ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.365 OF 1998

BETWEEN:

NATIONAL INSURANCE BOARD

Plaintiff

and

BOTTLERS (ST VINCENT) LTD

Defendant

Appearances:

Ms Paula David for the Plaintiff
Ms Margaret Hughes-Ferrari for the Defendant

2000: June 7,9

JUDGMENT

[1] MITCHELL, J: This case calls for the determination of the question whether certain persons are employees or are self-employed persons for the purposes of the National Insurance Act, Cap 229 of the 1991 Edition of the Laws of St Vincent and the Grenadines.

[2] These proceedings commenced by way of an Originating Summons filed on 31 August 1998. On behalf of the Plaintiff Board, affidavits were filed sworn by Reginald Thomas, the Executive Director of the National Insurance Scheme, and by Christopher Hepburn, an ex employee of the Defendant company between the years 1969 and 1996 when he retired. On behalf of the Defendant company, an affidavit was sworn and filed by Kenneth Bertram Charles, its Managing Director. By consent, directions were given that the matter be determined in Chambers on the affidavit evidence. None of the deponents were required for cross-

examination. Neither the facts nor the law was in dispute between the parties. The difference of opinion was over the application of the agreed law to the agreed facts.

[3] The Plaintiff Board is established by the National Insurance Act. The Act came into effect on 17 December 1986 when it replaced the old National Provident Fund, whose assets were transferred to the Board. The Board is a statutory corporation. The Act provides that every person who is under sixty years of age and who was previously a member of the National Provident Fund or who is between sixteen and sixty years of age and is gainfully employed in insurable employment shall be insured under the Act. Insurable employment is defined as employment under any contract of service or apprenticeship, written or oral, and whether express or implied. The Act provides that regulations may fix from time to time the rates of contributions to be paid by different categories of insured persons and employers.

[4] The Defendant company bottles and sells carbonated soft drinks throughout St Vincent. Its distribution system throughout the island is as follows. The island is divided into six districts. The arrangement the Defendant company has with its truck drivers is that each driver is assigned to a particular district. The Defendant company considers the drivers to be independent contractors. The Defendant company has its own trucks, and each driver is allowed to use the Defendant company's trucks to distribute the Defendant company's products. The Defendant company supplies the trucks with petrol and is responsible for the maintenance of the trucks. In the event of an accident, the truck driver is obliged if he is at fault to indemnify both the Defendant company and any other motorist who may have suffered. The drivers are paid on a commission basis on all products sold and delivered by them to customers' premises. The Defendant company is not required by the Inland Revenue Department to deduct PAYE from the commissions paid to the drivers. They are not told when to start work or when they can end their day. They work such hours and shifts as they please. If they

do not wish to work, they need not work. The drivers usually work from Monday to Friday. Each driver has a route which he must complete within the week. If a driver did not complete his route on Friday, the Sales Supervisor of the Defendant company would tell him to finish it on Saturday. The drivers and their helpers are supplied with advertising and promotional clothing which might be considered uniforms. They are given T-shirts with Pepsi or Ju-C logos. They are also provided with trousers. Each year they are allowed $100.00 to purchase a pair of shoes. Prior to the year 1982, these truck drivers had been treated as regular employees. From that year drivers were no longer entitled to sick leave and holiday pay, and they were treated not as employees but as independent contractors. From about the year 1987, the company introduced a practice whereby they would pay each driver $500.00 and tell him to take a break. Some drivers take a break each year for 2 or 3 weeks, others for 4 weeks, as they wish. Each driver is responsible for hiring his own helper. The truck driver is responsible for paying the helper's wages. The helpers are provided by the Defendant company with similar T-shirts and trousers as the drivers. There is no question, apparently, of the helpers being employees of the Defendant company.

[5] The Plaintiff Board considers that, in these circumstances, the truck drivers are employees of the Defendant company, and the Defendant company should be deducting NIS contributions from the commissions paid to the drivers and paying the contributions of the employee and the employer to the Plaintiff Board. Counsel for the Plaintiff Board emphasised that these drivers work regular hours, use the Defendant company's equipment, conduct their operations within the confines of an area designated by the Defendant company, and are subject to the instructions of the Sales Supervisor. In such circumstances, she submits, they are employees, not independent contractors. She relies on the 1984 judgment of Sir William Douglas CJ in the Barbados Divisional Court case of Rudder v Dallaway (1984) 38 WIR 56. The Defendant company opposes that view and sees the drivers as independent contractors not liable for NIS contributions. Counsel for the Defendant company in reply submitted that it is entirely up to the drivers how much

or how little remuneration they receive. The contract in this case between a driver and the Defendant company lacks the necessary mutuality to be a contract of service. A contract of service involves an essential core of mutual obligations: to be ready to work and to pay for that work. If the worker has the choice as to whether to work at all for a given period, then, she submits, the contract would lack mutuality. These drivers, she submits, are self-employed and the Defendant company is not required by the Act to make contributions to the NIS on their behalf. She relied on the cases of Short v J&W Henderson Ltd [1946] 62 TLR 427; and WHPT Housing v Secretary of State for Social Services [1981] 1CR 737; and Ready Mixed Concrete v Minister of Pensions and National Insurance [1968] 2QB 497; and O'Kelly v Trusthouse Forte plc [1984] QB 90. Before moving on, I must express my appreciation to both counsel for the care they took to prepare their arguments, and for expressing them with their usual lucidity, and for providing copies of all the authorities they relied on, all of which contributed to making my task so much less burdensome.

[6] There is a thorough analysis of the modern law on this question of who is an employee in Clerk and Lindsell on Torts, 17th Edition, at Chapter 5 which deals with vicarious liability, and on which I have relied for the following analysis. Halsbury's Laws of England, 4th Edition, Vol 16, at page 9 under the rubric "Characteristics of the relationship" summarises the present state of the law on the question of who is an employee, and was also helpful.

[7] The question of control, ie, the employer's right to control the method of doing the work, used to be the classic test for distinguishing an employee from an independent contractor. An early formulation of the test is found as far back as in the judgment of Bramwell B in the case of Yewens v Noakes (1880) 6 QBD 530. That test is no longer considered sufficient. But, even today, the test of the right to control the method of doing the work is still frequently referred to. It probably remains useful where relatively simple forms of employment are in issue. Thus, if the employer could easily control the method of working of the employed person,

but chooses to enter into a relationship giving up any control over the manner in which the person performs his duties, that would be a very relevant criterion in determining the nature of the relationship.

[8] It was Lord Denning who suggested the "organisation" or "integration" test in the case of Stevenson, Jordan and Harrison Ltd v Macdonald [1952] 1 TLR 101. He gave the example of the distinction between a chauffeur and a reporter on the one hand who are both employed on a contract of service, and a taxi-driver and a newspaper contributor on the other hand who are both employed under a contract for services. On an analysis of the earlier authorities, he said at page 111:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

It is now accepted that the question whether the person was integrated into the enterprise or remained apart from and independent of it is only one of the relevant factors in deciding on the overall classification of the individual.

[9] Other case law has underlined the need to identify the economic reality of a given relationship. It was Lord Wright in Montreal v Montreal Locomotive Works Ltd [1947] DLR 161 who set the basis for taking the economic approach. He suggested the following factors as important in assessing the economic reality: control, ownership of the tools, chance of profit, and risk of loss. This was the approach followed in the Ready Mixed Concrete case [supra].

[10] Cook J subsequently suggested in Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173 that a useful rule of thumb is, "Is the worker in business on his own account?" If he is, he will not be an employee. The factors to

be taken into account in making this assessment include such matters as control, who provides the equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether he can profit from sound management in the performance of his task. This approach of asking "on whose account" has been approved in the Privy Council case of Lee Tin Sang v Chung Chi-Keung [1990] 2 AC 374.

[11] Somerville LJ in the case of Cassidy v Ministry of Health [1951] 2 KB 343 had found that there continues to be scope for the "instinctive" approach to be followed. One can do no better than ask, "Was his contract a contract of service within the meaning which an ordinary person would give to those words?" Another way of asking the question is, "What would be the view of an ordinary person who learned of the facts?" This is one approach that I propose to use in deciding the question before the court.

[12] The more modern approach is to abandon the idea of a simple test, and to take a multiple factor approach. The later cases show the courts assessing all aspects of the relationship. The factors relevant in a particular case may include: control; integration; the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime; holiday; payment of income tax; national insurance contributions; whether the individual may delegate work; who provides tools and equipment; who ultimately bears the risk of loss and the chance of profit; the nature of the work; and how the contract may be terminated. Some of these factors were present in this case, while others were not.

[13] The payment of commission-based remuneration to sales persons who work outside of the day-to-day control of their employer is commercially eminently sensible. The Defendant company in this case has no hope of control over drivers and their staff who venture forth out of the city into the countryside through the hills and valleys of this island to deliver the goods of the Defendant company to distant

soft drink outlets. They might work enthusiastically and diligently or they might spend much of their time idling, off on a frolic of their own. It is out of the hands of the Defendant company. What better motivating tool for the drivers than to base their remuneration on commissions? If a sales assistant in a perfume or jewellery shop were paid by commissions on sales, no one would question that he was an employee and not an independent contractor. The payment of remuneration on the basis of commission on sales rather than on a flat wage does not of itself mean that a worker is not an employee. It might be no more than a management strategy to get the worker to increase his output by giving him an incentive to do so.

[14] I then ask myself if the entitlement of the drivers to hire their own helpers and to pay them out of their remuneration is an obstacle to finding that the drivers are themselves employees. Given the type of work that is done by the drivers in this case, such an arrangement might be advantageous to the Defendant company. The Defendant company can never have a long enough arm to control and supervise the drivers, far less their helpers out on the road on their daily task. If the drivers and their helpers were paid a flat salary, they would have to be left to carry out their tasks unsupervised. With a commission-based remuneration package for the drivers, the drivers have every incentive to sell a maximum of the Defendant company's products and to properly supervise and control their own helpers. I ask myself, what more mutuality could the court look for? Because a worker is permitted to hire whomsoever he wishes at his own cost to help him in the performance of his duties, does that automatically make him an independent contractor? I cannot find either in law or applying commonsense that that is the inevitable conclusion. (It is only in parenthesis that I add that I presume that the drivers of the Defendant company take care to honour their legal obligation to register themselves as employers and to deduct and pay NIS and any necessary PAYE contributions for their own employees.)

[15] What in the circumstances of this case, other than the lack of control and the right to hire help, is suggested as characterising these drivers as independent contractors? That they are employed under a contract that characterises them as self-employed has long been held not to be decisive. The court does not look to see by what name or character the parties to a contract distinguish their contract. The court must consider the categorisation of the person in question objectively, and make its own finding about the nature of a contract in law.

[16] Is it the fact that other government agencies such as the Inland Revenue classify these persons as self-employed? Applying the instinctive or commonsense approach again, I ask myself if there is anything that would stop the Inland Revenue from changing its classification at any time it wanted to. There is nothing to stop the Inland Revenue from taking advice tomorrow, and reclassifying the drivers of the Defendant company as employees. Or the tax authorities may decide to change the person's tax status later in the light of further evidence. In any event, the court is not bound by a classification of a contract given to it by someone in the Inland Revenue Department. It is one of the functions of the court to determine how contracts are to be classified.

[17] The clothing supplied by the Defendant company to the drivers and the helpers are of a promotional nature, apparently paid for by the companies whose products are promoted on the T-shirts. I place no great weight on those amounting to uniforms. But, I do consider the annual $500.00 payment and the instruction to "take a break" given by the Defendant company to the drivers to be in the nature of an annual vacation. Only employees are given vacations.

[18] Each driver is given a route that can just be completed in a week. If he has not completed it by Friday, he must do so on Saturday. Then, I imagine, he and his helper must start all over again to cover the same route, with its limited number of known outlets, the following week. There does not seem much scope for determining the level of your own income there.

[19] The cost of the manufacturing and the marketing of the product is all from general knowledge and information borne centrally. The sales money all goes to the Defendant company. Both the risk and the profit in these senses are to the Defendant company, not to the drivers.

[20] There is no express evidence on the point, but I understand the evidence to imply that the drivers work only for this one employer. The drivers of the Defendant company's trucks are not in the trucking business as normally understood, working for whomsoever gives them cargo to transport. The Defendant company is unlikely to allow its trucks to be used for any other purpose than to deliver its goods to particular outlets. Indeed, there is from the evidence no one else supplying the Defendant company's goods to the outlets that sell them. Without the distribution service provided by its trucks, the Defendant company would be hard pressed to get its goods to market, it would hardly be in business. In these circumstances, the proper finding is that the drivers are not apart from and independent of the Defendant company's business. They are an integral part of the Defendant company's enterprise.

[21] Is the fact that the Defendant company makes the drivers liable for any loss they cause by their negligence in driving the trucks of the Defendant company of any legal significance? Any employer can always attempt to reclaim from his employee damages the employer has had to pay resulting from a tort of the employee. There is no necessity for that right to form a part of a contract between an employer and a worker. That responsibility of an employee to indemnify the employer has never been thought to convert the employee into an independent contractor.

[22] This questioning of the nature of the contract of employment of the truck drivers is arising after twenty-odd years of accepting it as a contract for services. Is the length of time that the parties to the contract and the relevant regulatory authorities

have classified the contract significant in law? I think not. Persons may interpret or apply the law incorrectly for any number of years, but when the court is called upon to interpret the law, that task must be carried out without the court being influenced unduly by the length of time that these other persons may have fallen into error.

[23] Given all that I have found and said above, I must accept the submissions of counsel for the Plaintiff Board and find in favour of the interpretation of the Act given to it by the Plaintiff Board. The question is, what sort of an order should be made? The Plaintiff Board asks that an order be made that the Defendant company make national insurance contributions on behalf of its drivers from the date of employment of each driver until the date of judgment and onward or until the date of the termination of the employment of the driver if such termination occurred before the date of judgment. Such an order is probably permissible. I have considered that there is a period of nearly twenty years that the Plaintiff Board and its predecessor Fund have collaborated together with the Defendant company in approving the Defendant company's interpretation of its contracts with its drivers as constituting the drivers independent contractors. I have no evidence of what the total accumulated amount of money is that the Defendant company should have paid over to the Plaintiff Board over that period in relation to the drivers. Whatever the sum is, I do not consider that it would be just to order the Defendant company to pay it to the Plaintiff Board. Such a penalty in the circumstances would be unconscionable. I shall order instead that the Defendant company is to commence making the deductions and the appropriate payments as of the date of this judgment. There will be judgment accordingly for the Plaintiff Board with costs to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge