DECISION

Fair Work Act 2009
s.365—General protections

Mary Shaft
v
Diversey Australia Pty Ltd
(C2023/7216)

DEPUTY PRESIDENT BELL MELBOURNE, 2 APRIL 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – whether an employee or independent contractor – whether written contract adopted by the parties – whether sham contract – held not an employee – application dismissed.

[1] Ms Mary Shaft has made an application under s 365 of the *Fair Work Act 2009* (Cth) (Act) alleging a contravention of s 340 of the Act involving a dismissal. Necessarily, for such an application to proceed, Ms Shaft must have been an employee at the relevant time of the respondent, Diversey Australia Pty Ltd (Diversey). Diversey contends that Ms Shaft was not an employee but was, instead, an independent contractor. This decision addresses that dispute.

[2] As part of that broader dispute, there was also an issue raised about what the contractual terms between the parties actually were (as distinct from their characterisation). That issue arose from the fact that Ms Shaft's engagement with Diversey commenced from September 2021 and, prior to that, Ms Shaft had been engaged with Tasman Chemicals Pty Ltd (Tasman Chemicals) since 1991 and, from 2002, ostensibly under a contract titled "Distributor's Agreement". Diversey acquired the Tasman Chemicals business and, on its case, engaged Ms Shaft on the same terms. Ms Shaft says that the Distributor's Agreement did not constitute an independent contractor relationship and was in any case a "sham" on the part of Tasman Chemicals. Ms Shaft disputes that the Distributor's Agreement was adopted by Diversey and Ms Shaft following the acquisition and, in any case, pressed her contention that the Distributor's Agreement did not establish an independent contracting relationship and was otherwise a sham.

[3] Each party was represented at the hearing of the matter before me, with permission for representation having previously been granted. In accordance with directions issued on 8 December 2023, the matter was listed for hearing on 14 February 2024 and the parties were required to filed witness statements containing the witness evidence they intended to call. Ms Shaft filed and served a statement on her own behalf, the respondent filed statements for Ms Michelle Miles (Regional Business Director, ANZ, for Diversey) and Mr Adam Young (Health Care Business Manager for Diversey).

[4] At a mention hearing on 8 February 2024, Ms Shaft raised various matters, including a potential application for a production order and an adjournment of the hearing date to allow

time for compliance with that order. As events transpired, the issues were not pressed and were otherwise resolved by the respondent agreeing to file a further witness statement by Ms Deborah Walker (Marketing Manager, ANZ, and Director of the respondent). The hearing proceeded as scheduled.

Legislation and applicable principles

[5] Section 365 of the Act provides that a person can apply to the Commission to deal with a general protections dismissal dispute if the person has been "dismissed". A jurisdictional condition of that application is that the person was in fact "dismissed".[1]

[6] By s 12 of the Act, the term "dismissed" has a meaning defined by the criteria in s 386 but, relevantly, a person must be an employee for there to be a dismissal. There are exceptions to s 386(1) but none are presently relevant.

[7] As to the principles to be applied in characterising whether a particular contract is a contract of employment or an independent contracting arrangement, I consider the starting point for consideration is *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (***Personnel Contracting***) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (***Jamsek***).

[8] Where there is a wholly written contract whose terms are not disputed, there is usually no difficulty identifying those terms for the purpose of undertaking the exercise in characterisation (although the task of characterisation may still be a difficult one).

[9] Evidence of post-contractual conduct is generally irrelevant to the question of characterisation, although it may be relevant to establish the existence of a contractual term or terms, or where the validity of the contract is challenged as a sham or the terms of which are otherwise varied, waived or the subject of an estoppel: *Personnel Contracting* at [43] (Kiefel CJ, Keane and Edelman JJ); [177] (Gordon J).

[10] Paragraph [177] of Gordon J's judgment is as follows (citations omitted, original emphasis):

> "Of course, the general principle against the use of subsequent conduct in construing a contract wholly in writing says nothing against the admissibility of conduct for purposes *unrelated* to construction, including in relation to: (1) *formation* – to establish whether a contract was actually formed and when it was formed; (2) *contractual terms* – where a contract is not wholly in writing, to establish the existence of a contractual term or terms; (3) *discharge or variation* – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract; (4) *sham* – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement; and (5) *other* – to reveal "probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract". The relevance of subsequent conduct for the purposes of a particular statutory provision, legislative instrument or award was not in issue in this appeal."

[11] In relation to "sham", Gordon J referred to *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at 531 [34]-[35]. That was a taxation case, where one of the issues concerned was whether the terms of a trust deed correctly reflected the legal rights and liabilities of the parties concerned as they were applied in reality. After observing that, in various situations, the court may take an agreement or other instrument, such as a settlement on trust, as not fully disclosing the legal rights and entitlements for which it provides on its face Gleeson CJ, Gummow and Crennan JJ stated (citations omitted, emphasis added):

> "34. One such case is where other evidence of the intentions of the relevant actors shows that the document was brought into existence "as a mere piece of machinery" for serving some purpose other than that of constituting the whole of the arrangement. That, in essence, is the respondent's case with respect to the alleged existence of the "present entitlement" of the trustee of the E & M Unit Trust to the income of the Raftland Trust.
>
> 35. The term "sham" may be employed here, but as Lockhart J emphasised in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* the term is ambiguous and uncertainty surrounds its meaning and application. With reference to remarks of Diplock LJ in *Snook v London and West Riding Investments Ltd*, Mustill LJ later identified as one of several situations where an agreement may be taken otherwise than at its face value, that where there was a "sham"; the term, when "[c]orrectly employed", denoted an objective of deliberate deception of third parties."

[12] "Sham" in this context was similarly explained in *Personnel Contracting* at [54] by Kiefel CJ, Keane and Edelman JJ (footnotes omitted, emphasis added):

> "54. …For instance, in responding to a submission of sham in *Cam and Sons Pty Ltd v Sargent*, Dixon J spoke of investigating the "substance" of a written agreement that contained "elaborate provisions expressed in terms appropriate to some other relation", but emphasised that it was the *agreement* which was to be analysed. Lest there be any doubt, it has been held that this decision is consistent with the focus in *Chaplin* and *Narich* upon the terms of the written contract. In *Neale v Atlas Products (Vic) Pty Ltd*, this Court again considered a submission that the terms of a written agreement were a "sham". It was held that the written agreement, which "substantially set forth the conditions upon which each tiler was employed", was "the real measure of the relationship between the parties" and that "we should not be disposed to ignore it unless it can be said that the evidence establishes quite clearly that the conduct of the parties was inconsistent with it as the basis of their relationship"."

[13] Putting aside questions of identification of the terms, sham or variation, etc, recourse may be had to external events, where appropriate for the purpose of characterising the contract: *Personnel Contracting* at [175] (Gordon J).

[14] Once the terms of the contract have been properly identified and any questions of sham, waiver, etc are resolved, the task of characterising the contract is often informed by two particular considerations. As Wigney J recently stated[2] in *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 (***JMC v COT***) at [23] (emphasis added):

> "The first consideration is the extent to which the putative employer has the right to control how, where and when the putative employee performs the work: *Personnel Contracting* at [73]-[74] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); see also *Brodribb* at 24 (Mason J) and 36-37 (Wilson and Dawson JJ). The second is the extent to which the putative employee can be seen to work in his or her own business, as distinct from the business of the putative employer – the so-called "own business/employer's business" dichotomy: *Personnel Contracting* at [36]-[39] (Kiefel CJ, Keane and Edelman JJ); [113] (Gageler and Gleeson JJ); cf [180]-[183] (Gordon J). Neither of those considerations are determinative and both involve questions of degree."

[15] In relation to the element of control, as stated by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* at [73] (and see also *JMC v COT* at [24]):

> " … the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of an employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services"

[16] As for the "own business/employer's business" dichotomy, Wigney J summarised the matter thus in *JMC v COT* at [25] (original emphasis):

> " … it also "usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise": *Personnel Contracting* at [39] (Kiefel CJ, Keane and Edelman JJ); cf [180]-[182] (Gordon J). Another way of framing the question, which focusses more directly on the terms of the contract, is whether the person "is *contracted to work in the business or enterprise of* the purported employer": *Personnel Contracting* at [183] (Gordon J) (emphasis in original). One consequence of answering that question in the negative *may* be that the person is not an employee."

[17] While the elements of control and the own/employer's business dichotomy are significant matters, it remains appropriate to consider the "totality" of the relationship between the parties albeit – importantly – as framed by the rights and duties established by the parties' contract. As stated by Kiefel CJ, Keane and Edelman JJ in *Personnel Contracting* at [61] (citations omitted, emphasis added):

> "The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider "the totality of the relationship between the parties" by reference to the various indicia of employment that have been identified in the authorities. What must be appreciated, however, is that in a case such as the present, for a matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come to play out in practice but bearing no necessary connection to the contractual obligations of the parties."

[18] With the important limitation placed upon recourse to the "various indicia" being established from the terms of the parties' contract, the indicia described in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (***Stevens***) at 24 per Mason J remain relevant (citations omitted, emphasis added):[3]

> "But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question:… Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

[19] To similar effect, Wilson and Dawson JJ said in *Stevens* at 36 – 37 (emphasis added):

> "The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance."

Factual findings

[20] Ms Shaft's role since about 1996 was that of a salesperson for Tasman Chemicals, selling chemicals to customers. Tasman Chemicals was a different entity to the current respondent. Beginning in 1996, Ms Shaft's role as a salesperson was initially performed as an employee for Tasman Chemicals.

[21] In about 2002, the contractual document recording the relationship between Ms Shaft and Tasman Chemicals changed. As the effect of that document is challenged by Ms Shaft, I set out her evidence of that event and the period that followed up to around September 2021.

> "1. I was first employed by Tasman Chemicals Pty Ltd (Tasman), as an office employee in 1991 who then progressed to 'sales representative', remaining as an employee, in 1996.
>
> 2. Subsequently, in 2002, Tasman purported to convert me, without proper explanation, to an 'agent' or independent contractor.

3. Since that purported conversion, I continued to perform the same role and services as I had been providing since 1996 but no longer benefited from employment entitlements such as annual, personal, or long service leave.

4. I continued under this arrangement with Tasman from 2002 until September 2021.

5. From 2002, until September 2021, I was engaged by Tasman, purportedly as a contractor.

6. My role was to be a sales agent, selling chemicals to customers.

7. I was paid commission only and received recipient created invoices from Tasman when I was paid each month.

8. In my view, I was an employee of Tasman for all intents and purposes."

[22] Putting to one side references to a "purported" conversion and the final sentence – which expresses no more than Ms Shaft's opinion about a legal conclusion – there was no dispute about Ms Shaft's evidence as stated.

[23] Ms Shaft also states that the "only" agreement she had with Tasman Chemicals was a "Distributor's Agreement" dated 4 February 2002 (the Distributor's Agreement). That agreement, which was in evidence, was titled "Distributor's Agreement" and was made between Tasman Chemicals and Ms Shaft, the latter of whom was defined as "The Agent" in that agreement. It was signed by those parties and its substantive terms were as follows:

"**1. APPOINTMENT**

Tasman agrees to appoint the Agent as a distributor for its range of chemical products. The Agent agrees to distribute and sell products only if supplied by Tasman, unless Tasman consents in writing to an alternative supplier to provide products to the Agent. Such consent is not to be unreasonably withheld.

2. TERRITORY

The Agent agrees to sell only throughout designated areas and to designated customers unless otherwise agreed by Tasman in writing. The Agent should reside in Melbourne in order to effectively service their client base.

3. REPORTING

The Agent agrees to comply with Tasman 's reporting system and furnish a monthly report on operations. Tasman undertake to furnish the Agent with a full set of sales and debtors on a monthly basis, or more frequently as requested.

4. ADMINISTRATION

a. Selling prices will be set by Tasman. It is expected that the Agent will adhere as closely as possible to our level and pricing system, contract pricing will only be for major customers.

b. When quoting prospective or existing customers, a copy of such quotes is to be forwarded to Tasman to enable pricing to be entered onto the computer system.

c. The Agent will ensure that all customers for the products and all other persons involved in handling the products are fully informed as to the correct procedures in so far as handling and storage are concerned, and that the goods are transported and stored in compliance with relevant laws.

d. Tasman shall use its best endeavours to carry sufficient stock for the Agent operation of the business but nothing herein contained shall make Tasman liable for any loss or damage howsoever by any event outside of the control of Tasman.

5. REMUNERATION

a. Tasman agrees to pay the Agent an amount equal to 30% of the gross profit for consolidated sales in the territory. For the purpose of this agreement "gross profit" shall be calculated monthly and reflect the total amount of all invoiced sales made within the territory less the cost of producing those products by Tasman in accordance with a wholesale price list supplied to the Agent and reviewed by the parties from time to time. The gross profit is defined as the difference between the selling price and Tasman’s cost of the manufactured product. Gross profit will be expected to be around 40-50 per cent.

b. This amount is to be paid within the first ten working days of the month for the prior month’s sales.

c. Any bad debts which occur on the territory are to be shared by Tasman and the Agent, in the ratio of a full refund of Agent's commission on sales to the bad debtor. Failure to comply with Tasman’s credit policies will render the Agent fully liable for any resultant bad debts.

6. GENERAL OPERATING GUIDELINES

a. The continuance of the agency shall be dependent on the ability of the Agent to demonstrate consistent and satisfactory sales growth each year. Sales targets shall be set by mutual agreement each financial year and reviewed quarterly.

b. Tasman shall support its product range by offering National promotions. The cost for such promotions will be to Tasman's account.

c. The Agent shall not engage in any other business venture without prior approval of Tasman. It is expected that the Tasman activities should be the sole commitment of the Agent.

d. The Agent shall not employ or appoint resellers without written approval by Tasman.

   i. The Agent shall use their best endeavours to promote the products through the customers. Such promotional expenses to be approved by Tasman.

   ii. Approval for expenditure above $250.00 to be sought by the Agent from head office.

e. In the event of Tasman entering into an agreement to sell, dispose, transfer or in any other way divest itself of the business, then Tasman shall, on entering such agreement, obtain from the other party thereto a covenant that such other parties shall be bound by the terms of this agreement to the same extent as it would be as if it were Tasman.

7. PERIOD OF AGREEMENT

The agreement shall operate upon signing by duly authorised representatives for an initial period of one year. Should the target set by Tasman be not unreasonable and reached by the Agent and there are not other subsisting breaches of this agreement then the Agent shall have the option to renew this agreement under similar terms for a period of three years.

8. TERMINATION

a. Either party shall be entitled to terminate this agreement if the other party shall:

   i. Commit a material breach of any of its obligations hereunder, and shall not remedy such breach if the same is capable of remedy within thirty days of being required by written notice so to do;

   ii. Enter into liquidation except for the purpose of solvent amalgamation or reconstruction;

   iii. Being a company, have a receiver, manager or receiver and manager appointed over any part of its assets or enterprises or enter into any scheme or arrangement with its creditors, pass a resolution for winding up (except for the purpose of reconstruction) or become the subject of an application for winding up;

   iv. Being a person, commit an act of bankruptcy, or assign their estate for the benefit of or reach a composition with their creditors.

b. In the event of the distributor selling products which are competitive to Tasman, Tasman as its option shall be at liberty to refuse to supply any further products to the distributor and to terminate this Agreement by written notice.

c. This Deed shall be governed by and constructed in accordance with the law for the time being of the state of Victoria.

d. In the event that any provision of this agreement or these conditions of this agreement declared by any judicial or other competent authority to be void, voidable or otherwise unenforceable, the parties shall amend the provisions in such reasonable manner as achieves the intentions of the parties without illegality and if not agreement shall be reached it may be served from this agreement.

e. The Agent or its associates, shall not for a period of one (1) year after the termination of this agreement either on their or any other account or for any other person solicit, interfere with, or endeavour to entice away from Tasman or any related corporation any person who shall have been a customer of Tasman or the related corporation during period of employment with Tasman provided that their restriction shall only apply with respect to business of the type in which the Agent was engaged with Tasman.

f. The Agent is to provide for their own WorkCover, insurances, superannuation and taxation, and comply with all statutory reporting requirements."

[24] On 26 February 2002, Ms Shaft was issued with an Australian Business Number and was registered for the Goods & Services Tax (GST) from 1 March 2002.

[25] At least from about June 2021, Diversey was in negotiations with Tasman Chemicals to acquire the latter's chemical business. Diversey's acquisition proceeded by way of an asset purchase, by contrast to a share sale agreement.

[26] As part of that process, a due diligence data room was established to store copies of Tasman Chemical's files for inspection by Diversey. One of the files in the data room was the Distributor Agreement pertaining to Ms Shaft. There is no evidence that Ms Shaft was specifically aware of the data room process.

[27] Ms Walker was heavily involved in the acquisition for Diversey and acted as the "Integration Lead" for Diversey. Ms Walker gave evidence in her statement about the due diligence process, which was expanded by cross-examination. I infer there were hundreds, if not thousands, of documents in the data room, as Ms Walker described them in her oral evidence as "too numerous to count".

[28] Ms Shaft says that her view was that Diversey was not even aware of the contents of the Distributor's Agreement and, I infer, was not aware at around September 2021. At the time of the hearing before me, Ms Walker could not recall specifically sighting the Distributor's Agreement at the time of the acquisition, although I am satisfied the document was included in the data room. Ms Walker's evidence, which I accept, explains that the contents of the data room were copied to a Diversey-controlled server on 7 September 2021 following the acquisition. That copy contains a copy of the Distributor's Agreement.

[29] In addition to Ms Walker having access to the data room, there was a relatively confined "red list" of Diversey personnel permitted to view the data room at the time. They included "department leads", such as "HR, purchasing department, anyone who had to integrate, essentially, the different employees, purchasing customers, et cetera". Access to the data room by the cohort on the "red list" was available prior to the acquisition.

[30] As to Ms Shaft's awareness of Diversey's intention to acquire the business of Tasman Chemicals prior to September 2021, I infer, some announcement that was made in or shortly prior to about September 2021 and that Ms Shaft received that announcement.

[31] On about 1 September 2021, Ms Shaft received the following letter from the Managing Director of Diversey (the 1 September 2021 letter):

> "Mary Shaft
> c/o Tasman Chemicals Vic
>
> Dear Mary,
>
> This is to confirm that Diversey will continue with your contractual arrangement that is currently in place with Tasman Chemicals until a new Agreement is entered into between yourself and Diversey.
>
> We look forward to working with you at Diversey."

[32] The Distributor's Agreement was not attached to the correspondence. The respondent's legal representatives who appeared before me were not engaged to assist Diversey on industrial and employment matters regarding the acquisition of the Tasman Chemicals business at the time. A postscript to this decision would be that industrial and employment matters attendant with a significant business acquisition frequently involve some complexity in a specialist field, and eschewing the cost of engaging professionals with expertise in that field to assist may well be a false economy.

[33] Ms Shaft's evidence in chief was that, upon engagement with Diversey, she continued to perform her duties in the same manner for Diversey as she had been performing for Tasman Chemicals. Ms Shaft also says that, contrary to the suggestion in the 1 September 2021 letter, no new agreement was entered into. I accept that evidence.

[34] On 6 September 2021, Ms Shaft received a further letter from Diversey titled "Retention Bonus Agreement" providing an offer according to its terms. As that letter was signed by Ms Shaft, an agreement was formed (the Retention Bonus Agreement). As that agreement runs to four pages, it is not necessary to set it out in full but I will extract some of the relevant terms, as well as those referred to by the parties (emphasis added):

> "Diversey (the "Company") is currently exploring the acquisition of Tasman Chemicals (the "Target") in Australia to further strengthen our positioning in the market and expand our capabilities. This potential transaction and the integration of the two businesses is referred to as "Project Kingston".

Your continued service, assistance and dedication to the Company has been deemed essential to the Company's business needs. To incentivize you to remain employed with Diversey and assist with Project Kingston during this critical period, we are pleased to offer you a retention bonus, the terms and conditions of which are summarized in this letter ("Retention Bonus Agreement").

Retention Bonus

In recognition of your active and continued service with the Company through and until the completion of Project Kingston as described below (the "Integration Period"), we are offering you a retention bonus to induce you to remain employment [sic] with Diversey Australia, we are pleased to offer you a retention bonus as described in this document.

In recognition of your continued service with Tasman Chemicals through and until completion of Project Kingston (the "Retention Period"), we are offering you a retention bonus in the amount of $20,000, less all applicable withholdings and deductions required by law (the "Retention Bonus").

The Integration Period will last from the date of the completion of the acquisition, of the Target by the Company, till 18 months post the said date of completion.

Eligibility Conditions for Retention Bonus Receipt

You will be eligible to receive the Retention Bonus if all of the following eligibility criteria are satisfied, as determined in the Company's sole discretion, at all times during the Integration Period or during such other period expressly referred to below:

1. Your performance has been satisfactory from the date of this document through the end of the Integration Period. Including your active support of the integration activities to combine the Target business with the current business of the Company.

2. At all times following your execution of this letter, you observe and comply with all confidentiality provisions regarding Project Kingston, including the terms and conditions of any red list letter, restrictive covenants agreement, or any other written agreement designed to protect the confidentiality and integrity of activities related to Project Kingston.

3. Your conduct is not in violation of any Company policies, practices, procedures and/or any federal, state, or local law, regulation or other governing authority.

4. You are actively employed/contracted at all times with the Company throughout the Integration Period and on the last day of the Integration Period.

5. You agree and acknowledge that should your employment/contract end for any reason (including voluntary and involuntary termination for any reason or no reason) on or before the last day of the Integration Period, any claim to any and all portion(s) of the Retention Bonus shall be deemed forfeited, voided, and/or nullified

unless the Company otherwise agrees in a written document signed by Wayne Hill, Managing Director Diversey Australia.

6. You have not given notice of your intent to resign from employment/contract on or before the last day of the Integration Period unless the Company otherwise agrees in writing.

7. The Company has not given you notice of its intent to terminate your employment/contract on or before the last day of the Integration Period.

8. You agree and acknowledge that the Integration Bonus will not be deemed "earned" until the day following the last day of the Integration Period.

9. You agree and acknowledge that this Retention Bonus Agreement has no effect on your status as an at-will employee with Company. Either you or the Company may terminate the employment relationship at any time, with or without cause.

10. You agree and acknowledge that the Retention Bonus is not a right or general privilege of employment with Company, but rather offered to you under the specific terms and conditions set forth in this Retention Bonus Agreement.

[Terms dealing with confidentiality, manner of payment and manner of acceptance omitted]

Other Terms and Conditions

1. The payment of the Retention Bonus is subject to the terms and conditions of this letter and shall not be due until such time when all eligibility criteria and terms and conditions set forth in this Retention Bonus Agreement are satisfied as deemed by Company officials.

2. The Company shall retain the right to reduce the Retention Bonus by any outstanding amounts owed to the Company per other written agreements between you and the Company (e.g., personal corporate credit card charges, sign-on bonus repayments, relocation repayments).

3. This Retention Bonus Agreement contains all of the understandings and representations between Diversey Inc. and you relating to the Retention Bonus and supersedes all prior and contemporaneous understandings, discussions, agreements, representations, and warranties, both written and oral, with respect to any integration bonus.

4. This Retention Bonus Agreement may not be amended or modified unless in writing signed by Wayne Hill and you.

5. This Retention Bonus Agreement (including any and all exhibits attached hereto) are governed by, and construed in accordance with, the laws of Australia, including its statute of limitations.

6. The captions of this Retention Bonus Agreement are not part of the provisions hereof and will have no force or effect.

We look forward to your continued employment with us."

[35] Ms Shaft's evidence in chief was that at no time had anyone from Diversey told her directly that she was not an employee of Diversey. The respondent challenges that evidence.

[36] Ms Shaft's witness statement also contained statements about various post-contractual matters. Those matters included:

- Diversey set prices for her to sell at and gave her budgets.
- Diversey invoiced the customers Ms Shaft sold to directly.
- Diversey controlled customer accounts directly, met with those customers directly (without Ms Shaft's involvement or knowledge), made decisions to supply customers via an alternative third-party distributor if usual supply was going to take too long.
- Diversey "required" Ms Shaft to work Monday to Friday during business hours. Ms Shaft said she "could not work for any other employers" and the role was full-time.
- Ms Shaft was included in the Professional Sales Team and reported directly to the Victorian State Manager.
- Diversey "required" Ms Shaft to attend "regular" meetings, "usually on a monthly basis" and these meetings included all other salespeople and employees.
- Diversey provided her and other salespeople with a "daily sales report", detailing orders placed and invoiced for the day.
- Ms Shaft estimated there were about 50 – 70 salespeople carrying out the "exact same role" as her who were employees of Diversey.
- Ms Shaft said her role "could not be subcontracted because of the relationship I had established with the customers over many decades."
- Ms Shaft said Diversey provided her (and others) with a "welcome pack" that included a "polo shirt with logo as part of a uniform."
- Ms Shaft had a Diversey email address, which she used for internal and external emails. Her email signature included the Diversey logo and gave no indication she was a contractor.

[37] Some of the above evidence was uncontroversial, some was embraced by Diversey and other parts challenged.

[38] For example, I consider it uncontroversial that Diversey set Ms Shaft's selling prices and gave her budgets. So much was expressly stated in the Distributor's Agreement, which was a matter that Diversey relied upon to demonstrate that the *only* arrangements between the parties were those consistent with the Distributor's Agreement. Similarly, it was not in controversy that Diversey issued invoices to the customers to whom Ms Shaft sold product to, nor that Ms Shaft had a Diversey email address or was issued a welcome pack.

[39] It was not in controversy that Ms Shaft only performed work on behalf of Diversey although the reason and significance for that state of affairs was in dispute. Ms Miles gave

evidence there was no requirement to work those hours and what hours she did work was at Ms Shaft's discretion, or as agreed between her and any relevant customer.

[40] On the question of attending meetings, each of Ms Miles and Mr Young stated that Ms Shaft did not attend sales meetings, with the only possible meeting of note being a "town hall" style meeting and possibly a "check in" meeting. Ms Shaft did not file a responsive witness statement in chief and, so far as there is conflict, I prefer the evidence led by Diversey on this issue. While it was put to Mr Young that Ms Shaft's evidence did not refer to "sales" meetings, when sales meetings are removed from the subset of meetings Ms Shaft says she did attend, there was no explanation given in her evidence in chief as to what those meetings were. There was no other evidence before me as to non-sales meetings that I could infer that Ms Shaft attended any meetings of significance or note.

[41] One issue of controversy concerns Ms Shaft's evidence that at no time had anyone from Diversey told her directly that she was not an employee of Diversey. Mr Young gave evidence that, in early 2022 (and within about six months after Diversey acquired the Tasman Chemicals business) he had a discussion with Ms Shaft. He said he approached Ms Shaft and asked her whether she would consider joining Diversey as an employee. One of the reasons Mr Young advanced in favour of his suggestion was better protections and entitlements.

[42] Mr Young's evidence was that Ms Shaft explained to him that she preferred being an independent contractor and referred to the financial benefits of receiving a commission and the autonomy. Mr Young deposed to a similar conversation in mid-2023. Ms Shaft did not provide a responsive witness statement in chief to Mr Young's evidence, despite directions affording her an opportunity to do so. Mr Young was not challenged on his evidence and I accept it.

[43] I am fortified in the above conclusions by an email penned by Ms Shaft herself on 28 August 2023. The context of that email was an email request from Ms Miles on 24 August 2023 about how frequently Ms Shaft saw customers and various matters about those visits. A follow-up email was sent on 28 August 2023.

[44] In response to Ms Miles' request, Ms Shaft wrote (emphasis added):

> "I am confused by the requests in your email below, given that you have access to all the sales data and I cannot see the necessity or relevance of providing and in-depth response to your queries as the sales speak for themselves. Further, I do not have access to SAP, which means you actually have a greater insight to the sales than I do and for someone in my role, the sales are of paramount importance.
>
> As you are aware, I am not an employee of Diversey and do not work or get paid on an hourly rate. I do not get paid a salary but rather only a commission for my sales and my job is to obtain sales and service the clients. There is no specific procedure for how this outcome is achieved given that I am not an employee and there is nothing in my contract which governs the manner in which I do my job, including limitations or specifications in relation to the frequency that I see clients, the time spent to do my job or how I manage my day.

> What I have outlined above has been highlighted by the fact that for the past two years and since Diversey acquired Tasman, I have never been included in any sales meetings as I understand they are for Diversey employees only - clearly highlighting that I am not an employee and instead have a different role. The first and only sales meeting I was included in was when you were in Melbourne at the beginning of this month.
>
> Despite the above and in an attempt to address some of your queries, I can say that it is very difficult to determine customer service frequency and it is predominantly dependant on each clients circumstances. One example however, is that I service many aged care facilities regularly and this is very time consuming as when I am on site, I visit the kitchens, laundries, housekeeping rooms and management. Further, I check equipment, conduct stock takes and place orders and also conduct training for the staff, The majority of the aged care sites require fortnightly attendance and some are monthly.
>
> l also service six Australian Unity sites which order via Bunzl for faster deliveries as Diversery were unable to do.
>
> I trust the above clarifies my role for you, however, if you could perhaps explain why you are collecting this information and what relevance it has, I may be able to provide some more specific information."

[45] Save as identified above, Ms Shaft did not give evidence about any terms of conditions of her putative employment, other than by the general reference to the Distributor's Agreement. I do not consider it in dispute, and I find, that Ms Shaft's remuneration was set in accordance with tax invoices she issued, based on a gross profit amount for product she sold. She was not paid annual leave, sick leave, or superannuation. She provided her own car (and made tax deductions for the same).

[46] I also find that Ms Shaft had no direct line of report from her to Diversey, although Mr Young (who was the Victorian State Manager for Diversey) was her primary point of contact. Ms Shaft was not required to attend or work from a Diversey office.

[47] Finally, Ms Shaft remitted GST collected upon payment of the invoices she issued to Diversey. Diversey made no deduction for income tax on account of the payments it made to Ms Shaft on account of the invoices she rendered.

[48] While I note that the above findings do not represent the totality of the parties' evidence, I consider they capture the salient matters to determine the issues before me. Although I have not set out all aspects of the parties' evidence, I have considered them and they do not affect the conclusions that follow.

Consideration

What were the contractual terms?

[49] The first issue it is necessary to deal with is what were the contractual terms in place between the parties. Diversey states those terms are substantially those contained in the Distributor's Agreement, as adopted by operation of the 1 September 2021 email.

[50] It is not entirely clear exactly what Ms Shaft's written submissions contend her contractual arrangements are, if they are not embodied by the Distributor's Agreement. For example, after noting the "purported" conversion of Ms Shaft's employment with Tasman Chemicals in 2002 to an independent contractor relationship under the Distributor's Agreement, her written submissions state:

> "4. The Applicant continued under this arrangement with Tasman from 2002 until September 2021.
>
> 5. In September 2021, Tasman was purchased by the Respondent, Diversey Australia Pty Ltd (Diversey), whereupon the Applicant was offered to "*continue with [her] contractual arrangement that is currently in place until a new Agreement is entered into*" in a letter dated 1 September 2021 (1 September Letter).
>
> 6. The Applicant did not enter into a new agreement with the Respondent other than a retention agreement dated 6 September 2021 which referred to her employment status (outlined below at paragraph [13]). Nor was she provided with a deed of novation or any other document setting out the status of her ongoing working arrangement with Tasman other than the 1 September Letter.
>
> 7. Conversely, proceeding correspondence and agreements offered by the Respondent was indicative of an employment relationship, as set out below in paragraphs [13] to [21].
>
> 8. The Applicant was correctly engaged as an employee by Tasman in 1996 and was unlawfully converted to an 'independent contractor' in 2001 and continued under this sham arrangement with Tasman and later the Respondent until her termination."

[51] As I discern Ms Shaft's position, she accepts that the Distributor's Agreement is the putative contract between the parties but contends that arrangement is a sham. Being a sham, however, Ms Shaft does not otherwise point to what she considers the contractual terms are. Similarly, if the effect of the 1 September 2021 letter was not to adopt the Distributor's Agreement as contractual terms between Diversey and Ms Shaft, Ms Shaft does not identify what the contractual terms between the parties were.

[52] Save for one element that I do not consider material, I am satisfied that the contractual terms governing the relationship between the parties are those in the Distributor's Agreement, as adopted by effect of the 1 September 2021 letter.

[53] The Distributor's Agreement was expressed to commence operation "upon signing", which occurred on 4 February 2002. The period of agreement was expressed as an "initial period of one year", albeit there was an express contractual right (with some qualifying conditions) granting the Agent the option to renew for a further three years.

[54] There is no evidence that the contractual option was exercised, although Ms Shaft's evidence and submissions make it clear that Tasman Chemicals and Ms Shaft continued those arrangements until the acquisition by Diversey.

[55] Of course, "[w]here a wholly written contract has expired but the parties' conduct suggests that there was an agreement to continue dealing on the same terms, a contract may be implied on those terms (save as to duration and termination)".[4] That description aptly describes the situation for the balance of the time with Tasman Chemicals commencing 1 year after the Distributor's Agreement was signed.

[56] The Distributor's Agreement contained a promise, by Tasman Chemicals, that if it entered into an agreement to sell or in any way divest itself of the business, it would obtain a covenant that such other parties shall be bound by the terms of the Distributor's Agreement to the same extent as it would be as if it were Tasman Chemicals.

[57] Tasman Chemicals did enter into an agreement to divest its business and, objectively, this was a fact known to both Ms Shaft (albeit later in time) and Tasman Chemicals. Objectively, they would be understood as understanding that Tasman Chemicals would covenant with the purchaser for a contract in the same terms binding the purchaser. The covenant in the Distributor's Agreement did not specify whether that might be by novation or a fresh contract.

[58] By the 1 September 2021 letter, Diversey wrote to "confirm" that Diversey would "continue with your contractual arrangement that is currently in place with Tasman Chemicals". Objectively, the language of *confirming* the continuance of Ms Shaft's contractual arrangement is suggestive of the mechanism requiring Tasman Chemicals to procure a covenant in Ms Shaft's favour with the purchaser. Whether this was the case or not does not affect my conclusions that follow.

[59] Ms Shaft suggests that Diversey did not know of the existence of the Distributor's Agreement when it wrote the 1 September 2021 letter. I consider that proposition improbable, although I accept that Diversey's evidence on who knew what at the time does not identify any specific person with recollection of the Distributor's Agreement in about September 2021. I consider Ms Shaft's proposition improbable because I am satisfied that the Distributor's Agreement was one of the contracts in the data room that Diversey had access to prior to acquisition. It was also the case that "red list" Diversey staff, including heads of department, had access to the data room, which suggests that one of those people with responsibility for employment or contractor arrangements would have sighted it.

[60] At the very least, Diversey was plainly aware that Ms Shaft had a current contract with Tasman Chemicals because it wrote to her about it to "confirm" that "your contractual arrangement that is *currently* in place" would continue. While it is possible the source of that information was located from a source other than the Distributor's Agreement, it appears improbable that Diversey would write to Ms Shaft with a promise to continue her current contract without having any idea what was in it.

[61] However, even if Diversey had no awareness at all about the existence or terms of the Distributor's Agreement, the question of the terms incorporated by reference to the "contractual

arrangement that is currently in place with Tasman Chemicals" must be assessed objectively. Objectively, the only conclusion this points to is the Distributor's Agreement.

[62] The position is somewhat analogous to a party signing a contract without having read it. It matters not that the party did not read it, because the affixation of a signature is, objectively, a representation to an ordinary reader of the document that the party intends to be legally bound by it. As stated by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [45] (emphasis added):

> "It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be. …"

[63] Ms Shaft accepted the terms of the offer in the 1 September 2021 letter by continuing to perform her usual duties without demur. While there are necessarily some implied modifications to the terms of the Distributor's Agreement, such as references to "Tasman" would clearly now be read as references to "Diversey", none of those modifications are material to this decision.

[64] Ms Shaft appears to rely upon the Retention Bonus Agreement as establishing an employment relationship. I do not consider that agreement had any such effect. That agreement was no more and no less than a "retention" agreement. While it did contain references to Ms Shaft being an "employee", it also contained references to her being an "employer/contractor", the latter strongly suggestive that this was a carelessly crafted form document designed to cover both employees and independent contractors. No term of that agreement expressed an intention to affect any aspect of the legal relationship between Diversey and the letter's recipient. The Distributor's Agreement, nor any other agreement, was not mentioned.

[65] While the general rule in cases such as this is that post-contractual evidence is inadmissible for the task of characterisation, this is a case where post-contractual evidence can assist in identifying the *terms* of the contract between the parties. That evidence only points to a conclusion that the contract agreed by the parties as a result of the 1 September 2021 letter is the Distributor's Agreement.

[66] Firstly, there is Ms Shaft's own evidence. She states that she continued to perform her duties with Diversey in the "same manner" as she did for Tasman Chemicals. Ms Shaft's submissions state (emphasis added):

> "9. From 1 September 2021 until her dismissal on 31 October 2023 (Working Period), the Applicant continued under her previous contractual arrangement she had with Tasman."

[67] Putting aside the issue of sham and characterisation (which Ms Shaft qualifies the above statement against in her submissions), the contractual arrangement with Tasman Chemicals was the Distribution Agreement.

[68] Secondly, there is the unchallenged evidence that Ms Shaft issued invoices, collected and remitted GST, and was paid commission all in accordance with the Distributor's Agreement.

[69] Finally, there are the acknowledgements Ms Shaft made to Mr Young and, more starkly, in her email on 28 August 2023 to Ms Miles about her status as a contractor, and not an employee. While Ms Shaft's stated opinions as to her legal status were exactly just that – opinions – they were nonetheless consistent with the fact that the only contractual *terms* between the parties were those recorded in the Distributor's Agreement.

[70] Clearly, Ms Shaft's opinion about her status changed after the Distributor's Agreement was terminated, which brings me to the issue of whether the Distributor's Agreement was a sham or was properly characterised as an employment contract.

Was there a sham?

[71] Identification of a "sham" is not synonymous with the characterisation of a contract as one for services versus one of services. Put differently, a contract expressed to be an independent contractual arrangement for services may be correctly characterised as an employment contract of services without there being any question of sham. Gageler and Gleeson JJ adopted as instructive the following proposition regarding the task of characterisation: [5]

> "It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties."

[72] This was exactly the outcome before the High Court in *Personnel Contracting*, where there was no suggestion of sham[6] but where a majority concluded that a contract expressed to establish an independent contracting relationship was, properly construed, a contract of employment.

[73] As set out above, "sham" in this context can mean a contract "brought into existence "*as a mere piece of machinery*" for serving some purpose other than that of constituting the whole of the arrangement".[7]

[74] Kiefel CJ, Keane and Edelman JJ stated that the identification of sham is directed at "the real measure of the relationship between the parties" and that "we should not be disposed to ignore it unless it can be said that the evidence establishes quite clearly that the conduct of the parties was inconsistent with it as the basis of their relationship".

[75] The high watermark of the evidence alleging sham is in Ms Shaft's statement, made in the context of her being an employee in 2002 where she converted "without proper explanation" and that she continued to "perform the same role" since 2002 as she did previously. I do not consider the evidence demonstrates any sham by Tasman Chemicals, let alone quite clearly demonstrates it.

[76] To the contrary, the evidence shows that Tasman Chemicals and Ms Shaft acted *in accordance* with the Distributor's Agreement, in that she was paid commission only upon

invoices, and no longer received employment entitlements such as annual, personal or long service leave. She also remitted GST throughout that entire period and paid her own income tax, again in accordance with the Distributor's Agreement. Ms Shaft's statements about the "purported" conversion and her "view" that she was an employee are no more than her opinions as to the character of the Distributor's Agreement, but they evince no sham of the kind required by the cases.

[77] Even if there was a "sham" with Tasman Chemicals (which I reject), it does not follow that an unstated and unknown sham would propagate through to the different contract – albeit, on the same terms – with Diversey. There is simply no evidence to suggest any sham on Diversey's behalf, such that either it or Ms Shaft were acting inconsistently with the written terms of the Distributor's Agreement. The opposite is the case.

The characterisation of the Distributor's Agreement

[78] Having concluded that the Distributor's Agreement is the sole embodiment of the contractual terms between the parties, other than terms implied by law, I note that the agreement can fairly be described as a comprehensive, written agreement.

[79] Addressing the various "indicia" of matters concerning the task of characterisation, I start with "control". The terms of the agreement provide little in the way of direct contractual control over Ms Shaft's performance. The appointment is stated generally "as a distributor for its range of chemical products".

[80] The contract does not state *when* product must be sold or *how* it is to be sold[8] or any particular product mix. Indeed, the entirely commission-based payment structure is evidently intended to incentivise the agent to use her skill and ability to maximise sales rather than prescribing how they might be achieved.

[81] There are specific aspects of control or regulation of work under the contract, but I consider they are confined and do not evince an overall contractual right of control in Diversey's favour that is indicative of an employment relationship. The matters indicating areas of control are:

- An obligation to exclusively supply the principal's products.
- Selling is only permitted in "designated" areas and to "designated" customers.
- Product pricing was set by the principal.
- The Agent was obliged to "comply with [the principal's] reporting system and furnish a monthly report on operations".
- Copies of quotes to customers were to be forwarded to the principal to enable pricing to be entered into the principal's computer system.
- The Agent was obliged to ensure customers were "fully informed" as to the correct procedures for handling and storage of products and that such products were transported in "compliance with relevant laws".
- The Agent shall not engage in "any" other business venture without prior approval and it was expected that the Agent's activities for the principal should be the "sole commitment of the Agent."

[82] Of the above contractual features, I consider that the expectation that work under the contract will be the "sole commitment" of the Agent is the strongest indicator of control in a general sense, although I consider it falls well short of the level of control indicated by the authorities, even accounting for the other factors such as customer designation.

[83] The fact that the territory and customers were "designated" is not a factor that points strongly in either direction. Many commercial arrangements between suppliers and distributors – eg franchisees - will comprehensively regulate territorial or customer rights.

[84] The fact that pricing is set by the principal reflects that title to goods does not pass between the principal and Ms Shaft. While the passing of title would clearly point more strongly to an absence of control (and would be correlatively relevant to the "own/employer's business dichotomy") it is not a decisive factor. Again, there are numerous commercial arrangements where a supplier appoints a selling agent but title to goods is retained by the supplier for the purpose of allowing price control, the protection of intellectual property rights, safety, warranties, and numerous other rational commercial factors. There is nothing exceptional in such a practice.

[85] The provisions dealing with reporting and administration are simply necessary incidents of a distribution agreement based on commission payments. It would be commercially chaotic for a commission-based arrangement to operate without knowing precisely what was sold, to whom, when and for what quantities.

[86] One factor pointing against the requisite level of control is capacity to appoint resellers. While that contractual clause is expressed in the negative – "The Agent shall not employ or appoint resellers without written approval by Tasman" – the reference to written approval objectively indicates that appointment of resellers is permissible subject to that important qualification.

[87] As stated by the Full Court in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 at [74] (citations omitted, emphasis added):

> "In *Chaplin* at 391, in the passage reproduced at [16] above, it was held that a wholly unlimited right of delegation is "almost conclusive" against the representative being an employee. The reasoning of the Privy Council must also apply to a wholly unlimited right to subcontract. As is demonstrated by the reasoning in *Jamsek*, that conclusion does not mean that a lesser or more qualified contractual right to delegate or subcontract is other than a feature that is generally inherently inconsistent with an employment relationship. The degree of inconsistency must be examined in the characterisation of the relationship as established by the totality of the contractual relationship between the parties."

[88] Ms Shaft plainly did not possess a "wholly unlimited" right of delegation. Her capacity to appoint a reseller was more limited. While the contractual right of the principal to veto the appointment of any reseller was largely unconfined, the fact that the contract did contemplate appointment of resellers is a matter pointing against an employment relationship. However, if approval to appoint a reseller was granted, it is difficult to envisage how this could be achieved compatibly with an employment relationship.

[89] As to the "own/employer's business dichotomy", the evidence on this matter cuts both ways. There is also some overlap regarding the indicia of "control", so I will state these matters briefly.

[90] In Ms Shaft's favour is the fact that the Distributor's Agreement requires her sole commitment. That is indicative that the business Ms Shaft was working in was that of Diversey, with little practical opportunity for her to develop any outside business arrangements. Of course, this is far from determinative. There are many commercial arrangements between contracting parties where the service provider is required to dedicate all of its time to the contracted services.

[91] As noted above, the capacity for Ms Shaft to set her own prices would have more strongly indicated Ms Shaft was operating her own business, although the inability of an agent to set prices is a recognised feature of commercial arrangements between principals and agents. As stated by Gordon J, asking whether a person is working in their own business may not always be a suitable inquiry for modern working relationships.[9] The Distributor's Agreement neither provided for nor proscribed for tools or equipment, albeit the major items most likely contemplated by a sales representative might be a car, a telephone and computer.

[92] One feature potentially more indicative of Ms Shaft conducting her own business was the contractual distribution of risk between herself and Diversey for customers' bad debts. These bad debts were to be shared between the parties such that Ms Shaft's commission for those debts would be refunded to Diversey. However, in a practical sense, this reflects no more than a practice that commissions are only payable on sales that have been paid, which is also a feature of employment arrangements involving commission-based payments.

[93] Turning to some of the other factors recognised by the authorities, namely the mode of remuneration, the provision for paid holidays, the deduction of income tax, and the provision for insurance, these are factors generally pointing against an employment relationship save for mode of remuneration.

[94] While the mode of remuneration – being a percentage of gross profit - is a factor superficially pointing against an employment relationship, the contractual reality is that profit was determined by the selling price, which was set by the principal. Moreover, as noted above, commission-based remuneration is a well-known feature of many employment relationships and I consider this factor points in neither direction.

[95] By contrast, the responsibility of Ms Shaft for her income taxation, her collection of GST, and her responsibility for superannuation are factors pointing to an independent contracting relationship, as is the obligation to obtain and pay for Workcover and other insurances.

[96] Considering the totality of the arrangements, I find that, properly characterised, Ms Shaft's contractual relationship under the Distributor's Agreement was a contract for service as an independent contractor, not a contract of services by employment.

Disposition

[97] As Ms Shaft was not an employee, it follows that she was not "dismissed" within the meaning of s 365 of the Act. The respondent's jurisdictional objection is upheld and Ms Shaft's application is dismissed. An order[10] giving effect to that decision will be separately issued.

DEPUTY PRESIDENT

Appearances:

L Martin of Counsel instructed by D Bean of KCL Law for the Applicant
C Pase of Counsel instructed by N Keijzer of King & Wood Mallesons for the Respondent

Hearing details:

2024.
Melbourne:
February 14.

Printed by authority of the Commonwealth Government Printer

<PR772616>

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[1] *Coles Supply Chain Pty Ltd v Milford and Another* (2020) 279 FCR 591.

[2] While the decision was overturned on appeal, his Honour's statement of the principles described above was accepted as correct: see *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 at [9].

[3] See also *Personnel Contracting*, [174] (Gordon J).

[4] *Personnel Contracting* at [178], citations omitted (Gordon J).

[5] *Personnel Contracting* at [135] (Gageler and Gleeson JJ).

[6] *Personnel Contracting* at [23] (Kiefel CJ, Keane and Edelman JJ), [166] (Gordon J).

[7] *Personnel Contracting* at [177], citations omitted (Gordon J).

[8] Compare *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 at [91] – [103].

[9] *Personnel Contracting* at [181].

[10] PR772821