ALI HASSAN v TRANSPORT WORKERS UNION and 2 Ors (CBV0006 of 2005S)

SUPREME COURT — CIVIL JURISDICTION

FATIAKI CJ, FRENCH and HANDLEY JJ

11, 19 October 2006

Practice and procedure — appeal — extension of time to appeal — special leave to appeal — employer/employee relationship — bailment — Constitution of the Republic of Fiji ss 122, 122(2) — Fiji National Provident Act s 2 — High Court Rules 1988 O 53 r 3(2) — Land Transfer (Public Service Vehicles) Regulations 2000 — Road Transport (Public Service Vehicles) Regulations reg 17(1) — Supreme Court Act s 7 — Trade Unions Act (Cap 96) s 2(1) — Trade Unions (Recognition) Act 1998 ss 2, 2(1), 3(1), 3(2), 3(3), 3(4), 6(1)(a), 8(1), 8(2), 10, 32 — Wages Council Act — Wages Regulation (Road Transport) Order 2002.

Ali Hassan (the Petitioner) was the owner of a fleet of taxi cabs under the name Sanyo cabs (Sanyo). The Petitioner and his drivers entered into a standard agreement wherein: (1) the driver would be employed on a contract basis and required to pay the sum of $66 net to Sanyo each day, the amount beyond this sum being the driver's own income; (2) the operation was restricted to certain areas in Fiji; (3) the taxi could not be used outside the base metropolitan or country area without Sanyo's permission; and (4) Sanyo to have control over the taxi drivers' daily driving.

On 24 December 2002, the general secretary of the Transport Workers' Union (the Union) wrote to the Petitioner seeking voluntary recognition of the union as majority of his employees joined. However, the Petitioner advised that he could not accord the union voluntary recognition. Thus, the general secretary of the Union wrote to the Permanent Secretary of the Ministry of Labour, Industrial Relations and Productivity asking that he issue a compulsory recognition order under the Act as soon as possible because such order obliges an affected employer to recognise the relevant union for the purpose of collective bargaining.

On 2 January 2003, the Permanent Secretary asked the Petitioner to release to him the records of wage payments pertaining to all his employees pursuant to s 6(1)(a) of the Recognition Act but the Petitioner asserted that the drivers were self-employed under independent contracts and therefore could not accord voluntary recognition to the union.

The Permanent Secretary made inquiries in relation to the contention that the taxi drivers were independent contractors. He wrote to the Land Transport Authority attaching a copy of the standard agreement. In response, the Land Transportation Authority said that the content of the agreement was in conflict with the Land Transportation Regulations on Public Service Vehicle Permit Regulations 2000 and Driver Regulations 2000 and that the contract agreement constituted an appointment by a permit holder for the driver to manage "the taxi operations driven by him", making the agreement illegal.

On 8 January 2003, the Permanent Secretary issued a compulsory recognition order stating that the union was entitled to recognition by the employer under s 8 of the Trade Unions (Recognition) Act 1998.

On 23 January 2003, the Petitioner commenced proceedings in the High Court for leave pursuant to Order 53 rule 3(2) of the High Court Rules 1988, to apply for judicial review in respect of the compulsory recognition order. He sought certiorari to quash the decision and an injunction against the union to prevent it from exercising the powers and rights conferred by the order.

The Court of Appeal dismissed the Petitioner's appeal and ruled that the Permanent Secretary properly complied with the Recognition Act before issuing the compulsory

recognition order and that the contract entered into with the drivers of Sanyo was a clear cut employer-employee relationship. The Petitioner's application for leave to appeal was likewise refused.

The Petitioner's ground was that the Court of Appeal erred in finding that the Permanent Secretary's recognition was validly made on the basis that the Petitioner was an employer and the taxi drivers his employees.

Held — (1) The court held that the question of law identified in the petition raised matters of great general and public importance. The court expressed that the contractual arrangements between the Petitioner and the drivers who leased taxis from the Petitioner were similar to contractual arrangements entered into by the majority of taxi drivers in Fiji, as well as a number of other persons, such as couriers and tanker drivers who operate under similar arrangements in the belief that they are independent contractors and conduct their financial affairs in relation to the payment of taxes and contributions to the Fiji National Provident Fund on that understanding, as do those who enter into contractual arrangements with them. If the judgment of the Court of Appeal were allowed to stand, it would have an adverse impact upon the operation of a number of business operations in Fiji and could have unforeseen and unforeseeable economic effects.

(2) The court further explained that the taxi drivers who do not own their taxis are a category of workers whose contractual arrangements with owners or suppliers of their taxis have long been the subject of judicial consideration. The weight of established law governing the characterisation of the relationship that has historically existed between taxi owners and their drivers bore heavily upon this case. The court was satisfied that the Permanent Secretary for Labour and Industrial Relations erred in issuing the compulsory recognition order on the basis that the Petitioner's drivers were his employees.

Appeal allowed.

Cases referred to

Bank Voor Handel En Scheepvaart NV v Slatford [1953] 1 QB 248; *Checker Taxicab Co Ltd v Stone* [1930] NZLR 169; *Commissioner of Payroll Tax (Vic) v Mary Kay Cosmetics Pty Ltd* (1982) VR 871; *Dillon v Gange* (1941) 64 CLR 253; [1941] ALR 94; *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213; [1976] 3 All ER 817; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210; [1963] ALR 859; *Massey v Crown Life Insurance Co* [1978] 1 WLR 676; [1978] 2 All ER 576; *Narich Pty Ltd v Commissioner of Payroll Tax (NSW)* [1983] 2 NSWLR 597; 50 ALR 417; *Northern District Radio Taxi Cab Co-operative Ltd v Commissioner of Stamp Duties* (1975) 1 NSWLR 346; *Platt v Treweneck* (1953) AR (NSW) 642; *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; [1968] 1 All ER 433; *Roy Morgan Research Centre Ltd v Commissioner of State Revenue* (1997) 97 ATC 5070; *State v Permanent Arbitrator; Ex parte FEA* (1997) 43 FLR 123; *State v SCC; Ex parte Island Buses Ltd* (1997) 43 FLR 129; *Yewens v Noakes* (1880) 6 QBD 530; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; [1956] ALR 123, cited.

Attorney-General (NSW) v Perpetual Trustee Co Ltd (1952) 85 CLR 237; [1952] ALR 125; *Commissioner of Taxation v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507; *Doggett v Waterloo Taxi-Cab Co Ltd* [1910] 2 KB 336; *Fowler v Lock* (1872) 7 LRCP 272; *Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 PC; *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762; *Smith v General Motor Cab Co Ltd* [1911] AC 188; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; (1986) 63 ALR 513; *Yellow Cabs of Australia Ltd v Colgan* [1930] AR (NSW) 137, considered.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; 181 ALR 263; 33 MVR 399; [2001] HCA 44; *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681; *Vabu Pty Ltd v Commissioner of Taxation* (1996) 86 IR 150, distinguished.

J. Cameron for the Petitioner

No appearance for the first Respondent

S. Sharma for the second and third Respondent

[1] Fatiaki CJ, French and Handley JJ. This petition for special leave to appeal against a decision of the Court of Appeal raises a question about the nature of the working arrangements between the owner of a fleet of taxi cabs and his drivers.

[2] On 8 January 2003, the permanent secretary for Labour and Industrial Relations issued a compulsory recognition order under the Trade Unions (Recognition) Act 1998 requiring Ali Hassan, the proprietor of Sanyo Cabs, to accord recognition to the Transport Workers Union for the purposes of collective bargaining. This order was issued on the basis that the Sanyo Cab drivers were employees.

[3] Mr Hassan challenged the decision in an application for judicial review in the High Court, where he was unsuccessful. He appealed to the Court of Appeal and was again unsuccessful. He now applies for special leave to appeal to this court.

[4] For the reasons we now publish, we are of the view that this case raises a matter of general importance concerning the legal nature of the relationship between the taxi owner, Mr Hassan, and his drivers. It would appear to have ramifications for the taxi industry generally in Fiji.

[5] There is a long history of court decisions in England, Australia and New Zealand which establish that generally speaking the legal relationship between taxi owners and their drivers is not that of employer/employee. Rather they involve arrangements in the nature of a bailment or hire of the car by the owner to the driver. Where the taxi driver is not under the direction or control of the owner, pays a fixed fee each day to the owner and otherwise seeks out his own customers within an allocated area, the legal characterisation of the arrangement will be that of bailment.

[6] In this case we are satisfied that the permanent secretary for Labour and Industrial Relations erred in issuing the compulsory recognition order on the basis that Mr Hassan's drivers were his employees. Long standing case law relating to the taxi industry which stretches back into the 19th century was not drawn to the attention of the learned primary judge or the Court of Appeal and was not referred to in this court until we drew it to counsels' attention. We propose therefore to grant special leave, allow the appeal and quash the decision of the permanent secretary.

[7] Given the failure of counsel at any stage in these proceedings to address an important strand of legal authority upon which this case turns, we propose to make no order as to the costs of the proceedings at any stage.

Factual and procedural background

[8] Ali Hassan operates a substantial taxi business under the name "Sanyo Cabs" (Sanyo). Although Sanyo is sometimes referred to in its own documents as a "company", it is a business name under which Mr Hassan carries on his taxi business. He has operated that business since 1966. In 2002 he owned, or managed on behalf of others, at least 15 taxi vehicles driven by some 26 drivers. He employed seven office workers and six mechanics. Each of the drivers operating a Sanyo taxi did so pursuant to a standard agreement.

[9] The standard agreement recited that the driver signatory was *"engaged by the company upon certain general terms and conditions of Employment on the following terms and conditions"*. The substantive clauses provided, inter alia, that the driver would be employed on a contract basis (clause 1) and would pay the sum of $66 net to Sanyo each day, the amount beyond this sum being the driver's own income (clause 2). *Clause 3* of the agreement provided:

> The Driver for all intense *[sic]* and purposes is an independent contractor and shall be solely responsible for preparation and filing of his/her own tax returns, payments of any Tax due and be responsible for payment of all FNPF levies/charges should he/she becomes *[sic]* a member of FNPF as though he/she is self employed person.

[10] The operation of the taxis covered by the agreement was restricted to Suva, Deuba, along Queens Road and Tailevu along Kings Road (clause 4). Sanyo was to be responsible for their roadworthiness. There were clauses providing for driver liability in the event of an accident for which the driver was at fault while using the vehicle for private means (clause 6) or where the driver was convicted of driving under the influence or any other offence (clause 7).

[11] A driver was not allowed, without the consent of Sanyo, to undertake repair work other than in an emergency and then only sufficient to drive to the nearest garage: clause 8. The taxi could not be used outside the base metropolitan or country area without Sanyo's permission (clause 9). Only the driver was permitted to drive the taxi. Other members of his family were not permitted to drive the vehicle, nor was it to be lent to anyone else (clause 10). *Clause 11* of the agreement provided:

> The Company shall have no control over the Employee's daily driving.

The driver was required to bring in the vehicle for inspection by management each day between 8 am and 10 am (clause 15).

[12] On 24 December 2002 Mr Attar Singh, the general secretary of the Transport Workers' Union (the union) wrote to Mr Hassan advising that the majority of his *"employees"* had joined the union in recent weeks. The letter went on:

> As the union representing the interests of all workers throughout the transport industry, we are obliged to do our best to protect and promote the interests of our members in particular and all transport workers generally.
>
> Accordingly, I write to seek voluntary recognition of our union to act as the bargaining agent and representative of our members in all matters relating to their employment with your company including wages, hours of work and other terms and conditions of employment.

[13] Mr Hassan responded by letter dated 24 December 2002 advising that he could not accord the union voluntary recognition. He requested evidence that the union had in its membership more than 50% of his total workforce. This is a prerequisite of the statutory entitlement to compulsory recognition of a trade union under the Trade Unions (Recognition) Act 1998 (the Recognition Act). Some industrial difficulties followed. Five drivers were dismissed on that day and some 15 drivers went on strike on 28 December 2002. This led to the initiation of civil proceedings for damages against those drivers by Mr Hassan in January 2003. Those proceedings are not otherwise material.

[14] On 30 December 2002 the general secretary of the union wrote to the permanent secretary of the Ministry of Labour, Industrial Relations and Productivity asking that he issue a compulsory recognition order under the Act as

soon as possible. Such an order obliges an affected employer to recognise the relevant union for the purpose of collective bargaining. On 2 January 2003 the permanent secretary wrote to Mr Hassan referring to the union's compulsory recognition order which he said was made under s 3(4) of the Recognition Act. He said that pursuant to s 6(1)(a) Mr Hassan was required to release to him the records of wage payments pertaining to all employees. Mr Hassan had evidently already agreed, through his solicitor at a meeting with the Minister for Labour, Industrial Relations and Productivity, to provide the names of his workers by 31 December 2002.

[15] The requested details were not forthcoming and the union then supplied the permanent secretary with a list of the workers employed by Sanyo and a list of those who were its members. Mr Hassan's solicitors wrote to the permanent secretary on 6 January 2003 asserting that Sanyo's drivers were self-employed under independent contracts. On that basis, they said, that Mr Hassan could not accord voluntary recognition to the union.

[16] As appears from his affidavit of 27 May 2003 which was before the High Court, the permanent secretary made inquiries in relation to the contention that the taxi drivers were independent contractors. He wrote to the Land Transport Authority attaching a copy of the standard agreement. On 3 January 2003 he received a response saying that:

> The content of the Agreement is in conflict with the Land Transport Regulations on Public Service Vehicle Permit Regulations 2000 and Driver Regulations 2000.

Reference was made to the Public Service Vehicle Regulations which provided:

> 17(1) The holder of a permit must not appoint an agent or representative for the purpose of exercising the right in the permit or cause or allow an agent or representative to exercise any right under it except with prior consent of the Authority.

The contract agreement was said, to constitute an appointment by a permit holder for the driver to manage *"the taxi operations driven by him"*. This, it was said, was illegal.

[17] The second Respondent (R2) also considered previous correspondence from the Fiji National Provident Fund dated 23 March 1988 which evidently referred to another taxi company called Victoria Cabs. It appeared to be in the nature of a complaint that Victoria Cabs had not paid required contributions on the basis that its drivers were on a contract or rental arrangement. The letter asserted that the employees of Victoria Cabs fell within the description of an employee in s 2 of the Fiji National Provident Fund Act. How this assertion could relevantly be relied upon by the permanent secretary in arriving at his decision, was not apparent.

[18] On 8 January 2003 the permanent secretary issued a compulsory recognition order. The terms of the order were as follows:

> IN exercise of the powers conferred upon me by subsection 8(1) of the Trade Unions (Recognition) Act 1998 and after taking into account all facts and circumstances appearing to me to be relevant, I make the following order:
>
> Citation
>
> 1. This Order may be cited as the Compulsory Recognition (No 1) Order 2003 and is deemed to have come into force on 24th December 2002.
>
> Interpretation
>
> 2. In this Order—
>
> "employer" means Ali Hassan t/a Sanyo Cabs

"union" means Transport Workers Union

Recognition

3. The union is entitled to recognition by the employer under section 8 of the Trade Unions (Recognition) Act 1998.

Manner of Recognition

4. The employer must accord recognition to the union for the purposes of collective bargaining and, without affecting the general nature of paragraph 3, must when requested to do so by the union negotiate with the union on any specific matter relating to the terms and conditions of employment of any person who is a voting member of the Union.

[19] On 23 January 2003 Mr Hassan commenced proceedings in the High Court for leave pursuant to O 53 r 3(2) of the High Court Rules 1988, to apply for judicial review in respect of the compulsory recognition order. He sought certiorari to quash the decision and an injunction against the union to prevent it from exercising the powers and rights conferred by the order. On 9 July 2004, Singh J made orders dismissing the application and directing that Mr Hassan pay the costs of the union, the permanent secretary and the Attorney-General of Fiji, each of whom was named as a Respondent to those proceedings.

[20] The Court of Appeal dismissed Mr Hassan's appeal with costs on 29 July 2005, and on 25 November 2005 it refused an application for leave to appeal to this court. Subsequently Mr Hassan filed a petition in this court seeking an extension of time and special leave to appeal against the judgment of the Court of Appeal. The Transport Workers Union which appeared in the High Court and Court of Appeal did not appear and was not represented in this court. The application for an extension of time was not opposed and time was extended to enable the court to entertain the petition.

Statutory framework

[21] The Trade Unions (Recognition) Act 1998 commenced on the same date as the Constitution Amendment Act 1997.

[22] Section 3 of the Recognition Act creates the entitlement to *"recognition"* and provides, inter alia:

(1) Where there is—
  (a) a registered trade union of which more than 50% of the persons eligible for membership and employed by an employer are voting members; and
  (b) no other registered trade union claiming to represent those persons, that trade union is for the purpose of collective bargaining entitled to recognition by the employer in accordance with a voluntary recognition agreement executed between the employer and the trade union.

(2) An application for recognition under subsection (1) must be in writing and sent to the employer by registered or courier mail, or hand delivered to the employer, with a copy to the Permanent Secretary in either case.

(3) An employer who has received an application for recognition from a trade union under subsection (2) must respond to the application within 7 days of receiving it.

(4) A registered trade union which has applied for recognition by an employer under subsection (1) but—
  (a) has been refused recognition by the employer; or
  (b) has not been afforded recognition by the employer within 1 month of the application,

may apply to the Permanent Secretary for the issue of a compulsory recognition order under section 8.

[23] Section 8 provides:

> (1) The Permanent Secretary, on receipt of an application under section 3(4) must consider the application, taking into account all the facts and circumstances appearing to be relevant and may, subject to section 11, make a compulsory recognition order—
>
> (a) declaring that a registered trade union is entitled to recognition; and
>
> (b) specifying the manner in which the employer is to accord recognition to the trade union.
>
> (2) A compulsory recognition order made under subsection (1) is effective from the date it is made or as otherwise specified in the order.

[24] The duration of a compulsory recognition order is covered by s 10 which provides:

> (1) A registered trade union which is entitled to recognition under section 3(1) or 4(2) continues to be so entitled until such time as the Permanent Secretary, on an application by the employer or a majority trade union, determines that over a period of 6 months ending not more than 2 months before the date of application, the average number of persons in the employment of the employer who were voting members of the recognised trade union was less than 50% of the average number of persons who were eligible for membership in the union, in which case from the date of such determination the registered trade union ceases to be entitled to recognition.

Subsections (2)–(4) are not material for present purposes.

[25] Section 2 of the Recognition Act sets out the definitions of various terms used in the Act. In particular, the following definitions are relevant:

> "employee and employer" have the meanings respectively assigned to those terms by the Trade Unions Act;
>
> "Permanent Secretary" means the Permanent Secretary to the Minister;
>
> "recognition" means recognition for the purpose of collective bargaining;

[26] The Trade Unions Act (Cap 96) defines "employee" in s 2(1) thus:

> "employee" means any person who has entered into or works under contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service apprenticeship or a contract personally to execute any work;

[27] Despite the definition of *"employee"* and *"employer"* in the Recognition Act, which purports to adopt the definitions of those terms in the Trade Unions Act, there is no definition of *"employer"* in the latter Act. The term "trade union" is defined thus:

> "trade union" means any combination whether temporary or permanent, of more than six persons the principal objects of which are under its constitution and rules the regulation of the relations between employees and employers, or between employees and employees, or between employers and employers, whether such combination would or would not, if this Act (or the Industrial Associations Act) had not been enacted, have been deemed to have been an unlawful combination by reason of some one or more of its objects being in restraint of trade:
>
> …

Reference should also be made to s 32 of the Trade Unions Act which provides:

> (1) No person shall be a voting member of a trade union unless he is normally employed and normally resident within Fiji.

[28] It is clear enough from the provisions of the Trade Unions Act that although they do not comprehensively prescribe eligibility rules for the membership of trade unions, they are confined to employees, and this was common ground.

The grounds upon which judicial review was sought

[29] The grounds upon which judicial review was sought, as set out in the application for leave to apply for judicial review, were uninformative. They asserted failure to take into account relevant matters, failure to give proper reasons and abuse of power and discretion. The application for judicial review, as filed, was quite unsatisfactory. It is not good enough to collect from a textbook on administrative law the traditional grounds of review and invoke them without elaboration. The application should allege precisely each ground actually relied upon and the particulars of error or procedural failure upon which the ground is based: see *State v Permanent Arbitrator; Ex parte FEA* (1997) 43 FLR 123 and *State v SCC; Ex parte Island Buses Ltd* (1997) 43 FLR 129.

Reasons for judgment in the High Court

[30] The primary judge identified three issues in the proceedings:

(a) whether the permanent secretary had complied with the provisions of the Recognition Act before granting the compulsory recognition order;
(b) whether the Sanyo drivers were independent contractors or employees;
(c) whether the permanent secretary considered all relevant matters before granting the compulsory recognition order.

[31] The primary judge found that the permanent secretary had complied with the Recognition Act before issuing the compulsory recognition order.

[32] The second issue, namely whether Mr Hassan's drivers were independent contractors or employees, was said by the learned primary judge to lie *"at the core of the applicant's contention"*. His Lordship set out the standard agreement and referred to the tests that had been formulated to distinguish the *"master/servant relationship"* from that of an independent contractor. He observed that the degree of control and the nature of control by Mr Hassan of his drivers was one, but only one, of the factors to be considered in deciding the nature of their relationship.

[33] His Lordship said that the relationship rested on the written agreement and the issue was *"really … one of interpretation of the agreement"*. He noted that both the car and the relevant taxi permit belonged to Mr Hassan. In fact, as appears from the record, some of the cars were owned by third parties and operated as part of the Sanyo fleet by Mr Hassan. This, however, makes no difference to the characterisation of the relationship between Mr Hassan and his drivers.

[34] The primary judge observed that Mr Hassan was responsible for the roadworthiness of the vehicles. The capital outlay was his. The drivers probably only provided fuel, although that was not specified. There were areas, specified in clause 4, beyond which a driver could not drive. This meant there was control as to the area of operation. The driver could not undertake repair works except in an emergency. This was characterised as *"control as to what a driver can do*

to the vehicle". The driver could not permit anyone else to drive the vehicle. This meant that he could not employ someone else to generate income for himself. He observed that an independent contractor normally has the liberty to choose his own employees. Mr Hassan provided, maintained and insured the vehicles and therefore incurred considerable expense.

[35] Factors contraindicating an employer/employee relationship were the description of the drivers in clause 3 as *"independent contractors"* and the requirement that they pay their own taxi and FNPF levies. Mr Hassan had no control over their daily driving and the drivers were required to indemnify him for any damages arising out of their negligence. His Lordship said:

> The applicant under the agreement is charged with providing, maintaining and insuring the vehicles. He incurs considerable expense and capital outlay. He maintains a significant amount of control over the driver. There is provision for instant dismissal of the driver but the driver is required to give a week's notice if he desires to leave which are conditions normally found or implied in contracts of employment. An independent contractor maintains a certain amount of discretion and flexibility over the management of his affairs. Serious constraints have been placed on the element of discretion and flexibility. The driver is limited by area controls and inability to employ others. The applicant has retained to himself a measure of control and also the right to exercise his control. I am certain if there was a collision between the vehicle of the applicant, a third party and the third party got injured, the applicant would not be able to say that he is not vicariously liable. These drivers are representatives of the applicant I conclude. They are not independent contractors but employees.

His Lordship went on to refer to the agreement entered into with the non-driving staff of Sanyo. He described that as creating a clear cut employer/employee relationship.

[36] In the closing paragraph of his reasons for judgment his Lordship concluded that the cumulative effect of the terms of the contract showed that *"overall in substance the drivers remained employees and not independent contractors"*. He found that the permanent secretary was entitled to take the view, as he did, that they were working under employment contracts.

The reasons for judgment of the Court of Appeal

[37] The notice of appeal in the Court of Appeal raised a number of grounds. It asserted error on the part of the judge in holding that the permanent secretary had followed the requisite statutory process and in holding that the contracts made the drivers employees and not independent contractors. There was also a complaint that the learned trial judge erred in holding that the permanent secretary was entitled to take into account the Wages Council Order, the employer's obligation to make contributions under the National Provident Fund Act and the fact that the drivers were a disadvantaged group which needed protection.

[38] The Court of Appeal identified as the most important issue in the proceedings:

> … whether the Permanent Secretary in "taking into account all the facts and circumstances appearing to be relevant" (s 8(1)) before issuing the Compulsory Recognition Order was correct in rejecting the appellant's contention that however many persons in his workforce the union might claim to have as members, none of them was an employee and therefore the union was not entitled to recognition at all, whether voluntary or compulsory. In other words the question of recognition simply "did not arise".

Their Lordships observed that in support of his argument that the drivers were independent contractors rather than employees, Mr Hassan's counsel, Dr Cameron, focused *"on the terms under which they worked for Sanyo and the proper tests to be applied and the inferences properly to be drawn from them"*. Their Lordships agreed that the central question was to be answered by application of common law tests which had been considered by the High Court of Australia in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; 33 MVR 399; [2001] HCA 44 (*Hollis*).

[39] After setting out the terms of the standard agreement their Lordships posed the rhetorical question *"if … this was not a case of an employer/employee agreement then what was it?"*. Counsel submitted that it was little more than a rental car agreement between individual taxi drivers and Sanyo. Once the taxis had been rented they were used by the drivers to perform services for their clients. The drivers performed no services for Sanyo, which simply received $66 per day as its hiring charge.

[40] Their Lordships referred to what they described as *"the classic common law tests"* and then said (at [19]):

> Whereas the degree of control and superintendence exercised by the putative employer over the putative employee was formerly predominant, the present approach is to consider the "totality of the relationship", in which the degree of control will still be an important consideration.

They referred to *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29; 63 ALR 513 at 521 (*Brodribb Sawmilling*).

[41] Their Lordships considered the standard agreement and noted that clause 11 provided that Sanyo would *"have no control over the employee's daily driving"*. They observed, however, that it was evident from clauses 4, 9, 10 and 15 that this was not in fact the case. Clauses 4 and 9 restricted the area of use, clause 10 restricted the driving to the named driver and clause 15 required the taxi to be presented for daily inspection. Clause 15, it was said, would not normally be found in a rental car agreement.

[42] In Mr Hassan's affidavit of 31 December 2002 he had listed 11 substantial companies and organisations which were *"fixed customers of the business"*. He said these would be lost if he did not give them the services. Sanyo's letterhead described the firm as *"fully RT controlled"*. There were seven clerks and controllers working from the taxi base. Of this evidence the Court of Appeal said (at [22]):

> In these circumstances it is clear to us that Sanyo is a highly organised and controlled operation of which the drivers were an essential part. While the drivers undoubtedly had the freedom to ply for hire when not otherwise required to assist in the discharge of Sanyo's services to its "fixed customers" we are unable to accept that the driver's freedom to drive where and when and as they wished could reasonably be compared to that enjoyed by the driver of a rented car.

And further (at [24]):

> In our view, the primary function of the drivers was to drive taxis provided and maintained by Sanyo on behalf of Sanyo. By so doing they earned Sanyo the $66 per day which was the income upon which Sanyo depended. That it might have been the case that once the primary duty had been performed, the drivers were relatively free to decide how hard or how long they wished to work for themselves for such sums as they were able to earn beyond the $66 which they were obliged to pay Sanyo, does not in our view alter the basic nature of the relationship.

[43] The Court of Appeal concluded that the permanent secretary arrived at the correct conclusion and that the learned primary judge was correct to find that the reality of the total relationship between the drivers and Sanyo was that of employer and employees.

The reasons for the Court of Appeal refusing leave to appeal

[44] In refusing leave to appeal the Court of Appeal noted submissions by Dr Cameron on behalf of the applicant that it had adopted an incorrect interpretation of the standard agreement. Their Lordships said, however (at [17]):

> We would point out that, whether right or wrong, the Court's decision was based solely on the effect of the particular contents of a particular agreement. Mr Cameron does not challenge the common law tests upon which the Court based its decision so much as the conclusion it drew from them in relation to the Sanyo agreement. The issues raised and the question posed are similarly challenges to the Court's interpretation of the agreement when applying those established principles of law.

They went on to say that the judgment was based on the interpretation of the Sanyo agreement. There was no challenge to the legal test to be applied. The matters in issue were contractual in nature and their meaning and significance depended upon the facts of the particular case. While the court acknowledged that the outcome of the case might be of considerable interest to other taxi proprietors in Fiji, the interpretation of the terms of the Sanyo agreement was not a matter of significance beyond Mr Hassan and his drivers.

[45] With respect to the Court of Appeal, we do not accept that the case was one about the interpretation of the terms of the standard form contract. It was in truth about the characterisation of the relationship defined by that contract and whether it was an employer/employee relationship.

The grounds of the petition

[46] The principal grounds upon which the petition was based were that the Court of Appeal erred in fact and in law when it held that:

(a) The petitioner was "employer", and that those persons who drove taxis pursuant to contractual agreements with it were the "employees" within the meaning of s 2 of the Act and for the purposes of ss 3, 6, 7 and 8 of the Act; and

(b) The petitioner's letter to the first respondent dated 24 December 2002 was a refusal of recognition of the first respondent within the meaning of s 7 of the Act; and

(c) That the second respondent's Compulsory Recognition Order (CRO) dated 8 January 2003 was validly made in compliance with the provisions of the Act insofar as it followed procedures laid down in the Act for the issue of such an Order following refusal of recognition by an employer within the meaning of s 7 of the Act.

[47] The question of law identified in the petition as raising matters of *"great general and public importance"* was expressed thus:

(a) The contractual arrangements between the petitioner and the drivers who leased taxis from the petitioner are similar to contractual arrangements entered into by the majority of taxi drivers in Fiji, as well as a number of other persons, such as couriers and tanker drivers who operate under similar arrangements in the belief that they are independent contractors and conduct their financial affairs in relation to the payment of taxes and contributions to the Fiji National Provident Fund on that understanding, as do those who enter into contractual arrangements with them.

(b) If the judgment of the Court of Appeal were allowed to stand it would have an adverse impact upon the operation of a number of business operations in Fiji and could have unforeseen and unforeseeable economic effects.

[48] Despite the way the petition was framed, the question on the special leave application concerned the characterisation by the Court of Appeal of the relationship between Mr Hassan and his drivers based almost entirely upon the terms of the standard contract.

The criteria for the grant of special leave

[49] Section 122 of the Constitution confers exclusive jurisdiction on the Supreme Court, subject to such requirements as the parliament prescribes, to hear and determine appeals from all final judgments of the Court of Appeal. By s 122(2) an appeal may not be brought from a final judgment of the Court of Appeal unless the Court of Appeal itself gives leave to appeal on a question of significant public importance or the Supreme Court gives special leave to appeal.

[50] Section 7 of the Supreme Court Act provides, inter alia:

(2) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises:

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

Whether a ground for special leave has been made out

[51] The central issue is not the interpretation of the standard contract, it is the characterisation of the relationship defined by it. There are three characterisations open, although the third, was not considered below. The first, is that of employer and employee, found by the primary judge and the Court of Appeal. The second, is that of principal and independent contractor. The third, which is usually although not necessarily exclusive of the others, is that of bailment, the relationship between the owner and hirer of a chattel. The characterisation of the relationship raises a question of law. It was said, against the grant of special leave, that the relevant common law test was not in issue. Whether or not it was in issue, the result below is contrary to a considerable body of case law dating back into the 19th century, which was not referred to, that is directly relevant to the relationship between taxi owners and their drivers. Indeed the contractual arrangements between Mr Hassan and the Sanyo drivers may well have been based indirectly upon that long standing case law.

[52] The affidavits filed in support of the petition suggest that the standard form of agreement used by Sanyo at the time of the compulsory recognition order was similar to that used throughout the taxi industry in Fiji. The degree of that similarity and its relevance could not be judged as other forms of agreement were not put on the record. However there is no doubt that there are common features in many of the taxi owner and driver arrangements which have been considered in other jurisdictions. That is not to say that all owner and driver arrangements in the taxi industry will always attract the same characterisation. Each must be looked at by reference to any written or oral contract and the real relationship between the parties.

[53] These proceedings have focused, at first instance and in the Court of Appeal, upon the standard contract used by Sanyo. The evidence of other matters outside the contract relevant to the characterisation of the relationship was slight and it was not suggested that the agreement did not reflect the real nature of the relationship.

[54] Given its potential ramifications for the taxi industry as a whole and the desirability of a correct and consistent approach to the characterisation of contractual service arrangements, we are of the opinion that this is a matter of great or general public importance in which special leave should be granted.

The approach to characterisation of service contracts

[55] The distinction between employees and independent contractors has a long history in statute law and at common law. Master and servant legislation of the 19th century was one of its early progenitors. Common law doctrines relating to vicarious liability required consideration of the relationship between a person who committed an act or omission and a second person who was said to be liable on account of the first person's conduct. Over time a body of law developed in which the distinction was embedded. That distinction was originally based upon the degree of control exercised over the worker. An employee was *"a person subject to the command of his master as to the manner in which he shall do his work" — Yewens v Noakes* (1880) 6 QBD 530 at 532–3. The test was in a sense the product of a largely agricultural society. Its origins were explained in a passage from Glass, McHugh and Douglas, *The Liability of Employers* in *Damages for Personal Injury*, 2nd ed, 1979, pp 72–3 which was quoted with approval by the High Court of Australia in *Hollis* at [43]:

> It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor.

[56] A frequently cited statement of the test was that of McCardie J in *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 at 767–8:

> … the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant … An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.

In *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237; [1952] ALR 125, Kitto J set out three elements of the "master-servant" relationship in terms of a control test expressed in dated language (at CLR 299):

(1) Obedience to orders by the servant.
(2) Obedience to orders in the doing of the work, including how it should be done.
(3) The doing of the work for the benefit of the master.

[57] As the control test evolved it did not require specific directions as to the performance of duties. A right to control came to suffice especially where the worker was a person with special skills or knowledge. Trapeze artists in a circus

were a case in point — *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571; [1956] ALR 123. Workers contracted to perform services not subject to direct supervision but obliged to comply with detailed procedures upon pain of termination could be employees as the privy council held of Weight-Watchers lecturers in *Narich Pty Ltd v Commissioner of Payroll Tax (NSW)* [1983] 2 NSWLR 597; 50 ALR 417: compare cosmetic consultants in *Commissioner of Payroll Tax (Vic) v Mary Kay Cosmetics Pty Ltd* (1982) VR 871 and market research interviewers in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (1997) 97 ATC 5070.

[58] What seemed to some an alternative approach to characterisation was the so-called "organisation test". In 1947 Lord Wright said:

> … it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party was carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.
>
> *Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 PC at 169

Denning LJ, in 1953, spoke of an employee as one who is *"part and parcel of the organisation" — Bank Voor Handel En Scheepvaart NV v Slatford* [1953] 1 QB 248 at 295. Windeyer J in *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217; [1963] ALR 859 at 864 said that the distinction lies in *"the difference between a person who serves his employer in his, the employer's business and a person who carries on a trade or business of his own"*.

[59] *Brodribb Sawmilling* enunciated, for Australia, a multi-factor approach which treated control and the organisational arrangements between the parties as relevant but not exhaustive considerations. Mason J (Brennan and Deane JJ agreeing) observed that the element of organisation could be treated as a factor to be weighed with control in deciding whether the relationship was one of employment or of independent contract. Nevertheless priority seems to have been given to control. His Honour said (at CLR 27; ALR 519):

> For my part I am unable to accept that the organization test could result in an affirmative finding that the contract is one of service when the control test either on its own or with other indicia yields the conclusion that it is a contract for services. Of the two concepts, legal authority to control is the more relevant and the more cogent in determining the nature of the relationship.

His Honour interpreted Lord Wright's observations as consistent with that approach. He did not accept Denning LJ's view of the organisation test as an independent basis of characterisation which could replace *"…the traditional approach of balancing all the incidents of the relationship between the parties"*: at CLR 28; ALR 519. Mason J acknowledged the criticism of the control test that it was more suited to the conditions of earlier times than to the conditions of modern post-industrial society. He pointed to the development which shifted its focus from the actual exercise of control to the right to exercise control and added (at CLR 29; ALR 520):

> Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.

[60] *Brodribb Sawmilling* involved timber workers. Particular factors mentioned by Mason J relevant to characterisation of their contractual relationship were:

(1) the workers provided their own equipment;
(2) they set their own hours of work;

(3) their remuneration was by way of payments determined by the volume of timber delivered to the sawmill;

(4) the company and the workers regarded the relationship as one of independent contractor rather than employee.

[61] Wilson and Dawson JJ also favoured a multi-factor approach. They viewed the formulations by Windeyer J and Denning LJ as posing the ultimate question in different ways rather than offering a definition which could provide an answer. Their Honours saw the question as *"…one of degree for which there is no exclusive measure"*: at CLR 36; ALR 525. They thought it appropriate to apply the control test in the first instance because it remained the surest guide to whether a person was contracting independently or serving as an employee. Any attempt to list relevant matters however incomplete could mislead because they could be no more than a guide to the existence of the relationship of master and servant (at CLR 37; ALR 526):

> The ultimate question will always be whether a person is acting as a servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

The judgments were in accord on a "totality of relationship" approach.

[62] The difficult distinctions involved in the multi-factor approach are illustrated by the difference in outcomes between the decisions of the Court of Appeal of New South Wales in *Vabu Pty Ltd v Commissioner of Taxation* (1996) 86 IR 150 (*Vabu*) and of the High Court in *Hollis*. The company provided courier services and the question in the New South Wales Court of Appeal case was whether it was an employer for the purposes of superannuation legislation. The company's couriers were paid for the number of successful deliveries undertaken. They owned the cars, motor bikes and bicycles which they used and had to meet the cost of maintaining, repairing and insuring them. They had to provide themselves with street directories and telephone books. They had to wear a company uniform and to comply with the company conduct standards. Their working hours were fixed. There was no discretion to refuse work allocated by the company. However, because of the payment arrangements and the responsibility of the couriers to supply their own equipment they were held to be independent contractors.

[63] The High Court case involving *Vabu* arose out of an accident in which a person was injured by the negligence of one of its bicycle couriers while making a delivery. The High Court held 6–1, that the company was vicariously liable for the act of its courier. In relation to the bicycle couriers it differed from the New South Wales Court of Appeal in the earlier superannuation case.

[64] The majority judgment discussed the "control" test and observed that in *Brodribb Sawmilling* the court had been *"adjusting the notion of 'control' to circumstances of contemporary life"*: at 40. The court quoted with approval the observations of Mason J and in particular the passage in which he identified *"the totality of the relationship between the parties"* which must be considered for the purpose of its characterisation. After reviewing the various elements of the working relationship between Vabu and its couriers, the majority said (at 45):

> … Vabu's business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu's business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, … they were Vabu and

effectively performed all of Vabu's operations in the outside world. It would be unrealistic to describe the couriers other than as employees.

[65] The decision of the High Court of Australia differed from that of the New Zealand Court of Appeal on similar facts in *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681. That too concerned owner-driver couriers employed under standard contracts which declared that the relationship between the drivers and the company was that of independent contractors. It contained terms which, as the Court of Appeal in New Zealand found, suggested that *"each party was genuinely trading off benefits under one relationship for perceived advantages under the other"*: at NZLR 695. Although the company controlled the livery of the vehicle, the courier controlled his own chosen area or territory. He was responsible for employing relief drivers and would profit from sound management and performance of his task.

[66] A declaration in a contract that a party is an "independent contractor" does not determine the character of the relationship. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; [1968] 1 All ER 433, MacKenna J pointed out that the characterisation of the relationship as independent contractor or otherwise is a matter of law. It is dependent upon the rights and duties imposed by the contract. If a contract established a relationship of employer and employee it would be irrelevant that the parties declared it to be something else. MacKenna J did not deny some utility for such declarations, because they might help resolve cases of doubt. His judgment was approved by the majority of the Court of Appeal in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213; [1976] 3 All ER 817. Browne LJ (at WLR 1270) was prepared to assume that a declaration as to the nature of a relationship by the parties is *"a relevant but certainly not a conclusive factor"*: see also *Massey v Crown Life Insurance Co* [1978] 1 WLR 676; [1978] 2 All ER 576.

[67] The present position under the common law of England, Australia and New Zealand requires the court to consider the whole relationship. The primary consideration must be the degree of control, direction or constraint exercised or entitled to be exercised by the person receiving the services over the person providing them.

Statutory construction and the common law of Fiji

[68] Before applying the employee-independent contractor distinction in a statutory context, the question must be asked — what is the proper interpretation of the statute? For the statute may define "employee" or "employer" in a way which elides the distinction. The common law does not determine the meaning of the statute. However, where there is an established common law principle the statute is not generally taken to displace it unless it does so expressly or by necessary implication. There is an overlapping interpretive principle that where terms are used in a statute which have acquired an established judicial interpretation, there will be an inference that the legislature intended that interpretation to apply to those terms. There is nothing in the Recognition Act to suggest that it extends beyond employments existing at common law.

[69] To the extent that this case involves the common law governing the characterisation of contractual service relationships and bailment relationships, the court is concerned with the common law of Fiji, which is ultimately that declared by this court. Doctrines and principles accepted in Australia will be part of the common law of Australia. The same is true of New Zealand and Canada

and other countries. They, like Fiji, inherited the common law from England. But at particular times, and in particular ways, the common law, as declared in the courts of those countries, may have diverged from the common law elsewhere. The question must always be asked — what is the common law of Fiji? That does not entitle this court lightly to set that common law in directions which diverge from its historical origins or that of other countries with whom it shares its legal heritage.

[70] In some cases, particularly those affected by its constitutional principles including those relating to human rights and fundamental freedoms, Fiji may diverge from other jurisdictions which have been, like it, the inheritors of the common law of England. But a conservative principle should be applied to maintain, so far as possible, a degree of certainty and predictability about the judge-made law. With its historical depth of trial and error evolution it provides an immense resource upon which to draw in dealing with disputes between people which are part of the common lot of humanity and know no jurisdictional boundaries.

[71] There is a relevant criticism of the current common law approach to the characterisation of employer/employee relationships and independent contractor arrangements. Creighton and Stewart have observed that a difficulty with the prevailing judicial approach is that it permits one or both of the parties to a work relationship to evade obligations otherwise imposed by awards or statutes:

> … with a modicum of care and ingenuity it remains possible for businesses to obtain work from individuals who are virtually indistinguishable from employees, in terms of their close connection to the organisation and subordination to its managers and supervisors, yet whom the common law does not characterise as "employees". This can in most instances be achieved simply through a well-drafted contract that is designed to look as much like a client/contractor agreement as possible.

Creighton B and Stewart A, *Labour Law* (4th ed, Federation Press, 2005, at [11.43])

[72] The learned authors point to the international dimensions of the problem of "disguised employment". They refer to a report prepared for the International Labour Conference in 2003 which surveyed a range of countries and referred to an increasingly widespread phenomenon of dependent workers lacking labour protection. The ILO Report said:

> The growing lack of protection of many dependent workers, although not the same in all countries, is a challenge to the effective functioning of labour law. The non-protection of dependent workers harms workers and their families; it also affects the viability of enterprises and has consequences for society and governments.

Creighton and Stewart, op cit at [11.45].

[73] The concern expressed by the authors of the 4th edition of *Labour Law* can properly be acknowledged without the necessity to set Fiji's common law on a path that diverges from those jurisdictions which share its common law heritage. The approach to characterisation should involve close scrutiny of arrangements which involve standard form contracts declaring the nature of the work relationship which they cover as that of "independent contractor" when this is coupled with significant constraints on the way the contractor is to do his or her work.

Taxi drivers

[74] Taxi drivers who do not own their taxis are a category of workers whose contractual arrangements with owners or suppliers of their taxis have long been the subject of judicial consideration. In *Fowler v Lock* (1872) 7 LRCP 272 the owner of a horse and cab let it out for hire to a driver who paid 18 shillings a day and took the rest of the profit or loss upon himself. Grove J observed that the cab man was under no control as to his movements by the cab owner. He could make special bargains with the public. He was not carrying out any directions of the owner. There was no provision for notice of dismissal but only a refusal to supply cab and horse on non-payment. There were no correlative duties beyond those of bailor and bailee. He said (at LRCP 280):

> I feel obliged to come to the conclusion that the cab man is not the servant of the cab-owner.

[75] Byles J said (at LRCP 281):

> The driver, as between the cab-owner and himself seems to me to have the complete and exclusive control and disposition of the vehicle within a certain district, and not to be a servant of the proprietor.

In rejecting the characterisation of the relationship between the owner and driver as that of employer and employee, the decision reflected an application of the control test discussed earlier.

[76] In *Doggett v Waterloo Taxi-Cab Co Ltd* [1910] 2 KB 336 (*Doggett*), the Court of Appeal came to a like conclusion in relation to taxi drivers who took their cabs on a day-to-day contract, were free to go where they wanted, were paid a percentage of taximeter takings and could not be "dismissed" but merely refused the use of a cab. They rejected the driver's claim for workmen's compensation because he was not a servant of the owner although Cozens-Hardy MR entered the caution (at KB 341):

> There may be cases in which the proprietor of a taxi-cab exercises such a degree of control over the driver as to justify the conclusion that the relation of master and servant exists.

Buckley LJ referred to the lack of control exercised over the driver (at KB 342) and Kennedy LJ noted that there was no evidence that the company could have ordered the driver to take this or that job (at KB 344).

[77] The decision in *Doggett* was approved in *Smith v General Motor Cab Co Ltd* [1911] AC 188 (*Smith*). Lord Shaw observed that *"the point"* depended upon many circumstances (at AC 193):

> … the scope of the employment, the form of remuneration, the scope within which the person driving the cab has power to regulate his own times and seasons, or to drive or not to drive the cab as he wishes.

Doggett and *Smith* were applied in New Zealand to characterise a taxi owner and driver relationship as that of bailor and bailee rather than partnership — *Checker Taxicab Co Ltd v Stone* [1930] NZLR 169 (*Checker Taxicab*). The High Court of Australia applied that characterisation in *Dillon v Gange* (1941) 64 CLR 253; [1941] ALR 94 (*Dillon*) citing *Smith*, *Doggett* and *Checker Taxicab*: at CLR 258, 263 and 265.

[78] In *Yellow Cabs of Australia Ltd v Colgan* [1930] AR (NSW) 137 (*Yellow Cabs*), the New South Wales Industrial Commission decided that a taxi driver who was a bailee of his vehicle was not an employee. Street and Cantor JJ

acknowledged that, where parties occupy a relationship in the nature of joint adventurers, a degree of direction or control is necessarily involved (at AR (NSW) 165):

> But this does not necessarily create the relationship of employer and employee, that question, all the surrounding circumstances having been taken into consideration, being mainly determined by the degree and extent of the detailed control vested in one party over the acts of the other party in the actual execution of the work contemplated in the joint venture.

In that case, the drivers kept their taxis at the company garage or not as they wished and worked the days or hours they wanted and were not required to record their time or to work for a specified period. They were not under any directions as to the places in which they should look for work. They paid for their own petrol and had to pay for the cost of repairs to their cabs. Street and Cantor JJ said (at AR (NSW) 169):

> … each driver was substantially in the position of an independent contractor "who undertakes to produce a given result but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified before hand".

[79] This decision was followed in *Platt v Treweneck* (1953) AR (NSW) 642, where the drivers were bailees of their vehicles obligated to pay the owner in one case half and in the other two-thirds, of their daily takings. The fact that in one case details of available jobs were obtained from the owner's office by telephone (at 647) and in the other case by radio (at 651) did not convert the bailor/bailee relationship into one of employer and employee.

[80] The question was recently considered by the Full Court of the Federal Court in *Commissioner of Taxation v De Luxe Red & Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507. The case involved the liability of taxi fleet operators, cooperatives and plate owners to make superannuation contributions and income tax deductions from remuneration received by their drivers. This depended upon the characterisation of their relationship with the drivers as a relationship of employment. The argument against the Commissioner was that the relationship was one of bailment. The Full Federal Court held that under the general law the relationship between that taxi cab owner and its driver was bailment not employment. They applied *Dillon* and *Yellow Cabs* and referred to *Northern District Radio Taxi Cab Co-operative Ltd v Commissioner of Stamp Duties* (1975) 1 NSWLR 346 where Sheppard J said (at NSWLR 347–8):

> … in most cases drivers of taxi cabs owned by other persons are not employees of such owners, but are bailees of the cabs which they drive.

[81] The Full Court said (at FCR 522):

> We would be prepared to accept that the Commissioner's contentions might have some force, if they could be viewed apart from: (1) the direction in which the general law has developed, that is, towards bailment and away from employment; and (2) the acceptance of the general law bailment notion in the legislation governing the relationship between licence owner and driver. These considerations apart, there might have been something to be said for a conclusion that the presence here of at least some of the indicia of an employment situation justified the characterisation of the drivers as the providers of labour, and thus within the application of the two Commonwealth statutes now in question. But, in our view, it would be wrong to seek to divorce the issue of the true character of the relationship from its well established general law and statutory setting. When the present circumstances are viewed in that setting or context,

a conclusion that the drivers are bailees in a joint venture is appropriate, notwithstanding the degree of control reserved to the bailor. Such a reservation is not, as was noted in *Yellow Cabs*, necessarily inconsistent with a bailment relationship.

[82] The weight of established law governing the characterisation of the relationship that has historically existed between taxi owners and their drivers bears heavily upon this case. It is necessary now to have regard to the application of that case law to the arrangements in issue in this case.

The nature of the relationship between Sanyo and the cab drivers

[83] The standard contract between Mr Hassan and his drivers involve the following elements:

(1) Each driver was assigned a Sanyo taxi in which to offer taxi services to members of the public for a fare which was to be paid by the member of the public to the driver.

(2) Each driver had to pay $66 daily to Mr Hassan and could retain the rest of his takings.

(3) The area in which the driver could operate the cab was defined by reference to Suva, Deuba along Queens Road and Tailevu along Kings Road. The cab could not be used outside these areas without Mr Hassan's permission.

(4) The cab was restricted to the driver's personal use only and could not be made available to others to drive.

(5) The driver could not undertake repair work on the cab other than in an emergency and then only sufficient to drive it to the nearest garage.

(6) The driver was liable in the event of an accident for which the driver was at fault while using the vehicle for private purposes. It is implicit in this provision that the driver was free to use the vehicle for his own purposes.

(7) The driver was required to bring the vehicle in for inspection by management each day.

(8) Under clause 11 of the agreement it was provided "the company shall have no control over the Employee's daily driving". The reference to employee may have been a slip but in any event it cannot be conclusive. There was no express provision for termination by Sanyo however drivers were required to give one week's notice of termination "except in the casual dismissal" whatever that may mean.

[84] There was a control radio despatch system as appears from the Sanyo letterhead. And there was evidence that Sanyo had eleven regular clients. There was no evidence that drivers were or could be directed to pick-up someone for a regular customer or any other customer phoning for a cab. There was no evidence to suggest that the system was not one of bidding for jobs in the usual way.

[85] The finding of the Court of Appeal that Sanyo was *"a tightly organised and controlled operation of which the drivers were an essential part"* in our judgment was not supported by any evidence that such control was exercised.

[86] The fact, relied upon by R2 and third Respondent (R3) in their further submissions, that Mr Hassan told the Minister for Labour that *"Sanyo Cabs cannot afford to have drivers on strike"* and that *"all the drivers on strike have possession of my vehicles which are to be used for these services"* does not assist. Mr Hassan's reference to "strike" and to the need to service fixed customers is

entirely consistent with bailment arrangements. It was plainly in his interest to have as many of the drivers as possible on the road and earning at least the daily sum of $66 which was paid to him.

[87] The R2 and R3 argued in further submissions that the evidence established that the drivers *"drive the vehicles for the Petitioner's business and to serve Petitioner's fixed customers",* but there was no evidence that the drivers were subject to the control of Mr Hassan.

[88] The Respondents relied upon transport industry and labour regulations in aid of their submissions that the drivers are properly to be regarded as employees. They referred in particular to the Land Transfer (Public Service Vehicles) Regulations 2000, the Wages Council Act and the Wages Regulation (Road Transport) Order 2002.

[89] It was contended that reg 17(1) of the Road Transport (Public Service Vehicles) Regulations has the effect that a person who is the holder of a taxi permit cannot engage another person as a bailee to operate the taxi. A permit holder can only appoint an employee to drive a vehicle for him. Whether that is right or not is not necessary to decide here. If it is right, then Mr Hassan might be in breach of the law. So too may other taxi operators in Fiji. The limitations, if any, imposed by the regulations do not determine the character of the legal relationship between him and his drivers. The permanent secretary erred in his reliance upon advice from the Land Transport Authority in that regard.

[90] The Respondents also pointed to the Wages Regulation (Road Transport) Order 2002 as *"the relevant legislative provision governing terms and conditions of taxi drivers"* as *"light PSV drivers"*. The order, it was said, applies to all workers in the road transport industry and covers their terms and conditions. These include minimum rates of remuneration, hours of work, public holidays, annual holidays, overtime work, subsistence allowances, meal allowances and sick leave. The order, it was said:

> … does not cover or recognise relationships of bailment,,,

The issue in this case is not whether Mr Hassan has breached his obligations, if any, under the order. If he has, appropriate action could be taken against him. The issue in this case is and always has been, whether his arrangements with his drivers makes them his employees. The material properly before the court supports a different characterisation.

[91] The Respondents have also referred to public policy considerations about the need to ensure that taxi drivers receive entitlements of the kind contained in the order. It is not for this court to determine such matters. The court is not equipped to make judgments about the costs and benefits in the taxi industry of such entitlements and effectively to impose them by extending the concept of "employee" beyond its common law limits.

Conclusion

[92] For the preceding reasons we are of the opinion that special leave to appeal should be granted and the appeal allowed.

[93] The orders of the court will be:

(1) Special leave is granted.

(2) Appeal allowed.

(3) The orders of the Court of Appeal dismissing the Petitioner's appeal with costs are set aside.

(4) The orders of the High Court dismissing the Petitioner's application for judicial review with costs are set aside.
(5) Compulsory Recognition (No 1) Order 2003 made by the R2 on 8 January 2003 is quashed.
(6) No orders as to costs in the High Court, Court of Appeal and this court to the intent that each party will pay or bear his or its own costs.

Appeal allowed.