

FULL COURT OF FEDERAL COURT REVISITS MOFFET DECISION – INDEPENDENT CONTRACTOR STILL ENTITLED TO SUPERANNUATION

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The Full Court of the Federal Court of Australia has recently handed down its decision in *Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118*. This decision again highlights potential risks, particularly with respect to superannuation, for dental practices putting in place independent contractor arrangements.

We previously reported on the Federal Court's decision at trial - [see attached](#). In the earlier decision, Dr Moffet (who had been engaged by Dental Corporation as an independent contractor) claimed that he was entitled to be paid annual leave and long service leave on the basis that he was in fact employed by Dental Corporation. The trial judge rejected his claim, and Dr Moffet appealed that decision (appeal).

However, the trial judge held that Dental Corporation was obliged to make superannuation contributions to a fund nominated by Moffet on the basis that he was an "employee" within the meaning of the Superannuation Guarantee (Administration) Act 1992 (Cth) (SGA Act). Dental Corporation appealed that decision (cross-appeal).

It is important to note that this case dealt with an agreement the parties called a "Services Agreement" (sometimes known as an Independent Contractor Agreement) under which Dr Moffet was engaged to provide services to Dental Corporation. That arrangement is different to a genuine Services and Facilities Agreement (SFA) where the clinic is engaged to provide services to the practitioner in exchange for a fee.

FULL COURT DECISION

The Full Court dismissed both the appeal and the cross-appeal. Its decision again highlights that:

- clinics may be required to make superannuation contributions even if an independent contractor is held not to be an employee at common law;
- regardless of the terms of the independent contractor arrangement, what is critically important is considering both the totality of the relationship and the reality of the situation when engaging practitioners.

While every case turns on its own facts, some aspects of the reasoning of the Full Court which are interesting to note include:

- The submissions that Dental Corporation had a right to control Dr Moffet's work, and/or did actually control his work, were rejected. In particular, it was not accepted that a degree of control was exercised over him by reason of the regularity of the hours he worked - it was Dr Moffet who set his own work schedule;

- The trial judge had found that the reality of the relationship between Dr Moffet and Dental Corporation was that Dr Moffet continued to run his personal practice much the same as he did before the acquisition of the practice by Dental Corporation. The Full Court found that the trial judge had erred in this respect, particularly because:
 - Previously all of Dr Moffet's remuneration came from the operation of the practice but now it came from Dental Corporation (as Dental Corporation received all the revenue of the practice and then remitted monthly drawings to Dr Moffet).
 - The trial judge had not considered the question of who owned the goodwill in the practice.
- Despite this, it was again held that Dr Moffet was not employed by Dental Corporation and that the liberties reserved to Dr Moffet under his Services Agreement were too wide to sustain a conclusion of employment. It was noted in particular in reaching this conclusion that Dr Moffet:
 - could work as much or as little, and take as many holidays, as he wanted.
 - was underwriting the cash flow of Dental Corporation because he had agreed to compensate Dental Corporation if the annual cash flow of the practice failed to reach a particular level.
- However, the Full Court also rejected Dental Corporation's submissions that Dr Moffet was not an "employee" under the SGA Act. It was held that he was an "employee" for the purposes of the SGA Act as the Services Agreement was wholly or substantially for Dr Moffet's labour. Under the terms of the Services Agreement, Dr Moffet was required to provide dentistry services to patients of the practice and practice management to Dental Corporation.

TAKE AWAY POINTS

The Full Court's decision again highlights the importance of:

- ensuring that any SFA the practice may put in place is:
 - appropriately drafted, reflects a genuine services and facilities arrangement and is sufficiently comprehensive having regard to the numerous factors to be considered in determining whether an employment relationship exists
 - effectively and consistently implemented by the practice in a manner consistent with the drafting and structure of the SFA
- carefully reviewing any existing independent contractor and other proposed services arrangements in this context, including any such arrangements with the previous owner of a practice.

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