

Catherine Lee - - - - - Appellant

v.

Lee's Air Farming Limited - - - - - Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 11TH OCTOBER, 1960.

Present at the Hearing:

VISCOUNT SIMONDS

LORD REID

LORD TUCKER

LORD DENNING

LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The judgment of the Court of Appeal of New Zealand, from which this appeal is brought, was given as their opinion upon a Case Stated by the Judge of the Compensation Court. It is provided by Rule 5 of Chapter VIII of the "Workers' Compensation Rules 1939" that "In any action or other proceeding the Court or a Judge thereof may state a case for the opinion of the Court of Appeal on any point of law arising in the action or proceeding". This procedure was adopted by the Judge of the Compensation Court in the action which was brought by the appellant in respect of the death of her husband. She claimed £2,430 compensation on behalf of herself and her four infant children and she also claimed a sum for funeral expenses. The claim was made in reliance upon the provisions of the Workers' Compensation Act 1922 as amended by later statutes. The appellant's late husband died in an aircraft accident in Canterbury, New Zealand, on the 5th March, 1956, while engaged in the capacity of an aircraft pilot in aerial top-dressing operations. The claim of the appellant rested upon her allegation that at the time of his death her husband was a "worker" in that he was employed by the respondent company. The respondent company denied that the deceased was a "worker" within the meaning of the Workers' Compensation Act 1922 and its amendments. It is provided by section 3 (1) of the Act as follows:—

"3.—(1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall be liable to pay compensation in accordance with provisions of this Act."

Under the relevant part of the statutory definition the term "worker" means "any person who has entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, and whether remunerated by wages, salary, or otherwise". The denial of the respondent company that the deceased was a "worker" was based on the fact that the deceased was at the time of the accident the controlling shareholder and governing director of the respondent company. In 1954 the deceased had instructed a firm of public accountants in Christchurch to form a company for

the purpose of conducting an aerial top-dressing business. On the 5th August, 1954—"Lee's Air Farming Limited", the respondent company, was incorporated. The nominal capital of the company was £3,000 divided into three thousand shares of £1 each. The deceased was allotted 2,999 shares: the remaining share according to the Memorandum of Association was to be taken by a solicitor. The Articles of Association included the following:—

"32. SUBJECT as hereinafter provided GEOFFREY WOODHOUSE LEE shall be and he is hereby appointed Governing Director and subject to the provisions of Clause 34 hereof shall hold that office for life and the full government and control of the Company shall be vested in him and he may exercise all the powers and authorities and discretions vested in the Directors generally and that notwithstanding he is the sole Director holding office and he may exercise all the powers of the Company which are not by statute required to be exercised by the Company in general meeting and any minute entered in the minute book of the Company's proceedings signed by the Governing Director shall, in any matter not expressly required by statute to be done by the Company in general meeting have the effect of a resolution of the company.

33. THE company shall employ the said Geoffrey Woodhouse Lee as the chief pilot of the company at a salary of £1,500 per annum from the date of incorporation of the company and in respect of such employment the rules of law applicable to the relationship of master and servant shall apply as between the company and the said Geoffrey Woodhouse Lee.

34. THE Governing Director may retire from office upon giving one month's notice in writing of his intention so to do, and the office of Governing Director shall be vacated if the Governing Director

(a) ceases to be a director by virtue of section 148 of the Act; or

(b) becomes bankrupt or enters into a composition with his creditors; or

(c) becomes prohibited from being a director by reason of any order made under section 216 or 268 of the Act; or

(d) becomes of unsound mind or becomes a protected person under The Aged and Infirm Persons Protection Act 1912; or

(e) becomes incapable of carrying out the duties of a director.

35. THE Governing Director may at any time convene a general meeting of the Company.

36. THE Governing Director shall not be disqualified by his office from holding any office or place of profit in the Company or from contracting with the company whether as vendor, purchaser or otherwise, nor shall any such contract or arrangement or any contract or arrangement entered into by or on behalf of the company in which the Governing Director shall be interested be avoided nor shall the Governing Director be liable to account for any profit realised by any such contract or arrangement by reason of the Governing Director holding such office or of the fiduciary relations thereby established.

DIRECTORS

37. IF and whenever there shall cease to be a governing director the number of directors of the company shall not be more than four or less than two who shall forthwith be appointed or elected by the company in general meeting.

38. A director need not hold any share qualification in the capital of the company.

43. NO director shall be disqualified by his office from holding any office or place of profit under the company or under any company in which this company shall be a shareholder or otherwise interested or from contracting with the company either as vendor purchaser or otherwise nor shall any such contract or any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested be avoided nor shall any director be liable to account to the company for any profit arising from any such office or place of profit or realised by any such contract or arrangement by reason only of such director holding that office or of the fiduciary relations thereby established but it is declared that the nature of his interest must be disclosed by him as provided by section 155 of the Companies Act 1933."

The deceased was appointed Governing Director of the respondent company and the secretary was Mr. Sugden a Public Accountant and a member of the firm of Public Accountants who had been instructed by the deceased to form the company.

On the 16th August, 1954, Article 33 was amended by deleting the words "a salary of £1,500 per annum from the date of incorporation of the Company" and inserting the words "a salary to be arranged by the Governing Director". That resolution was effected by a minute signed by the deceased.

The Case Stated recorded that one of the assets of the respondent company was an "Auster" aircraft equipped for top-dressing and that the deceased was a duly-qualified pilot. The case further recorded that while the respondent company was in the course of being incorporated Mr. Sugden negotiated and obtained different forms of insurance cover for the benefit of the respondent company and its employees. Mr. Sugden supplied to the insurance brokers an Employer's Statement of Wages relative to Employer's Liability Insurance pursuant to section 8 of "The Workers' Compensation Amendment Act 1950" and duly received an assessment of premium. Certain personal accident policies were taken out in favour of the deceased: the premiums in respect of these were paid by the respondent company and were debited to the personal account of the deceased in the books of the company.

Under the provisions of the Workers' Compensation Amendment Act 1950 every employer of a worker in any employment to which the Act of 1922 applied was (subject to certain exceptions) under obligation to insure with an authorised insurer against his liability to pay compensation and was required to deliver a statement of wages to such authorised insurer.

Certain other findings recorded in the Case Stated were as follows:—

" 10. FOLLOWING its incorporation the Defendant Company started operating its aerial top-dressing business and the deceased worked for the defendant company as its pilot continuously thereafter until his death on 5th March, 1956.

11. ON the 8th day of July, 1955 the said Clyde Leslie Sugden forwarded to the said Brokers an Employers' Statement of Wages for the year ended 31st March, 1955 and on the same date wrote a letter to the said Brokers discussing the apportionment of the salary of the deceased. A copy of the said letter is annexed hereto. The relevance of the said letter was that a higher premium was payable on that part of the salary of the deceased attributable to his work as a pilot.

14. IN his capacity as Governing Director and controlling shareholder of the Defendant Company the deceased exercised full and unrestricted control of the affairs of the Defendant Company and he expressly or impliedly authorised the acts and conduct of any other employee or officer of the Defendant Company including the said Clyde Leslie Sugden.

15. IN his capacity as aforesaid the deceased made all decisions relating to contracts for aerial top-dressing, contract prices, the

manner in which the Defendant Company's aircraft was to be employed and the methods to be employed in carrying out the work of the Defendant Company, and in general he exercised complete and unfettered control over all the operations of the Defendant Company at all material times.

16. ON the 5th day of March, 1956 while the deceased was piloting the said "Auster" aircraft during the course of aerial top-dressing operations in Canterbury the said aircraft stalled and crashed to the ground and burst into flames and was destroyed and the said deceased was killed as a result of the crash.

17. THE Plaintiff and her said four infant children were totally dependent on the deceased and the salary payable to the deceased up to the time of his death was such that if the Defendant Company is liable in this action it must pay the said sums of £2,430 and £50 claimed by the Plaintiff in the action."

The question which was raised for the opinion of the Court of Appeal was whether at the time of his accident the deceased was employed by the respondent company as a "worker" within the meaning of the "Workers' Compensation Act 1922" and its amendments. The Case Stated came on for hearing in the Court of Appeal of New Zealand (Gresson, North and Cleary, JJ.) on the 27th November, 1958, and the Reasons for Judgment were delivered by North J. on the 18th December, 1958. In the course of his judgment the learned Judge said—"We interpret the question to mean whether on the admitted facts of this case the deceased could hold the office of governing director of the company and also be a servant of the company". Their Honours answered "the question in its amended form" in the negative. The Formal Judgment records the Judgment in these words:—"This Court Doth Answer in the negative the question raised in the Case Stated and as amended by this Court namely whether on the admitted facts of the case the deceased could hold the office of Governing Director of the Company and also be a servant of the Company."

The Court of Appeal recognised that a director of a company may properly enter into a service agreement with his company but they considered that, in the present case, inasmuch as the deceased was the governing director in whom was vested the full government and control of the company he could not also be a servant of the company. After referring in his judgment to the delegation to the deceased of substantially all the powers of the company, North J. said:—

"These powers were moreover delegated to him for life and there remained with the Company no power of management whatsoever. One of his first acts was to appoint himself the only pilot of the company, for although Article 33 foreshadowed this appointment yet a contract could only spring into existence after the company had been incorporated. Therefore he became in effect both employer and worker. True the contract of employment was between himself and the company (see *Booth v. Helliwell* 1914 3 K.B. 252) but on him lay the duty both of giving orders and obeying them. In our view the two offices are clearly incompatible. There could exist no power of control and therefore the relationship of master-servant was not created."

The substantial question which arises is, as their Lordships think, whether the deceased was a "worker" within the meaning of the Workers' Compensation Act 1922 and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the company. On this view it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane which belonged to the company and when he was carrying out the operation of top-dressing farm lands from the air. He was paid wages for so doing. The company kept a wages book in

which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were with the company alone. It cannot be suggested that when engaged in the activities above referred to the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor in their Lordships' view could it reasonably have been suggested) that the company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If then it be accepted that the respondent company was a legal entity their Lordships see no reason to challenge the validity of any contractual obligations which were created between the company and the deceased. In this connection reference may be made to a passage in the speech of Lord Halsbury in *Salomon v. Salomon & Company* [1897] A.C. 22, 33:—"My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transaction into which it has entered." A similar approach was evidenced in the speech of Lord Macnaghten when he said (at p. 53) . . . "It has become the fashion to call companies of this class 'one man companies'. That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors."

Nor in their Lordships' view were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was vested the full government and control of the company. Always assuming that the company was not a sham then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the company in its negotiation. The deceased might have made a firm contract to serve the company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed his contract would not have been affected. The circumstance that in his capacity as a shareholder he could control the course of events would not in itself affect the validity of his contractual relationship with the company. When therefore it is said that "one of his first acts was to appoint himself the only pilot of the company" it must be recognised that the appointment was made by the company and that it was none the less a valid appointment because it was the deceased himself who acted as the agent of the company in arranging it. In their Lordships' view it is a logical consequence of the decision in *Salomon's* case that one person may function in dual capacities. There is no reason therefore to deny the possibility of a contractual relationship being created as between the deceased and the company. If this stage is reached then their Lordships see no reason why the range of possible contractual relationships should not include

a contract for services and if the deceased as agent for the company could negotiate a contract for services as between the company and himself there is no reason why a contract of service could not also be negotiated. It is said that therein lies the difficulty because it is said that the deceased could not both be under the duty of giving orders and also be under the duty of obeying them. But this approach does not give effect to the circumstance that it would be the company and not the deceased that would be giving the orders. Control would remain with the company whoever might be the agent of the company to exercise it. The fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the company to give the orders does not alter the fact that the company and the deceased were two separate and distinct legal persons. If the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the company is recognised. Just as the company and the deceased were separate legal entities so as to permit of contractual relations being established between them so also were they separate legal entities so as to enable the company to give an order to the deceased.

An illustration of the validity of transactions entered into between a company comparable to the respondent company and its sole governing director is found in the case of *Commissioners of Inland Revenue v. Sansom* [1921] 2 K.B. 492. Sansom sold his business as a going concern to a private company John Sansom Ltd. He became the sole governing director of the company and the whole direction control and management of the business and affairs of the company were in his hands. The company made large profits but no dividends were ever declared. He was the only director. The capital of the company was £25,000 divided into 2,500 shares of £10 each. Sansom held 2,499 shares and had given one share to someone who had previously been employed by him. By its memorandum the company had power to lend money to such persons and on such terms as it should think fit. The company made what were described in the balance sheets as "loans or advances" to Sansom. They were made without interest and without any security. Sansom was assessed to super-tax on the loans: he was so assessed on the basis that the amounts received by him were in fact not "loans or advances" but constituted an income received by him from the company. Sansom appealed to the Commissioners. They found that the company was a properly constituted legal entity: that it had power to make loans to such persons and upon such terms as it should think fit: that it did make such loans to Sansom: and that such loans did not form part of Sansom's income for the purposes of super-tax. On appeal by the Crown on a Case Stated the Judge made an Order remitting the case to the Commissioners to find whether in point of truth and in fact the company did carry on the business or whether Sansom really carried it on to the exclusion of the company; whether if the company did carry on the business it carried it on as agent for Sansom who was to be regarded as a principal standing outside the company; whether the company carried on the business on its own behalf and for the benefit of the corporators. On appeal to the Court of Appeal it was held that the findings of the Commissioners being on questions of fact were conclusive and involved the negating of the questions which the Judge had directed to be put to them: accordingly the order remitting the case to the Commissioners was discharged. In his judgment Younger L.J. at p. 516 said:—"It is conceded that the entire property in this business was bought and paid for by the company, that it passed to the company nearly ten years ago, that every transaction thereafter was carried out by and in the company's name, and has now been carried to completion in a liquidation regularly constituted. In those circumstances unless the company's legal status is to be denied to it—and this

is expressly disclaimed by the learned judge—there appears to me to be no room on this case as stated for directing any such inquiry.” He further said (at p. 516):—“In my judgment so long as such a company as this was is recognized by the Legislature there can be no reason why the contracts and the engagements made in its name or entered into on its behalf, and themselves ex facie regular, should not everywhere until the contrary is alleged and proved be regarded as the company’s. . . .”

An illustration of circumstances in which a person may possess dual roles is seen in the case of *Fowler v. Commercial Timber Company Ltd.* [1930] 2 K.B. 1. In that case the plaintiff was appointed managing director of the defendant company (which was not a so-called “one man company”) for a period of years. The company did not prosper and the time came when it became clear that if it were not voluntarily wound up it would be compulsorily wound up. The directors including the plaintiff resolved that it was desirable to wind up the company voluntarily. An extraordinary general meeting was called at which the plaintiff was present and it was unanimously resolved to wind up the company voluntarily. The liquidators gave the plaintiff notice that his agreement was terminated and that his services were no longer required. He claimed damages for wrongful dismissal and it was held that there was no implied term in his agreement that he should lose his right to recover damages for breach of his agreement if the company went into voluntary liquidation with his assent or approval. Scrutton L.J. said (at p. 6):—“Such a complicated term cannot be implied for this reason: the two positions of the plaintiff (1) as managing director, who claims damages for breach of the contract of employment, and (2) as a director and shareholder of the company who thinks that in its own interests the company ought to stop business are quite consistent.”

In the present case their Lordships see no reason to doubt that a valid contractual relationship could be created between the respondent company and the deceased even though the deceased would act as the agent of the company in its creation. If such a relationship could be established their Lordships see no reason why it should not take the form of a master and servant relationship. The facts of the present case lend no support for the contention that if a contract existed it was a contract for services. Article 33, recited above, shows that what was designed and contemplated was that after its incorporation the respondent company would as a master, employ the deceased, as a servant, in the capacity of chief pilot of the company. All the facts and all the evidence as to what was actually done point to the conclusion that what purported to be a contract of service was entered into and was operated. Unless this was an impossibility in law then the deceased was a worker within the statutory definition as referred to above. It is said that the deceased could not both give orders and obey them and that no power of control over the deceased was in existence. It is true that an inquiry as to whether a person is or is not employed upon the terms that he will, within the scope of his employment, obey his master’s orders may constitute an important inquiry if it is being tested in a particular case whether there is a contract of service as opposed to a contract for services (see *Simmons v. Heath Laundry Company* [1910] 1 K.B. 543, *Short v. J. & W. Henderson Ltd.* [1946] S.C. (H.L.) 24). But in the present case their Lordships can find nothing to support the contention that there was or may have been a contract for services but not a contract of service.

Ex facie there was a contract of service. Their Lordships conclude therefore that the real issue in the case is whether the position of the deceased as sole governing director made it impossible for him to be the servant of the company in the capacity of chief pilot of the company. In their Lordships’ view for the reasons which have been indicated there was no such impossibility. There appears to be no greater difficulty in holding that a man acting in one capacity can give orders to himself in another capacity than there is in holding that a man acting in one

capacity can make a contract with himself in another capacity. The company and the deceased were separate legal entities. The company had the right to decide what contracts for aerial top-dressing it would enter into. The deceased was the agent of the company in making the necessary decisions. Any profits earned would belong to the company and not to the deceased. If the company entered into a contract with a farmer then it lay within its right and power to direct its chief pilot to perform certain operations. The right to control existed even though it would be for the deceased in his capacity as agent for the company to decide what orders to give. The right to control existed in the company and an application of the principles of *Salomon's* case demonstrates that the company was distinct from the deceased. As pointed out above there might have come a time when the deceased would remain bound contractually to serve the company as chief pilot though he had retired from the office of sole governing director. Their Lordships consider therefore that the deceased was a worker and that the question posed in the Case Stated should be answered in the affirmative.

Their Lordships find it unnecessary, as did the Court of Appeal, to review the judgment of the Compensation Court in *Brown v. Okiwi Farms Ltd.* [1957] N.Z.L.R. 1073, though they agree with the Court of Appeal that the phrase "incorporated partnership" is not a happy one. That case must be regarded as turning upon its own facts.

Their Lordships were referred to and have considered certain reported decisions of cases in the Workers' Compensation Commission of New South Wales in which, under comparable legislative provisions, questions have arisen and with varying results have been decided as to whether persons were employed under contracts of service. As these cases have not been under review and as they so largely depend upon a consideration of their own particular facts and circumstances their Lordships do not include an analysis of them in this judgment.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the question in the Case Stated should be answered in the affirmative. The respondent company must pay the costs before their Lordships' Board and in the Court of Appeal and the Compensation Court.

In the Privy Council

CATHERINE LEE

v.

LEE'S AIR FARMING LIMITED

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST