FEDERAL COURT OF AUSTRALIA

Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99

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| Citation: | Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99 |
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| Appeal from: | The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.7) [2013] FCCA 1097  The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.8) [2014] FCCA 225  The Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.9) [2014] FCCA 1124 |
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| Parties: | **LINKHILL PTY LTD (ACN 006 166 070) v DIRECTOR, OFFICE OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE** |
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| File number: | VID 129 of 2014 |
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| Judge: | **NORTH, BROMBERG AND WHITE JJ** |
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| Date of judgment: | 22 July 2015 |
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| Catchwords: | **APPEAL AND NEW TRIAL** – leave to argue ground of appeal not raised before primary judge – permission to raise argument not advanced at trial – when may new argument be advanced on appeal – expedient in interests of justice to allow new argument – failure to raise argument at trial  **INDUSTRIAL LAW** – right to deduct payments made from award entitlements – set-off of payments – off-set of award entitlements against payments made – method of calculation of underpayment of award entitlements – payments made taken into account as deduction against award entitlements – sham contracting  **PRACTICE AND PROCEDURE –** refusal of adjournment – discretionary judgment with regard to adjournment |
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| Legislation: | *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Schedule 2, Part 3, s11(1), Schedule 18, Part 3, s 13(1)  *Fair Work Act 2009* (Cth) ss 357(1), 357(2)  *Workplace Relations Act 1996* (Cth) ss 900(1), 900(2), 900(3) |
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| Cases cited: | *AON Risk Services Australia Ltd v Australian National University* [2009] HCA 27  *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* (2001) 111 IR 227; [2001] FCA 1785  *Blazevski v Judges of the District Court of New South Wales* (1992) 29 ALD 197  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833  *Connecticut Fire Insurance Co v Kavanagh* (1892) AC 473  *Coulton v Holcombe* (1986) 162 CLR 1; (1986) 65 ALR 656; [1986] HCA 33  *House v The King* (1936) 55 CLR 499; [1936] HCA 40  *James Turner Roofing Pty Ltd v Peters* (2003) 132 IR 122; [2003] WASCA 28  *JB Chandler Investment Company Ltd & Anor v. Commissioner of Taxation* (1993) 47 FCR 588; 93 ATC 5182; 27 ATR 340; [1993] FCA 963  *Logan v Otis Elevator Co Pty Ltd* (1999) 94 IR 218; [1999] IRCA 4  *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503; 9 IR 469; [1984] FCA 348  *O'Brien v Komesaroff* (1982) 150 CLR 310; 56 ALJR 681; 41 ALR 255; [1982] HCA 33  *Pacific Publications Pty Ltd v Cantlon* (1983) 4 IR 415  *Poletti v Ecob (No.2)* (1989) 31 IR 321; 91 ALR 381; [1989] FCA 779  *Poulos v Walton Stores (Interstate) Ltd* (1986) 10 FCR 429; [1986] FCA 159  *Ray v Radano* [1967] AR (NSW) 471  *Salahuddin v Minister for Immigration and Border Protection* (2013) 61 AAR 531; 140 ALD 1; [2013] FCAFC 141  *Siegwerk Australia Pty Ltd (In Liquidation) v Nuplex Industries (Aust) Pty Ltd* (2013) 305 ALR 412; [2013] FCAFC 130  *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; (1950) ALR 820; [1950] HCA 35  *University of Wollongong v Metwally & Ors (No 2)* (1985) 60 ALR 68; [1985] HCA 28  *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158  *Water Board v Moustakas* (1988) 180 CLR 491; [1988] HCA 12 |
|  |  |
| Date of hearing: | 24 and 25 November 2014 |
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| Place: |  |
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| Division: | FAIR WORK DIVISION |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 148 |
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| Counsel for the Appellant: | Mr J D Catlin |
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| Solicitor for the Appellant: | At Work Law |
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| Counsel for the Respondent: | Mr S J Moore with Ms A M Duffy |
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| Solicitor for the Respondent: | Clayton Utz |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 129 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | LINKHILL PTY LTD (ACN 006 166 070)  Appellant |
| AND: | DIRECTOR, OFFICE OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE  Respondent |

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| JUDGES: | NORTH, BROMBERG AND WHITE JJ |
| DATE OF ORDER: | 22 JULY 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. To the extent necessary the time within which to institute the appeal is extended.
2. The appeal is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| JUDGES: | NORTH, BROMBERG AND WHITE JJ |
| DATE: | 22 JULY 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# NORTH and Bromberg JJ:

# INTRODUCTION

1. The central issue raised by this appeal is whether the appellant, Linkhill Pty Ltd (Linkhill), should be permitted to raise an argument which it did not advance at the trial.
2. The argument which Linkhill now seeks to raise on appeal is that payments which it made to ten workers should be off-set against award entitlements which the Federal Circuit Court found it was obliged to pay. The way the issues arise is as follows.

# THE FACTS

1. Linkhill manages the buildings used by, and has other associations with, the Roy Morgan Group of companies. It managed a number of city buildings used by the Group and it also operated a restaurant and an art gallery. In the course of these businesses Linkhill engaged workers to do renovation and refurbishment at 384-386 Flinders Lane, Melbourne, and other like work at other places.
2. On 20 October 2011, the respondent, Director, Office of the Fair Work Building Industry Inspectorate, filed an application against Linkhill in the then Federal Magistrates Court. The Director brought the application in respect of ten workers engaged by Linkhill, namely, Stephen Etheredge, Paul Gillen, Joel Elliott, Nathan Lovell, Matthew Walker, Alex Najdoski, Robert Hunter, Cyrille Darrigrand, Ryan Lowery, and Julio Cabrera. The workers were relevantly engaged for periods of various lengths, though each within the range April 2007 and August 2010. Included among the workers were welders, carpenters, wood machinists, scaffolders, electricians, labourers and supervisors. They were paid an hourly rate which varied between workers from $22 to $35 per hour. In several cases the rate applicable to a worker was increased during the period of engagement.
3. The Director alleged that the workers were employees engaged under contracts of employment. The Director further alleged that Linkhill represented to them that they were independent contractors engaged under contracts for services. The Director alleged that, by so representing, Linkhill contravened the sham contracting provisions in s 900(1) of the *Workplace Relations Act 1996* (Cth) (WR Act) which provided:

A person contravenes this subsection if:

(a) the person is a party to a contract with an individual; and

(b) the person makes a representation to the individual that the contract is a contract for services under which the individual performs work, or is to perform work, for the person as an independent contractor; and

(c) the contract, as in force at the time of the representation, is a contract of employment under which the person is the employer of the individual, rather than a contract for services under which the individual performs work as an independent contractor.

1. Section 900 was repealed on 1 July 2009 but continued to apply to conduct that occurred before that date: (*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) schedule 2, part 3, s 11(1), schedule 18, part 3, s 13(1)). Section 900(1) is a civil remedy provision (s 900(3)).
2. Section 900(2) of the WR Act provided a defence as follows:

A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person did not know that, and was not reckless as to whether, the contract was a contract of employment rather than a contract for services.

1. Some of the conduct alleged against Linkhill occurred after 1 July 2009 and was subject to s 357(1) of the *Fair Work Act 2009* (Cth) (FW Act) which was, for present purposes, in substance the same as s 900(1) of the WR Act.
2. A defence in materially similar form to s 900(2) of the WR Act was provided by s 357(2) of the FW Act which applied after 1 July 2009.
3. The Director alleged that Linkhill had not paid the ten workers their entitlements as employees under certain awards and statutory provisions. He sought in respect of each worker declarations of contravention of the awards and statutory provisions, orders for payment of the award and statutory entitlements, and the imposition of civil penalties for the contraventions.
4. The trial of the action occupied 10 hearing days on days between 25 February and 9 October 2013. On 20 December 2013 the Federal Circuit Court delivered lengthy reasons for judgment comprising 286 pages. The reasons for judgment dealt with four issues.
5. The first issue was whether the ten workers were employees, as the Director contended, or whether they were engaged as independent contractors, as Linkhill contended. The Federal Circuit Court determined that each of the workers was an employee engaged under a contract of employment.
6. The second issue was whether Linkhill contravened s 900(1) of the WR Act and/or s 357(1) of the FW Act by representing to each of the workers that he was an independent contractor who worked under a contract for services. The Federal Circuit Court accepted the argument of the Director that Linkhill had made the representations.
7. The third issue was whether Linkhill had made out the defence under s 900(2) of the WR Act and/or s 357(2) of the FW Act, namely, that, when it made the representation, it did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services. The Federal Circuit Court again accepted the argument of the Director that Linkhill had not made out the defence.
8. The fourth issue involved a number of contentious matters as to how the awards or industrial instruments applied if the workers were employees including into what classification each employee fell, whether the employees were employed as casuals, and whether the awards applied at particular places of work. Finally, the Federal Circuit Court accepted the calculations provided by the Director in schedules annexed to the Amended Statement of Claim dated 6 December 2012 (ASOC) which quantified the amounts of each of the entitlements due to each of the employees.
9. Following the publication of the reasons for judgment, the proceeding was adjourned to allow the Director to bring in short minutes of orders to reflect the reasons for judgment. The Director formulated short minutes of orders and the matter was listed for hearing for the purpose of making those orders on 12 February 2014.
10. Shortly before 12 February 2014, Linkhill engaged new senior and junior counsel. At the hearing, on 12 February 2014, junior counsel applied for an adjournment for two weeks so that he and senior counsel could consider whether there was an argument available that Linkhill had a right to bring into account payments made to the ten employees as deductions against the award entitlements found by the Federal Circuit Court to be owing by Linkhill to the ten employees. The application for an adjournment was rejected. Then followed some discussion about the detailed form of the orders proposed, and the scheduling of preparatory steps for the penalty hearing. The Federal Circuit Court made an order listing the penalty hearing for 15 May 2014.
11. On 12 February 2014, the Federal Circuit Court made orders reflecting its reasons for judgment delivered on 20 December 2013. Paragraphs 2 – 51 of the orders were declarations as to the entitlements of certain of the ten employees and that Linkhill had contravened specified legislative provisions and awards. Paragraphs 52 – 61 were orders requiring Linkhill to pay each of the employees specified amounts for particular award entitlements. An example which reflects the nature of the entitlements can be seen in [54] relating to Mr Lovell as follows:

Pursuant to s.719(6) of the WR Act and s.545(1) of the FW Act, the Respondent pay Lovell the amount of $37,806.29 comprised of:

a. $7,423.52 in respect of unpaid overtime and weekend penalty rates under the 2000 Award and the 2010 Award;

b. $3,683.30 in respect of unpaid meal allowances under the 2000 Award and the 2010 Award; and

c. $489.73 in respect of unpaid crib time under the 2000 Award and the 2010 Award;

d. $12,009.80 in respect of unpaid fares and travel patterns allowances under the 2000 Award and the 2010 Award;

e. $4,740.57 in respect of unpaid redundancy/severance pay under the 2010 Award;

f. $7,919.34 in respect of unpaid accrued annual leave under the 2010 Award and the FW Act; and

g. $1,540.03 in respect of unpaid annual leave loading under the 2010 Award.

1. The orders for payment in respect of four of the other employees included the same range of entitlements as in the case of Mr Lovell. The orders for payment in respect of the remaining five employees covered some, but not all, of that range of entitlements.
2. Paragraph 62 of the orders required Linkhill to pay interest to each of the employees on the amounts due to them for the period from the date of commencement of the proceedings, namely, 20 October 2011, until the date of judgment, namely, 20 December 2013. Then, [63] required Linkhill to make superannuation contributions in respect of eight of the employees to nominated superannuation funds in specified amounts.
3. The total amount payable to the ten employees pursuant to these orders excluding interest was $152,865.
4. On 14 May 2014, the day before the penalty hearing was to be heard, Linkhill filed an application under r 16.05(2)(e) of the Federal Circuit Court Rules seeking to set aside [52] – [67] of the orders made on 12 February 2014 for the reason that they did not reflect the intention of the Court.
5. On 15 May 2014 the Federal Circuit Court heard the application to set aside the particular orders made on 12 February 2014, and heard evidence and submissions on the question of penalty.
6. On 20 June 2014, the Federal Circuit Court delivered judgment in which it rejected the application to set aside the particular orders, and imposed a penalty for the various contraventions amounting to $313,500.
7. Linkhill appealed against the orders made on 12 February 2014, and 20 June 2014. The grounds were crystallised in an amended notice of appeal filed 1 October 2014. This notice of appeal contained 25 grounds. Those grounds included challenges to the conclusion that the ten workers were employees, that Linkhill had made representations which contravened s 900(1) of the WR Act and/or s 357(1) of the FW Act and that Linkhill had not made out the defence under s 900(2) of the WR Act and/or s 357(2) of the FW Act.
8. Then, a significant number of the grounds raised or relied on the argument that the payments made by Linkhill to the workers should have been taken into account as a deduction against the award entitlements found to be due to the employees.
9. Some of the grounds of appeal, particularly the challenges to the orders made on 20 June 2014, were filed out of time. Linkhill applied for an extension of time within which to appeal on those grounds. The Director did not oppose the grant of an extension of time save on the basis that the grounds were not sustainable and consequently any extension of time would be futile.
10. In the course of the hearing of the appeal Linkhill abandoned, or was not permitted to press, all the grounds of appeal save the grounds which raised, or depended on, the argument that it was entitled to deduct from the award entitlements due to the employees amounts paid to them. Linkhill, in effect, also abandoned grounds 6 and 8(e) which challenged the refusal of the Federal Circuit Court to adjourn the proceedings on 12 February 2014. Had Linkhill not abandoned those grounds, the grounds would have failed for the reasons expressed by White J.
11. It is now necessary to consider the circumstances in which an appeal court will allow an argument not advanced at trial to be raised on appeal.

# WHEN MAY A NEW ARGUMENT BE ADVANCED ON APPEAL?

1. In *Suttor v Gundowda* (1950) 81 CLR 418 the High Court (Latham CJ, Williams and Fullagar JJ) said at 438:

The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below **and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.** In *Connecticut Fire Insurance Co. v. Kavanagh* (1892) AC 473, Lord Watson, delivering the judgment of the Privy Council, said, "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. **The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact,** in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

[Emphasis added.]

1. That approach was adopted by Mason J, with whom the other members of the Court agreed, in *O’Brien v Komesaroff* (1982) 150 CLR 310 at 319.
2. Then, in *University of Wollongong v Metwally & Ors (No 2)* (1985) 60 ALR 68 the Court (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) said at [7]:

It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

1. In *Coulton v Holcombe* (1986) 162 CLR 1 the majority (Gibbs CJ, Wilson, Brennan and Dawson JJ) said at [9]:

It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

1. Their Honours said that there was no distinction to be drawn in the application of these principles between an intermediate court of appeal and ultimate court of appeal (at [9]).
2. The majority further also endorsed the rationale of these principles which had been stated by the Court of Appeal from which the appeal had been brought as follows at [10]:

[T]he finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court.

1. Citing and applying these authorities, the joint judgment (Mason CJ, Wilson, Brennan and Dawson JJ) in *Water Board v Moustakas* (1988) 180 CLR 491 summarised the position at [13] thus:

More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but **otherwise the rule is strictly applied.**

[Emphasis added.]

1. In *Branir Pty Ltd v Owston Nominees (No 2)* [2001] FCA 1833 (*Branir*) Allsop J (as his Honour was then) (with whom Drummond and Mansfield JJ agreed) referred to some further considerations which might be taken into account by an appeal court when faced with a party seeking to raise a new point. He said at [38]:

First, the finality of litigation and the importance of parties being bound to the cases they make at trial should never be overlooked: Gleeson CJ and Hayne J in *Crampton*, supra at [15] and [157], respectively and *University of Wollongong v Metwally*, supra; see too *JB Chandler Investment Company Limited (in voluntary liquidation) v Commissioner of Taxation* [1993] FCA 641; (1993) 47 FCR 588 per Gummow J at 593G. Secondly, the difficulty of the party against whom the new point is raised reaching back in time to assess, necessarily hypothetically, how the conduct of the trial would, or may, have been different should not be underestimated. Such judgments or assessments can require re-agitation or reconsideration of decisions taken before and at trial (which may be privileged) and which can be very difficult to assess and articulate after the event. The entitlement of a party to the benefit of the opportunity of informed and reasonably contemporaneous assessment of relevant evidence, or inquiry, should be respected. Thirdly, the potential unfairness on counsel conducting an appeal who will be expected to assist the court in respect of the prejudice, or lack of it, to his or her client in the face of such matters being raised should not lightly be brushed aside. Even when counsel cannot positively say that something in particular would have been done differently, that does not mean that the court will be satisfied of a lack of prejudice. **The possibility of evidence or the possibility that the hearing would have taken a different course, if not fanciful, may well suffice to deny raising of the new point.** These considerations should not be seen as not requiring counsel frankly and candidly to say that the trial would not have been conducted differently if he or she is of that view. Fourthly, and in conclusion, before any new point be allowed, the court should be able to be satisfied that the raising of it could work no injustice on the other party and is otherwise in the interests of justice.

[Emphasis added.]

1. Applying these authorities, the Full Court in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158 restated, at [46], that:

… Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so.

See also: *Salahuddin v Minister for Immigration and Border Protection* [2013] FCAFC 141 per Flick J at [11]; and *Siegwerk Australia Pty Ltd (In Liquidation) v Nuplex Industries (Aust) Pty Ltd* [2013] FCAFC 130 per Robertson J at [104].

# PRINCIPLES GOVERNING THE RIGHT TO DEDUCT PAYMENTS MADE FROM AWARD ENTITLEMENTS

1. In order to determine whether the Director is prejudiced by allowing Linkhill to advance the new argument, it is necessary to examine what is required to establish the right to take into account the payments made by Linkhill.
2. A body of jurisprudence has developed which explains how payments made to employees are to be taken into account in claims for amounts due under industrial awards or instruments.
3. The starting point is the 1967 NSW Industrial Commission case *Ray v Radano* [1967] AR (NSW) 471 (*Ray v Radano*).
4. Mr Radano was employed as a chef at the Watson’s Bay restaurant of Mr Ray. Mr Radano received a fixed weekly wage plus travelling allowance for working six days a week from 11 am to 3.30 pm and 5.00 pm to 10.30 pm. On termination he claimed that he had not been paid overtime as required by the applicable award. His claim was made under s 92 of the *Industrial Arbitration Act* *1940* (NSW) which was confined to claims made under awards. Mr Radano did not bring into account any of the amount of wages paid to him by Mr Ray. The full bench of the NSW Industrial Commission agreed in the circumstances of the case that the wages paid had to be brought into account. Richards and Sheehy JJ explained at 476 that the “wage”:

…was intended by the parties to be in payment for the regular span of hours he was required to work in order to carry out the duties of chef at the restaurant. The award rates, whether for ordinary hours or overtime hours, were never in contemplation of the parties until Radano left the employ. This, however, does not affect Radano’s statutory right to receive the remuneration laid down by the award or to sue for any balance between the wages actually paid to him and what he would have been entitled to under the award.

1. Sheldon J said at 480:

…neither the complainant nor the defendant struck their bargain with anything in mind as tedious or esoteric as the details of an industrial award. The defendant knew how much he was prepared to pay for a cook willing to adapt himself to the exacting timetable of the restaurant and found him in the complainant. Thus the defendant simply paid a wage for such work as the complainant was employed to do and there was no allocation of parts of it to particular considerations. Therefore, it follows that the defendant can call in aid the whole of that wage to answer the whole of the claim arising under the award.

1. It is significant for the purpose of the present appeal that the Commission resolved the issue whether the wages paid were to be brought into account in assessing the balance due under the award by reference to the intention of the parties, a matter dependent on an examination of the facts relating to the making of the agreement.
2. Although the judges agreed on the reasoning and outcome of the proceeding, Richards and Sheehy JJ on the one hand, and Sheldon J on the other, disagreed in obiter about the proper approach to assessing the balance due under an award where over award payments or payments extraneous to an award have been agreed between the parties.
3. Richards and Sheehy JJ said at 474-5:

The worker’s right to recover in this type of proceeding is dependent in no way on the contract of employment between the parties once it is established that he was employed by the respondent. It is a statutory right to recover the difference between what he was paid by his employer for wages and the amount which he would be entitled to for wages under the award provisions. If the moneys received by him were not received for wages but for some other purpose, for example, for fares or as a uniform allowance, he would have to prove this fact in order to establish that such moneys were not to be taken into account in determining the correct balance due to him for wages. Proceedings under s. 92 must be clearly distinguished for an action in a civil court to recover moneys due under the contract of service between the parties. For the purpose of illustration let us imagine the following hypothetical case: a worker under his contract of service was promised $60 for 40 hours’ work per week when the appropriate award fixed the price or rate for 40 hours’ work per week at $40; the worker worked 45 hours in a particular week but was still paid his usual wage of $60. In such a case the worker, if he so desired, would be entitled to bring an action in a civil court to recover for the extra 5 hours worked in the week in question, but he could not be entitled to obtain an order under s. 92 unless the amount which would have been due to him under the award exceeded $60. If this were not so, he would be using s. 92 to recover a higher rate of wages than that provided for in the award, although s. 92 only creates a statutory right to the price or rate fixed by the award.

1. Sheldon J said at 478-9:

The position, as I see it, is that where a complainant has been employed by a defendant on work covered by an award, he is entitled under s. 92(2) to claim any balance due to him between his award entitlement for his work and any payment made to him by the employer which is properly attributable to that award entitlement. If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid; then the whole of that wage can be set-off against the award entitlement for the work whether it arises as ordinary time, overtime, week-end penalty rates or any other monetary right under the award. *Prima facie* a weekly sum paid by an employer to his employee is an appropriation by the employer (the debtor) to the payment due for that week …; and, in my opinion, there is no legal significance in the mere verbiage by which the payment is described whether it be “wages”, “remuneration” or the like. It is perhaps noteworthy that s. 92 under a side note “*Recovery of wages*” actually deals in its operative part with the “price or rate fixed by an award” for “any work” thus covering any monetary payment due under the award. I see no logic in a rule that a periodical sum so paid is deemed to be referable only to ordinary time worked unless it is specifically allocated also to other award rights. I agree that the two cases (cited in the majority judgment) which suggest the contrary were wrongly decided. On the other hand, if by contract, expressed or implied, the whole or part of the payment made to the complainant has been in respect of matters which are outside the award entitlement, the payment to the extent cannot be set-off. This may include amounts allocated, say, for fares or as a uniform allowance where there is no award entitlement in respect of such matters. This, of course, is recognized in the majority judgment.

But at this stage I must part company from that judgment because I can see no difference in principle between an amount promised in excess of the award requirement whether the promise is for, say, a uniform allowance or for a payment confined to ordinary time only. In each case, the employee works on the basis that he will receive an extra-award payment and, in my opinion, it is not to the point that in one case its subject matter is clothing and in the other additional remuneration for a nominated period of work. If one cannot be set-off, neither can the other because their essential character is identical i.e., both are payments in fulfilment of a promise extraneous to the award obligation. The award obligation re clothing may be nil, in regard to ordinary time it may be $X. The extraneous promise is to pay $Y and, whether it is in respect of clothing or ordinary time, it is $Y beyond what the award requires. To put it in more concrete terms, if the award rate for 40 hours work is $40 with overtime payable in addition but the employer agrees to pay a uniform allowance of $5 per week, it is common ground that it is no answer to a claim under s. 92 for $40 ordinary time and $5 overtime worked to show that in fact $45 went into the employee’s pocket. If this is so, I regard it as equally no answer if he got $45 only because the employer agreed to pay him the amount for no more than 40 hours work. In each case, as I see it, the employer cannot allocate to one subject matter what he has already paid in pursuance of a promise related to another subject matter. That would be approbating and reprobating.

From this it follows that, with respect, I cannot agree with the majority judgment that, in the hypothetical illustration there given, the employer, who had contracted to pay $60 for 40 hours work per week, although the award obliged him to pay only $40, would have a complete answer to a claim under s. 92(2) based on $40 for 40 hours work and an additional sum for 5 hours overtime under the award as long as the total claim under the award did not exceed $60. If this were not so, the majority judgment regards the complainant as “using s. 92 to recover a higher rate than that provided in the award”. I cannot see it this way. It appears to me that he would be using s. 92 to recover no more than his *award* entitlement which is his right under s. 92(1). In the illustration, his *actual* entitlement under his contract and the award is $60 plus 5 hours overtime. But to get *all* this he must rely on the procedures of the common law. The restrictive effect of s. 92 is to confine his entitlement under that section to $40 plus 5 hours overtime. This is the maximum he can recover and if he claims no more, he remains within the four corners of the authorities. He is claiming “the full amount of any balance due in respect of such price or rate” (s. 92(2)). The word “such” refers back to the “price or rate” fixed by the award. So the balance, which is the limit of his entitlement, is the difference between the “price or rate” fixed by the award and what has been paid in respect of that “price or rate”. I regard it as a departure from the provisions of s. 92 and, indeed, a contradiction in terms if an amount ($20 in the illustration) promised and paid as an *excess* over one part of the award entitlement can be used as if it had been a payment in *fulfilment* of another part of the award obligation. This involves re-allocating an amount promised to, and earned by the complainant, in respect of subject A (40 hours work) to meet a claim in respect of subject B (5 hours overtime). This would be striking a false balance, not a true one, under s. 92, because it is not a balance between the “price or rate” fixed by the award and payment made in respect thereto. It also involves, as I see it, a repudiation of the contract in order to reduce the balance due under the award. So, in essence, my view is that because s. 92 restricts what can be claimed to the award obligation, set-offs must also be restricted to payments which are referable, expressly or by implication, to the award obligation. If a complainant cannot enhance his claim under s. 92 because of private contract, neither can a respondent use private contract to reduce it. I would only add that where payments are made to the complainant, which relate neither to the award nor private contract, but are purely *ex gratia* (e.g., a Christmas bonus), they clearly cannot be brought into account to meet a claim under s. 92.

1. In *Pacific Publications Pty Ltd v Cantlon* (1983) 4 IR 415 (*Pacific Publications*) the Industrial Commission of NSW expressed a preference for the view expressed by Sheldon J in *Ray v Radano*. The question in *Pacific Publications* was whether an amount of $4000 paid to a journalist on retrenchment as a special gratuity could be taken into account to satisfy an award entitlement of 16 weeks’ pay in lieu of notice. The Commission said at 421:

Despite the subsequent allocation and the suggestions in argument to the contrary, we do not think the payment designated a “special gratuity” was intended to be a payment in lieu of award notice on termination. The company clearly appropriated the payment, at the time of making it, as a “special gratuity” in the special circumstances of the retrenchments then occurring and not as a payment in respect of any obligation which had arisen or might arise under cl 12. A gratuity labelled as a “Christmas bonus”, (to take the illustration of Sheldon J) would clearly be incapable of subsequent deduction by the payer as part of payment of wages or some other unsatisfied award entitlement. We are satisfied that this payment falls into the same category.

1. In *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 (*Lynch v Buckley Sawmills*) the respondent operated a timber mill in Mansfield. It employed four men under a timber industry award until the mill experienced financial difficulties. Then the respondent offered to engage the men on contracts and said they would not be paid sick leave, annual leave or public holidays. The men were to be paid in cash each week at a rate per cubic metre depending on the amount of timber invoiced. The union claimed that there had been an underpayment of award entitlements for wages, termination, annual leave and public holidays. Keely J said at 509:

The applications also seek orders under s. 119(3) of the Act that the respondent pay to each of the four workers the amount of the underpayment. The respondent contended that, in considering the amount of the underpayment, the Court should take into account the fact that in some weeks the worker was paid more - and on occasions substantially more - than the amount prescribed by the award. No authority was cited in support of that submission and in my opinion it cannot be upheld.

Clauses 4(a) and 15(a) of the award imposed an obligation upon the respondent to pay the prescribed amount to each of the four workers, which "payment shall not be delayed for more than four working days . . .". It is true, as Mr. Strahan submitted, that, if an employer initially paid to an employee wages less than those prescribed by the award and had later paid to the employee concerned the amount of the underpayments, the Court would not make an order under s. 119(3). However, the reason that the Court would not make such an order is that, on the hypothetical facts stated, it could not be said at the time of the hearing that "it appears to the Court that an employee of that employer has not been paid an amount to which he is entitled under an order or award . . ." (s. 119(3)). It would follow from the fact that the amount had already been paid to the employee before the court hearing that the employee was no longer "entitled" to such a payment - notwithstanding that at an earlier stage a breach of the award by the employer had occurred.

On the evidence in the present case, however, it is clear that the respondent never paid any amount to any of the four workers on the express or implied basis that it was an amount to which the worker was "entitled under (the) award" i.e. "entitled" by reason of the fact that the respondent had, on an earlier occasion, paid the worker less than the award rate, thereby leaving "an amount to which he is (still) entitled under an . . award". Even if one ignores the evidence that the four workers at times worked additional hours (which may have explained why some payments were in excess of the award rate), none of those payments which were in fact above the award rate were paid as amounts due under the award; they were paid as amounts due under an agreement which patently was not intended to fulfil the respondent's obligations to pay wages under the award. Mr. Strahan conceded - correctly in my opinion - that an employer who has paid, by agreement with an employee, an over-award payment can not later use that over-award payment to offset a subsequent payment of an amount less than that prescribed by the award. In my opinion the present cases, where the payments were made pursuant to an agreement, are in the same position.

1. This passage was referred to in *Poletti v Ecob (No.2)* (1989) 31 IR 321 (*Poletti v Ecob*) at 333.
2. In *Poletti v Ecob* the issue was directly considered by a Full Court of this Court for the first time. Mr Hunt was employed by Mr Poletti as a foreman in his horse racing stables at Warwick Farm. Mr Hunt previously worked for another trainer. Mr Poletti agreed to pay him what he had been paid by the other trainer plus $50 per week. Mr Poletti received part of his wages in cash without deduction for income tax.
3. A claim was made for amounts due to Mr Poletti under an award for underpayment of wages, overtime, annual leave, and public holiday entitlements. One issue was whether the wages paid to Mr Poletti could be taken into account to satisfy the award entitlements.
4. The Court (Keely, Ryan and Gray JJ) referred to the passages in the judgments in *Ray v Radano* which are extracted at [46] and [47] of these reasons for judgment, and said at 332-3:

It is to be noted that there are two separate situations dealt with in the passage from the judgment of Sheldon J. which has been quoted and in the reasoning of the Commission in *Pacific Publications*. The first situation is that in which the parties to a contract of employment have agreed that a sum or sums of money will be paid and received for specific purposes, over and above or extraneous to award entitlements. In that situation, the contract between the parties prevents the employer afterwards claiming that payments made pursuant to the contractual obligation can be relied on in satisfaction of award entitlements arising outside the agreed purpose of the payments. The second situation is that in which there are outstanding award entitlements, and a sum of money is paid by the employer to the employee. If that sum is designated by the employer as being for a purpose other than the satisfaction of the award entitlements, the employer cannot afterwards claim to have satisfied the award entitlements by means of the payment. The former situation is a question of contract. The latter situation is an application of the common law rules governing payments by a debtor to a creditor. In the absence of a contractual obligation to pay and apply moneys to a particular obligation, where a debtor has more than one obligation to a creditor, it is open to the debtor, either before or at the time of making a payment, to appropriate it to a particular obligation. If no such appropriation is made, then the creditor may apply the payment to whichever obligation or obligations he or she wishes. See *Halsbury’s Laws of England*, 4th ed., vol. 9, paras. 505 and 506.

1. The Court then concluded at 333-4:

In our view, it is appropriate that this Court should apply the principles discussed by Sheldon J. in *Ray v. Radano* and by the Industrial Commission in *Pacific Publications*. There are no significant differences between s.92 of the *Industrial Arbitration Act* 1940 (NSW) and s. 119(3) of the Act, for this purpose. The principles themselves are, as we have said, specific applications of general principles relating to parties to contracts and to debtors and creditors.

1. Applying this approach to the employment of Mr Hunt, the Court said at 334-5:

The appellant and Mr. Hunt clearly contemplated that the hours to be worked by Mr. Hunt would not be restricted to the ordinary working hours fixed by the Award. Their intention was to fix remuneration for the total number of hours to be worked by Mr. Hunt in each week. Accordingly, as was the case in *Ray v. Radano*, there was an agreement between the employer and the employee as to the manner in which the amounts paid were to be applied. The Court should give effect to that agreement by permitting part of the additional cash payments to be treated as having satisfied the appellant's obligations in respect of payment of wages for ordinary time worked. This will result in the claim for wages for ordinary time being satisfied completely. The finding that the appellant was in breach of the award in that respect will be set aside, and the $50 penalty imposed for that breach will be set aside.

…

The appellant also claimed that the evidence showed that some of the additional cash payments had been appropriated specifically to payments for annual leave. On the appellant's case, Mr. Hunt was paid $8,077.50 in respect of annual leave, as against an entitlement of $6,387.63. The Court should recognise the right which the appellant had to appropriate payments to a specific item. Since Mr. Hunt was over-paid for annual leave, the finding that the appellant was in breach of the award in that respect will be set aside, and the $50 penalty for that breach will be quashed. The result, however, is that the appellant must forego having the excess set off against any other claim, particularly overtime. Once appropriated to the payment of annual leave, the money cannot be relied on in satisfaction of any other claim. The amount of overtime owed to Mr. Hunt will therefore be increased further. There was no evidence of any specific appropriation of the additional cash payments with respect to public holidays. The finding of breach in that regard and the penalty for that breach will remain undisturbed.

The penalty for the breach in respect of failing to pay overtime will remain undisturbed. The order of the Chief Industrial Magistrate in respect of overtime will be varied, in accordance with the reasons we have given, to require the appellant to pay $116,938.59.

1. The issue again arose before the Full Court in 1999 in *Logan v Otis Elevator Co Pty Ltd* (1999) 94 IR 218 (*Logan*). Mr Logan was employed by Otis Elevator Co Pty Ltd from 1968 until 1995 save for two short breaks. Initially he was employed as a lift mechanic. In 1985 he was employed as the local representative of the company in the Orange area. Following his termination Mr Logan claimed amounts for overtime and call-backs due under the award. One question was whether the wages he was paid had to be brought into account in part satisfaction of the award entitlements.
2. The Court (Wilcox CJ, Marshall and Madgwick JJ) explained the facts thus, at [27]:

In the present case, Otis may not have realised that the 1989 award (or any other award) would apply to Mr Logan in his position as local representative at Orange. Before he was appointed to that position, Mr Logan was treated as an award employee and paid for overtime and call-backs. When he was offered the position at Orange, it was on the basis of an annual salary, higher than ordinary time wages calculated in accordance with the award. There was an issue before Moore J as to the content of the discussions at that time. However, his Honour accepted that Mr Logan and the relevant Otis officers were all aware "the salary included an amount intended to compensate for all overtime including call-outs". His Honour did not find this compensation accounted for the whole of the difference between an award wage and the agreed salary. He would not have been able to make such a finding; there was no evidence to that effect. None of the witnesses attempted to apportion the excess between overtime and call-backs, on the one hand, and the responsibilities, additional to those of an electrician special class under the award, being undertaken by Mr Logan as a local representative, on the other hand. These additional responsibilities were significant. They included administrative work and sales activities and ensuring an emergency service 24 hours per day, 365 days per year, either by making himself available for call-out or arranging for a local electrical contractor to be available. Mr Logan was the local "face" of Otis with important public relations responsibilities.

1. The Court then applied *Poletti v Ecob* as follows, at [28] to [31]:

No doubt the reason why no witness sought to apportion the excess is that nobody considered that question at the relevant time, when the appointment was made. It is in the interests of the parties now to adopt contrasting positions about apportionment of the excess. This was demonstrated during argument. When we asked Mr Hall how the Court should determine what part of the excess was attributed to overtime and call-outs, as distinct from Mr Logan's status and responsibilities as a local representative, he asserted it was reasonable to attribute almost all the excess to overtime and call-outs. Mr Haylen suggested the opposite. The truth is the Court has no basis for preferring one view to another; for doing what the parties refrained from doing until they found themselves in court. In this situation it is important to pay attention to principle. We think it is appropriate to follow *Poletti v Ecob*, this being a decision of a strong industrial court made after consideration of all the relevant authorities. Moreover, the decision is carefully founded on relevant principles of contract and common law.

… The subsequent decisions [following *Ray v Radano*] focus on the matter of designation and appropriation rather than the nature of the outstanding obligation.

The present case is not the “first situation” discussed in the passage from *Poletti v Ecob* quoted in para 26 above; the parties did not agree that the difference between the moneys that would be due under the award and the moneys actually paid “will be paid and received for specific purposes over and above or extraneous to award entitlements”. The case is that of the second situation: “there are outstanding award entitlements, and a sum of money is paid by the employer to the employee”. However, prior to the hearing of the appeal, neither party sought to designate or appropriate the excess, or any part of it, to any particular obligation owed by Otis to Mr Logan. The whole of the excess was paid and received as an amount appropriate to reflect the difference between the position of a local representative, with all that entails, and an ordinary electrician special class. It is not open to Otis now to change that situation by asking the Court to make a retrospective designation between the various elements that differentiate the situation of a local representative and an ordinary electrician special class. Without such a designation, none of the excess can be reasonably identified as a payment on account of overtime and call-backs and, accordingly, set-off against the overtime and call-back payments due to Mr Logan under the 1989 award.

In our opinion Moore J erred in holding that the excess is available for set-off against the overtime and call-back payments. In the absence of an agreement or timely designation, there is no basis for holding that any part of the excess is available for set-off.

1. The approach taken in *Poletti v Ecob* was again applied by a Full Court in *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* (2001) 111 IR 227 (*ANZ v FSU*). The union claimed long service leave entitlements under awards for six employees of the bank. The bank sought to set-off against the award entitlements amounts paid under a retirement / severance scheme which was part of the conditions of employment applicable to the employees. The union argued, relying on *Poletti v Ecob*, that the scheme payments could not be set-off against the award entitlements. The Full Court (Black CJ, Wilcox and von Doussa JJ) held that the scheme payments could be set-off against the long service leave entitlements due under the award. The Court dealt with each of the disqualifying circumstances referred to in *Poletti v Ecob* in the passage extracted at [53] of these reasons for judgment. The Court said [48] – [53]:

The first situation noted in the passage is one where “the parties to a contract of employment have agreed that a sum or sums of money will be paid and received for specific purposes, over and above or extraneous to award requirements”. In that situation, the Full Court said, “the contract between the parties prevents the employer afterwards claiming that payments made pursuant to the contractual obligation can be relied on in satisfaction of *award entitlements arising outside the agreed purpose of the payments*.” (Emphasis added). **So the critical question is whether the relevant award entitlements arose outside the contractually agreed purpose**.

It will usually be easy to determine whether there is a coincidence between particular award entitlements and the contractually agreed purpose. Take the case of an agreement for payment of wages of $1,000 per week to an employee who has an award entitlement to receive wages of $800 per week. Discharge of the contractual obligation will clearly also discharge the obligation to pay wages imposed by the award. On the other hand, take the first example offered by Sheldon J, where an employer agrees to pay a clothing allowance. It is no answer to a claim for underpayment of wages to say there was no award obligation to pay a clothing allowance. Similarly with Sheldon J's second example: it is no answer to an overtime claim to say the employee has received an over-award payment in respect of ordinary time.

In the present situation it is important to consider what it is the parties agreed, in relation to payment of the Retirement/Severance Allowance. Clause 43.3 of the Scheme includes the following statement:

“Eligible employees receive a payment under either the Retirement/Severance Allowance Scheme or the ANZ Group Award, whichever is more advantageous to the individual.”

The amount of this payment is directly related to the long service leave taken by the employee. Under cl 43.7 long service leave taken by an employee is directly set off against the entitlement of Retirement/Severance benefit. So it is accurate to describe the Retirement/Severance benefit as a money entitlement in respect of untaken long service leave. The same description may be applied to the entitlement provided by sub-clause 34.5 of the award.

In this situation, it seems to us accurate to say that both the award entitlement and the contractual payment arose out of the same agreed purpose. The situation is akin to a conditional agreement for an over-award wages payment. By way of variation of the above example, assume it was expected that the award wages to which an employee would become entitled over the forthcoming two years would not reach $1,000 per week, but the employer promised to pay the employee $1,000 per week anyway during that time, or the award wages, whichever was the higher. In that situation, it seems to us, it cannot be said the contract between the parties prevents the employer claiming the $1,000 per week is paid in satisfaction of the award obligation.

**It is inherent in this approach that there must be a close correlation between the nature of the contractual obligation and the nature of the award obligations. But it is not necessary that the same label be used.** In the present case, both the award obligation and the obligation imposed by cl 43.5 may aptly be described as obligations to make money payments in respect of untaken long service leave.

We do not think this case falls within the first situation discussed in *Poletti v Ecob*.

[Emphasis added.]

1. Then the Court said at [54] – [57]:

**The question that arises in respect of the second situation is whether the Retirement/Severance Allowance payment “is designated by the employer as being for a purpose other than the satisfaction of the award entitlements”.** We think that question is also answered by the sentence in cl 43.5 that we have quoted and the terms of cl 43.7. It is evident that it was intended that any payment of Retirement/Severance Allowance would subsume any lesser obligation to make payment under the award in respect of untaken long service leave.

Counsel for FSU referred to the notices of payment sent by ANZ to each of the six employees. These notices broke up the total payment into “long service leave” and “Retiring Allowance Eligible Termination Payment”. Counsel said those notices irrevocably designated the payments in question. This argument attracted North J. However, with respect to his Honour, it is apparent that the only reason for breaking up the total sum is that different taxation rates apply to long service leave and retiring allowances. The true character of the payment depends on the terms of the Scheme. As suggested, that character is payment in respect of untaken long service leave, the entitlement being calculated upon a more generous basis than under the award.

We agree with the statements in *Logan* … about the decisions focussing “on the matter of designation and appropriation rather than the nature of the outstanding obligation”. However designation and appropriation are matters to be determined by reference to the whole of the evidence. It is not contended, in the present case, that the payments made to the employees were calculated otherwise than by reference to the Scheme. They were payments pursuant to that Scheme, a feature of which is that it subsumes the award obligation. It does not matter that ANZ provided, for tax purposes, a break-up of its calculation.

We do not think that the principle in *Poletti v Ecob* applies to this case. The whole of the money paid to each of the six employees is to be taken into account in determining whether they have received the moneys due to them under the ANZ Group Award. On that approach, ANZ has not contravened the award.

[Emphasis added.]

1. Then, the issue was considered by the WA Industrial Appeal Court (Anderson, Scott and Parker JJ) in *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28 (*James Turner Roofing*).
2. Mr Peters, a roofing plumber, was engaged by the appellant which conducted the business of a roofing contractor. Mr Peters was offered work at an hourly rate of $25 ‘all in’ for all hours worked. The award rate for a 38 hour week was $16.92. The appellant believed Mr Peters was engaged as a subcontractor. The appellant did not pay overtime, holiday pay, superannuation, annual leave, sick leave, or any of the award allowances such as tool allowance or plumbing allowance or meal allowance. Mr Peters believed at all times that he was entitled to these benefits and complained about not receiving them.
3. Following termination of the relationship, Mr Peters made a claim for his entitlements under the award. The industrial magistrate allowed the claim. He found that Mr Peters was an employee and that he was entitled to, and had not been paid, the claimed amounts.
4. The industrial magistrate did not allow any deduction from the award entitlements for the hourly rate paid by the appellant. His reasoning was that these amounts were paid pursuant to a private agreement and had nothing to do with satisfaction of any of the components of the award. The payments were thus for purposes outside the award. Anderson J, with whom Scott and Parker JJ agreed, explained the reasoning of the industrial magistrate thus, at [29]:

Literally what this means is that amounts paid in excess of an award obligation cannot be relied on in defence to a claim for enforcement of the award obligation unless the payment was made with reference to and in order to cover that award obligation; and as the appellant never had the award in mind when it engaged the respondent, the appellant cannot now claim that the payments it made to the respondent did in fact satisfy its obligations under the award.

1. After reviewing the previous cases Anderson J said at [44]:

There is nothing in the cases referred to which is to the effect that, where payments are made pursuant to a contractual arrangement without regard for award obligations, they are to be completely ignored and left out of account in looking to see whether an obligation imposed by the award has been satisfied.

1. His Honour concluded at [45] and [48] thus:

**The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award.** This is so, whether the payment of the wages is made in contemplation of the obligations arising under the award or without regard for the award. However, if a payment is made expressly or impliedly to cover a particular obligation (whether for ordinary time, overtime, weekend penalty rates, fares, clothing or any other entitlement whether arising under the award or pursuant to the contract of employment) the payment cannot be claimed as a set off against monies payable to cover some other incident of employment. A payment made on account of say ordinary time worked cannot be used in discharge of an obligation arising on some other account such as a claim for overtime. Whether or not the payment was for a particular incident of employment will be a question of fact in every case.

…

I do not say that in no instance has the appellant contravened the award… I would doubt that the over award payment for hours worked could be set-off against the obligation to pay untaken long service leave. It will be for the Industrial Magistrate to consider these matters.

[Emphasis added.]

1. Consequently, the Court remitted the case for further consideration by the industrial magistrate in accordance with its reasons.

# CONSIDERATION

1. One consideration relevant to the determination whether it is expedient in the interests of justice to allow the new argument to be advanced on appeal is whether there is an explanation which justifies the failure of Linkhill to raise the argument at trial.
2. The Director contended that the circumstances suggested that Linkhill’s legal advisors made a forensic choice not to raise the argument.
3. Linkhill led no evidence from its legal advisors to explain why the set-off argument was not raised. Counsel who appeared on the hearing of the appeal did not appear as counsel at the trial. He did not know why the argument was not raised at the trial. There was no suggestion that the previous counsel was not available to give evidence about the reason that the argument was not raised at trial. Linkhill’s failure to provide an explanation leaves open the possibility that it now seeks to agitate an issue which it deliberately did not agitate before the primary judge. That circumstance provides a basis for not permitting Linkhill to now raise the set-off argument.
4. Linkhill submitted that the Director was aware of the availability of the set-off argument and deliberately concealed it from the Court. Although Linkhill did not go so far as to contend that the alleged concealment by the Director was the reason Linkhill was not aware of the availability of the argument, Linkhill did argue that the alleged concealment was a reason why it was expedient in the interests of justice that Linkhill should be granted leave to raise the argument on appeal.
5. The facts, however, do not support the contention that the Director concealed any material matter.
6. The ASOC pleaded the source of the claimed award entitlements. Then, it particularised the underpayments of award entitlements in respect of each of the ten employees. The pleading at [91] relating to Mr Etheredge illustrates the way the claim was made as follows:

As a result:

(a) of the contraventions referred to in **paragraph 84(e) and 88(e)**, Linkhill underpaid Etheredge the sum of $9,824.90 in respect of wages and allowances.

**Particulars**

The above amount is comprised of:

* $3,048.56 in respect of penalty rates for working overtime being all hours worked in excess of 8 hours per day and more than 38 ordinary hours per week and on weekends;
* $214.94 in respect of crib time;
* $654.40 in respect of meal allowances; and
* $5,907.00 in respect of FTP.

The calculation of the above amount is set out in Schedule 5 to this statement of claim.

(b) of the contraventions referred to in **paragraph 84(a) and 88(a)**, Linkhill failed to make contributions to a relevant superannuation fund on behalf of Etheredge in the sum of $7,455.03.

**Particulars**

The above amount comprises of:

* $7,046.10 in respect of ordinary time earnings; and
* $408.93 in respect of annual leave.

The calculation of the above amounts is set out in Schedule 5 of this statement of claim.

(c) of the contraventions referred to in **paragraph 84(b) – (d) and 88(b) and (c),**  Linkhill underpaid Etheredge the sum of $3,803.97 in respect of annual leave and $739.73 in respect of annual leave loading.

**Particulars**

The calculation of the above amounts is set out in Schedule 5 to this statement of claim.

(d) of the contraventions referred to in **paragraph 88(f)**, Linkhill underpaid Etheredge the sum of $2,279.37 in respect of redundancy / severance pay.

**Particulars**

The calculation of the above amount is set out in Schedule 5 to this statement of claim.

[Emphasis in original]

1. Schedule 5 to the ASOC commenced with a summary page setting out the entitlements claimed and a description of the method used to calculate each of them. The balance of Schedule 5 comprised 14 pages of spreadsheets which set out the detailed calculation of the amounts claimed in accordance with the method discussed in the summary. The calculations showed that the amounts paid by way of hourly rates by Linkhill were taken into account in calculating the amount due for ordinary time and overtime under the awards. The calculations also showed that the amounts paid by Linkhill were not taken into account as deductions from the amounts due under the awards for other entitlements including for crib time, meal allowances, travel allowances, superannuation, annual leave, annual leave loading and redundancy / severance pay.
2. Detailed schedules following the same pattern were annexed to the ASOC for each of the ten employees.
3. Linkhill’s Defence denied the contraventions such as those pleaded in [91] of the ASOC, but did not expressly take issue with the method of calculation of the figures.
4. Then, in extensive written submissions, the Director again explained in detail the method of calculation of the underpayment of award entitlements. As to the claim for overtime entitlements, the written submissions stated at [307]:

The above amounts for each respective worker are determined by:

(a) first, calculating the difference between:

(i) the amount the respective workers should have been paid under the 2000 Award for the hours worked each week based upon the invoices they provided by the respective workers and having particular regard to the hours worked in excess of 8 hours per day, Monday to Friday and/or in excess of 38 hours per week, on weekends and on public holidays; and

**(ii) what the workers were actually paid by Linkhill for those hours worked each week**; and

(b) secondly, adding together the above weekly amounts (as recorded in the various columns titled “difference” in the relevant spreadsheets in Part 2 of the relevant Schedule for each worker) for the duration of the relevant period of coverage of the 2000 Award. This identifies the total underpayment of penalty rates for each worker for the total period as set out in paragraph 306 above.

[Emphasis added.]

1. The submissions explained how in contrast, for instance, meal allowance entitlements were calculated without taking into account the payments of hourly rates made by Linkhill, as follows at [315]:

The above total amounts for each respective worker are determined by multiplying the applicable meal allowance amount (as set out in paragraph 311 above) by the number of meals due (as recorded in the column titled ‘meal’s due’ in Part 2 of the relevant Schedules) for the duration of the relevant period of coverage of the 2000 Award.

1. The Federal Circuit Court adopted the calculations formulated by the Director in the schedules to the ASOC. This course was not challenged by Linkhill at the trial as explained by the Federal Circuit Court as follows at [372] to [375]:

Not only were a substantial number of the appendices referred to in the respondent’s submissions neither filed or served, or if they were filed and served the appendices were filed outside of the directions for filing submissions but the appendices appear at best to be a selective extract from the evidence and the construct on which they were built (i.e. the workers were casuals) has been rejected. This and the matters raised by the applicant objecting to that material all (as was acknowledged by Counsel for the respondent in submissions before the Court) presented fundamental problems to that material being considered.

In clear distinction to this unsatisfactory approach the applicant had, prior to the trial, gone to the trouble of providing detailed calculations for each of the workers as schedules to the amended statement of claim.

The applicant’s submissions addressed in considerable detail the breaches of the applicable provisions (as that term is defined in the WR Act and the FW Act). **The respondent did not take issue or dispute the calculations in submissions, save as elsewhere set out in these reasons.** The applicant’s submissions also addressed in considerable detail the relevant statutory provisions in relation to leave in respect of the workers at paragraphs [473] to [532]. Save for resisting a finding the workers were employees and not engaged on a casual basis no issue was taken with those submissions by the respondent.

In light of the conclusions reached earlier and as no argument has been sustained that these calculations by the applicant are wrong, declarations should be made that the amounts particularised in the statement of claim remain outstanding and there should be orders for the payment of same including any interest.

[Footnotes omitted.] [Emphasis added.]

1. Thus, from the facts set out at [73] to [79] above, it is clear that the Director explained the way the underpayment of award entitlements was claimed. The explanation showed that payments made by Linkhill were deducted from the claim for overtime but not from the claims for other allowances. There was no concealment by the Director.
2. On the other hand, the failure of Linkhill to explain why there was no objection to the calculations is a factor militating against allowing Linkhill leave to raise the new argument on appeal because it leaves open the possibility that Linkhill made a deliberate forensic choice at the trial to accept the calculations contained in the schedules to the ASOC.
3. Linkhill had the schedules to the ASOC from December 2012, that is to say, three months before the trial began and ten months before final submissions were made. There was ample opportunity for Linkhill to challenge the calculations. And, indeed, some aspects of the schedules were challenged. In particular, Linkhill contended that if the workers were employees they were to be classified as casuals under the awards. Further, Linkhill contended that some work was undertaken at locations outside the purview of the awards. Linkhill also raised issues about which classifications applied to the ten employees under the awards. Each of these arguments questioned a basis on which the calculations in the schedules were made. But no challenge was made to the quantification of the entitlements detailed in the schedules. Nor was there any argument that payments of hourly rates by Linkhill to the employees had not been taken into account.
4. Next, the Director argued that he would be prejudiced if Linkhill were permitted to advance the new argument on appeal.
5. It is common ground that whether or not the payments made by Linkhill could be brought into account as a deduction against the award entitlements due to the ten employees was not in issue at the trial. In accordance with *Poletti v Ecob* and the cases which have followed it, the set-off question depends either on the terms of the agreement between the parties or, absent such agreement, on an appropriation of the payment by the employer, or, in default, by the employee. These matters depend on the facts of each case.
6. The Director argued that the investigation of the facts at trial was not directed to these matters because there was no issue joined on them between the parties. Counsel for the Director was cautious about predicting whether other evidence would have been led or whether the trial would have taken a difference course if the issue had been raised. That, he said, would depend on instructions received about the events of and surrounding the employment of the ten employees and detailed evidence about whether the hourly rate was comprised of any items also reflected in the award entitlements. Importantly, it would also depend on the basis upon which Linkhill made the claim for the set-off. The Director submitted that if leave were granted to Linkhill the Director would be denied the chance of exploring whether there was evidence available to contest the argument raised by Linkhill. Furthermore, if the set-off issue had been a live issue the Director may have wished to cross-examine Mr Gary Morgan, a director of Linkhill, on the question.
7. In response, Linkhill denied that the Director would be prejudiced by the grant of leave and contended that it is unlikely that there would be any additional evidence necessary to address the point. At the trial one of the main issues was whether the ten workers were employees or independent contractors. The resolution of that issue called for evidence about the terms of the agreement between the parties. It involved evidence about the agreement to pay an hourly rate and the terms on which payment was to be made. That evidence, so it was argued, equally went to the questions raised by the new argument.
8. Linkhill further submitted that the Director had failed to identify any additional evidence which would have been called by him. The submission of the Director was that there could be further evidence, not that there was further evidence on which he would rely.
9. It is noteworthy that counsel for Linkhill did not direct the Court in any substantial way to evidence led at the trial which he contended might have addressed any agreement between the parties about the purpose of the hourly rate or the matters which the parties intended to include in that rate. Neither did counsel for Linkhill direct the Court in any substantial way to evidence which he contended might have demonstrated whether or not Linkhill appropriated the payments to particular items of remuneration such as travel, meals, or annual leave. The argument was left to rest on assertion rather than by reference to the evidence.
10. One example from the evidence to which counsel for Linkhill did refer demonstrates the difficulty with Linkhill’s argument. He referred to the terms of a written agreement which was in the same form for Mr Gillen, Mr Hunter, Mr Darrigrand and Mr Lowery. It provided at [5]:

The Contractor acknowledges that it has no claim upon the Company in respect of annual leave, public holidays, sick leave, long service leave, superannuation or any other entitlements. The Contract Free (sic) shall be the full and only amount payable by the Company to the Contractor for all services provided and upon payment of the Contract Fee the company will be relieved of any further obligation or liability to the Contractor.

1. On its face the clause may be seen to be contrary to Linkhill’s contention. It acknowledges that the worker has “no claim” to any entitlement beyond the payment of the “Contract Fee” (the hourly rate). It follows that the purpose of the agreed payment of the hourly rate was not directed to any of the matters disclaimed as capable of being an applicable entitlement. A less likely meaning of the clause is that the acknowledgement that the worker has no claim is made because the claim for the nominated entitlements are satisfied by the payment of the contract fee. However, if the matter had been explored, the context in which the clause was agreed may have revealed its purpose. Had the set-off issue been in contention, that question may have been explored.
2. Furthermore, each of the written contracts was made before the period of the claims for underpayment and was made with another company in the Group. Those contracts had expired by the time of the work in question. It was suggested by the Director, at [232] of submissions before the Federal Circuit Court, extracted in the Federal Circuit Court’s reasons at [243], that the earlier designation of the contracts “cannot be assumed to have continuing application on later periods.” The Federal Circuit Court, at [279] of the reasons, acknowledges the possibility that the written contracts may have continued to apply to the later period, however there was no final determination on this point. The complexities in the factual situation raise the possibility that on the transfer and extension of the contracts there may have been discussions relevant to the set-off issue because the circumstances calling for the transfer and extension would have been addressed between the parties.
3. The Director has established the possibility that there might have been additional evidence available about what the parties intended to be included in the payment of the hourly rate, and also the possibility that the course of the hearing would have been different if the set-off issue had been raised at trial. These possibilities are not fanciful. Consequently, they constitute the type of prejudice which militates against the grant of leave to Linkhill to prosecute the new argument on appeal: *Branir* at [38].
4. For these reasons it is not expedient in the interests of justice to allow Linkhill to prosecute the new argument on appeal. As this was the only argument relied on by Linkhill the appeal will be dismissed.
5. Although it is unnecessary for the disposition of the appeal, for completeness, we briefly address the argument on the merits advanced by Linkhill.
6. Linkhill argued that the case pleaded by the Director and admitted by it was that each worker was to be paid a specified hourly rate for work performed. Except that the rate was for work performed, there was no attribution or badging of the money paid. It was just a flat hourly rate. It was paid in satisfaction of all legal entitlements arising from the provision of the services of the ten employees. It followed, so it was argued, that all the payments made by Linkhill should have been set-off against the award entitlements. Linkhill principally relied on *James Turner Roofing* which it said was on all fours with the present case.
7. However, *James Turner Roofing* did not hold that all payments could be set-off in these circumstances. As explained earlier in these reasons for judgment, in *James Turner Roofing* the rate was expressed as “all in”. The industrial magistrate held that no set-off could be applied. This was because the parties did not have the award in mind at all when setting the rate. The purpose of the arrangement was to act outside the award. The Court rejected that reasoning, and said that merely because an “all in” rate was agreed to exclude the application of the award did not mean that some of the elements comprised in the rate were not for the same purpose as entitlements under the award.
8. The situation which was addressed in *James Turner Roofing* is distinguishable from the present circumstances. In that case, the agreed hourly rate was expressed as an “all-in rate” which the Court there construed to mean “payment to cover all the monetary obligations arising in the employment relationship whatever they may be” (at [24]). We have earlier referred at [88]-[91] to Linkhill’s failure to demonstrate the purpose of the hourly rate. Linkhill’s argument was articulated at a high level of generality. It depended on the proposition that the agreement between the parties was simply for an hourly rate for work performed. Left in such general terms the agreement does not reveal whether the items to which the award entitlements were directed were intended to be included in the hourly rate or not. Consequently, Linkhill did not establish any error made by the Federal Circuit Court in accepting the calculation which did not provide for deductions of payments other than against the ordinary time and overtime entitlements under the award.
9. As the correctness of *James Turner Roofing* was in contest, it is necessary that we make some further observations. The substance of the conclusion there reached is highlighted at [66] above. That conclusion was based upon principle 1 set out at [21] of the judgment of Anderson J as follows:

If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.

If principle 1 (and it would follow, principle 4 also set out at [21]) was intended by the Court to mean that any monetary payment for work done could be set off against monetary entitlements provided in an award, then those principles so stated would be inconsistent with the approach taken in *Poletti v Ecob* and *ANZ v FSU*. In considering whether the purpose of a contractual payment correlated with the purpose of an award entitlement, the Full Court in *ANZ v FSU* at [52] emphasised that “there must be a close correlation between the nature of the contractual obligation and the nature of the award obligation. But it is not necessary that the same label be used”. That statement indicates that what is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined and be found to closely correlate with the obligations in the award said to be discharged by the payment. Alternatively, it may be that the stated principles were intended to reflect the previous authorities. Anderson J expressly stated at [21] before setting out the principles, that they were extracted from those authorities. Read consistently with those cases, the principles provided that only payment attributable to award entitlements may be set off against the liability to pay the entitlements. Indeed, principle 1 is taken verbatim from the judgment of Sheldon J in *Ray v Radano* at [478], a passage considered in the later authorities including *ANZ v FSU*. In these circumstances principles 1 and 4 may not have been intended to mean that any monetary payment could be set off against a monetary payment required by an award.

1. *James Turner Roofing* was a case in which the parties attempted to enter into a contract for services but were found to have created an employment relationship. That was also the case in *James v Buckley Sawmills*. Neither Linkhill or the Director contended that the principles articulated in *Poletti v Ecob* and *ANZ v FSU* and the other authorities discussed in these reasons were inapplicable because they were developed in circumstances where the parties succeeded in creating the employment relationship which, subjectively, they intended to make. Given that the purpose or intent of the parties in relation to a particular payment is central to the application of those principles, it may be that the principles do not translate well to a situation where the parties have created a relationship different to that which, subjectively, they had set out to make. Those principles may not apply to the circumstances in which the parties did not intend to provide for award entitlements at all because they did not advert to or had disavowed the relevance of such entitlements.
2. However, both the proper interpretation of *James Turner Roofing*, and the question whether the principles established in *Poletti v Ecob* and *ANZ v FSU* and the other authorities discussed in these reasons apply in the case of a failed attempt to create a contract for services may be left for another day.
3. The Director contended that *Lynch v Buckley Sawmills* was the case which came closest to the present. However, as with each of the authorities, the application of the principles depends on detailed findings of fact. Just as Linkhill did not attempt to argue the merits of the appeal by reference to a comprehensive analysis of the facts, the Director did not take the Court to facts, if they exist, which would justify the conclusion that the case was analogous to *Lynch v Buckley Sawmills*. Indeed his main argument, which we have accepted, was that the evidence led at the trial was not directed to the question because it was not in contention.

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| I certify that the preceding one hundred and two (101) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North and Bromberg. |

Associate:

Dated: 22 July 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | VID 129 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | LINKHILL PTY LTD (ACN 006 166 070)  Appellant |
| AND: | DIRECTOR OF THE FAIR WORK BUILDING INDUSTRY INSPECTORATE  Respondent |

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| --- | --- |
| JUDGES: | NORTH, BROMBERG AND WHITE JJ |
| DATE: | 22 JULY 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

# White J:

1. The circumstances giving rise to this appeal are set out in the reasons of North and Bromberg JJ and I will not repeat them.
2. The Amended Notice of Appeal of the appellant (Linkhill) contains 25 separate grounds of appeal. Linkhill sought an extension of time in which to appeal with respect to 17 of those grounds. To the extent that it may be necessary to do so, I would grant the extension of time but would dismiss the appeal.
3. Despite the multiple grounds for appeal, there are only two substantive issues for the Court’s determination. Linkhill abandoned eight of the grounds before or during the appeal hearing. It indicated that 14 of its grounds “turned on” its central complaint that the Trial Judge had erred by not setting off against the assessed underpayment of award entitlements the whole of the amounts which it had paid to the employees during their respective engagements. Nearly all of Linkhill’s submissions on the appeal were directed to this issue (the Set‑off Issue).
4. The second issue concerns the Trial Judge’s refusal of an application by Linkhill on 12 February 2014 for an adjournment of the hearing scheduled for that day. The Trial Judge had listed the matter for submissions with respect to the appropriate declarations and orders to be made to give effect to his reasons published on 20 December 2013 (*Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 7)* [2013] FCCA 1097)(the Liability Judgment) and for programming orders with respect to the imposition of penalty. Two of the grounds in the Amended Notice of Appeal related to this issue.
5. In Ground One, Linkhill complained that the Circuit Court Judge had erred in finding that each of the workers was an employee rather than a contractor. However, Linkhill’s outline of submissions did no more than incorporate by reference the written submissions which had been made to the Trial Judge on that topic. Accordingly, there was no articulation of any error by the Trial Judge. The omission was not corrected by Linkhill’s submissions in reply which said only that the instinctive synthesis of the Judge was in error. Accordingly, neither the Court nor the respondent was put on notice of the error alleged or of the issue to be agitated.
6. On the hearing of the appeal, counsel for Linkhill said that he wished to submit, under the aegis of Ground One, that the Trial Judge had erred in the manner by which he had decided the employee/contractor issue. It was said that the Trial Judge had simply “cut and pasted” the Director’s submissions on the topic and had then recorded a finding that the relationship involved was one of employer‑employee. The Court took the view that this was complaint as to methodology and outside the terms of Ground One. It did not allow Linkhill to make the foreshadowed submission. Linkhill did not seek to put any submissions in support of its articulated ground. Accordingly, it was taken to have been abandoned.

## The Set‑off Issue

1. The difficulty for Linkhill with the Set‑off Issue is that it has raised the issue only belatedly.
2. The Director filed the proceedings in the Circuit Court on 20 October 2011 and the trial commenced on 25 February 2013. On 11 December 2012, the Director had filed and served an Amended Application and an Amended Statement of Claim. Schedules attached to the Amended Statement of Claim contained the Director’s calculations of the underpayments he alleged. Those calculations included a set‑off of the hourly rate paid by Linkhill in respect of the claimed entitlement for work during ordinary time, but not otherwise. By this means, the Director had identified the extent of the set‑off which he considered appropriate.
3. Accordingly, in addition to the period before December 2012, Linkhill had more than two months’ notice before the commencement of the trial of the precise way in which the Director intended that account should be taken of the payments actually made.
4. Linkhill had filed a Defence to the Director’s claim on 20 December 2011 and Amended Defences on 20 June 2012 and 21 December 2012. The trial in the Circuit Court continued over 10 days, with final submissions made in October 2013. In none of the filed defences or at any stage during the trial did Linkhill make a plea or a submission that the set‑off should be greater than that for which the Director contended. I add that Linkhill was represented by solicitors and counsel throughout the proceedings.
5. In the Liability Judgment, the Trial Judge rejected the submissions which Linkhill had made in the trial as to the quantification of the employees’ entitlements. He noted that Linkhill’s submissions on the topic had been made on the assumption that the Court would find that each man was employed as a casual, whereas he had found to the contrary. The Trial Judge also noted that the written submissions of Linkhill referred to appendices which were not in evidence and which had been neither filed nor served. Unsurprisingly, he concluded that little weight could be attached to the submissions referring to those appendices.
6. The Trial Judge accepted the Director’s submissions as to quantification and concluded, at [375]:

In light of the conclusions reached earlier and as no argument has been sustained that these calculations by the applicant are wrong, declarations should be made that the amounts particularised in the statement of claim remain outstanding and there should be orders for the payment of same including any interest.

The Judge then adjourned the matter to 12 February 2014 so as to give the Director “the opportunity to bring in proposed minutes of orders to give effect to these reasons including the appropriate declarations and monies owing to each worker (along with interest thereon)”: at [377]. In addition, the Judge adjourned to a date to be fixed the taking of submissions with respect to the imposition of penalty.

1. At the hearing on 12 February 2014, new counsel then retained by Linkhill sought an adjournment of the hearing so that he could “explore” whether submissions should be made with respect to set‑off in accordance with the principles emerging from *Ray v Radano* [1967] AR (NSW) 471and *Poletti v Ecob (No 2)* (1989) 31 IR 321. The Judge’s refusal of that adjournment gives rise to the second issue for this Court’s determination.
2. It was common ground that it was on 12 February 2014 that Linkhill had first raised the possibility of some further set‑off before the Trial Judge.
3. Having refused the adjournment, the Judge proceeded to make orders in the terms sought by the Director, including orders with respect to the underpayment of the workers: *Director of the Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No 8)* [2014] FCCA 225.
4. The principles relating to the circumstances in which a party may be permitted to agitate on appeal a point not taken at first instance are summarised in the joint reasons. I respectfully adopt that summary.
5. In my opinion, in accordance with established principle, Linkhill should not be permitted now to agitate a claim that the Trial Judge should have allowed a greater set‑off than he did. The Court should accept the Director’s submission that, had the issue been raised during the trial, it may have been possible for him to have adduced further evidence bearing on the question. The Court should not be slow to accept such a submission: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [38].
6. The principles emerging from the line of authorities commencing with *Ray v Radano* indicate that, in a case like the present, close attention must be given to any agreement between the parties that a sum or sum of monies be paid for specific purposes which are extraneous to award entitlements and to any designation by the employer of payment of the sum or sums for a purpose other than the satisfaction of award entitlements (*Poletti* at 332). By their very nature, these are matters for evidence.
7. Linkhill submitted that the Director could be taken to have adduced all the evidence he could from each of the employees as part of the evidentiary case by which it sought to establish that they were properly regarded as employees. I do not regard that submission as persuasive. Had the issue been given sharper focus at the trial, it may well have been the case that the employees would have been able to recall more of their discussions with the Linkhill employee by whom they were engaged. It is common experience that witnesses who have seemingly exhausted their memory of relevant events will remember more when a particular issue or assertion is brought to their attention. That is because memories can, quite properly, be prompted. Further still, the prospect that the Director may have been able to elicit further evidence in its cross‑examination of Mr Morgan, who was called by Linkhill, or through its documents, should not be underestimated.
8. The leading authorities relating to the principles of set‑off are reviewed in the joint reasons. I do not wish to add to that review.
9. As already indicated, the authorities reveal the close attention which must be given to the evidence in each case of what the parties had agreed as to purpose of payments and to the employer’s characterisation of the payments. The requirement for that close attention indicates the injustice which would be caused if Linkhill were permitted now to agitate matters which were not at the forefront of the parties’ minds (and, accordingly, their evidence) in the trial.
10. Furthermore, many of the authorities reviewed in the joint reasons concern circumstances in which the parties had recognised, at the time of the events giving rise to the claim, that they were in an employment relationship. Almost all of the leading cases are of this kind: *Ray v Radano*; *Poletti v Ecob*; *Poulos v Walton Stores (Interstate) Ltd* (1986) 10 FCR 429; *Logan v Otis Elevator Co Pty Ltd* [1999] IRCA 4, (1999) 94 IR 218; and *Australian and New Zealand Banking Group Ltd v Finance Sector Union of Australia* [2001] FCA 1785, (2001) 111 IR 227.
11. Typically, these and other like cases involve circumstances in which the employer has made some payments towards satisfaction of award obligations and, in addition, some excess or, alternatively, payment of an entitlement for which the award did not provide. The question for determination is usually whether the employer, when sued for the balance of the award entitlement, may set‑off the amount of the excess or the amount paid in respect of the non‑award entitlement. It is in that circumstance that close attention is given to the agreed purpose for which the monies are paid, their relationship with the award entitlements and to any designation by the employer of the purpose for which the payments are made.
12. The present case is of a different kind because it concerns parties who, at relevant times, conducted themselves on the basis that their relationship was that of principal‑independent contractor, and it is only in retrospect that their relationship has been characterised as that of employer and employee. In a case of this kind, the parties do not usually advert expressly to award entitlements at all. In my opinion, this means that some care is necessary in applying the principles developed in the cases referred to above. Account must also be taken of the statutory context in which those decisions were made, and of the progressive development of the principles in the cases.
13. Two of the authorities reviewed in the joint reasons concerned circumstances in which the parties had conducted themselves at relevant times on the basis that their relationship was that of principal and independent contractor: *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503; *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28; (2003) 132 IR 122.
14. The decision in *Buckley Sawmills* is authority for the proposition that an over award payment in one week cannot be set‑off against an award underpayment in a later week, at 509. It did not concern the issue in the present case.
15. On its face, the decision in *James Turner Roofing Pty Ltd v Peters* is more apposite to the present. An employer had engaged an employee on the basis that he was an independent contractor and paid him an “all-in” hourly rate. In the proceedings at first instance, an Industrial Magistrate had ruled that the employer was not entitled to set-off against the award entitlement any of these payments because they had been made on the basis that the award was inapplicable. This decision was overturned on appeal and remitted to the Industrial Magistrate for further consideration.
16. Anderson J, in the judgment of the Full Court of the Supreme Court of Western Australia, summarised the relevant principles emerging from the authorities as follows, at [21]:

These cases must be discussed in some detail, which I will do later, but meanwhile I think the relevant principles that are to be extracted from them can be stated as follows:

1. *If no more appears* *than that* (a) work was done; (b) the work was covered by an award; (c) a wage was paid for that work; then the whole of the amount paid can be credited against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary entitlement under the award.

2. However, if the whole or any part of the payment is appropriated by the employer to a particular incident of employment the employer cannot later claim to have that payment applied in satisfaction of his obligation arising under some other incident of the employment. So a payment made specifically for ordinary time worked cannot be applied in satisfaction of an obligation to make a payment in respect to some other incident of employment such as overtime, holiday pay, clothing or the like even if the payment made for ordinary time was more than the amount due under the award in respect of that ordinary time.

3. Appropriation of a money payment to a particular incident of employment *may be express or implied* and may be by unilateral act of the employer debtor *or by agreement express or implied*.

4. A periodic sum paid to an employee as wages is prima facie an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.

5. *Each case depends on its own facts* and is to be resolved according to general principles relating to contracts and to debtors and creditors.

[Emphasis added]

1. Later at [44], Anderson J rejected the proposition that “unless there is an express appropriation to a particular award entitlement the sums paid by the employer to the employee are to be ignored or treated as referable only to ordinary time worked”.
2. The submissions of counsel for Linkhill placed considerable reliance on the judgment in *James Turner Roofing*. There is a question as to whether it involves some modification of the principles developed in the acknowledged employer‑employee cases. In my opinion, it is undesirable to attempt a resolution of that question on the present appeal. First, the submissions made on Linkhill’s behalf were at a high level of generality. Secondly, the emphasised passages in the reasons of Anderson J reinforce the importance of close attention to the circumstances of each particular case. That close attention did not occur at trial, by reason of Linkhill’s omission to raise the issue.
3. In short, I consider that this Court cannot be satisfied that the Director may not have been able to lead further evidence bearing on the Set‑off Issue.
4. There is a second reason why, in my opinion, this Court should not permit Linkhill to raise the Set‑off Issue on appeal. It is quite possible that the issue was not raised at trial because of a forensic judgment made by Linkhill’s then legal representatives. It seems improbable that they would have been unaware of the *Ray v Radano* line of authority or at least of the potential for set‑off. Those representatives may well have taken the view that, in accordance with the authorities, no further set‑off could be recognised. Linkhill has not sought to place any evidence before the Court as to why the issue was not raised in the trial. The Court should not be left to surmise in that respect.
5. For these reasons, I would not permit Linkhill to agitate on appeal the Set‑off Issue. That being so, I refrain from addressing the merits of Linkhill’s claim to a more extensive set‑off.

## The refusal of the adjournment on 12 February 2014

1. By Ground 6 and 8(e) of the Amended Notice of Appeal, Linkhill contended that the Judge had erred by refusing to adjourn the hearing on 12 February 2014.
2. I have already referred to some of the background to Linkhill’s adjournment application. As noted, the Trial Judge had delivered the judgment on the issues in the trial on 20 December 2013 and had adjourned the matter to 12 February 2014 in order (relevantly) that the Director could bring in minutes of the orders to give effect to his findings. On 24 January 2014, the Director sent to the Circuit Court and to Linkhill’s solicitor his minutes of the proposed orders. The Director’s solicitors asked that Linkhill inform them of any issues with respect to the proposed orders in advance of 12 February so that they could be addressed at the hearing. Linkhill did not give notice of any such matters.
3. On 6 February 2014, Linkhill sought the Director’s consent to an adjournment of the hearing on 12 February 2014 because it had briefed new counsel. The Director’s solicitors informed Linkhill on 10 February 2014 that he did not consent to an adjournment.
4. The application made by Linkhill’s new counsel on 12 February 2014 for an adjournment was an oral application only and not supported by any affidavit. Counsel told the Trial Judge that he had only just been briefed and wished to consider the issue of “set‑off”. Counsel accepted that Linkhill had not given prior notice that an application for an adjournment would be made.
5. In the Judge’s ex tempore reasons, he referred at [12] to the principles stated in *AON Risk Services Australia Ltd v Australian National University* [2009] HCA 27 as follows:
6. the conduct of litigation is not merely a matter for the parties. The need to avoid disruptions in the Court’s lists, with consequent inconvenience to the Court and prejudice to the interests of other litigants waiting to be heard, is a relevant matter (at [93]);
7. when considering an application such as this the Court should take account of other litigants, not just the parties to the litigation in question (at [94]–[95]);
8. costs are not always a sufficient compensation for the vacation of a hearing date (at [99]–[100]);
9. there may be cases where it may properly be concluded that a party has had sufficient opportunity to make their case and that it is too late for an adjournment application, having regard to the other party and the other litigants awaiting trial dates (at [102]);
10. the fact that an explanation has been offered for the delay in raising the issue is relevant, together with whatever explanation may be given (at [103]); and
11. whilst all matters relevant to the exercise of the power should be considered substantial delay, wasted costs and the concerns of case management are important (at [111]).
12. The Judge considered that Linkhill had had sufficient time since the publication of reasons on 20 December 2013 and since the provision by the Director of the minutes of the proposed orders on 24 January 2014 to consider the matter and to prepare for the hearing. The Judge then continued, at [18]:

The Court and the community at large share a legitimate interest in the effective resolution of disputes, which may transcend the interests of parties themselves where proceedings have been, and this is the situation in this case, elongated. The respondent has been before the Court since late 2011 and has been accorded, pursuant to directions made in the context of the substantive proceedings, every conceivable opportunity to put material before the Court and make submissions including, given the issues canvassed in Linkhill (No 7), on the issues raised today by Mr O’Neill. ...

1. On the appeal, counsel for Linkhill relied on his written submissions to support the claim that the Trial Judge had erred by refusing the adjournment. Those written submissions did not contain any critique of the Judge’s ex tempore reasons but referred instead to statements made by the Judge during the course of the submissions on 12 February. It was said that those statements indicated that the Judge had failed to consider the adjournment application judicially. It is not necessary to repeat in these reasons the statements upon which counsel relied. It is sufficient to say that they indicate that the Trial Judge raised bluntly with Linkhill’s then counsel the lateness with which the set‑off issue was being raised, the absence of evidence providing an explanation for that lateness, and his concerns that Linkhill should not be permitted, merely because of a change of counsel, to re‑agitate matters already decided.
2. Counsel on the appeal also submitted that the Trial Judge had erred in failing to recognise that Linkhill’s counsel on 12 February 2014 was indicating only that he wished to explore a matter of law, and not a matter which may require new evidence. For the reasons given earlier, this latter submission cannot be accepted.
3. The Trial Judge’s decision with respect to the adjournment involved a discretionary judgment. As such, review of the decision on appeal engages the principles stated in *House v The King* (1936) 55 CLR 499 at 504‑5:

It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

1. It should also be recognised that appellate courts do not readily disturb decisions of trial judges on adjournment applications: *Blazevski v Judges of the District Court of New South Wales* (1992) 29 ALD 197 at 200 (Kirby P) and 206 (Priestley J).
2. In my opinion, the Judge’s refusal of the adjournment sought by Linkhill on 12 February 2014 is unsurprising. Linkhill made an oral application only, without notice and unsupported by evidence. It had had a reasonable opportunity since the delivery of reasons on 20 December 2013 and the provision of the Director’s minutes on 24 January 2014 to consider the matter and to prepare for the hearing. This was in addition to the period between the commencement of the proceeding in 2011 and the final submissions in October 2013 in which it had had the opportunity to consider the potential availability of any set‑off. The stated purpose of the adjournment was to “explore” a matter which, if was to be raised, should have been agitated in the trial, and Linkhill had had ample opportunity to do so.
3. The Trial Judge’s ex tempore reasons indicate that he had regard to the appropriate principles, did not misunderstand any aspect of the history, and addressed the adjournment application appropriately. However bluntly the Trial Judge may have expressed himself during the submissions, the complaint that the Trial Judge did not address the adjournment application judicially cannot be sustained. No error of the *House v The King* kind has been established.
4. I would dismiss these grounds of appeal.

## Summary

1. For the reasons given above, I would (to the extent that it may be necessary to do so) grant Linkhill the extension of time which it seeks to pursue the additional grounds of appeal, but would dismiss the appeal.

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| I certify that the preceding forty seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 22 July 2015