

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 4246/19
Applicant: Teleah Waitoa
First Respondent: Laundry Logistics Management Pty Limited
Second Respondent: Workers Compensation Nominal Insurer
Third Respondent: Monica Waitoa
Fourth Respondent: N & F Logistics Pty Limited
Date of Determination: 23 April 2020
Citation: [2020] NSWCC 128

The Commission declares:

1. That the fourth respondent, N & F Logistics Pty Limited was not insured as required by the *Workers Compensation Act 1987* at all relevant times.

The Commission determines:

1. That the deceased worker, Jeremy Waitoa, died on 15 January 2019 in the course of his employment with N & F Logistics Pty Limited.
2. That the compensation payable by the employer, N & F Logistics Pty Limited, in accordance with section 25(1)(a) of the *Workers Compensation Act 1987* on the death of the deceased is \$798,100.
3. That Teleah Waitoa, his widow, and Monica Waitoa, his daughter, were dependent for support upon the deceased worker at the date of his death.
4. That there were no other persons dependent for support upon the deceased worker at the date of his death.
5. Pursuant to section 29 of the *Workers Compensation Act 1987* the apportionment of payments between the dependents is as follows:
 - (a) Monica Waitoa \$90,000
 - (b) Teleah Waitoa \$708,100
6. The second respondent, Workers Compensation Nominal Insurer, is liable to make the payments as if it were the insurer of the employer, N & F Logistics Pty Limited, at all relevant times.
7. That the Workers Compensation Nominal Insurer is to pay to Teleah Waitoa the sum of \$708,100.
8. Pursuant to section 85 of the *Workers Compensation Act 1987* the Workers Compensation Nominal Insurer is to pay \$90,000 to the NSW Trustee and Guardian for the benefit of Monica Waitoa.

9. That the Workers Compensation Nominal Insurer is to make weekly payments under section 25(1)(b) of the *Workers Compensation Act 1987* to Monica Waitoa as follows:
 - (a) From 15/1/2019 to 31/3/2019 at the rate of \$142.90 per week;
 - (b) From 1/4/19 to 30/9/2019 at the rate of \$145 per week;
 - (c) From 1/10/19 to 31/3/20 at the rate of \$146.20 per week and
 - (d) From 1/4/20 to date and continuing at the applicable rates, as indexed.
10. Pursuant to section 145 of the *Workers Compensation Act 1987* the employer, N & F Logistics Pty Limited reimburse to the Workers Compensation Nominal Insurer the amounts paid out of the Insurance Fund in respect of the above- mentioned compensation.
11. That the first respondent is not liable under section 20 of the *Workers Compensation Act 1987*.
12. Award for the first respondent.

A brief statement is attached setting out the Commission's reasons for the determination.

Josephine Bamber
Senior Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Mr Jeremy Waitoa, the deceased, was involved in a motor vehicle collision on 15 January 2019. He tragically died in that collision. He was aged 29. His widow, Teleah Waitoa, was aged 26 years at the date of Mr Waitoa's death. She has filed in the Commission an Application in Respect of Death of a Worker (ARDW). She seeks orders from the Commission regarding payment of the lump sum payment provided in section 25 of the *Workers Compensation Act 1987* (the 1987 Act).
2. Monica Waitoa is the daughter of the deceased and Sonia Cisternas. Ms Cisternas was in a relationship with the deceased for several years before he married Teleah Waitoa. Monica Waitoa was dependent for support on the deceased at the date of his death and seeks that some of the section 25 lump sum be apportioned to her. This is opposed by Teleah Waitoa.
3. A dispute has also arisen as to who was the deceased's employer at the time of his death. Both Teleah Waitoa and Monica Waitoa allege, in the first instance¹, that the employer was N&F Logistics Pty Ltd, a company that had no workers compensation insurance at all relevant times. Accordingly, the Workers Compensation Nominal Insurer have been joined as a respondent to the proceedings.
4. N&F Logistics Pty Ltd deny they were the employer and assert that Laundry Logistics Management Pty Ltd were the employer. Laundry Logistics Management Pty Ltd held a policy of workers compensation and their insurer EML Mutual Limited is acting on the company's behalf through subrogation under the statutory workers compensation policy. They deny that Laundry Logistics Management Pty Ltd was the employer.
5. In the alternative, Ms Teleah Waitoa and Monica Waitoa allege that Laundry Logistics Management Pty Ltd was the employer.
6. I will refer to N&F Logistics Pty Ltd hereafter in these reasons as "N&F" and to Laundry Logistics Management Pty Ltd as "LLM".

PROCEDURE BEFORE THE COMMISSION

7. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
8. The parties attended a conciliation conference/ arbitration hearing on 29 January 2020. The hearing took a full day and there was insufficient time to conclude the case. So, it was agreed the submissions relating to apportionment of the lump sum would be undertaken by way of written submissions. These have now been received and are listed below.
9. Teleah Waitoa attended and was represented by Mr Ross Goodridge, counsel, instructed by Melissa Obrist, solicitor.
10. LLM was represented by Mr Phillip Perry, counsel, instructed by Mr Stephen Lee, solicitor, and Ms Rosemary Sagvand from icare and Ms Leigh Osmanbrugge from EML. Mr Ty Vo a director of that company was present. Ms Lisa Groth from icare was also present.

¹ T12.2-.10

11. The Workers Compensation Nominal Insurer was represented by Mr Joshua Beran, counsel, instructed by Ms Joanna Turnbull and Ms Lydia Raimard, solicitors.
12. Monica Waitoa was not present as she is a minor. Her mother Sonia Cisternas was present, and Monica was represented by Mr Rohan de Meyrick, counsel, instructed by Mr Jeff Lloyd, solicitor.
13. N&F was represented by Mr Joe Hallion, counsel, instructed by Mr Ibrahim Khammoun, solicitor. Mr Neal Qian a director of that company was present. Mr Qian is also a director of LLM.
14. There were a number of support people also in attendance.

EVIDENCE

Documentary Evidence

15. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) The ARDW and attached documents;
 - (b) Application to Admit Late Documents filed by Teleah Waitoa dated 15 October 2019 and attached documents;
 - (c) Reply filed by LLM and attached documents excluding pages 7 to 12;
 - (d) Application to Admit Late Documents filed by LLM dated 28 January 2020 and attached documents;
 - (e) Reply filed by the Workers Compensation Nominal Insurer;
 - (f) Two notices issued under 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) and attachments, both dated 22 November 2019 tendered by the Workers Compensation Nominal Insurer;
 - (g) Application to Admit Late Documents filed by Monica Waitoa dated 16 September 2019 attaching her Reply and annexed documents;
 - (h) Reply filed by N&F;
 - (i) Application to Admit Late Documents filed by N&F dated 15 January 2020 and attached documents;
 - (j) Pages 7-12 of LLM's reply were tendered by N&F; and
 - (k) An email sent on 27 January 2020 at 12.27pm from Mr Stephen Lee to various parties was marked for identification as MF11.²
16. In addition, a document was tendered by Mr Goodridge headed "Objection based on the Parol Evidence Rule and the relevance of any Offending Evidence". I accepted this document as an aide memoire as I understood Mr Goodridge intended to incorporate the contents in his oral submissions.

² T6.10 and 13.10.

Oral Evidence

17. There was oral evidence from Mr Qian. He gave brief evidence in chief adopting his statement dated 22 October 2019. He was cross-examined by Mr Goodridge and Mr Perry and re-examined by Mr Hallion.
18. Ms Cisternas gave brief evidence in chief and was cross-examined by Mr Goodridge.
19. Counsel made oral submissions which were sound recorded. A copy of the recording is available to the parties.
20. A transcript (T) has been made from the sound recording. It is 158 pages long and so I will not repeat the submissions verbatim in these reasons, but I will deal with the main thrust of the parties' submissions.

Written submissions

21. The following written submissions have been filed relating to the apportionment of the section 25 lump sum:
 - (a) Teleah Waitoa dated 11 February 2020 (10 pages);
 - (b) Monica Waitoa dated 18 February 2020 (5 pages); and
 - (c) Teleah Waitoa in reply dated 20 February 2020 (2 pages).

FINDINGS AND REASONS

Employment issue

22. The term "worker" is defined in section 4 the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) as "a person who has entered into or works under a contract of service ... with an employer".
23. The relevant evidence to consider about the identity of the employer of the deceased can be summarised as follows.

Written employment contract with N&F

24. The birth certificate of the deceased reveals his full name is Jeremy Wharekaponga Waitoa³. The written employment contract dated 1 June 2018 in evidence states it is between N&F Logistics Pty Ltd, the employer, and Jeremy Wharekaponga⁴, the employee. The signature of the employee is "JW Waitoa" and typed underneath is Jeremy Wharekaponga⁵. I am satisfied that the reference to "Jeremy Wharekaponga" is to "Jeremy Wharekaponga Waitoa", the deceased.
25. The contract states that the employee will commence permanent full-time employment with the employer on 1 June 2018 and that the employer agrees to employ the employee as a driver for 40 hours per week. Reference is made to a weekly salary of \$937.60, payable every two weeks, with the employer being entitled to deduct amounts as required by law and to make superannuation contributions. There are various other clauses about leave entitlements and obligations of each party. Clause 49 states that any amendment or modification of the agreement will only be binding if evidenced in writing signed by each party or an authorised representative of each party.

³ ARDW p1.

⁴ ARDW p2.

⁵ ARDW p15.

Pay advices from N&F

26. These pay advices are from N&F to Jeremy Wharekaponga and they cover the periods expressed as “5/11- 11/11”, “12/11-18/11”, “19/11-25/11”, “17/12-23/12”, “24/12-30/12” and “31/12-06/01”⁶.

Bank record headed “Everyday”⁷

27. The screen shot of the bank record has deposits with a note “NF Logistics Salary” on 24 December 2018 of \$676, 4 January 2019 of \$776.60, 7 January 2019 of \$776.60 and 16 January 2019 of \$776.60. These amounts correlate with the pay advices. Other entries relate to “Deposit -salary schl payroll”. As noted below this the payment of salary to Teleah Waitoa who is a primary school teacher.

Westpac bank statements

28. The Westpac Bank Statement in the name of Ms Teleah June Waitoa and Mr Jeremy Waitoa reveals on 7 January 2019 a deposit was made into the account from “NF logistics salary” in the sum of \$776.60⁸.
29. On 16 January 2019, it is recorded that payment was made from “NF logistics salary” in the sum of \$776.60⁹. This is the day after the death of the deceased.
30. Deposits are also recorded from “NF logistics salary” on 20 July 2018, 11, 17 and 25 September 2018, 4, 10, 18 and 24 October 2018, 2, 8, 14, 20, and 29 November 2018, 20 and 24 December 2018, and 4 January 2019.
31. On 12 July 2018, a deposit was made from Mr Fei Qian salary \$937.60¹⁰. On 27 July 2018, a deposit was made from Mr Fei Qian “Salary 4 Foster” \$700¹¹. On 13, 20 and 27 August 2018 deposits were made from Mr Fei Qian salary \$937.60¹². On 5 September 2018 a deposit was made by Mr Fei Qian salary \$348.60.¹³ Two deposits were made on 11 December 2018 from Fei Qian salary for w1 Dec and Fei Qian salary for w2 Dec, each in the amount of \$676.60¹⁴.
32. It is important to look carefully at the bank statements because the Westpac account was a joint account of the deceased and his wife. For instance, on 9 January 2019 there was a deposit of \$2,172.86 and it stated to be “Deposit-Salary Schl Payroll Doe Sf 01285426”. Clearly this payment of the salary to Teleah Waitoa. I will discuss this further below because counsel became confused when asking Mr Qian about this payment. I have carefully checked the bank records for Mr Qian’s personal account and for N&F and there is no payment on this date relating to Mr Waitoa.

⁶ ARDW pp17-21.

⁷ ARDW p26.

⁸ ARDW p68.

⁹ ARDW pp72.

¹⁰ ARDW p 106.

¹¹ ARDW p109.

¹² ARDW p112.

¹³ ARDW p118.

¹⁴ ARDW p99.

Mobile phone records

33. The screen shots of mobile phone texts between Friday, 11 January and Monday, 14 January have been identified by Teleah Waitoa and Mr Qian as being messages between the deceased and Neal Qian.
34. They record a conversation about a worn tyre on the truck the deceased was driving, with Mr Qian saying he will book a replacement and, having checked with the supplier, telling the deceased to drop the truck off to have the tyre replaced on 15 January. The deceased replied that he would drop the truck off after his run on 15 January and he added "And can you pay me as well bro"¹⁵. However, the deceased died in the vehicle accident before he completed his run.

Claim form

35. The report a fatality claim form completed by Ms Obrist, solicitor for Teleah Waitoa, refers to the employer as LLM¹⁶.

Teleah Waitoa's statements

36. Ms Waitoa has supplied written statements dated 13 June 2019 and 16 August 2019, which are in the ARWD. She also has filed a further statement dated 15 October 2019 in her Late Documents, but that only deals with the apportionment issue.
37. Ms Waitoa states that the deceased commenced employment with N&F on about 28 May 2018.
38. She says she spoke with Neal, the owner of N&F, in about February 2019 and he told her that the deceased's employment was transferred from N&F to LLM in October 2018, however she says she does not believe this is true or correct.
39. She also says she does not believe the deceased's employment was transferred in January 2019; she says it is her belief that he was never employed by LLM.
40. Ms Waitoa attaches to her statement copies of the employment contract, payslips and bank screen shot referred to above.
41. Ms Waitoa states that she never received a payslip for the time after 7 January 2019.
42. She states that if the deceased's employment had been changed from N&F to LLM this is the type of thing the deceased would have told her.

Fei (Neal) Qian's statements

43. Mr Neal Qian has provided a brief statement dated 16 May 2019. He says he is employed in the position of Director of N&F since September 2017. He states that the deceased was employed by LLM, a company that N&F subcontracts to. Mr Qian states that prior to his death the deceased had undertaken some work for N&F in the previous six months both as a contractor and as an employee. Mr Qian corrected this in his second statement and deletes the words as a contractor. He states that the deceased's duties for N&F comprised of delivering goods to customers in the Port Macquarie area.

¹⁵ ARDW pp60/61

¹⁶ ARDW p31.

44. Mr Qian has provided a statement dated 22 October 2019 in the name of "Fei (Neal) Qian" in which he explains he is commonly known as Neal¹⁷. He states that he is 28 years old and was born in China. He came to Australia in December 2014 on a student visa. Between February 2015 and March 2017, he studied accounting at La Trobe University in Melbourne. He graduated with a Master of Professional Accounting.
45. Mr Qian states in about June 2015 to December 2015 he worked part time for a logistics company known as MMH for a Mr Wang, who was the director. Mr Qian was a warehouse manager and was responsible for dispatch and paperwork. In about May 2017 Mr Wang recommended Mr Qian to Mr Vo, who called him and offered him a job as a fleet manager. Mr Qian says that he and Mr Vo speak proficient English.
46. Mr Qian says on 11 May 2017 LLM was incorporated and Mr Vo and Mr Wang were its directors. He states, with reference to ASIC documents, that the shareholders of LLM were companies called Maverick Distribution Pty Ltd (Maverick) and M2W Investments Pty Ltd. Apparently Mr Vo was the sole director and shareholder of Maverick.
47. Mr Qian says in about June 2017 Mr Vo told him that in about May 2017 LLM had entered into an agreement with About Linen Pty Ltd trading as South Pacific Laundry (Sydney) (SPL) for LLM to provide logistic services to SPL regarding delivery of hotel linen. Mr Qian says he commenced employment for LLM between June and July 2017 as a fleet manager and driver in respect of their contract with SPL. Mr Qian was paid \$800 gross per week. Mr Qian says he was coordinating about six to seven LLM drivers, who were paid fortnightly.
48. Mr Qian states that due to visa issues he ended his employment with LLM in about early August 2017 and returned to Melbourne. He says in about early September 2017 Mr Vo rang him advising that he wanted to sub-contract a new contract from SPL to Mr Qian. Mr Qian said he asked Mr Vo how he would be paid, and he was told it would be commission based in monthly lump sum payments. He said he asked about workers and said to Mr Vo that Mr Qian did not have any employees under him. He relates that Mr Vo told him that Mr Qian could use Mr Vo's drivers and trucks, but the driver's salaries and other business costs would be deducted from the commission that he would pay to Mr Qian. Mr Qian says that Mr Vo told him that he should incorporate a company and run everything through that company, the same way that LLM does.
49. Mr Qian says he incorporated N&F on 21 September 2017 using an online website. He has been and remains the sole director and shareholder of N&F. He said Mr Vo did not tell him to take out any insurance. Mr Qian says his understanding of the business model proposed by Mr Vo was that LLM would provide the capital and use sub-contacted drivers to provide the deliveries. Mr Qian states that the work started in October or early November 2017 and that he provided the logistic service to LLM from his home in Melbourne on his laptop and mobile phone. He said SPL laundered linen in Port Macquarie and LLM had the contract to pick it up and deliver it to SPL's clients in Port Macquarie, Foster, Armidale and Coffs Harbour. Mr Qian says each destination involved a run and each run was allocated two drivers. Each run had a roster which remained essentially unchanged from week to week, excepting for absenteeism or for exceptional orders. His job was to fill the driving spots.
50. Mr Qian says the drivers did not use their own trucks. The trucks were supplied by Maverick but that LLM was going to directly purchase some vehicles. If a truck was off the road, a replacement would be hired through Thrifty car hire. Mr Qian says he would arrange this, and the cost would be invoiced to LLM who would reimburse him.

¹⁷ N&F Reply p1.

51. Mr Qian says he was also responsible for handling any inquiries or complaints from SPL. He also attended to the maintenance of the trucks and he ensured that the drivers had a "bank card of N&F to make payment for the fuel"¹⁸. However, at [35] Mr Qian says petrol was paid for by LLM.
52. Mr Qian says he did not devise the runs or how they were to be driven or what time the drivers commenced, finished or had lunch. The drivers did not have uniforms. He did not provide the drivers with instructions how to load or unload trucks or supervise this. He says drivers employed by LLM, such as Raymond Brady, would train the drivers and teach them how to perform their route.
53. Mr Qian says at the end of each month he would receive commission of \$11,000 from LLM. He says he was supposed to receive more, but LLM had cash flow problems due to the purchase of new trucks by Maverick. He says he trusted that in the future he would receive the payments owed.
54. Mr Qian says he would do the rosters using the drivers provided by LLM and would "work out what was due and would make the payment from the \$11,000 monthly payment that I received"¹⁹. It seems from the context of this statement that Mr Qian would pay the drivers from N&F. He adds "I would also occasionally when N&F was low on money, pay for expenses including payment to drivers through my personal bank account."
55. In March 2018, Mr Qian says he received a phone call from Mr Vo who informed him that LLM had short-term financial pressure and he asked Mr Qian to pay one of LLM's drivers, Mr Xiao (Felix) Fu. Mr Qian was to receive a commission of 0.8% for each hour Mr Fu drove. Mr Qian was to be reimbursed monthly for this payment. So, Mr Qian started to pay Mr Fu about \$1,000 per week. Then in May 2018 Mr Vo asked Mr Qian to also pay Greg Oxenbridge on the same arrangement.
56. In about May 2018, Mr Qian spoke to the branch manager of SPL, Grant Fantoia, to get the name for a new driver and in a second conversation he was told by Mr Fantoia that he had spoken to the deceased and he had given him Mr Qian's details. In late May 2018 Mr Qian says the deceased rang him and said, "I am prepared to drive full time starting when you need". Mr Qian said he responded "Good. You will be driving for a company called Laundry Logistics Management Pty Ltd. I will call you and let you know when exactly you start, but for now please send me your driver's licence to my number."
57. Mr Qian says he thereafter called Mr Vo and he relates the following conversation:
 - "Me: I have found a new employee for Laundry. His name is Jeremy and he wants to work full-time. I will get him to take my position and complete the Armidale run. I will provide you with his details so that you can employ him.
 - Mr Vo: Laundry has a lot of financial pressure on it, it would be better if you pay him directly and then Laundry reimburses you. This is because Laundry will struggle to make consistent fortnightly payments.
 - Me: How much shall I pay him?
 - Mr Vo: The same as for Laundry's drivers, being \$23.44 an hour for employees or if he wants to be a subcontractor \$25 under ABN. You will be reimbursed monthly."

¹⁸ Reply N&F p4 [33].

¹⁹ Reply N&F p5 [38].

58. Mr Qian says that the deceased said he wanted to be paid as an employee and he provided Mr Qian with his tax file number. Mr Qian says N&F was to pay the deceased directly and be reimbursed by LLM. He says the arrangement was oral.
59. Mr Qian then states that the deceased commenced driving with N&F in Armidale in about early June 2018. He says the deceased was paid weekly by N&F. He says he did not always receive the monthly reimbursement from LLM due to their financial concerns. He states that he did not receive any separate commission on the deceased's income. He attaches in annexure F to his statement some emails between himself and Mr Vo in which he lists the deceased's hours. These are dated 3 November 2018 and 20 November 2018 at 9.42am. The email in this annexure from Mr Vo is dated 20 November 2018 but has the time 8:20 so it is not clear that it is responding to either of these emails from Mr Qian. The email from Mr Vo states:

"Hello Neal

I've processed [sic] \$25 on ABN plus \$50 into your account.
We sort out the invoice at another time and stay focused on the bigger picture.

Regards,
Tai Vo
SPTD"

60. Mr Qian records that in about mid-June 2018 Mr Vo told him that Mr Oxenbridge had taken over the entire Coffs Harbour runs and LLM would pay him \$20,000 per month. This meant Mr Qian did not need to pay him any further.
61. Mr Qian relates that Mr Vo asked him to manage the workload that was being done by Mr Wang. He records that Mr Vo said that Mr Qian would be recorded as a director of LLM. Mr Qian said that he became a director on 1 August 2018. He says he was not paid any salary by LLM. Mr Vo says in his statement at [16] that he did not actually assign him work as a director of LLM as Michael Wang continued to perform his duties.
62. Mr Qian states that in about September 2018 the deceased told him he was going to make a home loan application and he needed payslips for the purposes of that application. Mr Qian says before this there was nothing documented as to the relationship between N&F and the drivers. He says from about August 2018 he started to provide payslips to the deceased, including providing backdated payslips for previous months.
63. Mr Qian relates that in September 2018 an LLM employee, Daniel, resigned. He had performed the Foster run. Mr Qian said the Foster run had always been done by a direct employee of LLM. Mr Qian says the deceased was transferred from Armidale to Foster to complete Daniel's run. Mr Qian at [69] relates a conversation with Mr Vo. However, he does not say there was a discussion about LLM taking over paying the deceased directly. What Mr Qian relates is his request for the unpaid commission to be paid to him. He states he said:

"Okay, please be quick, otherwise I cannot afford to continue operating N&F. As you know, I need to pay Felix and Jeremy. If this continues you may have to pay both Felix and Jeremy upfront."

64. Mr Qian says in late October 2018 Mr Vo called him and he proposed paying N&F quarterly, not monthly. Mr Qian says if this happened it may be difficult to pay Felix and Jeremy on time and that they needed to make an arrangement as to who would pay them directly or indirectly. Mr Qian attaches an email, annexure H, that says that N&F “will commence receiving quarterly lump sum payments deferring from the monthly instalment which was initiated from the purchase.” It is not clear what is the “purchase” to which reference is made. The email continues “LLM will also payout N&F for the residue PMQ backpay after March 2019, as LLM has encountered financial strain with more than 5 brand new truck purchases to date.” It is not clear what the residue PMQ backpay is. Mr Vo concludes the email by asking Mr Qian to advise as to how much per quarter and the suggested amounts to be deducted from LLM’s backpay.
65. Mr Qian relates emails about finding a replacement for the deceased while he was off getting married in December 2018 and that he had a conversation with Mr Vo in which Mr Qian informed him that he had found a new person to drive, Josh Ferris. Mr Vo asked Mr Qian to pay Mr Ferris and offered to pay a commission of \$2 per hour to Mr Qian, and to try to make payments to Mr Qian weekly. Mr Qian agreed.
66. Mr Qian says in late November 2018 Ms Teleah Waitoa called him and she requested a statement to show that the deceased is employed by N&F for the home loan application. He said Ms Waitoa said she would prepare it and email it to him. Mr Qian attaches at annexure K a letter on the letterhead of “N&F Logistics Pty Ltd” with his address, ABN, mobile phone and email address dated 1 December 2018. Mr Qian says he emailed this to Ms Waitoa on 2 December 2018. The letter states:
- “Dear Sir/Madam,
- My name is FEI QIAN. I am the director of N&F Logistics Pty Ltd.
- I am writing this letter to certify that Mr Jeremy Wharekaonga is a permanent full time employee of our company, who is not on probation. His weekly salary is \$937.6 before tax, which consists of 40 hours or work weekly.
- Should you require further clarification, please contact me.²⁰”
67. Mr Qian states that in late December 2018 ,Ms Waitoa sought further documents from him to show that the deceased was employed by N&F for the bank loan application, being a signed employment contract and a statement explaining the discrepancies in the deceased’s pay. Mr Qian says he asked Ms Waitoa to provide the documents to him and he would sign them. He says the employment contact was provided by her with a request it be dated 1 June 2018. He says he did this and emailed it back to her. A copy of an email is attached. The letter dated 2 January 2018 [sic] is also attached to annexure N to Mr Qian’s statement. It deals with the tax arrangements for the deceased’s pay as tax had not been deducted due to changes to be made with Mr Qian’s accountant to the payment schedule. The letter says once the tax is made up by the deceased he will return to receiving \$776.60 per week after tax. This letter is on the letterhead of N&F.
68. Mr Qian states in mid-December 2018 Owen Crocker commenced driving in Port Macquarie and he paid him \$25 per hour and was to be reimbursed by LLM plus \$2 per hour commission. So, it seems that Mr Qian says he received \$2 per hour commission for N&F paying directly every person he names, being Mr Crocker, Mr Ferris, Mr Xiao (Felix) Fu, and for a time Mr Oxenbridge; yet in relation to the deceased, he did not receive a commission.

²⁰ Reply N&F p89

69. Mr Qian at [39] lists payments made through his personal account on behalf of N&F these total \$12,495.07 on 9 November 2017, 10 January 2018 and the rest in November and December 2018.
70. Mr Qian states on about 4 January 2018 [sic, 2019] LLM owed N&F a significant sum and he called Mr Vo. He said he told him that he could not keep paying the deceased, Mr Fu, Mr Crocker and Mr Ferris upfront and that he was now making a lot of payments from his own personal bank account. In the conversation he relates at [84] he says Mr Vo said that he was receiving a commission on the drivers and that he replied "Yes, but not for Jeremy". The conversation is stated as follows:
- "Mr Vo: How about I pay Jeremy upfront since you don't receive anything from him, but you keep paying Felix, Owen and Josh and I will try to reimburse you for the amount you pay them weekly.
- Me: Okay. So, when will you start paying Jeremy?
- Mr Vo: This coming Monday.
- Me: Okay, but please make sure to pay him weekly and not fortnightly as he needs this for his home loan application.
- Mr Vo: Sure that is easy for me."
71. 4 January 2019 was a Friday. So, Mr Vo was agreeing to pay the deceased starting from Monday 7 January 2019. However, the bank statement for N&F confirms it paid the deceased \$776.60 on 7 January 2019²¹. There are no bank records showing any payment at any time from LLM to the deceased.
72. At [85] Mr Qian relates a conversation he says he had with the deceased. He does not specify the date but says it was following his call with Mr Vo. It is a reasonable inference that Mr Qian meant this occurred also on 4 January 2019 from the use of the word "following" but also because he says he told the deceased "Starting this coming Monday you will be paid by Laundry. I have agreed with Tai for Laundry to pay you." Mr Qian says that Mr Waitoa asked "So, when will Laundry start paying me?" and that he replied "Next Monday. I will tell Tai the hours you completed and have him pay you directly. I also told him to pay you weekly." Mr Qian said that the deceased said this "Sounds good, Do I need to sign anything or do anything?" Mr Qian says he advised "You don't need to do anything" and that the deceased replied "Okay, sweet."
73. Mr Qian says a few hours after this he spoke to Mr Vo and confirmed that the deceased was "agreeable to be transferred to Laundry. From next week you will be paying him." Mr Qian said he told Mr Vo to provide the deceased with a payslip for his home loan application.
74. Mr Qian acknowledges the text messages exchanged between him and the deceased from 11 to 14 January 2019. These have been referred to above and include on 14 January 2019 the deceased's last text to Mr Qian ended with "And can you pay me as well bro".
75. Mr Qian said he was informed on 15 January 2019 of the death of the deceased while driving the run between Armidale and Port Macquarie. He says the next day he and Mr Vo went to see Ms Waitoa to express their condolences and that during the visit he said to her:
- "Jeremy is still owed a bit of salary. I understand that this will be a difficult time for you and that your need money to pay for expenses associated with the funeral and daily living. I will make the payment to you now."

²¹ N&F Reply p173.

76. Mr Qian says he made the payment of the remaining salary at Ms Waitoa's home. He said after he and Mr Vo left he said to Mr Vo that he would need to reimburse him and issue a payslip from 7 January 2019. He said on 17 January 2019 Mr Vo provided him a payslip from LLM addressed to the deceased for the salary commencing the week of 7 January 2019, a copy of that is at annexure P. That payslip covers the period 7 to 12 January 2019. No mention is made for pay for Monday 14 and Tuesday 15 January 2019. Clearly on 14 January 2019 the deceased had not received his pay from LLM as he asked Mr Qian to pay him in the text message that day.
77. Mr Qian says LLM is yet to reimburse him for the final salary he paid to the deceased. He also said at the time of his statement being written he was owed \$42,359.05 from LLM.
78. Mr Qian refers to Ms Waitoa's statement dated 13 June 2019 and says he spoke to her in February 2019 and spoke about the deceased's employment being transferred from N&F to LLM on 7 January 2019 and says he told her that N&F originally intended to transfer him in October 2018, but that it did not happen then. He denies telling Ms Waitoa the employment was transferred on 1 January 2019. Mr Qian says that Mr Vo did not agree to say that Mr Waitoa was employed by LLM due to their relationship. Mr Qian also denies telling the Quantumcorp investigator that the deceased was an employee of LLM from 1 January 2019.

N&F financial statements

79. The N&F financial statements for the financial year ended 30 June 2019 comprise a Profit and Loss Statement, Balance Sheet and notes to the financial statements²².
80. The Profit and Loss Statement refers to service fees received of \$356,907 and other income of \$7,500. Expenditure is listed, including, but not limited to, the following items:

Depreciation- Vehicles	\$30,000
Food and accommodation	\$25,091
Fuel and Motor Oil	\$72,376
Repairs & Maintenance	\$13,301
Salary & Wages	\$69,440
Subcontractor	\$115,429
Truck Rental	\$30,000
Travel, accommodation and conferences	\$3,273

81. The Balance Sheet and Notes refer to GST of \$9,198 and a director loan to Mr Qian of \$33,109.

Mr Qian's oral evidence

82. Mr Goodridge cross-examined Mr Qian about the N&F profit and loss statement. Mr Qian was asked what vehicles were owned by N&F he identified two cars, which he estimated had a combined value of \$45,000²³. He was challenged about this answer and it was put to him that the depreciation cost claimed of \$30,000 was not consistent with such a value. Mr Qian then stated that he had not signed the profit and loss statement yet. He said he did not prepare it, that his accountant had. Mr Qian said he was not saying it was wrong, but he was saying it may not be accurate.²⁴

²² LLM Late Documents dated 28 January 2020.

²³ T37.26

²⁴ T39.34- 35.01

83. Mr Qian was asked about the text message received from the deceased on 14 January 2019 about the tyre and Mr Qian agreed that it was him that gave the direction as to when the tyre and the truck could be repaired²⁵.
84. He confirmed that the amount claimed for repairs and maintenance of \$13,000 was for vehicles including trucks for N&F. He agreed that N&F carried on a business for LLM and other people and tried to make a profit. He said he drew a salary from N&F and that he had personally loaned money to the company.
85. Mr Qian was asked if the arrangement between N&F and LLM was reduced to writing. He said in the beginning in 2017 there was a draft contract, but it was never signed. He said he never had the time to sit down and read it clearly²⁶.
86. He was asked if there was any evidence in writing anywhere before Jeremy's death that would show he was not an employee of N&F? He replied No.
87. Mr Qian was also asked the following:
- “Q. N&F paid Jeremy's wage before his death?
A. Yes
- Q. Paid the wage through January right up to his death?
A. The last statement was before- before 7 January.
- Q. Through N&F?
A. Yes. But there is one more payment on the night²⁷ when we went- Mr Ty Vo...”
88. Mr Qian was asked about the payslips and he confirmed they were from N&F for wages for the deceased for the periods referred to on them. He was then asked about the bank deposits and that N&F kept paying salary for Jeremy until his death. Mr Qian asked him to read the dates, which he did as 9 January 2019 (Mr Goodridge later corrected this to 7 January 2019) and 16 January 2019. Mr Qian said it was not a salary from N&F²⁸. Mr Qian then added “it's a salary for Jeremy's last work but it's not from N&F, it was from LLM. I was making this payment in front of all his families on that night that Ty and I went to his home.”
89. Mr Qian was asked about the text messages on 14 January about a bald and dangerous tyre and Mr Qian agreed he understood those texts came from Jeremy and that Jeremy was asking Mr Qian's permission to get the tyre fixed. It was put to Mr Qian that in the text in reply he said that he had checked with the garage and they do not have stock so, the truck would have to be dropped off tomorrow. He agreed this was his message. He was then asked:
- “Q. You were in charge of where the vehicle went, what Jeremy did, whether it got repaired, when it got repaired, you were in charge of all those things, weren't you?
- A. Actually I was not in charge, I was informed by- by them²⁹.”
90. Mr Qian was asked if the last message from Jeremy before his death was “Okay, bro I'll drop off after my run tomorrow... and can you pay me as well, bro?” He was asked ““can you pay me as well, bro?’ That was his wages wasn't it?” Mr Qian answered: “Yes, yes, this is his message.”³⁰

²⁵ T 40.10

²⁶ T 41

²⁷ T43.22, there is a transcription error in this sentence. I have listed to the sound recording Mr Qian stated there is one more payment on the *night* whereas the typist written “9th”. I have corrected this above.

²⁸ T 45

²⁹ T 46.26-.31

³⁰ T 47

91. He was asked while Jeremy worked for N&F, whether N&F regularly made payments of superannuation for Jeremy? He answered, "We didn't pay the superannuation like every month." He was asked if he paid it at all? And he replied "Yes, I paid it."³¹ Mr Qian said it was paid after the death. Mr Qian was asked whether N&F had produced a claim for reimbursement for the superannuation payment. Mr Qian eventually replied that he does not generate every invoice for reimbursement. Most of the reimbursement was confirmed on email with Mr Vo.
92. Mr Qian was asked about the letter, on N&F letterhead dated 1 January 2018 and he confirmed he saw it in 2019. He was asked, "was it signed by you because it was correct, that is, other than the date 2018, 2019 mistake?" He replied "Yes, it was signed by me." He was asked "was it correct?" and he replied, "I wasn't too sure".³² When questioned further about the contents of this letter, which dealt with N&F's arrangements about paying the deceased's tax on his wages, Mr Qian said that the part that said he was in negotiations with his accountant about the tax was not correct. He explained that the letter was drafted by the Waitoas³³. However, he agreed he signed the letter as being correct³⁴. It was put to him by Mr Goodridge "So you're quite prepared to lie, sign false documents?" Mr Qian answered "Well, I don't know if it's a lie but I only signed it due to my trust with Jeremy."
93. Mr Qian agreed that N&F did not have any workers compensation policy for the tax year ended 30 June 2019, as listed in the Profit and Loss Statement³⁵. His attention was drawn to the sum of \$69,440 paid by N&F for salary and wages. He replied "yes, the salary is correct". He confirmed that he told the investigators that Jeremy was not an employee of N&F at the time of his death. He was then asked:
- "Q. You accept that there was a contract of employment and that Jeremy was, at one stage, employed with N&F?
A. Yes, Jeremy was employee for a time³⁶"
94. Mr Goodridge questioned Mr Qian about his statement wherein he said that the employment contract was not prepared by N&F, but by someone else. He was asked:
- "Q. The contract was prepared by N&F, wasn't it?
A. That contract was done from a website.
...
Q. And you found that website and then took the contract (not transcribable 01:31:14), correct?
A. Yes³⁷"
95. Mr Goodridge asked Mr Qian about the clauses in the contract regarding termination and Mr Qian said he did not remember. He then agreed that there was a contract of employment between N&F and Jeremy, the contract was found on the website by Mr Qian, and the contract was signed by him and Jeremy³⁸. Mr Qian agreed the contract said what Jeremy would be paid each week. He was shown the contract from clauses 41 to 45 and Mr Qian said that he did not use any of those terms to terminate the contract.

³¹ T47.20-.34

³² T51

³³ T52

³⁴ T53.08-.09

³⁵ T 53.21-.24

³⁶ T54.18, the transcript has part of this answer as not transcribable, I have listened to the sound record Mr Qian says "Yes, Jeremy was employee *for a time*". I have added these words in italic above.

³⁷ T54.21-.28

³⁸ T55

96. Mr Perry sought to cross-examine Mr Qian. An objection was taken by Mr Hallion on the basis that in addition to Mr Qian being the director of N&F he was also a director of LLM, and that Mr Perry was acting on behalf of LLM and he could not impeach his own client. Mr Perry submitted in response to this objection that Mr Qian was not a director of LLM at the time of the material upon which he sought to question Mr Qian. Mr Hallion submitted that Mr Qian became a director of LLM in August 2018 and it would be difficult for him to object to Mr Perry's questions before that time. But he did object to questions about January 2019. I granted leave for Mr Perry to cross-examine Mr Qian about the paragraphs of his statement that he identified being paragraphs 51, 56, 69 and 92 and the events on 4 January 2019.
97. Mr Perry asked Mr Qian questions about paragraph 51 of his statement, which is dated 22 October 2019. This related to Mr Qian's conversation in May 2018 with Mr Grant Faatoia, the branch manager of SPL in Port Macquarie as to whether he knew of any drivers. Mr Qian was asked "you needed to recruit a driver?" He replied "Yes"³⁹. Mr Perry put to Mr Qian that after he received some advice from Mr Faatoia, Mr Qian called Mr Waitoa and gave him the option referred to in paragraph 56. Mr Qian agreed he gave him two options, to be an employee or subcontractor. The following evidence was given;
- "Q. And he chose to be an employee?
A. Yes.
- Q. And an employee of N&F?
A. Yes."⁴⁰
98. Mr Perry questioned Mr Qian about paragraph 69 of his statement. In the preceding paragraph Mr Qian had referred to an LLM employee, Daniel, resigning and that Daniel had done the Foster run. Referring to paragraph 69, Mr Perry asked Mr Qian if he had directed Mr Waitoa to be transferred from Armidale to Foster. He replied "yes". He was asked "And you told Mr Vo what you had decided to do?" He replied "yes". Mr Perry asked Mr Qian that it was within his decision as to whether Mr Waitoa would remain at Foster or go to Armidale. Mr Qian answered "the ultimate decision was not made by me, it was decided by Mr Vo." The following evidence was given:
- "Q. You told him [Mr Vo] about it and he went along with it?
A. I suggested it to him and he agreed.
- Q. Well, your words were, "I have transferred", weren't they, sir?
A. Because at the time Jeremy was the only option.
- Q. Yes. Thank you. But you didn't say to Mr Vo, "would it be all right, Mr Vo, if I transfer Jeremy from Armidale to Foster, did you Mr Qian?"
A. We do have an email communication about this transfer"⁴¹
99. Mr Perry questioned Mr Qian about paragraph 84 of his statement, which was a conversation between him and Mr Vo on 4 January 2019. He agreed with the contents of his statement, that he was under financial pressure, he conveyed that to Mr Vo and Mr Vo suggested that he take over paying Mr Waitoa and that this would commence "this coming Monday". Mr Qian agreed with Mr Perry's question that this coming Monday was 7 January. Mr Qian confirmed that he called Mr Waitoa the same day as he had spoken with Mr Vo. He confirmed he told Mr Waitoa "Starting this coming Monday you will be paid by Laundry". Mr Qian agreed he said this. Mr Perry put to Mr Qian that this was false that he had not said this to Mr Waitoa. Mr Qian replied, "it's not false."⁴²

³⁹ T64.20

⁴⁰ T64.27-65.01

⁴¹ T65-66

⁴² T71.30 - 72.01

100. Mr Perry referred Mr Qian to annexure O of his statement, being the text messages. Mr Qian confirmed that he told Mr Goodridge that they were the totality of the texts between him and Mr Waitoa on 11 and 14 January 2019. Reference was made to the last line of the text message from Mr Waitoa to Mr Qian on 14 January 2019 “and can you pay me as well, bro?” the following evidence was given:

“Q. Mr Waitoa expected you to pay him?

A. All the drivers in Port Macquarie expect me to pay them.

Q. Yes. So your statement that Laundry would pay him is false?

A. I represent the Laundry. Not only Jeremy but also his co-workers.

Q. Laundry has never paid- to your knowledge had never paid Mr Waitoa ever, had it. No money had passed from Laundry to Mr Waitoa?

A. I didn’t manage the Laundry’s accounts.⁴³”

101. Mr Perry questioned Mr Qian about him paying on 16 January 2019 the salary owing to Mr Waitoa. Mr Perry asked, “you fully understood that it was N&F’s responsibility to pay Mr Jeremy Waitoa for the work that he performed for N&F?” He replied that he did not consider anything about the company’s name, he wanted to pay what was overdue for the deceased. Mr Perry asked Mr Qian “he [Mr Waitoa] continued to do work at your instruction, did he not?” and Mr Qian replied, yes that Mr Waitoa did the work on his instruction⁴⁴.

102. Mr Hallion asked Mr Qian questions in re-examination. He asked where did the money come from to make the payments of N&F? He said the primary income for his company was from LLM, and some money was from SPL because he did extra deliveries for them as a driver and some money came from house moving jobs.

103. Mr Hallion asked Mr Qian what did LLM pay him for. Mr Qian replied:

“the subcontracting in Port Macquarie, *the bulk run with the*⁴⁵ truck and the men working in Port Macquarie local area plus the drivers- actually the subcontractors employed by LLM in Foster area I was paying them on behalf of LLM as well. I pay them upfront and then I seek reimbursement from LLM. That’s all recorded in the emails.”

Tai Vo’s statements

104. Mr Tai Vo has provided a brief statement dated 20 May 2019. He says he has been employed as a Director of LLM since 1 July 2017. He says LLM is a transport company and at the time of his death the deceased was employed by LLM. Mr Vo states that the deceased’s duties for LLM were advised to him by Neal Qian, Logistics Manager.

105. In a statement dated 13 December 2019, Mr Vo describes the nature of his corporate arrangements. This statement is in the Late Documents of N&F dated 13 December 2019. He said his arrangement with Mr Qian was to use Mr Vo’s company’s employees and trucks and that Mr Qian would be a subcontractor and manage it all through Mr Qian’s company. Mr Vo said he would pay Mr Qian’s company monthly commission and he would deduct his employees’ salary and other disbursements from the monthly commission.

⁴³ T73

⁴⁴ T77

⁴⁵ T79.15 the words above in italics were not transcribed by the typist but can be heard on the sound recording.

106. Mr Vo relates that in about mid 2018 the deceased was employed, and he arranged for Mr Qian to pay him as LLM had financial pressure due to the purchase of trucks by Mr Vo's other company Maverick. Mr Vo states "I approved Jeremy to be paid as an employee (pursuant to the request of Jeremy) at the same rate as Laundry Logistic's other employee drivers, being \$23.44 per hour before tax". He said N&F and Mr Qian were to receive no benefit from the arrangement. He said it was "never intended to change the true situation that Jeremy was to be other than on paper the employee of Laundry Logistics."
107. Mr Vo states during November 2018 N&F paid the deceased, Felix Fu and Joshua Ferris and LLM would reimburse N&F for them and pay N&F the monthly commission of \$11,000. He said at times he would direct Mr Qian to pay other drivers and he would reimburse him for those payments.
108. Mr Vo says the arrangement for the payment by N&F of the deceased's salary was on a short-term basis. He said, "Given employees were also paid super and other employee entitlements, there was no profit to be made by N&F Logistics or incentive for N&F Logistics to engage drivers as employees." Mr Vo states at [37] that Mr Qian raised that the deceased was getting a home loan and his preference was to be an employee and considered that being a sub-contractor did not provide enough security. Mr Vo says to smooth things over with Mr Qian "it was agreed that I would take back Jeremy and pay him directly and N&F Logistics would continue with the sub-contractors from who they received commission." He said Mr Qian rang back shortly to confirm that Jeremy was agreeable to being paid directly by LLM.
109. Mr Vo says on 7 January 2019 "Jeremy's notional employment arrangement with N&F Logistics was normalised and he commenced employment with Laundry Logistics".
110. Mr Vo says he was informed of the death of the deceased in a motor vehicle accident when "driving a truck owned by Maverick which was provided by Laundry Logistics to the sub-contractors to N&F Logistics to carry out the SPL contract for Laundry Logistics".
111. Mr Vo says he attended on Ms Waitoa with Mr Qian on 16 January 2019 and introduced himself as Jeremy's boss. He says he heard Mr Qian saying he would pay Jeremy's remaining salary to help and Mr Vo says he saw Mr Qian make what he understood to be a bank transfer on his phone.
112. Mr Vo says when they left Ms Waitoa's house Mr Qian said to him that LLM needed to reimburse him the transfer he had made for what was outstanding to Jeremy. He says the following morning he prepared a payslip to record that LLM was the employer of the deceased and he gave this to Mr Qian. He said he did not provide to Ms Waitoa as he did not have her details.
113. Using similar words and phrases Mr Vo, like Mr Qian, denies he told Quantumcorp that the deceased's employment was transferred on 1 January 2019. He said it happened on 7 January 2019. He does not say why the payslip he prepared did not cover the 14 and 15 January 2019, only going from 7 to 12 January 2019; noting that Mr Vo says he prepared it on 17 January 2019. Nor does he explain why LLM had not paid the deceased for the week ending 12 January 2019 before the deceased's death on 15 January 2019.
114. There is another version of Mr Vo's statement dated 13 December 2019. Attached to the icare letter to Teleah Waitoa dated 22 November 2019, issued under section 78 of the 1998 Act, is an unsigned copy which has four paragraphs that do not appear in the signed copy. In the unsigned copy they appear at paragraphs 25, 26, 37 and 53.

Mr Goodridge's submissions

115. Mr Goodridge made oral submissions on behalf of Ms Waitoa in relation to the employment issue. He relies on the contract of employment and submits it was never terminated under any of the provisions within the contract.
116. He submits in relation to the conversations Mr Qian had in January 2019 he has been able to demonstrate through cross-examination that Mr Qian accepts there was a written contract of employment and that, notwithstanding that Mr Qian had suggested Ms Waitoa had produced the contract, he accepts that he found it on the internet. He submits that it was signed by Mr Qian and there was clearly an employment relationship between N&F and the deceased.
117. He submitted that Mr Qian has showed himself "not necessarily to be a terribly honest, or least reliable person." He referred to Mr Qian's evidence about the value of N&F's vehicle, which was \$45,000 (Mr Goodridge misspoke and referred to \$54,000). He submitted that this evidence about the value of the vehicles is not consistent with a depreciation of \$30,000 in the profit and loss statement. It was also submitted that N&F was not just some enterprise paying LLM's bills, the evidence disclosed it paid salaries and wages, it earned income from a number of sources and that N&F was a separate legal entity and paid Mr Qian wages.
118. It was also submitted that Annexure R to Mr Qian's statement, being back records, show payments going right up to 24 December 2018 and the next payment was on 7 January 2019. It was submitted that the text message on 14 January 2019 from the deceased to Mr Qian was asking for his wages to be paid. It was noted that the wages were paid by Mr Qian after the deceased's death on 16 January 2019.
119. Mr Goodridge submitted that the N&F case at its highest is, even if a conversation happened between Mr Qian and Mr Vo as alleged and even if those arrangements were conveyed in part to Mr Waitoa, there was not a transfer of employment. It was submitted that there was no transfer of tax obligations, superannuation obligations and there was no conversation between Mr Vo and Mr Waitoa, the minimum you would expect between an employee and employer about the new arrangements.
120. It was submitted that the whole proposition about the transfer of employment is clearly all *ex post facto* and the only evidence from LLM is a payslip made up after the death of the deceased. Mr Goodridge noted that no invoices have been placed before the Commission to enable the Commission to ascertain the basis upon which each invoice had been sent, and N&F could have provided them but has not.
121. Mr Goodridge submits, in the alternative, if the Commission accepts the evidence of Mr Qian and Mr Vo, he seeks an award against LLM.
122. In relation to an argument about section 20 principal, Mr Goodridge submitted it would work in the premises of a principal but here the work being performed was in a vehicle, which on LLM's and N&F's cases was not owned by them. Mr Goodridge submitted that the vehicle might just as well be hired and that hiring would take place by L&F. Also, the delivery run work involves work being done picking up and delivering outside the vehicle. Mr Goodridge also drew attention to section 20(1) of the 1987 Act, which requires the work that is being done is the contractor's work. He submitted that the evidence is that the principal handing out the contract (I understood this to be a reference to SPL) needed to have people incorporated. So, he submitted it was never intended that the arrangement would be one to attract section 20.

Mr Perry's submissions

123. Mr Perry submitted that in paragraph 17 of Mr Qian's statement he said that Mr Vo told him that SPL required their service providers to be incorporated and would not give work to unincorporated contractors. He said Mr Qian incorporated on 21 September 2017 and called Mr Vo and told him that he had incorporated his company as Mr Vo told him and that it was called N&F. Mr Perry submitted that the upshot of this evidence was that the Commission should be satisfied that there was an arrangement between the two whereby the work that LLM had obtained would be performed by another corporation pursuant to a subcontract.
124. Mr Perry further submitted that paragraph 39 of Mr Qian's statement sets out payments made by way of wages and includes those paid to the deceased and N&F. He also referred to the conversations at paragraphs 47 and 49 of the statement between Mr Qian and Mr Vo about Mr Qian taking over paying Mr Fu and Mr Oxenbridge. He contrasted these conversations, with that related at paragraph 51, when Mr Qian spoke with Grant Faatoia about obtaining another driver, leading to the deceased being hired. Mr Perry submitted that there was a total lack of involvement of Mr Vo in this⁴⁶. He also submitted that there is no evidence at all from anywhere that Mr Vo ever met Mr Waitoa, and no evidence that Mr Waitoa had formed a contractual relationship with Mr Vo directly or by any corporation run by Mr Vo. He submitted that at no stage was there ever a contract of employment with Mr Waitoa and LLM.
125. Mr Perry submitted the relevant conversations were between Mr Qian and Mr Waitoa, with Mr Waitoa saying at [51] "I'm prepared to drive full time starting whenever you need." And Mr Qian responding at [56] that he went back to Mr Waitoa and informed him he could start work. Mr Perry submitted that it was relevant that Mr Qian said that he gave Mr Waitoa the choice of being an employee or subcontractor. He submitted that it was not LLM that gave him the choice. He submitted that this evidence, coupled with the wage slips from N&F, the payments from N&F into Mr Waitoa's bank account before and after his death lead to the conclusion that N&F was the employer of the deceased. Mr Perry submitted that it was notable that LLM had never paid a cent to the deceased.
126. It was also submitted that it is evident that Mr Qian had complete control over the way L&F ran its business from the contents of paragraph 69 of Mr Qian's statement; such as when Daniel left and Mr Qian moved Mr Waitoa from the Armidale run to the Foster run. He submitted that Mr Qian did not consult Mr Vo or seek his permission, but that Mr Qian tells Mr Vo what has happened. Mr Perry says this demonstrates that N&F had the control over the conduct of Mr Waitoa. He submitted the fact that N&F said to LLM that they would like money from LLM to reflect what they had to pay to perform the subcontract, including the wages that L&F had paid to Mr Waitoa, truck maintenance and fuel costs does not affect the proposition that Mr Waitoa was an employee of L&F.
127. Furthermore, Mr Perry submitted that the written contract of employment is between Mr Waitoa and L&F. He drew attention to the oral evidence from Mr Qian that he had obtained it from a website. He submitted that it was signed by N&F and presented it to Mr Waitoa who signed it. It was submitted that there is no basis to conclude other than this document contains the agreement between the parties. Mr Perry submitted that there is no evidence that this written contract was terminated in accordance with the clauses in the agreement. He submitted that the letters from Mr Qian in his capacity as director of N&F confirmed that Mr Waitoa was that company's employee.

⁴⁶ T100

128. Mr Perry referred to the conversation of 4 January 2019 between Mr Vo and Mr Qian wherein Mr Qian said he wanted to quit because LLM had not made payments to N&F, and that Mr Qian said he could not keep paying Jeremy and other named drivers. Mr Perry submitted there was only one way to read that evidence was that up until that time Mr Qian had been paying Mr Waitoa. He said when Mr Vo offered to pay Mr Waitoa's wages from the following Monday, it was not a statement that Mr Vo would arrange with Mr Waitoa for LLM to become his employer. He submitted this was just a subsidising of a salary, but that it did not end the obligation of N&F pursuant to the written contract.
129. Mr Perry also submitted that there was a falsehood creeping into Mr Qian's statement, wherein Mr Qian said he told Mr Waitoa that starting on this Monday you will be paid by LLM. Mr Perry submitted that it was likely this statement was false because of the text messages sent by Mr Waitoa to Mr Qian on 14 January 2019, the day before he died. Mr Waitoa asks Mr Qian "can you pay me as well, bro". Mr Perry submitted that it is relevant that Mr Qian did not reply- do not you remember LLM is going to pay you? Mr Perry submitted that this message from Mr Waitoa indicated that he remained of the view that he was looking to his employer, N&F to pay him. Mr Perry submitted that the text messages are also relevant because they show that Mr Qian continued to direct Mr Waitoa about the manner of execution of his work, that Mr Qian was organising the repair of the truck tyre.
130. Mr Perry submitted the fact that in the meeting with Teleah Waitoa on 16 January 2019 it was Mr Qian that made the payment of Jeremy's last pay to his account and not Mr Vo, was telling. He submits it contradicts the alleged conversation on 4 January 2019 when Mr Vo said he would from the next Monday pay Mr Waitoa.
131. Mr Perry submitted there is no evidence that Mr Waitoa agreed to become an employee of LLM, and that the written contract remained on foot, as it had not been terminated or modified in accordance with its terms.
132. In relation to the argument regarding the application of section 20 of the 1987 Act, Mr Perry submitted the fact that Mr Waitoa died in the course of his employment when driving does not factually come within the terms of section 20. He submitted that the application of section 20(6) is one of fact and degree. He cited two early English cases *Fenn v Miller*⁴⁷ and *Andrews v Andrews*⁴⁸ in which there were findings that notwithstanding the accident occurred in a vehicle it was not in any proximity to the place of business of the principal. Therefore, Mr Perry submitted that section 20 has no application to the facts in this matter.

Mr de Meyrick's submissions

133. Mr de Meyrick adopted the submissions of Mr Goodridge and Mr Perry and submits that N&F was the relevant employer at time of death.

Mr Hallion's submissions

134. Mr Hallion submits that the only evidence which supports the submissions that N&F is the employer is the text message from Mr Waitoa "can you pay me as well bro". Mr Hallion says this is ambiguous. He submits Mr Waitoa could have been asking whether he can pay him, not that Mr Qian has to pay him.
135. In terms of the profit and loss statement including a sum of \$13,000 for vehicle maintenance he says that is inconsistent with the cost of running a fleet of trucks and is consistent with maintenance for Mr Qian's two cars.

⁴⁷ [1900]1 QB 788 (CA)

⁴⁸ [1908] 2 KB 567 (CA)

136. Mr Hallion submits that Ms Teleah Waitoa, as the applicant, has the onus of proof and that Mr Qian as the fourth respondent does not have to disprove employment. This is correct the onus of proof lies with the applicant.
137. Then Mr Hallion made submissions that the evidence does not disclose that the accident occurred in the course of employment. However, no stage of the proceedings, before Mr Hallion's submissions, was this raised as an issue in dispute. This matter was originally listed before Arbitrator Batchelor. He issued a Direction on 19 September 2019 directing that N&F be joined as the fourth respondent and that it file a Reply by 3 October 2019. A telephone conference was held before Arbitrator Batchelor on 22 October 2019 N&F's solicitors, Mr Khammoun and Mr An, were present. It appears at that telephone conference N&F did not seek to raise as an issue whether the accident occurred in the course of employment. The issue notified to Arbitrator Batchelor was whether N&F was the employer of the deceased, as it was alleged the employment was verbally transferred shortly before the death of the deceased.
138. A Reply was filed by N&F on 22 October 2019 after the telephone conference. In Part 3 of the Reply it is stated "The fourth respondent further says, so as to avoid any doubt as to the basis upon which the claim is disputed, that..." Thereafter, the issues were listed as a denial that the fourth respondent was an employer as at the date of death, a denial that the deceased was a worker of the fourth respondent, and in the alternative issues about section 20 principal were raised. At no stage was it asserted that the deceased did not die in the course of employment.
139. A further telephone conference was held before Arbitrator Batchelor on 28 October 2019 and the Arbitration Hearing before him in Port Macquarie on 5 November 2019 was vacated and the matter was listed for Arbitration Hearing on 29 January 2019 in Sydney. Apparently there was a further telephone conference on 19 December 2019. It is my understanding, and it has not been asserted to the contrary, at no time in any of these telephone conferences was it asserted by those representing N&F that the deceased did not die in the course of employment. Had that been asserted the applicant would have been afforded the opportunity to put on evidence to address such an assertion. As noted above, it was raised by Mr Hallion in his submissions late on the day during the Arbitration Hearing before me on 29 January 2019. Mr Hallion did not make a formal application to raise such a dispute. However, in light of the history of the matter, I informed Mr Hallion that I considered it was too late for him to agitate such an issue.⁴⁹
140. Mr Hallion referred to Mr Qian giving evidence that he made a one-off payment on 9 January 2019 in respect to superannuation and he submitted that was consistent with this being the end of the employment relationship⁵⁰. However, this is not exactly what Mr Qian said. He was being questioned by Mr Goodridge and the evidence was as follows:
- “Q. So are you saying that whilst Jeremy worked for N&F, N&F regularly made payments for superannuation for Jeremy?
A. We didn't pay the superannuation like every month.
- Q. Did you pay it at all?
A. Yes, I paid it.
- Q. When, after his death or before his death?
A. It's on the after.

⁴⁹ T152-154, particularly 153.07. Note at T154.07 there is a transcription error the line should read "if it is *not* in issue"

⁵⁰ T120.23

- Q. So N&F paid Jeremy's superannuation after Jeremy's death and the superannuation was calculated as a percentage, what, nine and a half per cent or whatever the rate is of Jeremy's salary, was it?
A. I think so."

141. However, there was confusion created by a question of Mr Perry in his cross-examination of Mr Qian. Mr Qian was questioned about N&F paying the deceased on 7 January 2019 when Mr Vo had allegedly agreed in the conversation on 4 January 2019 to take over the wage payments to the deceased. He replied that we normally pay the salary after the driver's job is done⁵¹. He elaborated that the deceased's work in relation to this payment was done before 7 January 2019⁵². When asked further by Mr Perry "Mr Vo had told you he'd pay him, would he not?" Mr Qian responded "Onwards"⁵³. I took this to mean that Mr Qian was asserting that Mr Vo had agreed to pay Mr Waitoa's salary for work performed from 7 January 2019.

142. Then the next question asked by Mr Perry was based on an error in him reading the bank records. This created the confusion in Mr Hallion's submissions about the superannuation payment. Mr Perry asked Mr Qian the following:

- "Q. And on 9 January N&F made a payment of \$2,122.86 to Jeremy Waitoa.
A. ...(not transcribable)

- Q. I'm sorry?
A. I believe that's superannuation⁵⁴."

143. I have explained in [31] above that the payment Mr Perry was referencing was a payment into the Waitoa's joint account and it was the salary from school teaching for Teleah Waitoa. It had nothing to do with N&F, Mr Qian or Jeremy Waitoa. Mr Goodridge corrected this at the conclusion of Mr Qian's evidence and stated the payment on 9 January was the wife's salary⁵⁵. He said he was correcting this while Mr Qian was still present in case anything arises out of it. No party sought to ask Mr Qian any further questions.

144. The upshot of this is that Mr Hallion is in error when he submitted there was a one-off payment on 9 January 2019 by N&F for superannuation and that demonstrated the end of the employment relationship with N&F and the deceased.

145. Mr Hallion submitted that the payment by N&F made by Mr Qian on the night of 16 January 2019 could be understood by someone exercising decent human compassion. This was because this was a meeting at the home of Teleah Waitoa on the night after her husband died.

146. Mr Hallion also characterised the fact that Mr Qian had written the two letters attesting to Mr Waitoa working for N&F, and signed the employment contract, also showed Mr Qian's compassion; as he says he did this to assist the Waitoas obtain a home loan.

⁵¹ T69.23

⁵² T69.30

⁵³ T70.04, the transcript has this answer as not transcribable, I have listened to the sound record and Mr Qian stated "Onwards".

⁵⁴ T70.08, the transcript has this answer as not transcribable, I have listened to the sound record and Mr Qian stated, "I believe that's superannuation."

⁵⁵ T82.27-83.05

147. Mr Hallion also says the contract can be put to one side because it does not use the name the deceased was employed by. However, the pay slips from N&F and the contract all just refer to the deceased by his two Christian names and do not have the Waitoa surname. I do not consider this to be significant. It is clear from the bank statements, which marry up with the payslips, that it was the same person Jeremy Wharekaponga Waitoa, which is the name on his New Zealand Birth Certificate⁵⁶. Ironically, the signature on the contract clearly says "JW Waitoa"⁵⁷.
148. Mr Hallion submits there are other features about the contract of employment that lead to the view that it should be put aside. He said referred to paragraph 2 which says the employee has to maintain the company truck properly. To my mind this sentence is not clear in its meaning, "maintain" may just mean keep clean; rather than undertake mechanical repairs. Mr Hallion did not elaborate on this point so it is not clear why such a sentence would be relevant in terms of whether, in his argument, the contract should be placed aside. The same paragraph in the contract says the employee is employed as a driver for 40 hours per week and at paragraph 7 there is reference to the "compensation" to be paid to the employee. Mr Hallion argues the word "compensation" is not usually seen in employment contracts. But that sentence continues and says it "will include a weekly salary of \$937.60 AUD". So, Mr Hallion's argument, to my mind, has no force because it is clear when the whole paragraph is read that the word "compensation" is not being used instead of "salary", but could include the compensation of other expenses. Indeed paragraph 10 refers to reimbursement of other expenses.
149. The contract has other features to support that it is an employment contract. It has the primary place of work, being the South Pacific Laundry, Port Macquarie; which, from the other evidence, was the place from which linen was collected and dropped off.
150. Mr Hallion submitted that despite Mr Qian being cross-examined it was not put to him that the conversations with the Waitoas about the employment contract being required to support a home loan did not occur. To my mind this misses the point, a person may seek confirmation of employment for a home loan but just because it was created for such a purpose does not mean it is a sham, even though it was back dated. Also, why would Mr Vo and Mr Qian allegedly transfer the employment of the deceased on 4 January 2019 if he had been employed by LLM all along up to that time? I find there is inconsistency in the position taken by Mr Hallion in his submissions.
151. During Mr Hallion's submissions, I asked him about the payslip which says it is from LLM to Mr Waitoa covering the period from 7 to 12 January 2019. In Mr Vo's statement he confirms it was issued after Mr Waitoa's death. What is strange if it was for that period, and LLM has taken over the employment of Mr Waitoa for work done after 7 January 2019, why wasn't the payslip issued at the end of that week and why had not LLM made payment to Mr Waitoa on 12 January 2019 or even 14 January 2019. Mr Qian in his conversation on 4 January 2019 with Mr Vo stressed that Mr Waitoa was to be paid weekly⁵⁸. So, he should have received a payment before 15 January 2019. Mr Goodridge submitted that unless Mr Vo's and Mr Qian's evidence is corroborated by a document the Commission should not accept their evidence.
152. Mr Hallion submitted in response to Mr Goodridge that the credit of Mr Vo and Mr Qian had not been undermined. He submitted the only attack on Mr Qian was that he had in his profit and loss statement that the vehicle depreciation was \$30,000. Mr Hallion was then interrupted by Mr Goodridge saying that Mr Qian signed letters that were not true. He admitted he was not negotiating with his accountant about Mr Waitoa's tax. Mr Perry interrupted as well submitting that Mr Waitoa believed he was still in the employ of Mr Qian from his text message "can you pay me as well bro".

⁵⁶ ARDW p1.

⁵⁷ ARDW14.

⁵⁸ N&F Reply p14 at [84].

153. Mr Hallion took up his earlier submission that this text message was ambiguous. I do not agree it is ambiguous as it has to be read in the context of the email exchanges. Mr Waitoa was concerned about the state of the tyre on the vehicle. He took that up with Mr Qian on 14 January 2019. Mr Qian made enquiries about when it could be fixed and informed Mr Waitoa the details and then Mr Waitoa concluded with the request that his pay be made. I find it is significant that, had Mr Waitoa understood his employment had been transferred to LLM, one would have expected him to make such requests to LLM. I find this message is more likely than not, on the balance of probabilities, consistent with Mr Waitoa expecting payment as usual from L&F.
154. I also find it extraordinary that Mr Qian, a graduate in accounting, would engage in such casual business practices to verbally transfer Mr Waitoa's employment when it is evident from his own statement he knew that Mr Waitoa's security of employment was important to him. This is evident because he knew Mr Waitoa wanted to be an employee not a sub-contractor. It was Mr Qian who negotiated this and who interviewed Mr Waitoa. Mr Qian also knew the importance of this because of the bank loan application. He knew he had provided a written contract of employment and signed two letters attesting to L&F being the employer. It seems incongruous then that Mr Waitoa would have agreed to a verbal transfer without some document to show the bank that LLM was now his employer. It also beggars belief, had LLM been the employer at the time Mr Waitoa asked for these documents, that Mr Qian would not have arranged for them to be provided by LLM; but instead he provided them from L&F.
155. Also, there does seem to be an acceptance in the evidence of Mr Qian and Mr Vo that LLM were not the employer from the outset as otherwise there would be no need to refer to a transfer of employment.
156. The other matter I find is incongruous, is Mr Qian's oral evidence where he explained that the reason he made payment to Mr Waitoa on 7 January 2019 was because that was for work performed before then. That seems understandable at first blush, but I find it is not consistent with his version of what he says he told Mr Waitoa. In Mr Qian's statement at [85] he says he rang Mr Waitoa following his call with Mr Vo on 4 January 2019. He recounts that Mr Waitoa raised concerns about how it would affect his bank loan and then agreed to the arrangement and that Mr Waitoa said, "So when will Laundry start paying me?" and Mr Qian writes that he said "Next Monday. I will tell Tai [Mr Vo] the hours you completed and have him pay you directly." I find this is inconsistent with his oral explanation. Clearly in this passage Mr Qian was saying to Mr Waitoa the payment from LLM would start on Monday. Secondly, he was saying he would tell LLM the hours he had completed, he used the past tense not and not that in the future he would relay to LLM the hours as they were completed so they could make the wages payment. Also, Mr Qian says he then rang Mr Vo and said, "From next week you will be paying him". I find that this is not borne out by the actual facts. It was L&F that paid Mr Waitoa on 7 January 2019 and it was Mr Qian that made the payment on the night of 16 January 2019.
157. Mr Hallion submitted that I could not speculate why LLM had not made payment to Mr Waitoa in the week before he died. I am not speculating, but I find this evidence is more likely on the balance of probabilities consistent with the fact that L&F remained Mr Waitoa's employer to the time of his death.

158. In a case where the deceased cannot give evidence, and where I have found the objective facts are not consistent with what the witnesses say, I consider their evidence does need to be viewed cautiously. I also accept Ms Waitoa's evidence that a change in employer is something she would have expected her husband to inform her of, if it had happened. I find the fact that she was involved in obtaining the paperwork from Mr Qian for their home loan shows she was actively involved in the home loan process with her husband. I find, in this context, it is more likely than not he would have informed her of the change in employment if it had occurred because he had already, according to Mr Qian, raised concerns about the effect on his home loan. It is not unreasonable to infer that this is an important fact that Ms Waitoa would have needed to know for dealings with the bank. Further evidence of them both being involved in their financial matters is the fact that they had a joint bank account into which their respective salaries were paid.
159. There are other discrepancies in Mr Qian's evidence to lead me to view him as an unreliable witness. He stated in his statement at [80] that he asked Ms Waitoa to provide him with the employment contract and he would sign it. But in his oral evidence he was very definite that it was he who had found the contract on a website. Also, he told Mr Goodridge the superannuation was paid after the death of Mr Waitoa. This is a matter you would think he would remember, given it is an important legal obligation and noting his accountancy qualifications. Yet when questioned by Mr Perry about a payment on 9 January 2019 of \$2,122.86 he volunteered that it must be superannuation. This clearly was wrong and inconsistent with his earlier answer to Mr Goodridge. It also troubles me that, even making allowances for him having compassion and wanting to assist the Waitoas' with their home loan application, that he can brush off that he signed letters that had material errors in them. He stated in one letter that he was in negotiation with his accountant about Mr Waitoa's tax payments. He admitted in his oral evidence this was not true. Therefore, I find that his evidence needs corroboration before his assertions can be accepted as reliable.
160. Mr Hallion places weight on the fact that he says Mr Vo gives a similar statement to Mr Qian. Mr Vo was not cross-examined; however, one needs to regard his statement closely. In [8] he says he proposed that Mr Qian would use LLM's employees and trucks and that Mr Qian would manage it all through his company (L&F) and be a sub-contractor. Mr Vo said "I will pay your company monthly commission. I will deduct my employee's salary and other disbursements from the monthly commission." Mr Vo says the other disbursements included rent for the trucks that N&F used, insurance paid by LLM in respect of Port Macquarie and employees of LLM that N&F used. So, basically it seems LLM deducted everything it paid direct from the monthly commission that was otherwise payable to N&F.
161. Later because of cash flow problems with LLM, L&F paid direct several subcontractor drivers and Mr Waitoa, but it billed LLM these costs on top of its monthly commission. One would have thought that by L&F paying these costs it would have reduced the deductions that would have otherwise been made by LLM to L&F's monthly commission. However, there appeared to be a growing problem with LLM paying regularly L&F's monthly commission.
162. Without seeing the financial records of the two companies it is difficult to understand their arrangements. Mr Vo states that the arrangement between him and Mr Qian to pay Mr Waitoa as an employee was "purely an administrative and paper arrangement... it was an arrangement of convenience and never intended to change the true situation that Jeremy other than on paper the employee of Laundry Logistics".
163. At [32] Mr Vo states that "given employees [were] also paid super and other employee entitlements there was no profit to be made by N&F logistics or incentive for N&F to engage drivers as employees". However, as noted previously at [8] LLM was to deduct the wages and other disbursement relating to an employee from L&F's monthly commission. So, it seems such costs were to be taken into account one way or another.

164. If Mr Vo's contention is right then that means Mr Waitoa would have been an LLM employee from the outset. But one needs to consider the test of employment. It is all very well for Mr Vo to dismiss the situation as being "other than on paper." There is no evidence to show, for instance, that LLM declared Mr Waitoa an employee in relation to the payment of workers compensation premiums, although I do not base my decision on such a fact. I accept Mr Goodridge's submission that if Mr Waitoa ever needed to enforce payment of his wages, he would have been hard pressed on this evidence to do so against LLM. It was L&F that paid all of his wages and therefore it had the obligation to make payments of taxation and superannuation relating to those wages. It was L&F who liaised with Mr Waitoa about engaging him and discussed with him whether he wished to be an employee or sub-contractor. It was L&F to whom he turned to about payment of wages on 14 January 2019 and to fix a dangerous tyre. There is no evidence of any discussions between Mr Vo and Mr Waitoa.
165. Furthermore, L&F represented to the bank that Mr Waitoa was its employee. Whether this was done to help Mr Waitoa is beside the point, as I have said Mr Qian could have organised such a letter from LLM if it was the case that it was the employer.
166. I am not satisfied that I should accept Mr Vo's characterisation of the legal status of Mr Waitoa employment status. I have already explained why I do not accept that the employment was transferred on 4 January 2019 to take effect on 7 January 2019. I find the objective facts just do not bear out that this did occur.
167. Mr Hallion's last argument was why would anyone exercising sound commercial sense keep to the arrangement of paying Mr Waitoa when there is no commercial benefit to L&F as contrasted to them making \$2 per hour commission for the sub-contractor drivers L&F paid direct. It could be said that sound commercial sense has not come into any of the arrangements between Mr Qian with Mr Vo, with the delay in L&F receiving its commissions. However, that is not the test and, in any event, there is a commercial benefit to L&F in that it keeps an experienced driver performing a run, which if vacant could jeopardise the wider agreement between L&F and LLM, and between LLM and SPL.

Mr Beran's submissions

168. Mr Beran adopted the submissions of Mr Hallion. He added that there has been suggested that the evidence of Mr Qian and Mr Vo should not be accepted, and Mr Berna submitted that this essentially amounted to an allegation of insurance fraud and that would involve a higher standard of proof needed to be achieved. However, I do not accept that submission. Mr Vo's evidence largely depends on his characterisation of what he regarded the relationship was with Mr Qian, and so between LLM and L&F. I have not accepted that the arrangements between the two companies and with Mr Waitoa can be brushed off as a "not on the papers" employment by LLM. I have also explained why I cannot accept Mr Qian's evidence because of inconsistencies in his evidence. This does not mean I have made a finding of insurance fraud.
169. Armitage J, in *Suters v Progress Press Distributors & Printers Pty Ltd & Others*⁵⁹, quoted from *Mead v New England Seed Traders Pty Ltd*⁶⁰ at [117] wherein Kerr CJ and Hope JA (with whom Holmes JA concurred) said:

"The parties to a contract may well not be conscious either that the legal consequence of what they have done is the creation of an enforceable contract, or that the law will spell a contract of service out of their dealings."

⁵⁹ [1996] NSWCC40; (1996) 14 NSWCCR110

⁶⁰ (1972) 46 WCR (NSW) 113

170. The legal test to be applied to determine who is an employer can involve similar considerations as to when a determination is being made about whether a person is a worker or contractor. In *Articulate Restorations & Developments Pty Ltd v Crawford*⁶¹ the application of the control test was discussed, and it was stated that it requires consideration of the scope for control and not the actual exercise of control. The observation by Kirby P (as his Honour then was) in *Articulate Restorations*, was that “a lack of effective real control and supervision may not, in a particular case, be determinative”, but in today’s employment market, may be neutral as to the nature of the relationship. Other factors to consider are what direction and/or supervision is given, whether tools are provided, who pays the tax, who approves leave and who remunerates the worker.
171. The applicant has the onus of proof. In *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*⁶² McDougall J stated at [44]:
- “A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour’s statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.”
172. On the balance of probabilities, I feel the requisite actual persuasion of the existence of the fact that L&F was the deceased’s employer at the time of his death. Mr Beran submitted the fact that the transfer of employment was verbal is consistent with the fact that when Mr Waitoa was engaged there was no written contract. However, I have explained why I do not accept that the employment was transferred on 7 January 2019, because there was in fact no payment during that week by LLM or ever and that Mr Waitoa did not tell his wife of the change in his employment status. These facts, coupled with the text message to Mr Qian on 14 January 2019 requesting his pay be made, convince me that L&F remained his employer at the time of his death.
173. L&F had the responsibility and obligation to pay wages, tax, superannuation and approve his leave to be married. In addition, I find that L&F had the requisite control regarding Mr Waitoa’s employment. It was Mr Qian not Mr Vo who spoke to him and gave him direction, such as on 14 January 2019 about fixing the tyre. There is limited evidence about LLM interacting with Mr Waitoa. The evidence of Mr Vo is that the vehicle he was driving was garaged at SPL, where it was loaded and then driven on the run and returned to SPL. The evidence of Mr Vo indicated that LLM charged rent to L&F for the vehicles used by L&F. I am satisfied that LLM gained the particular contract with SPL and then LLM contracted the running of it to L&F and that L&F employed Mr Waitoa.
174. Mr Qian has given evidence that he is the sole director of L&F and the company did not at any time have a policy of workers compensation insurance.

Section 20 principal

175. Mr Hallion submitted that should the Commission find L&F was the employer section 20 of the 1987 Act would operate to create a liability in LLM, as principal given that L&F is uninsured. However, sub-section 6 provides that:

“This section does not apply in any case where the injury occurred elsewhere than on, in or about premises on which the principal has undertaken to execute the work or which is otherwise under the principal’s control or management, but nothing in the foregoing affects the liability of the contractor under any other provisions of this Act.”

⁶¹ (1994) 10 NSWCCR 751

⁶² [2008] NSWCA 246

176. Mr Hallion submits that a vehicle should be regarded as “premises”. He submits the business of L&F is operating courier trucks. He argued the provision should be given a beneficial interpretation as the Act is about compensating people. However, Ms Waitoa and Monica Waitoa can receive compensation from the Workers Compensation Nominal Insurer, so they do not receive the benefit of section 20 *per se*. Mr Hallion then submitted the purpose of sub-section 6 is to preserve the Nominal Insurer’s fund. There is authority for that proposition, in *Easton v Wiseman & Others*⁶³ Burke J stated:

“the overall purpose of the provision is to ensure, as far as practicable, that liability falls upon a licensed insurer or self-insurer rather than upon the WorkCover Authority.”

177. The meaning of “premises” in section 20(6) of the 1987 Act is not defined in the section or in section 4 of either the 1987 or 1998 Acts. Mr Hallion submitted that the word “premises” should be given a broad definition. He asks rhetorically, why should that word be read down to exclude a motor vehicle?
178. Both Mr Vo and Mr Qian say they were informed that Mr Waitoa died in a motor vehicle accident while driving the Armidale/Port Macquarie run. Teleah Waitoa states in her statement dated 13 June 2019 that he died because the tyre blew causing the truck to hit a tree and roll into a dam. This is repeated in the claim form. The death certificate lists the cause of death as presumed drowning after vehicle collision on 15 January 2019 at 7000 Oxley Highway, Yarras⁶⁴.
179. Apart from Mr Hallion’s submissions, referred to earlier, all counsel agreed that Mr Waitoa died in the course of his employment, and that the protagonists were told it was in a motor vehicle accident.
180. Mr Hallion submits that the truck Mr Waitoa was driving was part of the premises of the principal, LLM. Mr Vo in his statement dated 13 December 2019 describes how in 2017, he had a contract with SPL in Sydney. He says he used the trucks he bought through Maverick to provide consulting services to SPL. He then relates that he picked up the contract with SPL in Port Macquarie to deliver linen in Port Macquarie. There is no mention of LLM having any real estate property in Port Macquarie and Mr Waitoa’s truck is mentioned as being garaged at SPL’s premises in Port Macquarie. The companies L&F, LLM and Maverick all have registered addresses in Victoria according to the ASIC searches in N&F’s Reply.
181. Mr Hallion submitted that the vehicle was provided by LLM. I noted the vehicle is owned by Maverick, but earlier Mr Hallion said this did not matter. He referred to section 238 of the 1998 Act where it is defined “premises” to include a vehicle. However, the opening words of section 238(1) provides “In this section”. Therefore, I find the definition in that section does not apply beyond that section. Section 238 deals with powers of entry by an inspector which involves different considerations to section 20 of the 1987 Act.
182. Mr Hallion submits what is important is the carrying out of the work and the control or management of the work by the principal and in this case the truck he says, “was given to the deceased by LLM.”

⁶³ [1990] NSWCC 11; (1990) 6 NSWCCR 103

⁶⁴ ARDW p25 and larger copy at p59.

183. However, this does not appear to be a correct statement of the facts. Mr Vo at [8] of his statement describes Mr Qian as “managing it all though his company” and LLM would deduct rent from L&F for the trucks they used. So, the truck was not “given to the deceased by LLM” as asserted by Mr Hallion. Also, Mr Vo stated at [40] that on 15 January 2019 the deceased was driving a truck owned by Maverick which was provided by LLM to the sub-contractors to N&F to carry out the SPL contract for LLM. He said the truck was garaged at the SPL premises at Port Macquarie and used for the Armidale run, Mr Vo says the driver would pick the truck up at the SPL depot where it would be loaded, do the run and return it to the SPL depot. The truck was registered in Victoria and bought on finance.
184. There is scant evidence about the control and management of the vehicle. The deceased as an employee of N&F had control and management of the vehicle in the sense he drove it. Also, L&F had control and management of the vehicle as the evidence of Mr Vo suggests that L&F paid rent for the trucks they used, and it was deducted from the commission LLM was to pay. Also, L&F could be said to have control of the vehicle as it was them who discussed with the deceased arrangements to get the tyre fixed, including when and where and for L&F pay for such repairs. Fuel for the vehicle was purchased on a card supplied by L&F. L&F was sub-contracted by LLM to manage the whole Port Macquarie contract that LLM had entered into with SPL. So factually the situation is not as straightforward as Mr Hallion’s submission suggests.
185. Mr Beran adopted Mr Hallion’s submissions about section 20.
186. The submissions of Mr Goodridge and Mr Perry have been referred to earlier. Mr Hallion has not referred me to any cases that state a vehicle could be “on, in or about premises on which the principal has undertaken to execute the work or which is otherwise under the principal’s control or management”. Mr Perry relies on early cases which refer to the distance from buildings or land where the work is performed, like the SPL yard or the place where Mr Waitoa delivered linen to.
187. I have not found any cases dealing with a driver injured in the course of driving and section 20 being applied because the vehicle was considered part of the premises of the principal. The facts in *Lanesbury v Air Card Pty Ltd*⁶⁵ involved a worker employed to deliver pharmaceutical goods to a pharmacy. The worker, Ms Lanesbury, was injured after she got out of her vehicle but before entering the pharmacy. Curtis J in *Lanesbury* found:
- “13. I am satisfied that as principal Elite employing the services of Air Card Pty Ltd undertook to the pharmacist that the pharmaceuticals would be delivered to the pharmacist's premises. Air Card Pty Ltd, the applicant's employer undertook to execute the work of this delivery; that is, work which required that the applicant go to a place about the premises of the pharmacist.
 14. The phrase "about the premises" is a geographical expression denoting close propinquity to the premises (*Powell v Brown* [1899] 1 QB 157 (CA)) - the provision of a statute being satisfied in that case where the injury occurred while the worker was loading a cart in the street near the entrance to the premises.
 15. I am referred by Mr Bradford for the respondent to the decision of *Allbut and Coramba Milling Co Ltd v George Kydd King* 1928 WCCR 73. That case, however dealt with facts distinguishable from the present in that the worker, at the time of his injury, was travelling on a daily journey between his place of abode and place of employment.

⁶⁵ [2001] NSW CC 180

16. In the present case the applicant suffered injury when she was geographically about the premises at which the work of delivery had to be performed. I am satisfied that the applicant was an employee of Air Card (this is not in dispute) and that Air Card was the principal in relation to a contract to perform work for Elite Express Pty Ltd. The applicant prima facie is entitled to succeed.”

188. In the Oxford English Dictionary⁶⁶, the word “premises” is relevantly defined to mean:

“A house or building together with its grounds, outhouses etc., esp. a building or part of a building that house a business.”

189. This definition is consistent with Curtis J finding the injury was suffered when Ms Lanesbury was geographically about the premises at which the work of delivery had to be performed, that is the pharmacy shop.

190. Judge Curtis found that Air Card Pty Ltd, Ms Lanesbury’s employer, undertook to execute the work of this delivery; that is, work which required that the applicant go to a place about the premises of the pharmacist. I find that N&F, Mr Waitoa’s employer, undertook to execute the work of delivery of linen for LLM which in turn was contractually obliged to have the linen delivered to various sites, some of which were the premises of SPL. I find the pick-up and delivery sites were not the premises of LLM.

191. I consider it strains the normal meaning of “premises” for it to include a vehicle. I find that Mr Waitoa did not die on, in or about premises on which the principal has undertaken to execute the work or which is otherwise under the principal’s control or management. Therefore, I find that section 20(6) of the 1987 Act precludes a finding that LLM is liable as principal to pay the compensation that otherwise L&F as employer is liable to pay.

Apportionment

192. The deceased and Teleah Waitoa were married on 15 December 2018⁶⁷. The deceased’s occupation on the marriage certificate is listed as a truck driver and Teleah as a primary school teacher. In her statement dated 16 August 2019, she says she has been teaching for four years and is employed full time. She has taken various types of leave and worked reduced hours since the death of her husband.

193. She says she and the deceased had a joint bank account into which their salaries were deposited, and they shared responsibility for the payment of their living expenses. Ms Waitoa attaches their joint Westpac bank statements, Telstra phone and internet invoice, and electricity invoice. She says their car was in her name, but the deceased would have paid half of the CTP insurance, registration costs and other running expenses.

194. She says the contract for the deceased’s mobile phone was in her name and she paid the cancellation fee to Vodaphone.

195. Ms Waitoa says she and the deceased were in the process of buying a home together and she completed the purchase after the death of the deceased with her sister and brother-in-law.

196. In her statement, Ms Waitoa sets out the domestic tasks performed by the deceased in their relationship and their plans for the future.

⁶⁶ Third edition, March 2007

⁶⁷ ARDW p22.

197. Ms Waitoa states that the deceased paid \$57.17 per month in child support for Monica Waitoa⁶⁸.
198. She attaches a statement from the deceased's superannuation fund, and says she is to receive 30% of the funds and Monica 70%.
199. Prior to his marriage with Teleah Waitoa, the deceased had been in a relationship with Sonia Cisternas. Ms Cisternas has provided a statutory declaration dated 13 June 2019⁶⁹. The whole of the declaration has been read by me but does not need to be summarised in these Reasons. She confirms the deceased paid child support for Monica and that he used to visit her every two to three months and as she became older Monica would stay with the deceased at his Aunt's home during such visits.
200. Ms Cisternas says the deceased would regularly give Monica cash between \$50 and \$100 when he visited. She says Monica would also call the deceased on her mobile phone. Ms Cisternas says Monica suffers from asthma and occasionally has to go to Hospital for treatment. She says Monica received psychological counselling to deal with separation issues when the deceased left his relationship with Ms Cisternas and she sees the School Counsellor, and she has been upset about the death of her father. Monica's school reports are in evidence and they reveal she is performing satisfactorily.
201. Ms Cisternas states that to her knowledge the deceased had no other children in Australia or New Zealand, and she says she is fairly certain of this as she had contact with the deceased's extended family in both countries.
202. Copies of the school fees from Mary Immaculate Catholic Primary School addressed to Mr J Waitoa and Ms S Cisternas reveal in 2019 the fees were \$2,625 plus \$170 for resource fee and sport/excursion levy⁷⁰.

Ms Cisternas' oral evidence

203. Ms Cisternas gave evidence in chief that the amount the deceased was paying for child support for Monica was \$57 per month. She also confirmed that the relationship she had with the deceased broke up in about December 2016.
204. Ms Cisternas was cross examined by Mr Goodridge about her statement wherein there was at annexure B a letter regarding child support dated 30 July 2018 suggesting the child support payment for one month should be \$434 and for the next month \$436. She said this was the last statement she received. She was then asked was she suggesting that the letter regarding child support dated 5 September 2018 addressed to both her and the deceased saying the correct payment was \$57 per month, was not received by her. She explained that she was content to receive \$57 per month and she regarded the other figures as estimates.
205. Mr Goodridge also asked her about her income appearing on the document marked annexure B being \$35,710 and \$34,150 and that in her statement she said this was about what she was earning. She acknowledged this. Mr Goodridge then asked her didn't she earn in the tax year 2015 \$44,000 and he showed her the Notice of Assessment. She agreed with this figure and that for the financial year ended 30 June 2017 her income was over \$43,000. She was asked whether she had neglected to mention her earnings were down in 2018 was because she had travelled overseas. She replied she had changed jobs. She agreed that she had also been to Santiago on a holiday.

⁶⁸ Late Documents 15.10.19

⁶⁹ LLM Reply p41

⁷⁰ Late Documents Monica Waitoa p19

206. Mr Goodridge asked Ms Cisternas about paragraph 42 of her statement wherein she said she was not sure as to what superannuation entitlement Jeremy had at the time of his death. She was asked if this was the whole truth and she replied Yes. She was then asked whether she had received well over \$100,000 from that fund. Ms Cisternas replied that her daughter did, that she herself did not. She agreed it was sent to her for her daughter. She agreed that she had not mentioned this in her statement.
207. Finally, Ms Cisternas confirmed that after the death of the deceased she had been receiving the statutory weekly benefits in relation to Monica, which are higher than the child support payments she had been receiving from the deceased before his death.
208. Mr de Meyrick asked in re-examination whether she had received the superannuation monies at the time she put her statement together and she replied "No". Mr Goodridge interjected, and the transcription typist did not record the answer "no" but I heard the same. Mr de Meyrick asked whether Monica had received any monies under a will of the deceased or intestacy and Ms Cisternas said no.

Ms Teleah Waitoa's submissions

209. In the ARDW there are submissions made on behalf of Ms Teleah Waitoa⁷¹. These submissions ask the Commission to take into account that Monica received 70% of the superannuation payout and she receives more in weekly payments than she did from child support from the deceased.
210. At the Arbitration hearing the matter could not be concluded in the day so written submissions from the counsel representing Ms Teleah Waitoa and Monica Waitoa have been provided.
211. Mr Goodridge makes submissions that section 29 of the 1987 Act refers in sub-paragraph 6 to total and partial dependents. He argues that the legislature intended that the degree of dependency be of primary consideration, that is the greater the dependency he says the greater the apportionment. Mr Goodridge lists the relevant facts including that the commitment between the deceased and Teleah Waitoa was demonstrated by him leaving Ms Cisternas, commencing cohabitation with Teleah, living together with her parents, moving to Port Macquarie and becoming married. It was also submitted they had a joint bank account, sharing responsibility for expenses and they decided to buy a house together. Mr Goodridge also drew attention to their domestic arrangements, with the deceased doing much of the housework as he arrived home sooner. He noted they planned to have children together.
212. It is also relevant that Teleah was only 25 at the time of her husband's death.
213. Mr Goodridge was critical of Ms Cisternas' evidence, Monica's mother. He submits that Monica now receives more than 11 times the monthly payment she would have but for her father's death and she has received over \$100,000 from his superannuation. He also submits that the school records do not suggest that Monica will progress to tertiary education, which I do not accept. Quite simply this is unknown at age nine. Even if she did not progress to University level study there are many vocational study opportunities available that young people need to pursue to obtain employment.
214. Mr Goodridge also focused on the other types of loss of support experienced by Teleah.

⁷¹ ARDW p245-247

215. Mr Goodridge refers to passages from various cases, which I am not going to repeat. I accept they all refer to relevant matters to be taken into account in the exercise of my discretion. However, a number of those cases were decided before the lump sum under the 1987 Act became so large. In the present case the payment under section 25 is \$798,100.
216. Mr Goodridge submits it is relevant to take into account that Monica has received \$104,204 being 70% of the superannuation fund.
217. In his proposed orders he seeks nil to be awarded to Monica.

Monica Waitoa's submissions

218. Mr de Meyrick made written submissions dated 18 February 2020. He also refers to various cases summarising the principles to be taken into account. Again, I accept the same. He submitted that the evidence discloses that the deceased and Monica had a close relationship and pointed to the fact that in addition to child support, he had regular access visits, paid Monica some money during those visits and paid for school fees. It was submitted that Monica and the deceased would have anticipated that he would be there for her throughout her life and assisted her with such costs as schooling, tertiary study, wedding, travel and housing.
219. Mr de Meyrick says the Commission should not take into account the payment of weekly benefits as that is separate to the entitlement under section 25 of the 1987 Act. He submits that the payment of the superannuation benefit occurred post death and the Commission is required to assess the loss of support at the time of death.
220. Mr de Meyrick concludes by submitting that both Monica and Teleah are entitled to a substantial proportion of the death benefit.

Mr Goodridge's submissions in reply

221. In reply Mr Goodridge submits Mr de Meyrick is wrong in law to submit that the weekly payments and superannuation are not to be taken into account. He said the factual evidence discloses a strained relationship with very little contact, at the most he submits \$600 would have been given to Monica per year on visits. It was also submitted on the deceased's income it would have made it difficult for him to contribute to the matters referred to by Mr de Meyrick in the future.

Determination

222. The amount of the lump sum benefit is \$798,100 for death on 15 January 2019. Section 25(3) of the 1987 Act includes a provision that the amount of any weekly payments shall not be deducted from the amounts in sub-section (1)(a), that is the lump sum payment. Therefore, I reject Mr Goodridge's submission about taking into account the weekly compensation payments to Monica, because to entertain the same means he is seeking to reduce what otherwise be her portion of the lump sum to reflect this fact. Even though Mr Goodridge did not submit in these terms, I find that would be the net effect of his submission that Monica should be given nil from the lump sum.
223. Mr de Meyrick has not taken me to any case law to support his submission that the superannuation payment after the death should not be taken into account. Certainly, Mr Goodridge is correct that in common law cases a defendant cannot rely upon such receipts to lower its liability to a plaintiff. I consider it is one factor to take into account in the factual matrix but both counsel have acknowledged precision is not possible.

224. Monica is now nine and a half, in a few months turning 10. She has been without her father for just over a year. I consider it is appropriate to allow loss of support for that year and approximately 11 more years into the future. As I stated above, I consider it is more likely than not even if she does not pursue post school university studies, she would undertake vocational studies. She may even do both. So that is about 12 years loss of support. Even though visits with her father since he separated from her mother have been somewhat limited, as Monica grew older there was a prospect of closer times as she would have become more independent.
225. Exercising my discretion, I find that the appropriate apportionment is \$90,000 to Monica Waitoa and the balance of \$708,100 to Teleah Waitoa. Accordingly, I make the following orders and findings:
- (a) That the deceased worker, Jeremy Waitoa, died on 15 January 2019 in the course of his employment with N & F Logistics Pty Limited.
 - (b) That the compensation payable by the employer, N & F Logistics Pty Limited, in accordance with section 25(1)(a) of the *Workers Compensation Act 1987* on the death of the deceased is \$798,100.
 - (c) That Teleah Waitoa, his widow, and Monica Waitoa, his daughter, were dependent for support upon the deceased worker at the date of his death.
 - (d) That there were no other persons dependent for support upon the deceased worker at the date of his death.
 - (e) Pursuant to section 29 of the *Workers Compensation Act 1987* the apportionment of payments between the dependents is as follows:
 - (i) Monica Waitoa \$90,000
 - (ii) Teleah Waitoa \$708,100
 - (f) The second respondent, Workers Compensation Nominal Insurer, is liable to make the payments as if it were the insurer of the employer, N & F Logistics Pty Limited, at all relevant times.
 - (g) That the Workers Compensation Nominal Insurer is to pay to Teleah Waitoa the sum of \$708,100.
 - (h) Pursuant to section 85 of the *Workers Compensation Act 1987* the Workers Compensation Nominal Insurer is to pay \$90,000 to the NSW Trustee and Guardian for the benefit of Monica Waitoa.
 - (i) That the Workers Compensation Nominal Insurer is to make weekly payments under section 25(1)(b) of the *Workers Compensation Act 1987* to Monica Waitoa as follows:
 - i. From 15/1/2019 to 31/3/2019 at the rate of \$142.90 per week;
 - ii. From 1/4/19 to 30/9/2019 at the rate of \$145 per week;
 - iii. From 1/10/19 to 31/3/20 at the rate of \$146.20 per week and
 - iv. From 1/4/20 to date and continuing at the applicable rates, as indexed.

- (j) Pursuant to section 145 of the *Workers Compensation Act 1987* the employer, N & F Logistics Pty Limited, are to reimburse to the Workers Compensation Nominal Insurer the amounts paid out of the Insurance Fund in respect of the above-mentioned compensation.
- (k) That the first respondent is not liable under section 20 of the *Workers Compensation Act 1987*.
- (l) Award for the first respondent.

