



## Employee or Independent Contractor?

“To be or not to be ... that is the question”

The recent Supreme Court decision in *Bryson v Three Foot Six* deals with the controversial issue of whether an individual is an employee or an independent contractor. We take a close-up look at this case and what it means for employers.

In 1998, Mr Bryson was employed by Weta Workshops ('Weta') to make miniatures/models for 'The Lord of the Rings' (LOTR).

Mr Bryson was no stranger to Weta. Weta had employed Mr Bryson as an independent contractor under a contract for services in 1996 and 1997. He rejoined Weta again in February 2000 and continued working on LOTR models.

Weta also worked closely with another company, Three Foot Six Limited ('Three Foot Six'). Three Foot Six was established to administer the production of LOTR.

In April 2000, Mr Bryson was seconded from Weta to Three Foot Six to work in its miniatures unit as a temporary model maker. He was not given a written contract at the time. Mr Bryson received training at the start of his job and worked fixed hours which increased following the birth of his child. He received a pay increase in September 2000.

In October 2000, Three Foot Six supplied Mr Bryson with a written contract which referred to the 'Contractor' and 'Independent Contractor'. Mr Bryson did not think to question these descriptions.

In August 2001, Three Foot Six had to downsize the miniatures unit. Two technicians were retained, but Mr Bryson was made redundant at the end of September. Mr Bryson alleged that he was dismissed unjustifiably.

### The law

A personal grievance brought against an employer, such as a claim of unjustifiable dismissal, can be raised within 90 days under the Employment Relations Act 2000. However, the option



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to bring such a claim is limited to when a worker is found to have been an employee as defined in section 6 of the Act.

This means that an independent contractor is prevented by the Act to bring a claim even in cases where they have clearly been unjustifiably dismissed.

### The litigation path

The confidential process of mediation was the starting point in settling the question of whether Mr Bryson was an employee under a contract of service at the time Three Foot Six made him redundant, or whether he was an independent contractor under a contract for services. Mediation was unsuccessful.

Next, the Employment Relations Authority determined that Mr Bryson was an independent contractor. This meant that Mr Bryson was lawfully barred from pursuing his personal grievance claim for unjustified dismissal.

Mr Bryson challenged this decision and elected to have the matter heard by the Employment Court. There, Judge Shaw held that Mr Bryson was an employee. Judge Shaw arrived at that point by first establishing the application of section 6 of the Act to Mr Bryson’s situation.

In essence, section 6 requires the courts to ascertain the *real nature of the relationship* (our italics) between the parties. In doing so, the courts must look at all relevant matters (including the parties’ intentions), and not treat any statements by the parties (including contractual statements) as determinative of the nature of the relationship.

The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as degree of control, integration in the business and the ‘fundamental’ test as to whether a person is performing the services on their own account.

Industry practice is another matter that is considered, although this is far from determinative of the primary question.

The ultimate decision in any case depends on the entire matrix of facts. The facts which Judge Shaw considered in Mr Bryson’s case included the following:

#### *Intention of the parties*

When Mr Bryson started his work with

Three Foot Six, he did not enter into a written agreement with them. The Judge considered that this lack of evidence showed that there had not been any mutual ‘turning of minds’ by Mr Bryson and Three Foot Six, in terms of the true nature of his employment with them.

#### *Control*

Mr Bryson was trained for approximately six weeks after he started with Three Foot Six. The training indicated that he had no relevant experience and skills for his new position. Unlike independent contractors who market their skills to gain employment, Mr Bryson could not be said to have done so.

Once trained, Mr Bryson was assigned various activities. This included moving the miniatures from storage to one of the four shooting stages and fixing them in position as directed. There was a daily routine on the set. All employees would attend a crew meeting after they had watched the rushes of the previous day’s filming. Mr Bryson would receive specific instructions on how to dress a model for filming. He would rely on his own experience, but be instructed by the director of photography on what was required to get the correct detail for each shot.

There was significant control imposed by the crew deal memo which was exercised by Three Foot Six over Mr Bryson’s work. This control characterised a contract of service between an employer and an employee.

Mr Bryson was required to be at work between specific hours each day of the week. He performed duties as directed on a day-to-day basis. This control was essential in an environment where the LOTR directors required constant and often urgent changes and adaptations to the models being filmed.

#### *Integration test*

The evidence strongly pointed to Mr Bryson’s work being an integral part of Three Foot Six business. Mr Bryson was not in any way an addition to the miniatures unit, but an integral part of it.

#### *Fundamental test*

Mr Bryson did not operate as a trust, a partnership, a limited liability company or sole trader – unlike most independent contractors. His income from Three Foot

Six was not linked in any way to the profits or losses made by that company.

Mr Bryson was paid a regular wage based on an hourly rate. His pay slips were generated by Three Foot Six, not by Mr Bryson himself, and seemed to be a record of his hours worked.

When he began working with Three Foot Six, Mr Bryson filled out IR3 forms received from the Inland Revenue Department (IRD). He was never registered for GST. Mr Bryson continued to receive the IRD forms and simply continued to fill them out. The Judge did not think that this amounted to Mr Bryson acquiescing that he was an independent contractor.

#### *Industry Practice*

Expert witnesses gave evidence saying that the film, TV and commercials production industry was unusual in the extent to which it comprises independent contractors.

The Judge thought that the evidence was general, not specifically applicable to Mr Bryson’s work set up and therefore concluded that industry practice was of little use in establishing the intention of both parties.

The Court of Appeal decision found Mr Bryson to be a contractor, based primarily on the film industry context, which was said to be dependent on that practice.

The Supreme Court overturned this decision and upheld the Employment Court’s decision that Mr Bryson was an employee. This judgment is significant for its decision to overturn the Court of Appeal judgment and reinstate the Employment Court decision.

### Implications for employers

Even though the case concerned the film industry, the principles of the case will have general application to every sector. From an employer’s perspective, if contractors look and act like employees, they probably are.

We recommend all organisations using independent contractors should look closely at the types of contractors they engage to ascertain whether there is a likelihood that they would in fact be employees.

If you have any doubt about existing employment arrangements, don’t hesitate to call us. Getting it wrong can be most time-consuming and expensive – for both parties.

# Fisheries / Aquaculture / Seafood

Allocation of fisheries and aquaculture assets to iwi

**Delegates of the seafood industry and Maori commercial fisheries recently attended their first combined annual seafood conference, signalling the beginning of increased interaction between these two groups. This article identifies other areas in the seafood industry, some less obvious, where increased interaction between the two sector groups might occur.**



With the fisheries and aquaculture assets soon to be allocated, the seafood sector is the first of the national industries to face the prospect of formal daily interaction with Maori.

In May 2005, delegates from both sector groups gathered at the annual seafood conference to consider, amongst other things, the respective implications of two major milestones – the Maori Fisheries Act 2004 and Maori Commercial Aquaculture Claims Settlement Act 2004. With the passage of this legislation, iwi organisations are expected to take on daily responsibility for the management and growth of tribal assets worth millions of dollars. This has immediate implications for the seafood industry as a whole.

## **What will this mean for the corporate/business sector?**

Until now, New Zealand corporates have not had to consider the potential implications of settlements from a national perspective, working perhaps to the related but less relevant timeframe set by the land settlement process. Fisheries and commercial aquaculture settlements provide a more immediate need to consider such issues.

At this year's conference, delegates heard that allocation of the assets could occur for the first of the iwi organisations from as early as October 2005. Previously substantive issues of mandate have all but been resolved with relatively minor work remaining for iwi to satisfy legal infrastructural requirements.

## **What will this mean for the seafood industry?**

Iwi will have quota to trade as well as access to 20% of available coastal marine space, if not more. In the words of one iwi delegate, "Deep-sea quota is likely to be leased out with Maori recognising we have neither the capacity nor the economy of scale to fish it ourselves and we will simply be looking for a better return. With in-shore species and marine space, on the other hand, there's more opportunity to be active. We have to work it because we can't sell it."

## **What changes are we likely to see?**

Corporate interaction with Maori will be required at levels never seen before and this may require new ways of doing things. Chief executives and other executive managers may require additional skill sets

and corporations may need to develop new protocols with different timeframes for transacting business.

Issues of sustainable management and preservation of the marine environment may take on a new significance. Current controls are the quota management system and emerging marine reserves. Iwi delegates say, "Rahui [temporary harvesting ban], mataitai [reserves managed at a local level] and taiapure [reserves managed with a formal management regime] will be how we control the fisheries." Maori corporates will stake their presence in the New Zealand economy. It is likely a new business culture will emerge that will have an interesting blend of commercial acumen and tikanga Maori. Cultural confidence will be a regular accountability alongside the usual triple bottom line indicators in a company's annual report.

## **Practical cultural solutions?**

Practical cultural solutions are not a new phenomenon for the public sector. On the other hand, the private sector may require greater flexibility and a more responsive change.

The challenge for New Zealand corporates will be to find effective measures that enable all participants in the industry to meet their legal and commercial responsibilities and other matters of compliance (whether to their shareholders and/or to the regulatory authorities) whilst accommodating the emerging and equally important cultural accountabilities of the new Maori stakeholder.

Preservation and sustainable management of tribal assets for future generations have always been key considerations for iwi. Such considerations will assume equal, if not greater, significance to all sector groups in the seafood industry, if they seek to trade with Maori and as they come to understand the depth of the obligation felt by Maori to the future generations.

# Enduring Powers of Attorney

## Protecting your future

**If, right now, you suddenly lost the mental capacity to manage your property, to look after those you care about or even take care of yourself, are you confident that those who would step in to do these important things would do them as you would want? If your answer is yes, then chances are you have already set up an Enduring Power of Attorney (EPA). If you reply NO or you are unsure, we recommend you read on.**

Many of us do not reflect on what would happen to us and our property if we should become incapable of managing our affairs. It is not a pleasant thought, but there is certainly peace of mind to be had in the knowledge that someone we trust will be in charge of this important task. Arranging an EPA is the way in which you can appoint someone (an 'attorney') to look after your property and personal care and welfare in the event you cannot.

The person setting up the EPA (the 'donor') must establish the EPA *before* he or she becomes mentally incapable. If a person is not of sound mind when they set up the EPA the powers will be invalid. The donor decides how much power the attorney is given and how the power is to be exercised. This is your chance to say how you want things done if you cannot do them in the future.

### Two types of EPA

#### *Property EPA*

A Property EPA gives the person (or people – you can have more than one) you choose as attorney the power to make decisions regarding your property, including your finances. You can choose whether you want the powers to take effect immediately, or only in the event you become mentally incapable.

You can also limit the attorney's powers to deal with specific property or only in certain circumstances. It is possible to appoint more than one attorney and to state that they get each other's permission before doing anything with your property. You can direct your attorney to provide for loved ones while you are living and to look after your property wisely to protect the interests of those you provide for in your Will.

In short, you get to say what you would like done with your property and how you would like it done, while you are still able to.

If you have a business, the existence of a Property EPA may be the difference between your business continuing or it having to be wound up. If you have employees and others who depend on your business, it is certainly time to set up an EPA.

#### *Personal Care and Welfare EPA*

The second type of EPA gives your attorney the power to make legal decisions about your personal care and welfare in the event you cannot. This type of EPA can give the attorney the power to decide such things as whether you are in need of care and what sort of medical treatment you should have. This power only becomes effective if you become mentally incapable.

Again, what power you give to your attorney is up to you. You may wish to give your attorney a general power to make all decisions they are able to by law or you may wish to limit their power to specific circumstances or decisions. You can only have one personal care and welfare attorney (unlike the Property EPA) and it cannot be a trustee organisation.

It is a good idea to set up both types of EPA at the same time.

### Choosing an attorney

Your attorney has a great deal of power so it is important to choose someone who can be trusted to make sound decisions. Your attorney can be a friend or family member, or you may prefer to appoint your lawyer.

If you do become mentally incapable and you do not have an EPA (and therefore no attorney), the court will appoint someone to look after your care and your property. However, the person selected by the court may not be someone you would have chosen, and they may not do things the way you would have liked. In addition, having to go to court entails a lot of



unnecessary expense which is avoidable by having an EPA.

Without an EPA in place, even a partner, parent or adult child would need to apply to the court should they wish to make those important decisions for you.

By setting up an EPA yourself you will spare your loved ones the distress of having to take this step and give them the peace of mind that things are being done as you wished.

### Your future and that of those you love

An EPA can become as important a document as your Will, perhaps even more so. However an EPA is often overlooked until it is needed, at which point it may be too late.

Setting up an EPA is a quick, simple and effective way to look after your future and that of your loved ones – if you are unable to. Setting up a Property EPA is simply an integral part of sensible estate and/or business planning. A Personal Care and Welfare EPA gives you the security of knowing that your wishes now will guide your care in the future if you cannot do so. Take some time now to protect your future and that of those you love.

# Are New Zealanders compromising their investments due to tax and fees?

There has been significant media attention recently on the pitfalls of managed funds. This criticism can be distilled quite simply into the claim that managed funds pay too much in tax and too much in fees. It is important to remember however that while historically there has been a cost in investing in managed funds, there are also substantial benefits.

Are New Zealanders compromising their investments due to tax and fees?

If we take a step back and look at what a client is trying to achieve when they invest, it is difficult to argue that the following investment principles are absolutely central:

- 1. Growth** – can the investment outpace inflation?
- 2. Protection of capital** – is the capital protected by diversification?
- 3. Cash flow** – does the investment provide a regular income?
- 4. Flexibility** – is their sufficient liquidity?
- 5. Management** – is the investment managed by experienced and qualified investment professionals?

The importance of these investment principles cannot be understated, and managed funds are one of the only investment vehicles through which **all** these objectives can be achieved.

The significance of the principles is best underlined if we look at a case study. Mr and Mrs Sample live in Whangarei where they have a range of investments including:

- A \$250,000 rental property, which they have just bought;
- \$50,000 in term deposits with four years to maturity;
- \$80,000 in finance company debentures with two years to maturity; and
- Five stocks on the NZX50 worth around \$45,000.

The Samples are happy with their investments, but if circumstances change, it highlights the fact that they do not stack up.

Let's say the New Zealand economy started performing poorly and Mr Sample lost his job. The share market fell by 10% and the housing market starts going backwards. The Samples cannot sell their rental property (in which they now have negative equity) and cannot access their fixed income investments, so they are forced to sell their shares (which have been hard hit due to poor management).

This is an extreme example, but it does highlight the importance of the five key investment principles. The point is that due to the lack of liquidity, overall management and diversification, the Samples are left in a difficult financial position. This would likely not to have been the case if they had a good portion of their assets in managed funds.

An appropriate asset allocation for clients should almost always include managed funds, as they remain the most effective way of achieving the five key investment objectives.

Source: TPG



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# Postscript

## Simply Sustainable

An on-line toolkit for business, *Simply Sustainable*, was launched recently by the Ministry of the Environment to give easy access to know-how on sustainable business practices. It explains various aspects of sustainable business practices including energy efficiency, waste management and triple bottom line reporting.

The site lists five easy steps towards sustainability – switch off when not in use, green your office stationery, recycle all that you can, choose greener and safer cleaning products and choose energy efficient equipment and appliances. A number of case studies are shown to illustrate how other businesses in New Zealand have successfully introduced sustainable practices into their operations.

Look for [www.sustainability.mfe.govt.nz](http://www.sustainability.mfe.govt.nz)

## Disputes Tribunal

The Disputes Tribunal is a useful means for hearing small claims such as faulty goods, damage to property, services that have not been performed as agreed, disputed debts and so on. The Tribunal can hear claims of up to \$7,500, or to \$12,000 if both parties agree to this.

Less structured than a formal court, Disputes Tribunal hearings are conducted by a referee, each party presents their own case without being represented by a lawyer. The referee either can either make an order or renegotiate an agreed settlement between the parties.

The Disputes Tribunal cannot be used for disputes issues such as Wills, debts that are not disputed, ownership of land, relationship property, day-to-day care and contact with children (formerly known as 'custody' and 'access'), events that occurred over six years ago, etc. To find out more, look at [www.justice.govt.nz/tribunals](http://www.justice.govt.nz/tribunals)

If you have a dispute, remember to talk with us first. We can advise you on making the most of your opportunity to have your dispute settled in a cost-effective way.

## 'Vulnerable employees' not necessarily protected

A recent employment law case saw businesses heave a sigh of relief. Six Dunedin kindergarten cleaners took a commercial cleaning company to the Employment Court asserting they should have kept their jobs when their employers' cleaning contract was taken over by another company – Crest Commercial Cleaning. A full Employment Court decision stated the law (Part 6A of the Employment Relations Act) did not apply to 'second-generation contracting out'.

This new legislation, which came into effect in December 2004, was designed to protect 'vulnerable' employees (mainly people employed in occupations such as cleaning and hospitality) whose employment could be terminated when the business they were employed in was restructured or sold.

The legislation is likely to have the effect of protecting vulnerable employees where their employer restructures the business, for example, a factory contracting a third party firm to provide catering services where previously those services were provided in house.

Where, however, the work is already contracted out to a third party, and the 'employer' decides to change the service provider, the new service provider will not be required to take on the staff of the previous service provider.

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