 150 I am satisfied that it has been proved to the requisite level that Mr Markellos was a self employed person."

3 The learned Magistrate began by saying the requisite task was to make an analysis of the rights and obligations of the parties ascertained from the agreement between them, considered as a whole. This was expressed in somewhat different terms by the Court in *Hollis v Vabu Pty Ltd:*[3]

> "… It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered."

4 The learned Magistrate's rejection of the appellant's self description as a problematic indicia is soundly based.[4] Because the relevant terms of the agreement have been described comprehensively by Judge Hannon in his reasons, we will take that description as our background in making the following remarks regarding the characterisation of the relationship. However we would reiterate the remark of His Honour that the agreement[5] was a common contract used across the board in the fishing industry and a "one fits all" type of document.

5 The learned Magistrate regarded as indicia unsupportive of a contract of employment the lack of provision of workers compensation, the absence of a PAYE tax deduction and the rejection of any leave entitlements or superannuation benefits. The problem with these indicia is they only attach to the relationship as ultimately concluded. For that reason they can hardly be an indication of the relationship. The reasoning for this was explained by Gray J in *Re Porter; Re Transport Workers Union of Australia.*[6] That is also the view of Stewart.[7] Likewise the indemnity clause.[8] If the applicant is an employee then s 59 of the *Civil Liability Act 1936* regulates the matter. As a result none of these matters assist much in the analysis.

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[3] (2001) 207 CLR 21 at para [24].
[4] *Commissioner of State Taxation v Roy Morgan Research Centre Pty Ltd* (2004) 90 SASR 12 at para [10].
[5] Exhibit C6
[6] (1989) 34 IR 179 at 185
[7] *Redefining Employment? Meeting the Challenge of Contract and Agency Labour*, Andrew Stewart (2002) Vol 15 AJLL 235 at 244.
[8] Exhibit C6, cl 22

6 The learned Magistrate referred to the only payments arising under the agreement being a share of the catch set at 22%. As a result the appellant's returns could vary significantly. That however is not an indicia in our understanding. It has been a custom of long standing for fishermen to be paid by a share of the catch. It does not indicate the nature of the relationship. Indeed for the reason that it did not indicate the nature of the relationship the provisions of the early compensation Acts excluded from the definition of "workmen" members of the crew of a fishing vessel remunerated by a share of the profits or the gross earnings of the working of such vessel.[9] Moreover all the crew were paid on a share basis including the deceased and it was not in question that he was an employee. That aside there is no distinction to be made in the case of fishermen from the situation that applies to other workers.

7 The learned Magistrate dealt with the innate independence of a "skipper" on his boat. He referred to the fact that the appellant was a "relieving skipper", that apart from the work for Jean Bryant Fisheries Pty Ltd he owned his own boat and usually operated it and had done so for 25 years. It appeared he operated a business of his own. Reference was made to the autonomy and the special qualifications he brought to the task together with the authority he had over his crew. However with respect, these matters did not support a contract for services. The point is made in *Hepple and O'Higgins* and in the following terms:[10]

> *"The* control test assumes that the employer is both a manager and a technical expert; in other words, it reflects a stage of society in which the employer could be expected to be superior to the employee in skill and knowledge. … However, as Professor Kahn-Freund has pointed out, 'to say of the captain of a ship, the pilot of an aeroplane, the driver of a railway engine, of a motor-vehicle or of a crane that the employer "controls" the performance of his work is unrealistic and almost grotesque'. In these cases the employer is in no position to instruct the skilled worker how to do his job. Indeed, a skilled worker who simply relied on his employer's directions without exercising his own professional judgment might actually be in breach of his contract."

8 This expression is consistent with the view of the High Court in *Zuijs v Wirth Brothers Pty Ltd*[11] and in the following terms:

> "The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may

[9] *Workers Compensation Act 1932* s 7(1)(f), *Workers Compensation Act 1971* s 8(1), *Willis' Workers Compensation 26th* Edition at 386, 390.
[10] *Hepple and O'Higgins Employment Law* 3rd Edition, BA Hepple, 1979 at para [134].
[11] (1955) 93 CLR 561 at 571

> exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters. …"

It was acknowledged by the learned Magistrate in his findings there was evidence of a right to control by the owners though the circumstances of its occasion were limited. The indicia is in our view supportive of employment.

9 What might have received more emphasis in the analysis was the fact the boat was owned by Jean Bryant and all the needed equipment was supplied by it together with all fuel and provisions. The appellant provided his personal skill. The provision of wet weather gear and personal flotation devices with respect is neither here nor there. These circumstances give rise to the often repeated distinction in this area of the law between the provision of "mechanical traction" and the supply of "the work and skill of a man".[12] The indicia is in our view supportive of employment.

10 That feature was strongly complemented by the term which forbad assignment of the rights under the agreement without first obtaining the written consent of the operators[13] and that the appellant was to devote the whole of his time and attention to his obligations and not engage in other business without prior consent of the operator.[14] These provisions indicate strongly that this was a contract of personal service.[15] The prohibition of a right to assign or delegate is arguably "the single most determinative factor" in the determination of the type of relationship.[16] In our opinion this feature points strongly in favour of a contract of employment.

11 For this reason we find errors in the learned Magistrate's decision. The proper conclusion ought to have been that the appellant was engaged by Jean Bryant under a contract of employment. As agreed by the Crown if that conclusion was reached, the prosecution had to fail. We agree with Judge Hannon the appeal must be allowed and the conviction set aside and the complaint against the appellant dismissed.

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[12] *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 per Dixon J at 404.
[13] Exhibit C6 cl 19
[14] Exhibit C6 cl 16
[15] See *Price v Grant Industries Pty Ltd* (1978) 45 FLR 129 at 130-131.
[16] Stewart at 244

HANNON J:
Introduction

12 By a complaint and summons issued on 31 October 2007 by Mr Baker, the respondent to this appeal, Jean Bryant Fisheries Pty Ltd ("the company") and Mr Arthur Markellos ("the appellant"), were charged with offences under the *Occupational Health, Safety and Welfare Act 1986* ("the Act").

13 The company carried on business as the operator of a fishing vessel named *Jean Bryant* ("the vessel"). The charge against the company was that, as an employer, it failed to ensure so far as was reasonably practicable that its employee, Mr Giacomo Salvemini was, whilst at work, safe from injury and risks to health contrary to s 19 of the Act. It was alleged that Mr Salvemini was exposed to risk of injury at work and was killed whilst he was assisting in the retrieval of a fishing net and associated equipment by a process which included the winding of the net onto a spool fixed to the deck of the vessel. The complaint alleged that the company failed to provide and maintain so far as was reasonably practicable safe systems of work and plant in a safe condition.

14 The appellant was the Master in charge of the vessel at the time of the incident.[17] In this capacity he was commonly described as the "skipper". The charge against him was that, being a "self-employed person", he failed to ensure, so far as was reasonably practicable, that Mr Salvemini, not being an employee employed or engaged by the appellant, was safe from injury and risks to health while Mr Salvemini was in a situation where he could be adversely affected through an act or omission occurring in connection with the work of the appellant contrary to s 22(2)(b) of the Act. It was alleged that the appellant was in control of the operation and speed of the spool being used to assist in the retrieval of a fishing net, and that Mr Salvemini was assisting in this task. It was further alleged that the appellant, whilst operating the spool, failed to ensure that Mr Salvemini was safe from injury and risks to health.

15 The company and the appellant pleaded not guilty to the charges. The matter proceeded to trial before a learned Industrial Magistrate ("the Magistrate") who found the charges proven against both the company and the appellant and subsequently imposed penalties.

16 The company appealed against the penalty but did not appear before us to pursue the appeal. The appellant appealed on the ground that the Magistrate erred in finding that he was a self-employed person subject to s 22 of the Act, and alternatively, if he was a self-employed person, in

[17] He said he held the qualification of Master Class 5, fishing – Exhibit C30, record of interview, p 5.

finding that there was anything reasonably practicable which he could have done in the circumstances to prevent the incident from occurring.

Relevant legislation

17 The relevant provisions of the Act for the purposes of the prosecution of the appellant are as follows:

> **"Section 4—Interpretation**
>
> (1) In this Act, unless the contrary intention appears—
>
> ***employee*** means a person who is employed under a contract of service or who works under a contract of service;
>
> ***employer*** means a person by whom an employee is employed under a contract of service or for whom work is done by an employee under a contract of service."
>
> (2) "For the purposes of this Act, where a person (the ***contractor***) is engaged to perform work for another person (the ***principal***) in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, will be taken to be employed by the principal but the principal's duties under this Act in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor."

Section 22:

> "(1) An employer or self-employed person must take reasonable care to protect his or her own health and safety at work.
>
> Maximum penalty: Division 7 fine.
>
> (2) An employer or self-employed person must ensure, so far as is reasonably practicable, that any other person (not being an employee employed or engaged by the employer or the self-employed person) is safe from injury and risks to health—
>
> (a) while the other person is at a workplace that is under the management and control of the employer or self-employed person; or
>
> (b) while the other person is in a situation where he or she could be adversely affected through an act or omission occurring in connection with the work of the employer or self-employed person."

Factual background

18 The *Jean Bryant* was a shark fishing vessel. The usual crew comprised the skipper and one or two crewmen. On the day of the incident giving rise to the charges, the appellant was the skipper of the vessel and was

assisted by two crewmen, Mr Salvemini as deck hand and Mr Nicholas Toumazos who was assigned to assist Mr Salvemini and act as a fish filleter.

19 The appellant was acting in a relief capacity in place of the usual skipper of the *Jean Bryant*, Mr Maczkowiak, and for this purpose had entered into a Crew Agreement ("the agreement") with the company.[18] The appellant was a very experienced fisherman who had owned and operated his own commercial fishing business including a number of fishing vessels for approximately 25 years. The agreement was dated 1 October 2005 and on its face applied for an indefinite period from 15 October 2005. The intention of the parties however, was that the arrangement was to extend over two fishing expeditions conducted by the vessel in the west of South Australia in the Great Australian Bight. The first trip occurred over a period of about five or six days ending on 20 October 2005. The second trip commenced on 26 October 2005 and was to end on or shortly after the day of the incident being 1 November 2005, whereupon the engagement of the appellant was to cease with Mr Maczkowiak resuming as skipper.

20 The vessel was about 18 metres in overall length. The fishing operations were conducted by use of a large fishing net approximately 3.4 metres in width and 4200 metres in length. The fishing process required the casting of the net into the sea at chosen fishing spots and the retrieval of the net in due course after each "shot" or setting of the net. This cycle would usually take place two times a day depending on the conditions. The retrieval process involved mechanically winding the net in so that it gathered around a large reel or spool assembly. In the course of this activity the net passed over a spreader bar attached to the spool. The purpose of the spreader bar was to facilitate the even distribution of the net around the spool, with the crewmen providing manual assistance in this regard as necessary. The spool assembly was situated on the port side of the foredeck close to and immediately in front of the wheelhouse from where the skipper would operate the vessel and supervise fishing activities. A hydraulic motor drove the rotation of the spool and was controlled by the skipper from his position in the wheelhouse.

21 Because of its height, size and location, the spool presented a very large visual obstacle on the foredeck and obscured a considerable degree of forward vision from the wheelhouse. Whilst the helm and controls for the vessel were situated on the starboard side of the wheelhouse so that the skipper retained unrestricted vision directly in front of him, the restriction of his vision to his left due to the position of the spool had the result that he could not see crew standing in certain locations in front of the spool and the spreader bar attached to the spool.

[18] Crew Agreement dated 1 October 2005 – Exhibit C6.

22 The retrieval of the net was a lengthy process which had to be constantly supervised by the skipper with the assistance of his crew. The skipper would stop the operation of the spool as necessary to allow for the retrieval or extraction by crewmen of fish or detritus from the net, or to address any other problems arising during the process.

23 The Magistrate found that the net retrieval operation was dangerous on account of the risk of those assisting in the process being caught by the net as it was being wound onto the spool and becoming entrapped whilst the spool was rotating. This risk was enhanced by the operational environment of a vessel at sea, and by the fact that the skipper, being in control of the rotation of the spool, did not have a complete view of areas of danger around the spool, and could not observe the activities of crew assisting with the retrieval process if they moved beyond his restricted range of vision. It was accepted that it was both reasonably practicable and regular practice, in the course of net retrieval, to stop the operation of the spool if a member of the crew moved out of the line of sight of the skipper, and that the appellant had been instructed in this regard.

24 The incident resulting in Mr Salvemini's death occurred on 1 November 2005, towards the end of a net retrieval following the second shot of the day. The only witness to the incident, Mr Nicholas Toumazos, observed that Mr Salvemini had been standing adjacent to the front of the spool in a position where he was not in view of the appellant, nor able to see the appellant. A length of rope attached to the moving net caught Mr Salvemini and drew him over the spreader bar and into the spool. Mr Toumazos called out to the appellant who immediately brought the spool to a halt. Mr Salvemini was trapped against the net between the spool and the spreader and was dead by the time he was able to be freed. The appellant admitted during an interview with an investigator that Mr Salvemini and Mr Toumazos had been out of his sight for up to half a minute before the incident, during which time he presumed they were conversing with each other.

Decision of the Magistrate

25 After finding that the particulars of the charge against the company had been proven, the Magistrate considered the charge against the appellant.

26 He first addressed what was accepted to be an essential element of the offence charged under s 22(2) of the Act, namely whether the appellant was a "self-employed person" as opposed to being an employee of the company.

27 The Magistrate had regard to various indicia for and against an employment relationship as opposed to a contract for services. He noted that the appellant, when interviewed, stated that he considered himself to

be a "contractor", and that the agreement itself categorised him as such. The Magistrate considered this not to be determinative of the true nature of the relationship, and had regard to the agreement as a whole, noting a number of provisions which he considered to be indicative of a principal/contractor relationship. On the basis of this and other evidence as to the conduct of the fishing operations of the company which the Magistrate considered to be indicative of a lack of retention by the company of a power to control the manner in which the appellant exercised his skills as a skipper in charge of the vessel, the Magistrate concluded that the appellant was a self-employed person.[19]

28 In so concluding the Magistrate rejected the submission of the appellant that, in light of certain other indicia supportive of an employment relationship, there was a reasonable hypothesis consistent with his innocence, and that his alleged status as a self-employed person had not been proven beyond reasonable doubt. The Magistrate found the evidence excluded such a hypothesis, and was satisfied that it had been proven to "the requisite level" that the appellant was a self-employed person.[20]

29 The Magistrate then turned to the events during the net retrieval process which resulted in Mr Salvemini's death. He found that Mr Salvemini disappeared from his expected position and placed himself out of the view of the skipper. Whether or not Mr Salvemini should or should not have left his designated work area at the time, and whether or not the appellant supposed that Mr Salvemini was merely conversing with Mr Toumazos whilst they were both out of his sight, the Magistrate found that the appellant ought to have stopped the rotation of the spool as soon as Mr Salvemini disappeared from view, but did not do so. He found that it was a reasonably practicable measure for the appellant to stop the spool as soon as he became aware that he could not see Mr Salvemini. He found also that the appellant failed to provide any or adequate instructions to Mr Salvemini to stand clear of the spool at all times whilst he could become entangled, and failed to ensure that Mr Salvemini was standing clear of the spool at all times whilst he could become entangled.[21]

30 The Magistrate rejected the contention that the appellant should be found not to have breached the Act for the reason that his failure to notice Mr Salvemini was out of his sight, or his false assumption as to what Mr Salvemini was doing at the time, were failures due to "human error or momentary inattention, distraction or oversight".[22] The Magistrate

[19] Paras 143-150 of the decision *Baker v Jean Bryant Fisheries Pty Ltd and Another* [2010] SAIRC 33 ("the decision").
[20] Paras 148-150 of the decision.
[21] Pars 151-172 of the decision.
[22] Para 180 of the decision.

found that a lack of due care arising from any of these factors did not provide a defence, but was an issue going only to the level of culpability and mitigation.

Grounds of appeal and the appellant's contentions

31 The appellant raised three grounds of appeal. First, he complained that the Magistrate erred in concluding that he was a self-employed person in failing to give adequate weight to certain aspects of the relationship which favoured a conclusion that the appellant was an employee. In particular, the appellant submitted that insufficient weight was given to the fact that the company not only supplied and maintained the vessel and all but some personal equipment, but also retained control and lawful authority to command the appellant as skipper of the vessel, and actually exercised control over the fishing activities conducted by the appellant. In addition, the appellant contended that the Magistrate wrongly took into account an irrelevant factor, being the appellant's longstanding operation of his own fishing business before his engagement by the company, and his apparent intention to resume that activity upon completion of his relief work on the vessel. These considerations, contended the appellant, should have resulted in a conclusion that the competing indicia were finely balanced, and that even if a conclusion remained open that he was a self-employed person by application of the civil standard of proof on the balance of probabilities, the evidence was not capable of founding a conclusion that it had been proven beyond reasonable doubt that the appellant was a self-employed person for the purposes of s 22(2) of the Act.

32 The second and third grounds of appeal raised by the appellant are relevant only if his alleged status as a self-employed person for the purposes of s 22(2) of the Act is accepted as having been proven. As to the second ground, the appellant submitted that even if he was a self-employed contractor in supplying his services to the company as a relief skipper having regard to the common law test, nevertheless he must be taken to have been employed by the company by virtue of s 4(2) of the Act, given that he had been engaged to perform work "in the course of a trade or business carried on" by the company. The appellant contended that s 4(2) was a deeming provision which had broad application for the purposes of the Act such that, if he was a deemed employee under s 4(2) of the Act, he could not have an alternative status as a "self-employed person" for the purposes of s 22(2) of the Act.

33 The third ground was that the Magistrate erred as a matter of law in rejecting the appellant's contention that the evidence could not exclude the possibility that any failing on his part was the product of his inattention, distraction or lack of due care; and further in not finding that

the evidence did not establish that there was anything reasonably practicable that might be done to prevent such human error.

Approach of the Court

34 This is an appeal by way of rehearing under s 42 of the *Magistrates Court Act 1991*. There was no dispute as to the facts found by the Magistrate. In these circumstances, the Court is required to examine the Magistrate's assessment of the facts as found, and to draw its own inferences and conclusions after giving due respect and weight to the Magistrate's conclusions: *Police v A, TG.*[23]

35 In the context of the first ground of the appeal involving a review of the Magistrate's decision on the nature of the contract between the appellant and the company, the Court must consider whether the Magistrate adopted the correct approach as a matter of principle in determining the nature of the contractual relationship between the appellant and the company, and if so, whether he appropriately balanced the various considerations indicative of a contract of service as opposed to a contract for services by having regard to all relevant facts surrounding the relationship.

36 As is apparent from the approach taken by the High Court in *Hollis v Vabu Pty Ltd,*[24] each case turns on its facts and on a characterisation of the totality of the relationship, which in turn is determined from the written contractual terms and the informal written and oral systems and work practices which apply in the relationship: *Advance Resource Services Pty Ltd v Charlton.*[25] In this context, the emphasis with respect to the control test is not on the actual exercise of control, but rather on the right to exercise it so far as there is scope for it, even if it be only in incidental or collateral matters.[26]

Whether the appellant was proven to be a self-employed person

37 The context in which the agreement made on 1 October 2005 was explained by Mr Terry Toumazos, a company director of the company, and the responsible officer under s 61 of the Act.[27] Mr Toumazos said that the form of the agreement was a "common contract" used across the board in the fishing industry and was used by some skippers operating as corporate entities or with their own business number. The agreement did not state that it was to apply for any specific period of time, but was understood by the parties to contemplate only a temporary arrangement,

[23] [2006] SASC 299 per Sulan J [paras 13-21].
[24] [2001] 207 CLR 21 at [43 – 45], [48 – 57].
[25] [2007] SAIRC 38 at [124] per Judge Parsons.
[26] *Hollis* at [44], drawing from the analysis of relevant principles in *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571.
[27] The nephew of the crewman Nicholas Toumazos.

in that according to Mr Toumazos, its purpose was to allow the vessel to be operated on a couple of trips while Mr Maczkowiak was on leave.[28]

38 The vessel conducted fishing operations which included the general area off the west coast of South Australia in October/November each year. A decision was made to engage the appellant because of what Mr Toumazos described as his "vast amount of experience in the fishery and an excellent safety record".[29]

39 A summary of the salient clauses of the agreement follows.

40 Clauses 2 and 4 of the agreement permitted the appellant to work on the vessel on a "share fishing basis" from 15 October 2005[30] in such manner as good fishing practice and skills of the trade determined, and to apply his own knowledge and skills to assist the company in the conduct of the business of fishing in accordance with approved industry methods and to their mutual advantage.

41 Clause 5 set out various means by which the agreement might be determined, including by the company upon no less than 24 hours notice and the appellant upon seven days notice.

42 Clause 7 provided that the property in all fish and other marine life caught on the vessel would vest in the company as soon as the catch was landed on the vessel, and would be sold by the company on its behalf and on behalf of members of the crew. Clause 8 required that the appellant be paid a share of the gross proceeds of the sale of a particular catch which under item 2 of the Schedule to the agreement was fixed at 22% with payment to be made under cl 9 as soon as practicable, but at least every two months unless otherwise agreed.

43 Clause 11 provided that nothing in the agreement was intended to create any partnership or joint ownership of the vessel or equipment between the company and the appellant, or of any fishing licence owned by the company.

44 By cl 12, the parties acknowledged that the basis of the agreement was that the appellant was not an employee of the company, but was an independent contractor, and that accordingly the normal responsibilities accruing to an employer in an employer/employee relationship would not be applicable. Consistently with this arrangement, the parties acknowledged under cl 13 that the appellant would be responsible for the payment of income tax in respect of remuneration derived from his activities, and would not be entitled to workers compensation, holiday

[28] Tr 902.25.
[29] Tr 845.22.
[30] Item 2 of Schedule to Exhibit C6.

pay, long service leave or other employee entitlements, and further that he was responsible for effecting his own sickness and accident insurance. Clause 13 also provided that the appellant was to supply and wear his own self-inflating suit and/or life jacket and waterproofs and that the company would not be responsible for provisioning the vessel with stores, that responsibility resting with the appellant.

45 Under cl 14 the company agreed to pay all costs and expenses of and incidental to the repairing of the vessel and all machinery, plant and other equipment erected on the vessel. By cl 15, the appellant acknowledged that it was a condition of the agreement that during such periods as the company reasonably required, he would devote such of his time and undertake to perform and carry out such work as the company required to assist in the maintenance of the vessel and fishing gear used on the vessel.

46 Clause 16 provided that the appellant would devote the whole of his time and attention to carrying out his obligations under the agreement and would not, without the prior consent of the company, engage in any other business. By cl 19, the appellant agreed not to assign the benefit of the agreement without first having obtained the written consent of the company.

47 Under cl 22, the appellant agreed to comply with all regulations relevant to fishing activities conducted by the vessel and to fully indemnify the company against all loss, damage, or cost howsoever incurred as a result of any act or default on the part of the appellant so as to cause cancellation or suspension of the company's license or diminution in the value of it, or any other financial loss or damage howsoever arising.

48 Clause 23 made a provision with respect to obligations of parties if any amount payable under the agreement was subject to GST. Clause 24 provided that if a crewman was a body corporate, and was engaged to provide the services of a person exercising responsibilities as a skipper of any vessel, then the crewman as the body corporate would be responsible for all of the obligations as if it was a natural person, and would ensure that the person providing services held appropriate qualifications.

49 It can readily be seen that many of the above clauses may be said to support an employment arrangement, on the one hand, and a self-employed contractor arrangement on the other, and that other clauses are neutral in this regard. By way of a non-exhaustive summary, indicators of an employment arrangement upon which the appellant relied include that the company provided the vessel and supplied all fishing and general safety equipment, and was responsible for fuel and maintenance (cls 1 and 14); that the company required the appellant to devote the whole of his time and attention to carrying out his obligations

under the agreement and did not allow him to engage in any other business or to assign the benefit of the agreement without prior consent (cls 16 and 19); that the appellant provided no tools of trade but agreed to work only by application of his skills and knowledge in the industry (cl 4); that the appellant received no interest either in any fish caught which immediately vested in the company (cl 7) subject to his ultimately receiving his agreed share, and that he received no interest in the fishing operation and was not exposed to financial impost or risk in that regard (cl 11), and made no contribution to the running costs of the vessel.

50 The respondent relied on other clauses as indicators of self-employment including that the appellant was to be paid by way of result having regard to cls 2, 4 and 8[31] with an implicit mutuality of benefit arising from engagement in a joint share fishing enterprise which shared risk and reward; that the agreement contained no provision allowing the company to direct the appellant in the performance of his duties whilst the vessel was at sea, but merely provided that the appellant was to work on any vessel designated by the company "in such manner as good fishing practice and skills of the trade determine" (cl 4); that as well as describing the appellant as an independent contractor (cl 12), the agreement expressly made no provision for workers compensation, leave or other employee entitlements such as superannuation, and recorded that the appellant was to be responsible for payment of income tax on his remuneration (cl 13); that the agreement required the appellant to indemnify the company for any financial loss, claim or damage or demand howsoever arising (cl 22); that provision was made for responsibility for payment of GST (cl 22), which the respondent contended could have no application to payments if potentially they were to include income under an employment relationship, and thus was indicative of a contract intended only to be with a self-employed person; and that a similar implication flowed from cl 24 which contemplated that the company might contract with a corporate entity for the provision of crew.

51 Indicia in the agreement of the nature of those relied upon by the respondent can be accepted as being indicative of the appellant having status as an independent contractor. None of them are conclusive in themselves, and in this regard I reject the respondent's contention that this is the effect of cls 23 and 24 relating respectively to liability for GST and the ability to contract with a corporate entity. The existence of such contingent or enabling clauses in what the evidence indicated was a template agreement used by entities operating under a variety of business arrangements does not dictate the outcome in any one case, particularly where the written contract does not record the totality of the relevant circumstances.

[31] Cl 8 and Item 2 of the Schedule providing for a 22% share of the gross proceeds of sale.

52 The Magistrate commenced his analysis by correctly directing himself as to the weight to be given to the acknowledgment by the parties in the agreement, and the later apparent concession by the appellant,[32] that the nature of their relationship was such that the appellant was an independent contractor and not an employee. The Magistrate acknowledged, in accordance with authorities such as *Lenzoot Haulage v Sinclair*,[33] that the description given by the parties to the nature of their relationship was merely a primary fact, and that the status of the person concerned was to be determined upon an analysis of the rights and obligations of the parties as ascertained from the agreement between them considered as a whole. In addition, it appears that he went beyond the terms of the agreement, in that he took into account "other direct evidence of the nature of the engagement" of the appellant,[34] by which I understand him to have endeavoured to consider the totality of the circumstances in accordance with the approach in *Hollis v Vabu*.

53 There was no dispute between the parties that the agreement did not record the totality of the circumstances relevant to ascertaining the status of the appellant. In particular, it did not make any provision with respect to the right of the company to control the manner of the work done by the appellant except to the extent that such might be inferred from the agreement and from the ownership of the vessel by the company.

54 The Magistrate took the view that the various provisions of the agreement described above upon which the respondent relied were indicative of a relationship of principal and independent contractor. After describing these provisions in general terms, the Magistrate then had regard to two specific matters drawn from the factual circumstances surrounding the agreement which he considered were indicators of the appellant being a self-employed person.

55 The first was that the appellant was a relieving skipper and provided his own wet weather gear and personal flotation device, and further that the appellant, having only signed his contract of engagement on 1 October 2005, had performed only one prior trip on the vessel before that during which the incident occurred, following which Mr Maczkowiak was to resume control. He observed:

> "In fact Mr Markellos owned his own boat and usually operated it and had done so for about 25 years. It therefore appeared that he operated his own business".[35]

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[32] Exhibit C30 – Record of Interview of appellant p 4.
[33] (1986) 42 SASR 514 per King CJ.
[34] Para 144 of the decision.
[35] Para 146 of the decision.

56 The second specific matter was the issue of control. The Magistrate found that the appellant had the autonomy and control commonly associated with the operation of a fishing vessel consistent with his specific qualifications and skills. He noted that the appellant had the authority to give commands to the crew that they were required to obey by virtue of their own contracts of employment. In particular, that whilst there was an element in their relationship indicating that the company was able to direct the appellant as to the objective to which the appellant was to address his skills, the company was not able to control the manner in which the skills to pursue the objective were to be exercised.[36]

57 The Magistrate acknowledged the aspects of the agreement upon which the appellant relied, and that there were indicators of a level of control exercised by the company over the appellant consistent with an employment relationship. These included that the company provided the vessel and all of the associated fishing equipment, fuel and other necessary provisions for the operation of the vessel, and further that directions were given to the appellant as to where the vessel was to go, when it would fish, and when it was to be handed over to Mr Maczkowiak after completion of the second trip. The Magistrate accepted there to be some validity in the submission that the company had retained control over the vessel and over the appellant, and that the appellant was restricted in the work he was to undertake and the manner in which he was to do it.[37]

58 However, he concluded as follows:

> "…when all factors are considered my view is that the indicia are strongly in favour of the fact that Mr Markellos was a self-employed person. The element of control is a significant one but apart from some directions about some fishing, the fishing activities were determined and conducted by Mr Markellos. Even though there was a direction to fish in a certain area the decision itself as to the deployment of the net was up to Mr Markellos. The incident involving Mr Salvemini occurred on the eighth shot retrieval and Mr Markellos had conducted all of these. Only the seventh or previous shot was directed by the first defendant. The first defendant also said through Mr Toumazos in relation to the conduct of the vessel, that the skipper was automatically responsible after the boat left port and in particular as to how exactly he wanted the crew to operate."[38]

59 The Magistrate then stated that he was satisfied that it had been proven to "the requisite level" that the appellant was a self-employed person.[39]

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[36] Para 147 of the decision.
[37] Para 149 of the decision.
[38] Para 149 of the decision.
[39] Para 150 of the decision.

60 The appellant contended that the Magistrate erred in placing too much weight on the two specific matters identified above, being the appellant's past experience in the operation of his own fishing business, and the autonomy and control said to have been exercised by the appellant in the operation of the vessel.

61 As to the control issue, the appellant contended that the Magistrate failed to give due weight to the absence of evidence of any limitation on the capacity of the company to control or direct the appellant with respect to fishing activities undertaken by the vessel. He contended that the control exercised by the company through its utilization of Crew Agreements, by the requirement that the appellant and other crew undergo safety inductions, by directions to the appellant as to where the boat would go to undertake fishing activities, and as to the port at which the vessel was to be docked for handover upon completion of the appellant's engagement, were of such significance that it could not be properly concluded that the indicia were "strongly in favour" of the appellant being a self-employed person.

62 Whilst it does not appear that he specifically addressed the topic, the Magistrate did not err by failing to take into account as an indicator of employment the requirement that the appellant participate in an induction process undertaken by the company with respect to all crew before each fishing trip. The fact that the company conducted an induction and a review of safety procedures involving the participation of the appellant was at most a neutral indicator as to the contractual status of the appellant. The company was obliged under either s 19 or s 22 of the Act to take reasonably practicable steps to ensure the safety of employees and any other persons at a workplace under its management and control. The discharge of this obligation could reasonably be expected to include an induction process for crew each time they convened for a fishing trip, particularly given the likelihood of there being differing personnel on each trip with disparate levels of experience. Whether the crew comprised self-employed persons, or employees, or a mixture, makes no difference in this regard.

63 A consideration of the control issue requires the nature of the fishing operations conducted by the company to be put in perspective. One would expect that the company, as the operator of the vessel, and with a substantial capital investment in the fishing enterprise, would exert overall control as to when and where the vessel was to undertake fishing activities, regardless of whether the skipper was engaged as an employee or an independent contractor. This is particularly so given the past experience of the company with the productivity of various fishing grounds.

64 As Mr Terry Toumazos explained, over the years the company had retained a record of catches made by its vessels in the different areas fished at different times of the year. Thus, although skippers of vessels might be very experienced, they might not have the exposure to knowledge of certain fishing areas available to the company through its records. He said that as a result of its accumulated knowledge, the company was able to identify areas which were more productive at certain times of the year, and thus directed its crew to those fishing grounds.[40]

65 In this context, it could be expected that specific decisions with respect to the manner of the conduct of the fishing operations in the areas to which the vessel was directed would be left for the appellant as skipper, who in general had control over when, where and how many shots would be done in a day, or at all, the depth at which the nets would be set, and what the crew would do and how they would perform their tasks. But the making of specific decisions of this nature by the appellant is of itself no clear indicator of his status, as he could be expected to make such decisions as a skipper using his skills, knowledge and experience whether he was engaged as an employee or a contractor.

66 In my view the Magistrate gave undue weight to the degree of autonomy and control exercised by the appellant in relation to the operation of the fishing vessel after leaving port in determining his status to be that of an independent contractor. The dangerous nature of fishing operations in general necessitated that the appellant, as skipper, have an appropriate degree of autonomy and control with respect to crew and the conduct of fishing operations. The fact that the appellant had specific qualifications and vast experience in the industry which enabled him to bring a high level of skill and judgment to the task of operating the vessel is not of itself indicative of his contractual status one way or another. He was necessarily in total charge once the vessel left port as confirmed by Mr Terry Toumazos.[41]

67 Moreover, evidence was given by Mr Toumazos as to arrangements made for crewing of vessels which indicates that the company reserved for itself the right to control the number of crew members allocated to a vessel, a matter which impacted indirectly upon the manner of the appellant's performance of his work and his remuneration for it.

68 Mr Toumazos said that the vessel was surveyed for four crew including a skipper, but whilst on fishing operations during 2005, it was worked with a skipper and with either one or two crew.[42] He stated that there were a number of considerations in determining whether a skipper would be

[40] Tr 908.
[41] Tr 890 and 905.
[42] Tr 835.4-18.

assisted by one or two crew. Some skippers were "hands on", such that if they had been allocated or had themselves chosen fewer crew than the maximum available to them, they would be required to do extra work. For example, after the net had been hauled in, the skipper who had the assistance of only one crewman would emerge from the wheelhouse and undertake work to assist the single crewman with general cleaning and other activities. The skipper, if the decision was left to him, could instead choose to work with two crewmen so as not to be required to give the direct manual assistance needed if there was only a single crewman, the consequence being that the percentage of the proceeds available to be shared by the skipper and the crew would be reduced given the greater number of people on the vessel.[43]

69 Mr Toumazos said that the skipper of a vessel usually made the decision as to the number of crew to be taken on board, but that in the year leading up to the incident in 2005, the decision as to the number of crew assisting the skipper was made by the company. At the time of the fishing trip in question he said the number of crew on the vessel was the result of a combined decision made by management, the skipper and the crew in the interests of running a harmonious operation and minimizing disputes. Nevertheless, he said that "we do have a say" in that, "what we try and do is, for training purposes, we encourage and we actually, in a way we force whenever we can, a third person to go on the boat."[44] Mr Toumazos explained that this third person may be a less experienced crewman or someone just starting off, who was allocated to the vessel so as to gain experience and training to enable that person to work up to be the first deckhand on the vessel or the main crewman.[45] This appears to have been the context in which his relatively inexperienced uncle Mr Nicholas Toumazos was assigned to the vessel for the first time on the trip when the accident occurred, apparently for the primary purpose of assessing the quality of the fish.[46]

70 A reservation of a right to exercise a significant degree of control over the manning of vessels is consistent with the company's view as to the intent of the contracts it entered into in the form of the agreement with the appellant. In this regard, Mr Terry Toumazos said that whilst he did not know how others considered the arrangement, from the point of the company, as a result of such contracts "we have a lot of control over these people; like we choose to; like that's the way we operate our company; that's the way we run our company and we wouldn't want to have it any other way".[47]

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[43] Tr 906.
[44] Tr 907.
[45] Tr 907.
[46] Evidence of Mr Nicholas Toumazos tr 428 – 430; 475.
[47] Tr 902.

71 The apparent restriction on the appellant's autonomy in choosing the number of crew was supported by the answers the appellant gave during an interview with investigators following the incident.[48] The appellant said that his normal procedure was to work with two crew, although "on the trip previous", it had been a single crew.[49] He said the varying allocation of crew members arose from differing preferences as to allocation of percentages from the sale of the catch. He stated that in general he would decide whether he wanted to operate with one or two crew "…[B]ut in this case, it was more of the case that The Fish Factory[50] supplied the boat and the crew members. And I was only on board as a Skipper or a Master Class 5 Fisherman."[51]

72 The implication of this evidence generally is that, with respect to the trip when the incident occurred, the company reserved to itself the right to determine the number of crew to assist the skipper rather than leaving it to the skipper. This reservation of control indirectly impinged upon the autonomy the skipper would otherwise have had to operate with less crew, and to earn a greater percentage return by choosing to do more manual work than would be required if he was assisted by more than a single crewman. It indirectly impacted on the manner of performance of the work by the skipper. This is indicative of a reservation of a right to exercise control over what were more than incidental or collateral matters as far as the manner of performance of the appellant's work was concerned. It is a factor which reduces the extent to which the autonomy and control otherwise exercised by the appellant favours his having the status of a self-employed person. The Magistrate did not have adequate regard to these considerations in assessing the control issue.

73 The Magistrate also erred in giving weight to the fact that the appellant came to his task as a temporary relieving skipper, and that the appellant had owned and operated his own fishing vessel for about 25 years. It is implicit in the reasons for decision that the Magistrate took these matters into account as favouring a conclusion that the temporary relationship between the appellant and the company comprising only two fishing trips involved a contract for services as opposed to a contract of service.

74 The fact that the appellant may have come from his own business to undertake a temporary relieving engagement as a skipper, and could be assumed to be returning to that business on completion of the engagement, is of itself no indication as to his contractual status as relieving skipper. Short term engagements of persons with high levels of skills and experience may occur under either an employment contract or a contract for services. The appellant's past activities are not relevant

[48] Exhibit C30 – Transcript of interview 16 October 2006.
[49] Record of interview tr p 11 line 258.
[50] As the entity controlling the company was commonly described.
[51] Record of interview tr p 11 line 260 – p 12 line 273.

other than to indicate that he was highly experienced in the fishing industry and suitable in terms of his skills and knowledge as a temporary replacement for Mr Maczkowiak. The comments of the Magistrate which immediately followed his consideration of this point, as to the appellant having "the autonomy and control commonly associated with the operation of a fishing vessel", and specific qualifications for the task, would appear to link the fact of the appellant's operation of his own business with the nature of the relationship with the company. However, as observed above, the extent of the control exercised by the appellant with respect to members of the crew, and the requirement that they obey his commands as skipper, is what might be expected in relation to the operation of a vessel whether the skipper was an employee or a contractor.

75 As a result of what I have identified as errors in the Magistrate's approach, I consider that he gave too little weight to aspects of the control issue indicative of an employment relationship, and too much weight to the appellant's background as a self-employed operator of his own business. In the context of civil proceedings in which the nature of an engagement for the provision of services must be determined, these errors may not have had crucial significance. It might be accepted that the indicia remained finely balanced, and in such circumstances the label given by the parties to their arrangement might be sufficient to lead to a conclusion that, on the balance of probabilities, there was a contract for services.

76 In this case however, an essential element of the complaint for the purposes of s 22(2) of the Act is not made out unless it is established beyond reasonable doubt that the appellant was a self-employed person. I do not consider the evidence was capable of supporting such a conclusion. In so stating, I do not accept the appellant's submission that the Magistrate, having found at an earlier stage of the proceedings that there was a case to answer on the self-employment issue, failed to appreciate that in the final analysis, a higher threshold of proof had to be overcome than at the case to answer stage. A fair reading of the Magistrate's reasons indicates that he appreciated this, and understood that self-employment had to be established beyond reasonable doubt.

77 The defect in the Magistrate's conclusion is that, once the evidence as to control is put properly in context, then at best, in terms of the respondent's case, the competing considerations are finely balanced having regard to the totality and the practical realities of the relationship. The evidence at its highest may have allowed a Court to feel an actual persuasion that the appellant was a self-employed person so as to satisfy the civil onus. However, the evidence cannot satisfy the "high degree of probability" required for proof beyond reasonable doubt, such as to leave

only a remote possibility of the alternative conclusion.[52] As stated in *Rejfek v McElroy*:[53]

> "The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in any civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensible to the support of a conviction upon a criminal charge."

78 Put in another way, the evidence cannot exclude any reasonable or rational hypothesis consistent with innocence before the appellant's guilt could be established: *R v Boyle*.[54] Nor could it be said that a reasonable doubt as to the appellant's status could not be entertained in the circumstances: *R v Fouyaxis*.[55]

79 The conclusion which must follow is that the essential element of the offence under s 22(2) that the appellant was a self-employed person was not proven beyond reasonable doubt. Accordingly, the conviction cannot stand. The fact that this outcome may highlight a difficulty for prosecutions dependent on establishing whether the status of a person charged is that of either employee or contractor, in that the appellant, if charged with an offence as an employee under s 21 of the Act, might equally have escaped conviction on account of an inability to prove his status as an employee beyond reasonable doubt, cannot avail the respondent. Each case brought in reliance upon the asserted state of employment or self-employment must stand or fall on the basis of the cogency of the evidence presented.

80 The conclusion as to the insufficiency of the evidence with respect to the appellant's status for the purposes of s 22(2) of the Act disposes of the appeal. However, in case the matter is taken further, and a different view is taken as to whether the appellant's alleged status as a self-employed person was proven beyond reasonable doubt, it is necessary to address the appellant's two alternative contentions.

Whether the appellant was a "deemed" employee under s 4(2) of the Act

81 The appellant submitted that, even if it were the case that he was an independent contractor by reference to the common law test, he must be taken to be an employee for the purposes of the Act having regard to the provisions of s 4(2). Those provisions are set out above. The appellant

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[52] *Miller v Minister of Pension* [1947] 2 All ER 372 at 373-4 per Denning J.
[53] (1965) 112 CLR 517 at 521.
[54] (2009) 26 VR 219 at [44] per Court of Appeal.
[55] [2007] SASC 335 at [64] per White J.

contended that their effect is that, for the purposes of the Act, including the operation of s 22(2), his engagement to perform work for the company in the course of a trade or business carried on by the company means he must be taken to have been employed by the company at the time of the incident.

82 The appellant contended that this "deeming provision" was not limited in its effect to s 19 of the Act, and necessarily took him out of the class of "self-employed persons" subject to the obligations imposed by s 22 of the Act, and that accordingly an essential element of an offence under s 22 could not be established. The appellant contended that there was no warrant for reading down the breadth and universality of the provisions of s 4(2), given that ss 4(3) and (5), relating respectively to the application of the Act to the performance of work for an employee gratuitously, and to the meaning of references to divisional fines within the Act, enjoyed a similar broad application given that they too applied "for the purposes of the Act".

83 Reliance was also placed upon observations of the Chief Justice in the Full Supreme Court decision *Complete Scaffold Services Pty Ltd v Adelaide Brighton Cement Ltd*,[56] and on the terms of s 26, which provides that for the purposes of Part 4 of the Act the term "employee" does not include a "self-employed" contractor, thus being an indicator that if Parliament had intended to restrict the operation of the deeming provision in s 4(2) to s 19 and not to encompass s 22(2), it could have said so.

84 In my view the respondent correctly submitted that the proper construction of s 4(2) of the Act could not have the result for which the appellant contended. Section 4(2) extends the obligations of principals who engage contractors by expanding the range of persons who may be taken to be in an employment relationship with the principal, but at the same time limits the extent of the duty to that extended range of employees by confining the duty to matters over which the principal has control.

85 In the absence of such a provision, there would be a gap in the legislation, in that obligations on an employer as a principal under s 19 would extend only to those of its employees under a contract of service with it in accordance with the definition of "employee" in s 4, and would thus impose no obligation on the employer as principal with respect to contractors engaged by it, or with respect to employees of those contractors, in relation to matters over which the principal has control. In seeking to address this situation by providing that the principal is taken to be the employer of a contractor and employees of the contractor in the

[56] [2001] SASC 199.

circumstances described, s 4(2) does not redefine the categories of employer and employee for all purposes. The definitions in s 4 otherwise continue to apply and should not be taken to affect the operation or scope of s 22(2) of the Act. Thus s 4(2) simply extends the range of actual or deemed employees who may be the subject of a charge under s 19 of the Act. In my view the general observations made by Doyle CJ in *Complete Scaffold Services* with respect to the potential breadth of the operation of s 4(2) have no application to the confined circumstances in which s 4(2) is to be considered in this matter.

86 The respondent illustrated the anomaly that would arise if the appellant's contention as to the unlimited scope of s 4(2) was correct by reference to the example of a principal or host employer contracting with a labour hire company for the use of an employee of the labour hire company to perform work at the host employer's site. It was contended that in such circumstances, if the appellant's construction of s 4(2) was correct, the labour hire company would cease to be an employer notwithstanding its contract of employment with its employee, and that both the labour hire company and its employee would be deemed employees for the purposes of the Act. If that were so, any breach of duty as between the labour hire company and the employee could not be addressed by a prosecution of the labour hire company under s 19 even if it was a breach for which the host employer could not be prosecuted, because it related to a matter over which it had no control. The only remedy would be to bring a charge against the labour hire company as an employee under s 21 of the Act which has considerably lower penalties than is the case with a s 19 offence.

87 This would be an anomalous outcome not consistent with the scheme of the Act and the greater extent of the safety obligations imposed on employers as opposed to employees.

88 Further, the fact that s 26 of the Act specifically provides that an employee does not include, for the purposes of Part 4, a self-employed contractor, can be taken to be supportive of the respondent's construction of s 4(2). The absence of a similar provision in Part 3 of the Act (in which both s 19 and s 22 are contained) supports the proposition that a person could be taken to be employed for the purpose of one of the general occupational health and safety duties imposed under Part 3 and to be self-employed or an employer for the purpose of another of those duties.

Whether there was no reasonably practicable alternative

89 The appellant contended that the evidence at trial could not exclude the reasonable possibility that any failing on the part of the appellant was the product of his inattention, distraction or lack of due care, and did not

establish that there was any reasonably practicable action that he might have taken to prevent his human error in the nature of an attention, distraction or lack of due care.

90 I do not accept this submission.

91 It is not a proper characterisation of the case to assert that there was simply a momentary lapse in attention on the part of the appellant. This is contrary to the findings of fact made by the Magistrate which were not challenged.[57]

92 Paragraph 4(e) of the complaint particularised specific and identifiable acts and omissions alleged against the appellant said to have placed the safety of the Mr Salvemini at risk. These included a failure to provide any or adequate instruction to Mr Salvemini to stand clear of the spool whilst he could become entangled; a failure to ensure that he was standing clear; a failure to provide adequate instructions to Mr Salvemini to maintain a line of sight with the operator of the spool whilst it was moving; a failure by the appellant to maintain at all times a line of sight with Mr Salvemini whilst the spool was moving; a failure to stop the spool if Mr Salvemini was not within the appellant's line of sight; and a failure to provide any or adequate supervision of Mr Salvemini in the performance of his duties.

93 The appellant made admissions about the period of time immediately before the incident over which he was unable to see Mr Salvemini and Mr Toumazos. On his estimate, they were out of sight for about half a minute.[58] During this period the appellant allowed the spool to continue to operate. Mr Salvemini was not out of view momentarily whilst the appellant turned his head or became distracted or inattentive. In not taking prompt action to stop the rotation of the spool upon becoming aware that Mr Salvemini was out of sight, the appellant permitted the continuation of a state of affairs that was both unacceptable and unsafe. He made an unjustifiable presumption as to what Mr Salvemini and Mr Toumazos were doing whilst they were out of his sight, namely "having a conversation".[59]

94 Accordingly, it was not a case of the appellant exercising constant vigilance except for a moment when there was a lack of proper attention or concentration. By his own admission, the appellant confirmed that he allowed the operation of the spool to continue whilst he could not see his crew.

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[57] Paras 156 and 157 of the reasons for decision.
[58] Exhibit C30 record of interview pp 30, 34.
[59] Interview at C30 p 30.

95 In addition, the Magistrate had evidence before him of the practice of other skippers engaged in similar work and as to what action they would have taken in similar circumstances. They emphasised the necessity of shutting off the spool as soon as a crew member was out of the line of sight of the skipper. The evidence was that such action was absolutely necessary, not only because there was a risk of the unseen crew member being drawn into the spool, but because of the possibility of a crew member falling overboard. The rule was immutable. If someone was out of sight, the spool should be stopped.[60]

96 This evidence was uncontested and was accepted.[61] It was clearly open to the Magistrate to find that it was a reasonably practicable measure for the appellant to immediately halt the operation of the spool upon his becoming aware that a crew member was out of his line of sight.

97 In any event, the appellant's assertion as to the incident occurring due to a momentary lack of attention does not provide a defence to the charge. It is not incumbent upon the prosecution to establish beyond reasonable doubt that there was a measure available which may have prevented the appellant from falling into error or from being distracted whilst operating the spool. The prosecution must prove beyond reasonable doubt that there was a reasonably practicable measure able to be taken by the appellant which would have reduced or eliminated the risk to the health and safety of Mr Salvemini. The respondent established these matters by identifying several acts and omissions arising from the conduct of the appellant at the time of the incident, and in particular that the appellant could have stopped the operation of the spool immediately upon Mr Salvemini going out of his line of sight.

Conclusion

98 The appellant succeeds on the ground of appeal asserting error on the part of the Magistrate in his assessment of the weight of the indicia with respect to the characterisation of the contract between the appellant and the company. The competing indicia as to the contractual status of the appellant were less favourable of a conclusion that he was a self-employed person than as found by the Magistrate. Although the evidence nevertheless may have allowed for a conclusion that the appellant was a self-employed person by application of the civil onus, it was not sufficient to establish this fact beyond reasonable doubt for the purposes of an offence under s 22(2) of the Act.

99 I would allow the appeal and would order that the conviction be set aside and that the complaint against the appellant be dismissed.

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[60] Mr Maczkowiak tr 727.2; Mr Retsas tr 382.25; Mr Steel tr 338.32, 342.23, 342.36.
[61] Reasons for decision paras 163 -172.

PUBLICATION OF THESE REASONS

It is the practice of this Court to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Court's usual practice.