IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA315/2020
[2021] NZCA 705

BETWEEN	A LABOUR INSPECTOR Appellant
AND	SOUTHERN TAXIS LIMITED First Respondent
	MAUREEN VALERIE GRANT Second Respondent
	RONALD JAMES GRANT Third Respondent

Hearing:	19 August 2021
Court:	French, Collins and Goddard JJ
Counsel:	N Fong for Appellant No appearance for First Respondent L A Andersen QC for Second and Third Respondents
Judgment:	20 December 2021 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the approved question of law as follows:

> **The level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.**

C The orders made in the Employment Court in relation to the liability of Mr and Mrs Grant, and in relation to costs, are set aside.

D The proceeding is referred back to the Employment Court to be determined in light of our answer to the approved question of law.

E Costs in this Court are to lie where they fall.

REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] Southern Taxis Limited had a number of "commission drivers" whom it treated as independent contractors, not as employees. The Employment Court found that these drivers were employees, and that they had not been paid their minimum entitlements under employment legislation including the Minimum Wage Act 1983 and the Holidays Act 2003.[1] Southern Taxis was found liable to pay four of these drivers a total of about $80,000 in respect of unpaid entitlements.[2] But the company has stopped trading, and is not able to meet these obligations.

[2] Mr and Mrs Grant were the directors of Southern Taxis. Under pt 9A of the Employment Relations Act 2000 (ERA), which came into force on 1 April 2016, they may be found personally liable for the amounts that Southern Taxis failed to pay to the employees if they were "involved in" Southern Taxis' breaches of its obligations. In this case, that depends on whether they were "knowingly concerned in" the breaches.[3]

[3] Mr and Mrs Grant genuinely believed that the drivers were independent contractors, not employees. The genuineness of that belief is not challenged.

---

1 *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413 [Employment Court judgment] at [187] and [189]–[190].
2 At [191]–[193].
3 Employment Relations Act 2000, ss 142W(1)(c) and 142Y.

[4] The Employment Relations Authority (Authority) found that Mr and Mrs Grant were involved in the breaches by Southern Taxis and were personally liable for amounts due to the drivers.[4]

[5] The Grants appealed to the Employment Court. Their appeal was successful: Judge Corkill found that the Grants were not involved in the breaches by Southern Taxis because they genuinely believed that the drivers were not employees.[5]

[6] The Labour Inspector appeals to this Court on a question of law relating to the liability of the Grants under pt 9A of the ERA.[6] The approved question is:[7]

> What is the level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000?

[7] We have concluded that whether Mr Grant and/or Mrs Grant were involved in the breaches by Southern Taxis, and are personally liable for the amounts that Southern Taxis failed to pay the drivers, depends on whether each of them knew the essential facts establishing the breaches by Southern Taxis. It is their knowledge of the primary facts that matters. The inferences of fact or law they drew from the primary facts are not relevant. In particular, it is irrelevant that the Grants believed that the drivers were not employees. Rather, the inquiry should focus on whether they knew the primary facts that led to the finding that the drivers were employees, and the primary facts relevant to the finding that Southern Taxis had failed to make the required payments to those drivers.

[8] The appeal will therefore be allowed, and the proceedings referred back to the Employment Court to be determined in light of our answer to the question of law.

---

4 *Labour Inspector v Southern Taxis Ltd* [2019] NZERA 291 [Second Authority determination] at [42]–[47].

5 Employment Court judgment, above n 1, at [187] and [189]–[190].

6 Leave to appeal was granted under s 214 of the ERA: *Labour Inspector v Southern Taxis Ltd* [2020] NZCA 337.

7 At [13].

Background

[9] Southern Taxis operated a taxi business in Dunedin from 2002 to 2016, when it ceased trading. Most of its drivers were commission drivers who were paid a flat commission of 40 per cent of the takings they received while driving vehicles owned by Southern Taxis.

[10] Four of those commission drivers contacted the Dunedin office of the Labour Inspector claiming that they had not been receiving minimum entitlements as employees, including minimum wages payable under the Minimum Wage Act and paid leave entitlements under the Holidays Act. After investigating their complaints, the Labour Inspector brought claims in the Employment Relations Authority alleging that the four drivers were employees, and in many instances were not paid the minimum wage, holiday pay, sick leave or rest breaks. The Labour Inspector sought orders that the sums involved should be paid to the drivers.

[11] Because Southern Taxis had ceased trading in 2016, the Labour Inspector also brought claims against the Grants as the directors of Southern Taxis alleging that they were liable for the unpaid entitlements, and for penalties in respect of Southern Taxis' breaches.

Liability for involvement in breaches of employment standards

[12] This is the first occasion on which this Court has considered the liability of persons involved in breaches of employment standards under pt 9A of the ERA, which as noted above was inserted in the ERA with effect from 1 April 2016.

[13] The object of pt 9A is to provide additional enforcement measures to promote the more effective enforcement of employment standards (especially minimum entitlement provisions).[8] The new part provides for declarations of breach of minimum entitlement provisions, pecuniary penalty orders against persons in respect of whom the court has made a declaration of breach, compensation orders against persons in respect of whom the court has made a declaration of breach, banning orders

---

8 ERA, s 142A(1).

preventing a person from being involved in employment agreements, and liability of persons involved in breaches of employment standards, among other matters.

[14] The term "employment standards" is defined in s 5 of the ERA to include various requirements set out in the ERA including rest break requirements, the minimum entitlements and payments prescribed by the Holidays Act, and minimum entitlements under the Minimum Wage Act.

[15] Section 142W is at the heart of this appeal. It sets out the circumstances in which a person is involved in a breach:

> **142W Involvement in breaches**
>
> (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
>
> (a) has aided, abetted, counselled, or procured the breach; or
>
> (b) has induced, whether by threats or promises or otherwise, the breach; or
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
>
> (d) has conspired with others to effect the breach.
>
> (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
>
> (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
>
> (a) a person occupying the position of a director of a company if the entity is a company:
>
> (b) a partner if the entity is a partnership:
>
> (c) a general partner if the entity is a limited partnership:
>
> (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:
>
> (e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

(4) This section does not apply to proceedings for offences.

[16] Section 142X provides that a person involved in a breach is liable to a penalty under the ERA if the breach is one for which the ERA provides a penalty.

[17] Section 142Y sets out the circumstances in which a person involved in a breach may be liable for a default in payment of wages or other money due to an employee:

> **142Y When person involved in breach liable for default in payment of wages or other money due to employee**
>
> (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
>
> (a) there has been a default in the payment of wages or other money payable to the employee; and
>
> (b) the default is due to a breach of employment standards; and
>
> (c) the person is a person involved in the breach within the meaning of section 142W.
>
> (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
>
> (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
>
> (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[18] Sections 142ZC and 142ZD provide defences that apply to certain proceedings in relation to breaches of minimum entitlement provisions, including claims to recover wages or other money under s 142Y.[9] The defences that are available in relation to claims against a person involved in a breach (as defined in s 142W) are set out in s 142ZD:

> **142ZD Defences for person involved in breach**
>
> (1) This section applies if—
>
> (a) a person (**A**) breaches a minimum entitlement provision; and

---

9 Section 142ZB(a). The term "minimum entitlement provisions" is defined in s 5 of the ERA to mean minimum entitlements under certain statutes including the Holidays Act 2003 and the Minimum Wage Act 1983.

(b) another person (**B**) is involved in the breach.

(2) In a proceeding referred to in section 142ZB against B for involvement in the breach of a minimum entitlement provision, it is a defence if B proves that—

(a) B's involvement in the breach was due to reasonable reliance on information supplied by another person; or

(b) B took all reasonable and proper steps to ensure that A complied with the provision.

(3) For the purposes of subsection (2)(a), **another person** does not include a director, an employee, or an agent of B.

Employment Relations Authority determinations

[19] The Employment Relations Authority determined that the drivers were employees.[10] The Authority subsequently determined that Mr and Mrs Grant were personally liable for the amounts Southern Taxis failed to pay the employees from 1 April 2016 onwards.[11]

Employment Court judgment

[20] Mr and Mrs Grant brought de novo challenges to the Authority's determinations in the Employment Court. The Authority then removed to the Employment Court the issues that remained before it relating to penalties and costs, which had been reserved when the earlier determinations were issued.[12]

Finding that the drivers were employees

[21] Section 6 of the ERA provides that in determining whether a person is an employee, all relevant matters must be considered.[13] The label attached to the relationship by one or both parties is not determinative.[14] What matters is the real nature of the relationship.[15] The Judge noted that an intensely factual analysis may be

---

10 *Labour Inspector v Southern Taxis Ltd* [2018] NZERA 104 [First Authority determination] at [81].
11 Second Authority determination, above n 4, at [42]–[47]. The Authority also held that the Grants were liable for amounts that should have been paid to the drivers before 1 April 2016, under the former s 234 of the ERA: at [40].
12 *Labour Inspector v Southern Taxis Ltd* [2019] NZERA 359 [Third Authority determination] at [6].
13 ERA, s 6(3)(a).
14 Section 6(3)(b).
15 Section 6(2).

required to determine the real nature of the relationship.[16] He carefully reviewed the relevant features of the relationship.

[22] The Judge found that the parties did not have a common intention in relation to the status of the drivers. The drivers believed they were employees. But the Judge accepted that Mr and Mrs Grant genuinely believed the drivers were working under contracts for services. Their evidence that they believed the drivers were not employees had not been challenged.[17]

[23] The Judge identified the following factual features of the relationship as relevant:

(a) The drivers operated under a roster prepared and maintained by Southern Taxis. The roster was the mechanism by which it was agreed and known in advance what days of the week a given driver would work, and broadly which shift that driver would work. Once the roster was agreed, the drivers were required to work these days and hours, and their work patterns did not change from week to week.[18]

(b) The primary means of organising the work of the commissioned drivers on any given day was via Southern Taxis' dispatcher. The drivers' work was largely allocated by the company's dispatcher.[19]

(c) The drivers were required to submit completed pages from their log books including, or together with, details of fares taken. They provided all takings to Southern Taxis. Southern Taxis then carried out the necessary calculation to credit the drivers' proportion of fares to their personal bank accounts, after deducting tax.[20]

---

16 Employment Court judgment, above n 1, at [71], citing *Franix Construction Ltd v Tozer* [2014] 12 NZEmpC 159, (2014) 12 NZELR 331 at [44].
17 At [80]–[81].
18 At [85].
19 At [88].
20 At [93].

(d) Southern Taxis operated a taxi business which needed drivers to operate the branded vehicles which it owned. In the main, Southern Taxis relied on the availability of commissioned drivers for its business operation.[21]

(e) The drivers did not own their own vehicles or pay any of the running costs involved, including maintenance. They could not earn income by sub-contracting.[22]

(f) The drivers were not responsible for making their own personal tax payment to Inland Revenue, because PAYE was deducted by Southern Taxis. The drivers were not registered for GST, and did not render invoices.[23]

[24] The Judge considered that it was clear that the drivers were not in business on their own account.[24]

[25] Balancing all relevant factors, the Judge was "well satisfied" that the real nature of the relationship between Southern Taxis and the commissioned drivers was that of employer and employee.[25]

Arrears payable by Southern Taxis

[26] The Judge determined the arrears that Southern Taxis owed to the drivers in respect of minimum wages, holidays, rest breaks, and unlawful deductions from their wages. The amounts owing to each driver were set out in sch A to the Employment Court judgment.[26] They came to a total of approximately $80,000 for the four drivers.

---

21 At [98]–[99].
22 At [105].
23 At [106].
24 At [105].
25 At [124].
26 See [145].

Personal liability of the Grants

[27] The Judge then turned to consider whether the Grants were personally liable in respect of any of these amounts. Different tests for liability applied before 1 April 2016, and from 1 April 2016 onwards following the enactment of pt 9A of the ERA.

Personal liability for amounts payable before 1 April 2016

[28] Prior to 1 April 2016, the personal liability of Mr and Mrs Grant turned on s 234 of the ERA (now repealed):

> **234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay**
>
> (1) This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.
>
> (2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—
>
> (a) the company is in receivership or liquidation; or
>
> (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—
>
> the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.
>
> (3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.
>
> (4) In this section,—
>
> **company** has the meaning given to it by section 2(1) of the Receiverships Act 1993

> **holiday pay** means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday
>
> **minimum wages** means minimum wages payable under the Minimum Wage Act 1983.
>
> (5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[29] All but one of the requirements for liability under s 234 were met. Minimum wages and holiday pay were owed. Southern Taxis was unable to pay these sums. The critical question was whether the Grants had "directed or authorised the default in payment" of the minimum wages or holiday pay. The Judge referred to the decision of this Court in *Brill v Labour Inspector (MacRury)*, where it was held that a Labour Inspector "must prove the officer, director or agent knew the payment was in default of the company's obligations".[27]

[30] The Judge accepted Mr and Mrs Grant's evidence that they did not believe the affected drivers were employees. They therefore did not know the payments they were making were in default of Southern Taxis' obligations under the Minimum Wage Act or the Holidays Act. That meant they could not be personally liable under s 234 of the ERA.[28]

Personal liability for amounts payable from 1 April 2016 onwards

[31] With effect from 1 April 2016, s 234 was repealed and replaced by the personal liability regime set out in pt 9A of the ERA. The Judge considered that the language used in each of the listed criteria in s 142W(1) suggested deliberate involvement in a breach was required. All the words used denoted intentional action.[29]

[32] In light of the text of the legislation, and its parliamentary history, the Judge concluded that proof of intentional and purposeful actions on the part of the person accused of being involved in a breach is required.[30]

---

27 At [155], quoting *Brill v Labour Inspector (MacRury)* [2017] NZCA 169, (2017) 14 NZELR 460 at [27].
28 At [171]–[172].
29 At [180].
30 At [187].

[33] Because the Labour Inspector had not proved that Mr and Mrs Grant knew the commission drivers were employees, the necessary pre-requisite for liability, being proof of intentional and purposeful actions in breach of the relevant minimum standards, was not made out. The Grants were not liable for the established breaches of minimum standards in the period from 1 April 2016 onwards.[31]

Submissions on appeal

Submissions for the Labour Inspector

[34] Mr Fong, counsel for the Labour Inspector, submitted that to establish a person was "involved in a breach" under s 142W by virtue of being "knowingly concerned in" that breach, it must be proved that the person had actual knowledge of the essential facts giving rise to the breach. That may include wilful blindness. It was not necessary for that person to know that a breach was being committed as a matter of law. Nor did they need to appreciate that the drivers were properly characterised at law as employees.

[35] Mr Fong submitted that the approach adopted by the Employment Court is:

(a) Contrary to the statutory scheme. Under pt 9A, whether a breach was committed intentionally is a matter relevant to pecuniary penalty proceedings, but not to proceedings seeking to recover minimum employment entitlements from persons involved in a breach.

(b) Inconsistent with orthodox principles of accessory liability, and authorities in New Zealand and elsewhere on the meaning of the phrase "knowingly concerned in". Accessories are judged on the facts as they believe them to be, but on the law as it is.[32] A mistake as to, or failure to appreciate, the legal consequences of known facts does not negate accessory liability.

---

31 At [189]–[190].

32 *Securities and Investments Board v Scandex Capital Management* [1998] 1 WLR 712 (EWCA) per Millett LJ at 720.

Submissions for the Grants

[36] Mr Andersen QC, counsel for the Grants, agreed with the Labour Inspector's submission that the knowledge required for liability under s 142W is actual knowledge of the essential facts giving rise to a breach of employment standards. He agreed that may include wilful blindness in relation to such facts, but submitted it would not extend to constructive knowledge.

[37] Mr Andersen accepted that a person may be involved in a breach if they know the essential facts giving rise to the breach, even though they do not know that those facts amount to unlawful or infringing conduct. So, for example, a director of a company that fails to pay its employees their minimum wage entitlements will be involved in the company's breach of the Minimum Wage Act if the director knows the essential facts, even if they do not know that there is a Minimum Wage Act and do not know about the company's obligations under that Act.

[38] However in this case the Court had made a finding of fact that the directors believed the drivers were not employees. Mr Andersen submitted, in reliance on the Supreme Court decision in *Bryson v Three Foot Six Ltd*, that whether the drivers were employees was a question of fact.[33] Mr and Mrs Grant did not have actual knowledge of the fact that the drivers were employees. Knowledge that the drivers were employees is knowledge of an essential fact giving rise to the breaches. In the absence of such knowledge, the Grants could not be liable under s 142W.

[39] Mr Andersen accepted that knowledge that a person is an employee can often be inferred. But in the present case, the Grants gave evidence of their belief to the contrary and that evidence was not challenged. An inference could not be drawn about their knowledge that is inconsistent with their unchallenged evidence about what they understood the position to be.

[40] In the course of argument, we asked Mr Andersen whether he accepted that only one answer in relation to the employment status of the drivers could be derived from the facts set out at [23] above. Mr Andersen accepted that was the position.

---

[33] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [21]–[23].

Plainly all of those facts were known by Mr Grant, who was actively involved in all facets of the Southern Taxis business. We asked Mr Andersen whether any of those facts were not known by Mrs Grant. He confirmed that she would have known all of those facts. He noted that none of those facts related to the amounts being paid to the drivers, though Mrs Grant knew the general basis on which they were engaged.

[41] In response to questions from the Court, Mr Andersen confirmed that on his approach a person would not be liable if they had a genuine belief that the drivers were employees, even if that view was unreasonable. If such a view was unreasonable, that might call into question the genuineness of the view. But in the present case, the belief of the Grants that the drivers were not employees had not been challenged.

Discussion

Knowledge required to be "knowingly concerned in" a breach

[42] The Labour Inspector's argument before us focussed on the "knowingly concerned in" limb of the test for involvement in a breach in s 142W.[34] It was common ground before us that a person is knowingly concerned in a breach if they have actual knowledge of all the essential facts giving rise to that breach, or are wilfully blind in relation to those facts. That is plainly correct, in light of the authorities on accessory liability in New Zealand, Australia and England.

[43] In *New Zealand Bus Ltd v Commerce Commission* this Court considered accessory liability for breaches of the Commerce Act 1986.[35] Section 83 of the Commerce Act provides for pecuniary penalties to be imposed on a person who is a party to a breach of certain provisions of that Act. The language of s 83 is very similar to the language of s 142W(1) of the ERA. In particular, a person may be liable as an accessory under s 83 of the Commerce Act if they have been "in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person" of a relevant provision.[36] Arnold J explained that:[37]

---

34 ERA, s 142W(1)(c).
35 *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433.
36 Commerce Act 1986, s 83(1)(e).
37 *New Zealand Bus Ltd*, above n 35, at [260], referring to *Yorke v Lucas* (1985) 158 CLR 661 (HCA).

> … an accessory will be liable only if he or she intentionally participates in the contravention, which means simply that the person must have knowledge of the essential matters which go to make up the contravention (see *Yorke v Lucas*).

[44] *Yorke v Lucas*, which Arnold J referred to in the passage just quoted, is a decision of the High Court of Australia in relation to accessory liability for breach of s 52 of the Trade Practices Act 1974 (Cth).[38] The accessory liability provision considered by the High Court also used the phrase "knowingly concerned in" the contravention.[39] The majority of the High Court of Australia held that "[to] form the requisite intent [the defendant] must have knowledge of the essential matters which go to make up the offence whether or not [they know] that those matters amount to a crime."[40]

[45] Similarly, in New Zealand, it has been held that an accessory to a breach of the Fair Trading Act 1986 must be shown to have "[h]ad knowledge of the essential factual features of the offence … whether or not he knew they constituted an offence".[41]

[46] That has been the established position under English law for more than a century. Addressing the meaning of the phrase "knowingly contravene" in companies legislation, Neville J said in *Burton v Bevan*:[42]

> I think that "knowingly" means with knowledge of the facts upon which contravention depends. I think it is immaterial whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is, Did he know the facts which made the act complained of a contravention of the statute?

[47] As Millett LJ said in *Securities and Investments Board v Scandex Capital Management*, a defendant charged with being "knowingly concerned" in an offence "is to be judged on the facts as [they] believed them to be, but on the law as it is".[43] In that case a company was found to have carried on unauthorised investment business in the United Kingdom in contravention of the Financial Services Act 1986 (FSA).

---

38 The Australian equivalent to s 9 of the Fair Trading Act 1986, imposing liability for misleading and deceptive conduct in trade.

39 Trade Practices Act 1974 (Cth), s 75B(1)(c).

40 *Yorke v Lucas*, above n 37, at 667.

41 *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 (HC) at 250.

42 *Burton v Bevan* [1908] 2 Ch 240 at 247.

43 *Securities and Investments Board v Scandex Capital Management*, above n 32, at 720.

A director of the company was found to have been knowingly concerned in that contravention. The director argued on appeal that the company was permitted to carry on investment business in Denmark under transitional provisions pending a determination of its application for authorisation in that country, and he genuinely believed that this meant the company was authorised to carry on investment business in Denmark, so was exempt from the FSA requirement to obtain a separate authorisation in England. That argument was rejected: the director knew all the facts upon which the company's contravention depended. If he made any mistake, it was a mistake about the English law in relation to whether, on the facts as he knew them, the company was an "authorised person" for the purposes of the FSA. There was no arguable defence to the claim that he was "knowingly concerned" in the contraventions.[44]

[48] In enacting pt 9A, and in particular s 142W, Parliament deliberately broadened the net of accessory liability beyond that cast by the former s 234 of the ERA. Under the former s 234, a director would be liable only if they had "directed or authorised the default in payment of the minimum wages or holiday pay or both". As this Court held in *Brill*, the s 234 test would be met only if the director knew of the company's obligations, and knew that it had failed to meet those obligations.[45] But the scheme of pt 9A is quite different. Parliament has used a familiar, and broader, formula to define the scope of accessory liability.

[49] The broader net cast by s 142W is accompanied by two safeguards. First, liability under ss 142W and 142Y is confined to officers of entities such as companies and partnerships: the potential for liability to attach to other agents of the company under s 234 has been removed.[46] Second, s 142ZD provides a defence to such an officer if their involvement in a breach was due to reasonable reliance on information supplied by another person, or if they took all reasonable and proper steps to ensure compliance by the relevant entity. So for example a director who seeks advice from the company's lawyer on whether a person is an employee or independent contractor, and reasonably relies on advice that the person is an independent

---

44 At 721.
45 *Brill*, above n 27, at [20]–[22].
46 Compare ERA, ss 142W(2) and 234(2) (now repealed).

contractor, will not be involved in the company's breaches of employment standards in relation to that person.

[50] Sections 142W and 142Y allocate, as between directors and other officers on the one hand, and employees on the other hand, the risk that a company will be unable to meet its minimum obligations under employment legislation. The effect of these provisions is to impose the risk of non-performance of those obligations by the company on a director who knows all the primary facts relevant to the company's breach, unless the director has reasonably relied on information (for example, legal advice) provided by a third party, or has taken all reasonable and proper steps to ensure the company complied with the relevant provisions. A director cannot escape liability on the basis that they did not turn their mind to the legal consequences of what they knew. Nor can they escape liability on the basis that they genuinely but erroneously believed that the obligations in question did not apply, unless that incorrect understanding of the position was the result of reasonable reliance on information supplied by another person.

[51] We do not consider that there is anything in the legislative history of pt 9A that supports a different approach. The Judge referred to a Cabinet paper[47] and various passages from Hansard[48] which he read as supporting the view that accessory liability under pt 9A requires intentional and purposeful participation in a breach.[49] However none of these passages suggests that s 142W, which adopts a familiar formula for accessory liability, should be read other than in accordance with the well-established approach to that formula, and in particular to the term "knowingly concerned in" a breach. General references in the legislative history to intentional participation by accessories in a breach do not shed any light on what precisely the accessory must know or intend. That is spelt out in s 142W. A person who is knowingly concerned in a breach is intentionally involved in that breach in the only sense that matters for the purposes of s 142W. This is not a case in which Hansard provides any assistance.

---

47 Employment Court judgment, above n 1, at [183], quoting Hon Michael Woodhouse "Strengthening Enforcement of Employment Standards" (Ministry for Workplace Relations and Safety, 2015) at [42]–[43].

48 At [184]–[186], referring to (8 September 2015) 708 NZPD 6354; (3 March 2016) 711 NZPD 9394; and (10 March 2016) 711 NZPD 9608.

49 At [187].

We add that we have significant reservations about reference to Cabinet papers as an extrinsic aid to interpretation of legislation. They do not form part of the Parliamentary record. They may not be available to all members of Parliament, or to the public, when the legislation is considered by the House. They are not invariably available to the public even after the legislation is enacted. It is difficult to envisage circumstances in which it would be appropriate to refer to a Cabinet paper to support an interpretation that would not otherwise be adopted by reference to the legislation itself, and to other (admissible) extrinsic materials.[50]

Is employee status an "essential fact"?

[52] The central plank of Mr Andersen's argument for the Grants was that an essential fact establishing the contravention by Southern Taxis in this case was the status of the drivers as employees. Their status as employees was, he submitted, a question of fact: for this proposition he relied on the Supreme Court decision in *Bryson*.[51] Because the Grants genuinely believed that the drivers were not employees, they could not be knowingly concerned in the breaches by Southern Taxis.

[53] We do not accept this argument. The Employment Court's finding that the drivers were employees was the result of applying the law to the facts found by the Court, and in particular the facts set out at [23] above. It is in our view clear that this conclusion about the drivers' status is not a primary fact of the kind that a person must know in order to be knowingly concerned in a breach of employment standards. Rather, it is a conclusion (or inference) based on the application of the law to the primary facts relevant to the inquiry required by s 6 of the ERA into the real nature of the relationship between the drivers and Southern Taxis.

[54] Mr Andersen's argument based on *Bryson* misapprehends the conclusion reached in that case, and seeks to apply that conclusion out of context. It is helpful to set out the relevant passage in full:[52]

---

50 See Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis NZ Ltd, Wellington, 2021) at 380; and *GB v Chief Executive of the Ministry of Social Development* [2013] NZCA 410, [2013] NZAR 1309 at [33].

51 *Bryson*, above n 33.

52 *Bryson*, above n 33.

[21] Leaving to one side for a moment the effect of the directions now found in s 6, the characterisation of the relationship – the determination of whether someone is or is not an employee – has generally been treated as a question of fact. Lord Griffiths gave the following explanation in delivering the advice of the Privy Council in *Lee Ting Sang v Chung Chi-Keung*:

> "Whether or not a person is employed under a contract of service is often said in the authorities to be a mixed question of fact and law. Exceptionally, if the relationship is dependent solely upon the true construction of a written document it is regarded as a question of law: see *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323. But where, as in the present case, the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, it must now be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellate court as a question of fact to be determined by the trial court. At first sight it seems rather strange that this should be so, for whether or not a certain set of facts should be classified under one legal head rather than another would appear to be a question of law. However, no doubt because of the difficulty of devising a conclusive test to resolve the question and the threat of the appellate courts being crushed by the weight of appeals if the many borderline cases were considered to be questions of law, it was held in a series of decisions in the Court of Appeal and in the House of Lords under the English Workmen's Compensation Acts 1906 and 1925 that a finding by a county court judge that a workman was, or was not, employed under a contract of service was a question of fact with which an appellate court could only interfere if there was no evidence to support his finding . . .."

Other than in the exceptional situation to which Lord Griffiths refers, the task which the lower Court is engaged upon is the application of the law to the facts before it in the individual case. It involves a question of law only when the law requires that a certain answer be given because the facts permit only one answer. Where a decision either way is fairly open, depending on the view taken, it is treated as a decision of fact, able to be impugned only if in the process of determination the decision maker misdirects itself in law.

[22] In a case under the Employment Contracts Act 1991, *TNT Worldwide Express (NZ) Ltd v Cunningham*, the Court of Appeal appears to have proceeded on the basis that the employee/contractor question was open to appeal as a question of law because the case was of the exceptional kind. In a judgment with which the other members of the Court expressed agreement, Cooke P said that when the contract was wholly in writing it was the true interpretation and effect of the written terms on which the case must turn. That is an instance of the law requiring a certain outcome, namely the correct interpretation. But Cooke P accepted that many, perhaps most, contracts of employment coming before the Courts are not cases of relationships governed by comprehensive written contracts, and that in those more typical cases it has been held that the question of classification is one of what he termed "mixed fact and law".

[23] The 1991 Act has now of course been replaced by the [ERA], which stipulates in s 6 that, in deciding whether a person is employed by another

> person under a contract of service, the Employment Court or the authority must determine the real nature of the relationship between them and in doing so must "consider all relevant matters". The Court or the authority must therefore, even when the written contract is apparently comprehensive, take into account other matters which are relevant. Accordingly, s 6 mandates an inquiry by the Court or the authority for the purpose of determining a question of fact. The ultimate conclusion reached by the Court in a given case concerning the nature of the relationship is thus not ordinarily amenable to appeal to the Court of Appeal under s 214.
>
> [24] Appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion. If the Court were, for example, to misinterpret the requirements of s 6 – to misdirect itself on the section, which incorporates the legal concept of contract of service – that would certainly be an error of law which could be corrected on appeal, either by the Court of Appeal or by this Court. …
>
> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
>
> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. …
>
> (Footnotes omitted.)

[55] The analysis in *Bryson* is directed at the circumstances in which there is a right of appeal from a finding that a person is an employee, in particular where the right of appeal is confined to questions of law. For policy reasons, the courts have treated such findings as determinations of fact from which there is no appeal other than in the limited circumstances set out in [24]–[26] of *Bryson*. But that policy rationale does not extend beyond the context of appeal rights.

[56] More fundamentally, the Supreme Court does not suggest that whether or not a person is an employee is solely a matter of fact. To the contrary, the need to apply the law to the facts to reach a view on that question is repeatedly referred to. The Supreme Court explains the various ways in which a conclusion that a person is an employee may result from an error of law, even on the restrictive approach adopted in the context of appeal rights. Neither the result nor the reasoning in *Bryson* provides any support for the proposition that employee status is solely a question of fact, let alone of primary fact.

The irrelevance of the Grants' belief that the drivers were not employees

[57] It follows that it is irrelevant that Mr and Mr Grant believed the drivers were not employees. Rather, the inquiry under s 142W of the ERA should focus on their knowledge of the primary facts that led to the finding that the relevant drivers were employees. The Employment Court will also need to consider whether each of them knew the primary facts concerning the manner in which the drivers were paid that are relevant to the various contraventions by Southern Taxis.

Our answer to the question of law

[58] We set out again, for ease of reference, the approved question of law:

> What is the level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000?

[59] We answer that question as follows:

The level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.

[60] We will refer the proceeding back to the Employment Court to be determined in light of our answer to the approved question.

Result

[61] The appeal is allowed.

[62] We answer the question of law as follows:

The level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention by the employer.

[63] The orders made in the Employment Court in relation to the liability of Mr and Mrs Grant, and in relation to costs, are set aside.

[64] The proceeding is referred back to the Employment Court to be determined in light of our answer to the approved question of law.

[65] Mr Fong accepted that this was a test case, and that it would be appropriate for costs in this Court to lie where they fall. We agree.

Solicitors:
Crown Law Office, Wellington for Appellant
Gallaway Cook Allan, Dunedin for Second and Third Respondents