DETERMINING EMPLOYEE STATUS: *UNITED MARINE PRODUCTS V ANGATIRI* [2007] KICA 17

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INTRODUCTION

Drawing the line between employees and independent contractors is often difficult as the legal tests are somewhat imprecise and each case is very much determined on its own facts. The question of how the English common law legal tests for distinguishing between employees and independent contractors should apply in the University of the South Pacific (USP) region,[2] and whether the region needs different tests than those found in English common law, has not often been considered.[3]

The distinction is also interesting as it is a mixed question of fact and law. As appellate courts do not have the authority to revisit questions of fact, the legitimate role of appellate courts in hearing appeals relating to the question of whether a party is an employee can be difficult to determine.

In *United Marine Products v Angatiri*[4] the Kiribati Court of Appeal canvasses both the legal tests for how to distinguish between an employee and an independent contractor and the law on the role that appellate courts can play in hearing such appeals.

BACKGROUND

Angatiri Toantabanga (the worker) signed a contract with United Marine Products in July 2004 to work diving for *beche-de-mer*. On 30 August 2004 he died while diving. The matter was brought to court by the worker's widow. The central issue was whether the worker could be considered an employee; if so, his widow would be entitled to compensation under the *Workmen's Compensation Ordinance*.[5] In the High Court Chief Justice Millhouse found that the worker was an employee, and initially fixed compensation at $11,000.[6] Four days later the Chief Justice used the "slip rule" to correct

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[2] USP Member countries are: Cook Islands, Fiji, Kiribati Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.
[3] The main USP region case to consider this issue in detail is the Vanuatu Supreme Court case of *Public Prosecutor v Lowen* ([2003] VUSC 31 http://www.paclii.org), which produced the "multi-factor test". *Hassan v Transport Workers Union* ([2006] FJSC 11 http://www.paclii.org) also discusses the question, but is the facts of that case relate to employee/independent contractor status of taxi drivers, on which there is a long line of case law. As a result the judgment, while it canvasses the authorities, does not discuss the nature of the authorities.
[4] [2007] KICA 17 http://www.paclii.org.
[5] [Cap 102].
[6] *Angatiri v United Marine Products Ltd - Assessment of Damages* [2006] KIHC 131 http://www.paclii.org.

an error in his calculations and changed the amount to $22,000.[7] This rule appears the *High Court (Civil Procedure) Rules 1964*, which provides, in order 30 rule 11, that:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal.

United Marine Products (the appellant) appealed both the finding that the worker was an employee and the quantum of damages.

THE COURT OF APPEAL DECISION

The Court of Appeal's decision was divided into three main parts:

- 'Employee or independent contractor?';[8]
- 'The amount of compensation awarded';[9] and
- 'The slip rule'.[10]

Employee or independent contractor?

The Court of Appeal began by considering the facts. The terms of the agreement suggested that the intention of the appellant was to create an independent contractor arrangement, as the appellant was referred to as a 'sea cucumber buyer'[11] and the agreement specified '[t]hat the [worker] is to sell its sea cucumber to [the appellant].[12] The worker was required to assume the risk of diving, and there was a clause that the appellant 'has no involvement with accident happened to the diver in regard to various forms of compensation',[13] although, as noted by the Chief Justice in the High Court, if the worker were an employee then this clause would be invalid due to s 29 of the *Workmen's Compensation Ordinance*.[14] The worker also had responsibility for checking that equipment was safe before using it, although the equipment was supplied by the appellant.

In terms of other facts, the worker:

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[7] *Angatiri v United Marine Products Ltd - Order* [2006] KIHC 132 http://www.paclii.org.
[8] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [9].
[9] Ibid [16].
[10] Ibid [24].
[11] Ibid [7].
[12] Ibid.
[13] Ibid.
[14] Ibid [8]. Section 29 of the *Workmen's Compensation Ordinance* [Cap 102] states 'Any contract or agreement, whether made before or after the commencement of this Ordinance, whereby a workman relinquishes any right of compensation from an employer for injury arising out of and in the course of his employment, shall be null and void in so far as it purports to remove or reduce the liability of any person to pay compensation under this Ordinance…'

> along with other divers was taken to the island by one of the company's ships. The arrangement was that the fare of $240 would be paid out of his earnings. They all stayed in the maneaba at Kabuna village on Tabiteuea, apparently at the company's expense. The company supplied all the diving equipment and a speedboat to take the divers to where they were to dive. There were no fixed hours of work, and Angatiri was given no specific instructions on the manner of diving, or where or when to dive. The company paid him according to his catch, and neither Provident Fund nor tax deductions were made from the total of $1901 he received.[15]

The legal principles that applied were drawn from English common law. The Court of Appeal noted that the form of the contract should not be decisive, but that, instead 'the Court must look at the realities of the situation…'[16]

In considering "the realities of the situation" the High Court relied on *Gould v Minister of National Insurance*,[17] which in turn quoted Lord Thankerton in *Short v J & W Henderson Ltd*.[18] In that case 'his Lordship proposed four indicia of a contract of service… [which] were "(a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the doing of the work; and (d) the master's right of suspension or dismissal".'[19] The Court of Appeal noted that '[t]he law has developed since Lord Thankerton wrote in 1946'[20] and also referred to *Market Investigations Ltd v Minister of Social Security*[21] as affirmed in *Lee Ting Sang v Chung Chi-Keung*.[22] The test from *Market Investigations* is:

> The fundamental test to be applied is this: "is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he

[15] Ibid [9].
[16] Ibid [11].
[17] (1951) 1KB 731.
[18] (1946) 39 BWCC 62.
[19] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [10].
[20] Ibid [12].
[21] [1969] 2 QB 173.
[22] [1990] 2 AC 374.

> has an opportunity of profiting from sound management in the performance of his task.[23]

The Court of Appeal noted that the *Market Investigations* test is 'a little remote from this scuba diver fishing for beche-de-mer off Tabiteuea',[24] but found that, in conjunction with Lord Thankerton's tests, there is appropriate guidance for a court that is trying to decide someone's employment status.

The role of an appellate court

Although counsel for both sides argued on the facts before the Court of Appeal, the court did not consider the merits of counsel's arguments in this area, for the simple reason that an appellate court does not retry questions of fact. The court relied on *Bryson v Three Foot Six Ltd (No. 2)*[25], which in turn relied on *Lee Ting Sang v Chung Chi-Keung*.[26] The law, as adopted by the Kiribati Court of Appeal, is that:

> Where a decision either way is fairly open, depending on the view taken, it is treated as a decision of fact, able to be impugned only if in the process of determination the decision-maker misdirects itself in law.[27]

In this case the Court of Appeal found that, as the decision was fairly open, the Chief Justice was entitled to reach the decision he made.

The amount of compensation awarded

Having upheld the decision that the worker was an employee, the Court of Appeal next had to consider whether the amount of compensation awarded under the *Workmen's Compensation Ordinance* [Cap 102] was correct. This Act provides that, in the case of death, 'if the workman leaves any dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to 48 months' earnings or $25,000 whichever is less'.[28] As the worker had left a widow and three young children[29] this was the appropriate measure to use, but the difficulty was that the worker had only worked one month when he died and so there was no clear measure of 48 months' earnings.

In the month that the worker had worked as a diver he earned $1901. In the High Court it was argued by the plaintiff's counsel that this amount should be taken as his average monthly earning and the amount of compensation worked out from this. The judge,

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[23] As quoted in *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [12].
[24] Ibid [13].
[25] [2005] ERNZ 372.
[26] Above n 19.
[27] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [15], quoting *Bryson v Three Foot Six Ltd (No. 2)* [2005] ERNZ 372.
[28] Section 6(a) *Workmen's Compensation Ordinance* [Cap 102] as amended by the *Workmens' Compensation (Amendment) Act 1994.*
[29] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [17].

however, looked to section 12(1) of the *Workmen's Compensation Ordinance* [Cap 102], which provides that:

> where by reason of the shortness of the time during which the workman has been in the employment of his employer or the casual nature of the employment or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average monthly amount which, during the 12 months previous to the accident, was being earned by a person of similar earning capacity in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person of similar earning capacity in the same grade employment in the same class of employment and in the same district

The court considered the average income in Kiribati, and held that '[i]t would be absurd - and very unfair to the Respondent - to calculate earnings for 48 months on one month only, a month in which Angatiri earned a very large amount in comparison to the other 47 months.'[30] Instead, the judge found that he had to 'wield the broad axe'.[31] Based on the evidence it appeared that the workers average weekly salary had been $100, so in 24 months the worker would have earned $10,400. 'Coming to a final figure… [the court took] into account his much higher earnings in the last month'[32] and rounded the amount up to $11,000, (which was later doubled to $22,000 as discussed in the next section below).

In the Court of Appeal the appellant's counsel argued that 'the Chief Justice was not entitled to take this approach'[33] and that it was made on the basis of inadequate evidence. As a result the case should be referred back for reconsideration as to compensation. The Court of Appeal declined to accept this argument, instead taking a pragmatic view. It found that there was unlikely to be any better evidence, and that the High Court had assessed the damages in the best manner that it could. As a result, the Court of Appeal held that '[t]here is no point in referring the case back.'[34]

The slip rule

The final ground of appeal was that the Chief Justice should not have used the slip rule to change the amount of compensation from $11,000 to $22,000. The appellant's counsel, relying on *Storey & Keers Ppty Ltd v Johnstone*,[35] argued that the slip rule should not be used 'if the proposed amendment requires the exercise of an independent discretion or is a matter upon which a real difference of opinion might exist… and that in any event the Chief Justice should have given his reasons for the amendment he made'.[36]

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[30] *Angatiri v United Marine Products Ltd - Assessment of Damages* [2006] KIHC 131 http://www.paclii.org.
[31] Ibid.
[32] Ibid.
[33] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [22].
[34] Ibid [23].
[35] (1987) 9 NSWLR 446.
[36] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [24].

The Court of Appeal rejected this argument. Although the order changing the amount of compensation[37] did not specify the reasons for the change, they were noted on the court file. The reason for the change was that, in accordance with the *Workmen's Compensation Ordinance* [Cap 102], the calculation of compensation should have been based upon 48 month's earnings, but that initially the Chief Justice had made the calculation based on 24 month's earnings. The correction was simply one of mathematics, and did not involve independent discretion. 'Although the Chief Justice would have been wise to have informed [counsel] of his intention to make the change'[38] he was not required to do so.

DISCUSSION

This case is quite straightforward, and does not discuss any particularly controversial points of law. Its value lies in the clarity with which it discusses the legal principles in each section of the decision.

The Court of Appeal's discussion of the law that can be used to answer the question of "employee or independent contractor" concisely draws upon only the main English authority. There are many different expressions of the legal tests that can be used to distinguish an employee from an independent contractor however, as the court noted, 'each case turns upon its own particular facts.'[39] Attempting to comprehensively discuss the variety of legal tests which have been expressed in relation to particular facts is not, therefore, helpful. Instead, this judgment provides lawyers in the Pacific with a concise statement of the general criteria that can be used in any case in which the need arises to distinguish an employee from an independent contractor.

The pragmatic approach taken to the measure of compensation, while only briefly discussed, not only stands as authority for how to interpret the *Workmen's Compensation Ordinance* [Cap 102] and similar legislation around the region, but can be applied to other cases in which there is a need to determine damages but inadequate evidence on which to base this calculation. Indeed the Court of Appeal, in making the decision in *Angatiri*, referred to its own judgment in *Attorney General v Koriri*,[40] which involved compensation for land following correction of the Land Register. In the High Court hearing of that case the judge noted:

> None of the evidence presented was satisfactory. I have had to do the best I can to establish the facts on which to found an assessment. That has meant wielding a very broad axe.[41]

[37] *Angatiri v United Marine Products Ltd - Order* [2006] KIHC 132 http://www.paclii.org.
[38] *United Marine Products v Angatiri* [2007] KICA 17 http://www.paclii.org [25].
[39] Ibid [10].
[40] [2007] KICA 20 http://www.paclii.org.
[41] *Koriri v Attorney General & Butaritari Island Council - Damages* [2007] KIHC 40 http://www.paclii.org.

The Court of Appeal affirmed this approach. Whilst taking a pragmatic approach to determining compensation does not excuse a court of first instance from properly considering all the evidence before it, the reality is that, often, it is not possible to precisely determine the correct measure of compensation or damages across cases with a wide variety of factual situations.

Finally the discussion of the slip rule concisely gives us authority for when the use of the slip rule can be legitimately challenged.

Whilst cases from Kiribati are only persuasive authority for courts in other Pacific Island jurisdictions, the clarity of this judgment means that it should have value for other Pacific Island courts that are faced with the issue of distinguishing between an employee and an independent contractor. One could even argue that, generally, Pacific Island courts *should* prefer to use cases that come from other Pacific Islands as authority to cases that come from more remote parts of the common law system.[42] This is for two (related) reasons. First, conditions in a neighbouring country are more likely to be similar than the conditions in a country like England, so geographically closer authority is more likely to be relevant. Second, the common law is constantly evolving, and it is this evolution that will, in part, help to make a distinctive jurisprudence in the region, that is appropriate to local conditions.

The development of the Pacific Islands Legal Information Institute (PacLII)[43] has meant that judgments from around the Pacific are more readily accessible than ever before. The argument that authorities from countries such as England, Australia or New Zealand are used not because they are preferred, but because they are the only ones that are readily available may have been valid 10 years ago, but is now questionable.

The *Angatiri* case does not discuss any sensitive issues, or suggest divergence from the English common law. However, accepting the philosophical point that Pacific Island courts should generally prefer to use cases that come from other Pacific Islands as authority, I hope to see it becoming one of the leading Pacific authorities in this area.

[42] This preference is, of course qualified. "Local" judgments that are poorly reasoned are of little value and should not be used as authority simply because of a thoughtless bias towards local cases. Further, cases can and should be distinguished or applied on their facts, and there should not be an automatic assumption that all Pacific cases are relevant and all "non-Pacific" cases are irrelevant.

[43] http://www.paclii.org.