Film Industry Meeting on Actors' Equity and Immigration Issues

To	Hon Gerry Brownlee	Priority	Medium
Date	28 April 2010	Deadline	29 April 2010

Purpose

1 This report provides information for your meeting with Immigration Minister Dr Jonathan Coleman and film industry representatives on Thursday the 29th of April at 10 am. The purpose of this meeting is to discuss an ongoing issue with NZ Actors' Equity ("Actors' Equity") and Walt Disney Pictures (Disney).

Meeting Overview

2 The Immigration Minister Dr. Jonathan Coleman and Paul Swallow from MED will be attending this meeting, in addition to the following film industry representatives:

- *Penelope Borland*, Chief Executive, Screen Production and Development Association of New Zealand (SPADA) – SPADA is a non-profit, membership-based organisation that represents the interests of producers and production companies on all issues affecting the commercial and creative aspects of independent screen production in New Zealand.
- *Sue Thompson*, Film New Zealand (Formerly Acting Chief Executive, currently transitioning Gisella Carr into the Chief Executive role) – Film New Zealand is the national film locations office that provides information, introductions and support to international and domestic filmmakers[1]. It is possible Gisella Carr will also attend.

Background on Issue

3 Actors' Equity is the industrial and professional organisation that represents performers who work in New Zealand's entertainment industries. Actors' Equity merged two years ago with the Australian union Media Entertainment and Arts Alliance (MEAA), and now operates as an autonomous part of MEAA.

4 Actors' Equity plays a role in the immigration process for issuing temporary work visas by supplying letters of non-objection for non-New Zealand actors cast in a production.

5 Film or television production companies wishing to bring in cast and crew to work here temporarily can use the Specific Purpose or Event subcategory of immigration temporary work policy. In line with the overall intent of immigration temporary work policy, this policy is designed to ensure that New Zealanders are provided with opportunities to work on all productions.

[1] Film New Zealand receives operational funding from Vote Economic Development at the current annual level of $799,000.

6 Film New Zealand and SPADA have recently been involved in correspondence with Actors' Equity over an issue with a Disney production. Disney was trying to obtain temporary work visas to bring child and teenage actors to New Zealand for the US production *Avalon High*. Actors' Equity requested that Disney supply the names of all New Zealanders who auditioned in the casting process and the reasons why each individual was not cast.

7 Disney was not prepared to provide this information. According to Ms. Borland, revealing names and reasons why actors were not cast is not accepted practice within the screen industry and raises significant privacy and reputational concerns for the actors involved.

8 Ms Borland alleges that Disney were advised by Actors' Equity that because they were not willing to provide this information, Actors' Equity were now going to take ten days to process and consider applications for each and every actor in order to ascertain whether there has been a bona fide casting process and that Actors' Equity will not look at the applications together. This allegation (if true) would have had serious implications for Disney's production schedule, with work visas potentially not being issued until after the actors were scheduled to travel to New Zealand.

9 Disney has advised Film New Zealand that if Actors' Equity persists in delaying the processing of actors Disney is unlikely to continue with plans to bring future productions to New Zealand.

Update on Issue

10 MED has been advised by the Department of Labour (DOL) that this issue in respect of the Disney film Avalon High has been resolved and that the visas have been issued in time for the production to keep to its schedule. The visa applications, once lodged, were approved within two working days.

11 DOL has advised that in situations where Actors' Equity is not prepared to issue letter of non-objection to satisfy visa requirements, production companies need to raise this with DOL. If the issue cannot be resolved between the parties concerned, the issue can then be brought to the attention of the Associate Minister of Immigration, who may make a determination on whether the visa application can proceed. This has happened in several cases in the last 12 months, with all being approved by the Associate Minister.

MED Comment

12 While individual production companies do not dictate the Government's film and related policies, Disney is responsible for many large budget and long-running productions in New Zealand[2] and it would obviously be a major concern if Disney was to move its productions offshore due to one body unduly influencing immigration procedures.

13 MED is concerned that production companies, such as Disney, are becoming increasingly frustrated by the processes involved in securing temporary work visas for overseas actors, and that this may lead production companies to choose not to undertake productions in New Zealand.

[2] Including the children's television series *Power Rangers*, which has filmed seven series here.

14 While MED recognises that there are immigration procedures that need to be followed, the information requested by Actors' Equity in order to process recent visa requests from Disney appears to be causing unnecessary production delays, and if it continues is likely to result in Disney, and possibly other large international production companies, deciding not to undertake further productions in New Zealand.

Options for you as Minister

15 As Minister for Economic Development there are a number of courses of action you could take to ensure that the economic benefit to New Zealand from international productions is not lost or reduced as a result of complications with immigration procedures. MED has identified the following options that you may wish to explore with Minister Coleman:

i. Asking SPADA to attend a meeting with Actors' Equity along with MED and DOL representatives to determine whether they can review the issues that have arisen and come to an agreement on assessment process and timeframes.

ii. Encouraging Actors' Equity to look at alternative ways of gathering information about whether New Zealand performers have had a fair opportunity to be involved in a production, for example, information about New Zealand actors not cast in a production could be provided collectively so as not to identify the identity of any individual performer and to reduce time delays for the production company.

iii. Directing DOL to establish some guidelines for Actors' Equity to work within and requiring DOL to monitor and/ or audit the processes used by Actors' Equity on a regular basis. You and Minister Coleman may wish to direct MED to work with DOL to establish these guidelines.

iv. Investigate whether the current policy should be replaced with a new policy that does not require a letter of non-objection. (This could be problematic because under the 'Kiwis-first' principle, a relevant union may still need to be consulted, and the process could actually become even more drawn-out.)

Recommendation

We recommend you:

a **Note** the contents of this report in preparation for your meeting on Thursday.

Paul Swallow
Manager, Industry Policy
Industry and Regional Development Branch

Hon Gerry Brownlee
Minister for Economic Development

29 October 2010

Minister Brownlee

Notes for Oral Cabinet Item

2010 (ORAL) - Warner Brothers Agreement

Note that:

1. a group of Ministers comprising the Prime Minister, Minister of Finance, Minister for Economic Development, Minister for Arts, Culture and Heritage, Associate Minister of Finance and the Minister of Labour had the Power to Act to take decisions on any proposals by the Government in relation to issues concerning New Zealand as the possible location for the filming of The Hobbit.

2. the Minister of Economic Development on behalf of the group of Ministers and the New Zealand Government entered into an agreement with Warner Brothers that outlines good faith understandings in relation to the planned two Hobbit movies to be made in New Zealand by Warner Brothers and its subsidiaries.

3. Warner Brothers will be entitled to the standard Large Budget Screen Production Fund grant of 15% of qualifying expenditure.

4. the Agreement included widening the Large Budget Screen Production Fund grant criteria to include participation payments for the two Hobbit movies and future movies by any studio with budgets in excess of US$150m.

5. the Government of New Zealand will enter into a strategic partnership with Warner Brothers for the promotion of New Zealand as a destination for future film production (in particular, for films with budgets in excess of US$150m).

6. that Tourism New Zealand will become a strategic partner of Time Warner Global Media Group. This group will work in partnership with Tourism New Zealand to promote New Zealand to the global market place through to the release of the second planned Hobbit movie.

7. Ministers agreed to pay Warner Brothers US$10m (NZ$13.358m) on 16 November 2010 for the strategic marketing opportunities for New Zealand associated with the two Hobbit movies.

8. Ministers have decided to extend the Large Budget Screen Production Grant evaluation date from November 2011 to June 2012 and that this evaluation include an assessment of the impact on tourism by the film industry.

From: Penelope Borland
Sent: Tuesday, 12 October 2010 1:40 pm
To: Tim Hurdle (MIN)
Subject: Disney, etc

Hi Tim

I understand that Dave Gibson is trying to speak to you. We need urgent resolution of The Hobbit sitatuation now. Things are not looking good.

Please see below the situation with Disney, as outlined by their international line producer here. Fran and Peter asked for this.

Best
Penelope

From: Penelope Borland
Sent: Tuesday, 12 October 2010 1:35 p.m.
To: [Fran and Peter]
Cc: 'Matthew Dravitzki'; 'Richard Fletcher'
Subject: Disney, etc

Hi Fran and Peter

Please see below email from [ ], Disney line producer.

s9(2)(a)

[ ] knows that I am passing this on to you in confidence to understand the situation with Disney.

[s9(2)(ba)(i)]

Cheers
Penelope

[→ s9(2)(ba)(i)

Tim Hurdle (MIN)

From: [Peter Jackson]
Sent: Monday, 18 October 2010 7:08 pm
To: Tim Hurdle (MIN)
Subject: Re: RE:

Thanks for the prompt reply, Tim. It will be terrific for Gerry and Carolyn to speak. I'll need to tell her before tomorrow, since it's news they have been waiting for all day, and she's still awake in LA.

It seems like the blacklisting will be lifted tomorrow, which is due to Warners discussions with SAG, although Equity here will attempt to claim credit for doing it.

There is no connection between the blacklist (and it's eventual retraction), and the choice of production base for The Hobbit. What Warners requires for The Hobbit is the certainty of a stable employment environment, and the ability to conduct it's business in such a way that it feels it's $500m investment is as secure as possible.

Unfortunately Warners have now become very concerned about the grey areas in our employment laws. This situation hasn't been helped by the fact that they spent a lot of money fighting (unsuccessfully) the Bryson case in our courts, so they have seen these vague laws in action. Making the situation far worse is the knowledge that they now have a very motivated enemy lying in wait to target them, due to the recent history with MEAA and it's leader.

They are just looking for reasonable security, and unless it's provided, it's likely they will choose to base the movie somewhere else. But we all know this ... it's been discussed endlessly these last few weeks.

I'll talk with Warners now.

Cheers,

Peter J

On 18/10/2010, at 6:49 PM, Tim Hurdle (MIN) wrote:

> Hi,
>
> It is Mr Brownlee's intention to speak to Carolyn Blackwood tomorrow
> to explain what decisions have been made.
>
> He is more than happy to explain. At the moment, it is a call on
> timing of the announcement of decision. We are close to positive
> developments in what has been a potentially volatile industrial
> dispute.
>
> At the moment we wish to keep our powder dry to ensure the best
> possible outcome and provide Warners with clarity for their decision
> making process.
>
> We have and can continue to give Warners a guarantee that we will back
> casting decisions through immigration processes.
>
> In the end, the New Zealand Government - and not any other party -
> will determine who can enter the country.

From: Penelope Borland
Sent: Tuesday, 19 October 2010 5:05 pm
To: Tim Hurdle (MIN)
Subject: Agrement

Hi Tim

The agreement is signed as per the attached.

We await the signal from Warners for our update and media release.

Penelope

Tim Hurdle (MIN)

From: Tim Hurdle (MIN)
Sent: Tuesday, 28 September 2010 7:19 pm
To: Hon. Gerry Brownlee (MIN); Eileen O'Leary (MIN); Hon. Tim Groser (MIN); Natalie Maher (MIN); Kathleen Lambert (MIN); Jemma Adams (MIN); Hon. Jonathan Coleman (MIN)
Cc: Hon. Christopher Finlayson (MIN); Wayne Eagleson (MIN); Natalie Roberts (MIN); Fleur Thompson (MIN); Melissa Turner (MIN); Richard May (MIN)
Subject: The Hobbit

Hon Finlayson has asked me to prepare a note of his meeting with Sir Peter Jackson to discuss "The Hobbit", this afternoon.

Tim

Hon Christopher Finlayson held a meeting with Sir Peter Jackson, Frances Walsh and representatives of the Screen Producers Association (SPADA).

Sir Peter has been given the green light yesterday by major studios Warner Bros and MGM for a two part film shoot of "The Hobbit" in New Zealand.

Sir Peter outlined the impact on these films that industrial action driven by the Australian-based Media, Entertainment and Arts Alliance (MEAA) - of which the New Zealand Actors Equity is aligned – would have. MEAA are attempting to position to lead collective bargaining arrangement for New Zealand actors.

The two key issues are -

- Status of self employed contractors versus collective bargaining arrangement for employees.
- The Actors Equity being able to vet the employment of actors because they have to provide letters of non-objection

Sir Peter and the Screen Producers and Directors Association (SPADA) maintain that actors in New Zealand are contractors because they may only be employed for a short period i.e. a few weeks.

Under New Zealand law (the Commerce Act of 1986, section 30) if New Zealand actors are deemed to beindependent contractors, they would not be permitted to engage in 'price-fixing' - so a collective agreement negotiated by the MEAA would be illegal. The Union has a legal opinion from Simpson Grierson that this would not be the case if they were employees. This is considered impractical by the industry.

This has also highlighted a legal judgement "The Bryson Decision" which decided that an individual engaged by Weta Workshops was actually an employee rather than a contractor as assumed by the company. This decision has created uncertainty as to the ability of the film industry to employ contractors.

"The Hobbit" is an attractive target for the union due to its length of filming and that there will be two blocks of 8 - 9 weeks, where there will not be filming. In these periods, employees would of course be on a payroll. They are using this situation to collectivise the New Zealand film industry.

The MEAA, is a registered Australian union which effectively bankrolls the NZ Actors' Equity and has no legal status in New Zealand. Actor's Equity is not registered as an NZ trade union, nor are they on the register of incorporated societies. (Sir Peter estimates that less than 10% of New Zealand actors are actually members of Actors' Equity.) Sir Peter has received large numbers of emails in support from other actors who are concerned at the implications of union action on the health of the New Zealand screen industry.

The motivation of the Australian union is questioned, as they have only arrived in New Zealand after the success of Lord of the Rings and Narnia. At the same time, Australian studios have struggled, in part due to what are seen by producers as restrictive labour market practices. In Australia, actors are deemed to be employees but gain the benefits of being able to take tax deductions for work related activity i.e. gym memberships. The MEAA have promised New Zealand actors similar treatment - however this is not a realistic prospect. In practice as contractors, actors gain benefits from being able to write off expenses i.e their agents' percentage etc.

The MEAA claim that they are attempting to get the same pay and conditions as other jurisdictions. Sir Peter was adamant that they pay in accordance with New Zealand negotiated industry "pink book" standards. The only material difference with US Screen Actors Guild (SAG) standards is around "residuals" – payments for repeats, DVD sales etc – where the intention is to pay in line with UK and Canada practice. For "The Hobbit", Warner Bros have created a profit pool to ensure equal treatment of SAG and non-SAG actors. Very few NZ actors are SAG members.

To get around the situation, Sir Peter's company have been given legal advice to hire on a "non-exclusive" basis. This would mean that if an actor decided to go to another production at their whim, they would have no recourse. This would be highly risky. It is also unclear as to whether "The Bryson Decision" would not still apply.

The MEAA had enlisted the support of the SAG to effectively "blacklist" the Hobbit production. This has caused considerable concern from the American Studios.

Delays in filming would be very difficult as it means that that the studio would not be able to release the film during the lucrative Christmas season and make the maximum return. Sir Peter said that it was literally a week before this could start costing Warner Bros considerable amounts of money. They have a cast list and need to start working with their actors on costuming and prosthetics. Sir Peter considers there is a very real risk that, faced with this situation, Warners may choose to relocate production from New Zealand to Eastern Europe.

The letter of non objection issue has caused considerable difficulty for the film and television industry. In order to employ an overseas actor for a production, Actors Equity must produce a letter of non-objection. This is a labour market test to see whether a suitable New Zealand actor could not take the role. To arrange letter of non-objection, producers had found themselves dealing with Mr Whipp, the MEAA representative in Sydney. Actors Equity have been asking for cast lists and more information than necessary. They are believed to use these lists to target new membership. They have held up productions as a bargaining tool in an attempt to get collective bargaining arrangements. Frances Walsh said that Disney would no longer consider productions in New Zealand due to difficulties they had had with Immigration.

Tim

Tim Hurdle (MIN)

From: Blackwood, Carolyn (NLC)
Sent: Tuesday, 12 October 2010 6:57 pm
To: Tim Hurdle (MIN)
Subject: The Hobbit - please forward to Gerry Brownlee

Dear Minister Brownlee,

Thank you again for taking to time to speak with me earlier. However, I was troubled to hear through Peter and Fran that you had a very different impression of our conversation, so I thought it may be helpful to write you a note to clarify things. First, and most importantly, when you asked me if the decision had been made to move the films offshore, I told you that that decision had not yet been made. And it hasn't. As I have said to you on every occasion that we have spoken, we are committed to NZ, both because of Peter and Fran's deep commitment to be there, as well as our own - we filmed all three Lord of the Rings films in NZ and are not making any decisions to move this production lightly. If that were to happen, it would honestly be a blow to all of us. That said, we are in a very precarious position given our significant investment to date (and in the future) and we feel that the uncertainty of the labor issues creates real risk to us. [Section 9(2)(h)

] We are still deeply concerned.

Additionally, as I promised on our call last week, I will be very honest with you about our process and keep our lines of communication open. I do not want there to be any surprises - that wouldn't be fair or right. In keeping with that promise, when you asked me today about any decision to move, I explained that the momentum was growing to find alternatives - including New South Wales - and that they had offered a very attractive incentive to us. When I asked you if your office (or perhaps another branch of the government) was available to discuss that sort of thing with us, too, or if you would consider anything similar to help us in address our growing risk profile (especially given the currency issues we are also now facing), it sounded like you were amenable to that conversation. But I hope that you did not take my request as a demand of any sort - it was (and is) truly a request to help us explore any and all options for relief to our set of issues. We are very open to trying to work with you to identify any ideas or suggestions for solutions to our problems, both through legislative means and possibly economic ones, and appreciate any opportunity to address that. I should also mention that you rightly pointed out that if we were to move to NSW, we would end up having to deal with MEAA, and I agreed that it would be a sad irony and not ideal. But in case I was not clear about why that would be an option for us, the reality is that filming there would not present the same set of legal risks and exposure that a potential strategic strike in NZ would create, and coupled with the further economic benefits on offer, it is one option under consideration. There is a certainty in filming there, as well as other jurisdictions around the world, that simply isn't the case right now in NZ. While we've always believed that we would make these films in NZ, we also have an obligation to our company and our shareholders and we have to be responsible to them. Again, that does not mean a decision has been made, nor did I say or mean to imply that it has, but in the interests of full and frank communication, I thought you should be aware of all of the issues and factors being weighed by us.

I can only add that we are still hopeful that we can figure out how to bridge all of these various issues to give us proper comfort, as decisions need to be made in the coming weeks. The work that you are doing to help correct the immigration and work visa issue will be welcome relief, too, and I hope that you are successful with that endeavor at next week's meeting. It is very much appreciated, I assure you. I also welcome the opportunity to speak with Tim Hurdle, as you suggested, to see if there is anything further we can do to find solutions to help alleviate our concerns. I am available to discuss any and all of this whenever convenient for you, so feel free to reach out anytime.

Best regards,

Carolyn Blackwood

P.S. Please note that I am also copying Minister Finlayson on this note as it relates to the Crown Law Opinion in case he has further comment. Thank you again, as always, for your time and attention to this matter.

Tim Hurdle (MIN)

From: Penelope Borland
Sent: Thursday, 23 September 2010 11:11 am
To: Tim Hurdle (MIN)
Subject: Action against The Hobbit
Attachments: ATT38491.htm; Hobbit Urgent Meeting Notice.pdf; ATT38492.htm; Hobbit Fact Sheet.pdf; ATT38493.htm; ATT38494.htm

Hi Tim

I know the Minister must have a lot on his plate at the moment, personally and portfolio wise. I was in Christchurch for the earthquake and its aftermath. What an experience, hopefully never to be repeated!

FYI the immigration issue still rolls on, and we have been engaging in good faith to try to resolve, but not at all happy with the process from Immigration New Zealand.

Please see notice attached of NZ Actors Equity/ MEAA Alliance action against *The Hobbit*. This is a serious risk for the NZ film industry and international production.

MEAA is advising NZ performers not to work on *The Hobbit* unless Wingnut agrees to enter into a collective agreement directly with the union, The Alliance: MEAA Australia.

This is similar to the action that MEAA/ Equity has tried to take with NZ dramas and some features over the past 18 months and intersects directly with the immigration issue. This form of union action is one of the ulterior motives for Equity trying to require names of actors through the Letter of Non Objection process for Immigration New Zealand, and gain as much information as possible on productions in order to try to heavy them into entering into an agreement directly with the union, which is not even legal, given this is not an employment situation, such information we understand being passed on to MEAA Australia. Immigration NZ don't want to know about this.

The notice of urgent meeting next Tuesday 27 in Auckland on this has been authorised by Simon Whipp who runs MEAA, The Alliance in Australia, which fully funds Equity and is affiliated with the Screen Actors Guild in the US.

We understand that there is a back up plan from Wingnut being put together by their studio, Warner Bros, which involves relocating the production elsewhere (UK).

If this blows undoubtedly Ministers will have to become involved. It's directly related to the immigration issue Tim which we have done everything in our power to resolve but the cards are stacked against production companies. Disney still on hold etc.

Kind regards
Penelope Borland

Dear All,

Can you send out urgently to everyone on your books. One is the notice of the meeting on Tuesday 28th September at 7pm at the Grey Lynn Community Centre; the other is the background with links to the relevant correspondence.

Could you do everything in your power to encourage performers (union and non-union) to attend the meeting.

Thanks

Frances

Tim Hurdle (MIN)

From: [Fran and Peter]
Sent: Friday, 15 October 2010 4:07 pm
To: Tim Hurdle (MIN); Mark Da Vanzo (MIN)
Subject: Fw: News from an Equity minded friend...

Dear Ministers Brownlee and Findlayson - just to be clear

Simon Whipp is doing this to enable the MEAA to become the distributor of all non-sag residuals on NZ films. (This has always been his end game) He is doing this so that he can claim to have negotiated The Hobbit contract. This in turn will give him and the MEAA access to a very large chunk of money via the actor's residuals. (The MEAA takes 5%-15% off all down stream earnings)

The things Whipp has cited as conditions for lifting the ban (facilities, meals and turnaround) are the same things he brought up as problems with The Hobbit contract. This is not a co-incidence.

This is his way into our film and the NZ film industry.

If we allow this to happen the next action we will be facing from the FIA (backed by SAG) a joint union action to force the production to acknowledge the MEAA as having been party to the negotiation of terms and conditions for all performers, thus according them the right to distribute all Non-SAG residuals. Once the MEAA control residuals they control the film industry.

This guy has played us for fools. We have just heard that NZ Equity are about to make a statement claiming they have negotiated The Hobbit residuals with Warners.

We appreciate your support, but in light of the MEAA's tactics we cannot carry on for much longer in this insanity.

Best regards,

Fran and Peter

From: Blackwood, Carolyn (NLC)
Sent: Friday, October 15, 2010 3:02 PM
To: [Peter and Fran]
Cc: Ken Kamins
Subject: RE: News from an Equity minded friend...

NOT true - our residuals offer was voluntary! Has been all along! Whipp has also just now placed a condition of us agreeing to conform our terms to the Pink Book (facilities, meals and turnaround?) before he will retract the Do Not Work Order. I am on with all the lawyers right now. I am furious. Furious. Will update you soon.

-----Original Message-----
From: [Fran and Peter]
Sent: Thursday, October 14, 2010 7:06 PM
To: Blackwood, Carolyn (NLC)
Cc: Ken Kamins
Subject: Fw: News from an Equity minded friend...

Hi Carolyn and Ken - we just got this from a sympathetic friend in the acting community.

They are trying to claim credit our deal, (among other things) - so that the MEAA can take ownership of the residuals!

We wanted to confirm there is no truth to the claim they have been talking with Warners? franx

Subject: FW: News from an Equity minded friend...

Got this third hand news just now

------ Forwarded Message

Just got sent this from a friend:

"Equity and SPADA have agreed to negotiate over the next 4-6mths to improve the conditions contained in the so-called "Pink Book" and to work towards a more binding document. Nothing will be off limits, everything will be up for negotiation including minimum rates of pay, residuals etc. This is a HUGE step forward. The deadline for this negotiation is March 31st next year, meaning that there will have to be a new set of conditions agreed by both parties by that date. Secondly Equity has negotiated with Warners a residual deal that is second only to SAG worldwide. Including residuals for ALL performers (not only those the production deems fit) on ALL uses after 24mths, so DVD's, Toys, Posters etc. So today has been a big day, stay tuned for more developments..."

------ End of Forwarded Message

(Information provided to Minister Finlayson by Peter Jackson and Fran Walsh)

BACKGROUND INFORMATION

Dear Minister,

You are no doubt aware of the recent public eruptions between the producers of The Hobbit and the MEAA, which is attempting to intercede on behalf of all NZ actors who will potentially be engaged to work on the films.

In 2006 Actor's Equity (NZ), whose membership at that time had dwindled to around 80 actors, decided to take up an offer by the Media and Entertainment Arts Alliance (MEAA) to become a branch of the larger and more powerful Australian trade union. The MEAA represents Australian sports people, journalists, performers and actors. In doing this, NZ Actor's Equity essentially forfeited their independence and their voice to the MEAA, a trans-Tasman trade union which has no legal standing in NZ. (MEAA/Actor's Equity is not registered as an NZ trade union, nor are they on the register of incorporated societies.)

With the announcement of casting beginning on *The Hobbit* we heard rumours that MEAA had made the decision that it was going to 'target' *The Hobbit* in order to leverage more support for their union and strengthen their position within the Australasian film industry. We have been told privately that MEAA management recognizes it is in their best interests to lock down NZ actors so that they cannot form a competing pool of talent which makes itself available to big budget productions. Whilst we recognise that the MEAA have every right to pursue this strategy - it's smart, if somewhat ruthless - in doing so and in placing their own best interests first, they are putting the entire NZ Film Industry at serious risk of collapse. They are jeopardizing the livelihood, not only of NZ actors, but also of crew, post-production workers, and industry support personnel - hundreds, if not thousands of jobs will be lost.

For the last several months, Simon Whipp (assistant federal secretary of the MEAA) has openly stated that the MEAA intends to use The Hobbit to assume control of all NZ actor's contract negotiations. By leveraging the support of more powerful unions like SAG, (the Screen Actor's Guild) the MEAA has stated as its intended aim of 'forcing the Producers of *The Hobbit*, to the bargaining table in order to enter into a union-negotiated agreement.'
To this end the MEAA is insisting on collectively bargaining wages and conditions for all NZ actors who will be engaged to work on The Hobbit. The problem is, it is illegal for actors who are hired as independent contractors to collectively bargain under NZ law. Under New Zealand law (the Commerce Act of 1986, section 30) New Zealand actors are independent contractors and are therefore not permitted to engage in 'price-fixing'. Most kiwi actors, almost without exception, choose to be independent contractors because it carries enormous advantages - the three most notable being (i) you pay less tax; (ii) you have the ability to claim back your Agent's 10% fee (iii) you can charge your services out at a higher rate.

The MEAA's answer to getting around this legal restriction is to change the tax status of kiwi actors from independent contractors to employeess - a suggestion which is both absurd and untenable. Most NZ actors are employed on films for very limited periods of time, on short term contracts. The idea of hiring actors on the basis of being 'permanent employees' is ridiculous.

because films don't offer permanent work. But this is the only way MEAA can legally operate in New Zealand - so it is what they are advocating.

In a nutshell our position is this: the MEAA is demanding that we, as the producers of The Hobbit enter into an illegal collective bargaining situation and they are threatening to boycott the production (worldwide) if we do not comply.

The MEAA claims to have a legal opinion which says there are ways they can collectively bargain under NZ law. We gave seen this legal opinion and basically it states that in order for the MEAA to get around NZ employment law, they need to deal with all NZ actors as employees. If this should come to pass, it will obviously have a catastrophic impact on the employment structure of the NZ film industry, not to mention the budgets of our films. It will also severely impact the tax status of NZ actors. The MEAA's legal advice is that the entire NZ cast of The Hobbit would have to form a legal joint venture with the film makers and studio in order to have their collective bargaining status recognized. It also offers a complex argument that all NZ actors would have to be employed under the same terms and conditions including salary, for the MEAA negotiation to be legally admissible - again we do see how this can possibly work. It defies common sense.

Our standard Hobbit contracts for all actors provide terms and conditions almost identical to those of SAG (the Screen Actor's Guild). One aspect of MEAA's demands is that they are insisting on negotiating the contracts for all NZ actors, regardless of whether these actors are members of NZ Equity or not. To put this in context, NZ agents have nearly 2,000 actors on their books (this number increases to 17,000 if second rung performers are included) NZ Equity refuses to reveal its membership numbers but those in the know, have put it at around one hundred paid up members. Many NZ actors simply don't wish to belong to MEAA and have shunned Equity membership as a result. The reality is that NZ Equity doesn't even represent one tenth of all actors who are available to work in NZ and yet MEAA is claiming to represent a 'majority' of NZ actors. (Sixty eight percent was the number cited in a recent article) This completely fraudulent statistic is being used by the MEAA to justify its collective bargaining position on behalf of all NZ actors engaged to work in the NZ film and television industry.

We are not anti-Union. We are very proud and loyal members of three Hollywood Unions – the Directors Guild, the Producers Guild and the Writers Guild. We have always supported the Screen Actors Guild . All these organisations do terrific work on behalf of their members.. The MEAA claims we are "non-Union" but whenever we hire an actor who belongs to SAG, we always honour their working conditions, their minimum salary agreements and their residuals.
To call The Hobbit 'non union' as Simon Whipp has done, is simply a lie.

We also recognise that many of the actors who work on our films are members of SAG and many are not — especially younger actors and many Australian and New Zealand performers. Residuals can be worth tens of thousands of dollars to an individual if the film is successful – however the normal situation is that if an actor is not a member of SAG, they do not share in the profit pot. This has always struck us as unfair, since most Kiwi actors are not lucky enough to be SAG members. To this end, Warner Brothers have agreed to create a separate pot of profit participation, for Australian and NZ actors working on The Hobbit. This profit participation will be divided up amongst all non-SAG actors who are cast in the film. SAG members have their pot, and non-SAG

members now have theirs. We have introduced the scheme to Kiwi agents and it's now part of all Hobbit cast deals. This was not done because of any pressure from Guilds or Unions – it was an attempt by Warners to treat all actors working on The Hobbit equally and with respect, given the unprecedented success of The Lord of the Rings.

We are in no doubt that The MEAA is attempting to exploit a loophole in our employment law which is highlighted by The Bryson Decision. The Bryson Decision effectively means someone who is hired as an independent contractor can be deemed by the court to be an employee, after the fact. There are currently there are no clear guidelines under NZ employment law as to how or why this can happen. It is currently a huge cloud which hangs over the head of all employers hiring independent contractors. The impact The Bryson Decision has had on the film industry has been significant.

THE BRYSON DECISION

James Bryson versus Three Foot Six Limited

Alan Sorrell, barrister and past chairman of the New Zealand Film Commission, provides a summary and analysis of the recent Employment Court decision regarding the employment status of a screen technician.

There are very few special laws for the New Zealand film and television industry, despite recent media comment to the contrary. Whether one is a supplier of services (and therefore an independent contractor) or engaged via a contract of service (and therefore an employee) has always been a matter of substance rather than form.

While it would be more convenient if those labelled as independent contractors were treated as independent contractors by both the Inland Revenue Department (for tax purposes) and the Employment Court (for the purposes of the Employment Relations Act), that has never been the case.

The widely criticised decision of Judge Coral Shaw in the action brought by James Bryson against Three Foot Six Ltd demonstrates conventional analysis.

Bryson gave evidence supported by David Madigan, former president of the New Zealand Film and Video Technicians Guild. While both entertainment lawyer Karen Soich and former SPADA chief executive Jane Wrightson submitted affidavits regarding industry practice, their submissions weren't found to be particularly applicable to the facts. (This article assumes the facts as stated in the decision are correct.)

Background Facts

Bryson had a 20-year history of model making. He had worked for Weta Workshop in 1996 and 1997, and in 1998 he was employed by Weta to make models for The Lord of the Rings. On these occasions it was accepted he worked as an independent contractor. He rejoined Weta Model Shop in February 2000 and continued working on Lord of the Rings models.

Three Foot Six Ltd had a miniatures unit to film some of the special effects for The Lord of the Rings project, and Weta staff were commonly seconded to Three Foot Six.
In April 2000 Mr Bryson was seconded to Three Foot Six as a temporary model maker, and "at the end of the two weeks he was offered a permanent position with Three Foot Six as an on set model technician".

Bryson's hours were negotiated because his partner was expecting a baby. It was agreed that rather than work the usual Three Foot Six hours of 7.30am to 6.30pm, he would work "Weta-time" (ie, 8.00am to 6.00pm) until July when the baby was born. On that basis he began work at Three Foot Six. There was no written employment agreement or work contract when he began, and he was trained for the first six weeks.

In September he was given a pay increase from $18 to $22 an hour.

In October 2000 Three Foot Six supplied a written contract for all its crew.

In August 2001 Bryson got a further pay increase.

On 23 August 2001 Three Foot Six models unit was downsized and Bryson's engagement terminated.

The issue in this case was whether he was an employee and therefore able to claim for unjustifiable dismissal.

The Law

Judge Shaw stated the tests for determining what constitutes a contract of service (ie, employee status) as follows:

- "The Court must determine the real nature of the relationship;
- "The intention of the parties is still relevant but no longer decisive;
- "Statements by the parties, including contractual statements, are not decisive of the nature of the relationship;
- "The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the 'fundamental' test;
- "The fundamental test examines whether a person performing the services is doing so on their own account;
- "Another matter which may assist in the determination of the issue is industry practice, although this is far from determinative of the primary question."

Application of the Facts to the Law

The crew deal memo had printed on the back "crew time card - tax invoice", which had to be completed each week to secure payment. The crew deal memo, based generally on the guidelines of the New Zealand Film and Video Technicians Guild, is attached to the judgment.
Bryson gave evidence that he did not understand the distinction between a contractor and employee.

The tax invoice that had to be submitted each week by Bryson stated that it was for "services rendered as an independent contractor on the theatrical motion picture *The Lord of the Rings*".

The invoice required the contractor to fill in his/her address, IRD number and hourly rate. There is a provision for the deduction of withholding tax. The bottom of the invoice reads:

"Time card must be completed and signed by U.P.M. and H.O.D. or payment will be delayed. Travel time only applicable when approved on call sheet. No overtime or broken turnaround without U.P.M approval.

"Agreed to and accepted by Contractor [Contractor signature]

"By signing above, Contractor acknowledges and agrees to the Standard Terms and Conditions on reverse."

Clause 28 of the conditions set out in the reverse of the crew deal memo states:

"28. Independent Contractor: The Contractor is engaged as an Independent Contractor and not as an employee of the Company. Nothing in this agreement shall be deemed to create a joint venture or partnership."
The conditions specify how the contractor is to be engaged. This set of conditions contains a number of features that were identified by the Judge as being more consistent with an employment contract. The Court also questioned whether the deal memo reliably indicates the real nature of the contract.

Counsel for Three Foot Six submitted that those clauses in the crew deal memo that appear to be more consistent with employment terms are simply based on industry practice. The Court accepted this but would not overlook these clauses when determining the nature of the employment relationship: "Whatever their origin or purpose they are part of the agreement ... and are therefore a part of the facts which must be taken into account."

The absence of a written contract at the start of the working relationship, coupled with there being no direct evidence from Three Foot Six as to the terms on which that relationship began, led to the Court being left with Bryson's uncontroverted evidence. From that the Court concluded: "... he did not turn his mind to the nature of employment when he began working with Three Foot Six. He simply accepted the employment that was offered because he saw the opportunity to gain new skills."

One aspect of the Court's reasoning that is troubling is the statement in paragraph 36:

"It is clear from the evidence of the witnesses of the defendant that they did not contemplate at any stage that Mr Bryson's employment relationship was anything other than as an independent contractor because that was the invariable practice of Three Foot Six or across the film industry. On the facts of this case, industry practice is of little use in establishing the intention of both parties. Mr Bryson acknowledges he had been employed as an independent contractor with Weta Workshop but that is not sufficient evidence from which to infer he knowingly intended to be an independent contractor of Three Foot Six."

This finding illustrates the risks of submitting such an issue to judicial determination, rather than it being the subject of a written agreement signed by the parties. It is surprising - standing back from the case - that Bryson, claiming the tax benefits of an independent contractor, and having previously been employed twice by Weta (as an independent contractor), was not fully aware of the issue. It seems reasonable that Three Foot Six expected the usual arrangements to apply and that Bryson would engage on that basis.

However, in addition to failing to have a written agreement, the production company failed to recognise that a number of the aspects regarding how Bryson was controlled and worked were more of the nature of an employment relationship.

Apparently he lacked the requisite skills when he started with Three Foot Six, as he was trained for six weeks by Rob Townshend. The routine of the set was that of an employee engaged on a permanent basis doing other work for the employer when its principal activities did not require him. The work on set was described as collaborative but was closely supervised by the DOP and ultimately by Peter Jackson and others.

The evidence was that Bryson provided minimal tools - ie, a cordless drill, a large craft knife and a scalpel - while the production supplied the rest and replaced any personal tools that were lost or broken.

Bryson was determined as having been fully integrated with the work of the production.

The pay slips given to Bryson appeared to show the deduction of PAYE, although evidence was given by Three Foot Six that this was Withholding Tax. Bryson was not registered for GST. He did not have any independent entity - such as a company - that was engaged by Three Foot Six. It appears from the decision that the lack of registration for GST, coupled with the pay slip showing a deduction of PAYE negated the evidence that Bryson completed an IR3 form and claimed expenses as if he were an independent contractor.

On ordinary contractual interpretation principles giving commercial arrangements business efficacy, it is surprising that so little weight was given to the previous arrangements that had existed between Bryson and Weta.

Industry practice evidence

The Judge was not persuaded as to the relevance of the evidence given in this area.

The evidence of one of the witnesses regarding the adverse effects on the industry that would be caused by personal grievance procedures was described by the Judge as follows: "This evidence could be interpreted to mean that a significant reason for the present employment arrangement is to avoid the responsibilities imposed by employment law, in which case they are a sham."

There is no doubt the ramifications of this decision regarding the broader industry was squarely before the Judge. David Madigan, as past president of the Technician's Guild, was recorded as having observed: "... most screen technicians are unaware of the significant differences between contractors and employees."

Barrie Osborne is also recorded as having "implied that should this change, New Zealand might become a less attractive location for lucrative film deals".

Osborne is also described as having accepted: "... there could be a case for treating some sectors of the industry differently in terms of their employment relationship, provided the conditions were negotiated with the Guild and contained the flexibility recognised by the industry."

The Court said generally on this issue: "Whilst these concerns are acknowledged, I am of the view that, in the context of this case, they are overstated."

In concluding that - despite the crew deal memo and being paid on invoice - the real nature of Bryson's employment was that of a contract of service, the Court noted the following:

- There was no evidence Bryson was acting as a "separate business entity" that contracted independently to Three Foot Six;
- He did not tender for the position but was seconded to it;
- The position was not short term;
- He had no other employment while he was at Three Foot Six;
- He required six weeks training;
- Much of the crew deal memo reads like a contract of service, including discretion to pay sick leave;
- There was close control of the work done by Bryson, including being required to attend regular meetings and take directions about the work he had to do during times when his services were not otherwise required;
- Independent contractors would not be paid for down time and could engage in other work.

It is easy for structures to be subverted by practice. In this case, the failure to get a written contract at the start of the relationship, insist on a GST number, and correctly describe the deduction of withholding tax were material in the outcome.

Conclusion

While emphasising that her decision was "based solely on the individual circumstances" of Bryson - and should therefore not be seen as "affecting the as yet untested status of any other employee in the film industry" - Judge Shaw concluded: "On the other hand, I am conscious that this decision may well cause the employer in this case, as well as SPADA and the Guild; to revisit the question of the employment or contractual status of people such as Mr Bryson, namely those who are obviously not operating as a separate entity and who are required by the production company to work under controlled conditions.

Judge Shaw's ruling refers to the 'untested status' of independent contractors working in the film industry which means that producers are now exposed to an ever present threat of cast and crew legal action. There are currently no clear guidelines under the law as to when an independent contractor is likely to be retrospectively deemed by the court to be an employee, and as such it is impossible for producers to protect themselves from countless court cases from disgruntled cast and crew – or for that matter the MEAA.

Clearly this lack of definition under the law as to when an independent contractor becomes an employee works to the MEAA's advantage. They have an agenda to redefine all NZ actors as employees and currently there is nothing to stop them bringing legal action against producers who have engaged actors as independent contractors. The Bryson Decision means that the law is effectively on their side.

TO SUMMARISE:

We have been told the MEAA and its affiliates will boycott The Hobbit unless we agree to the MEAA negotiating cast deals for all NZ actors. This is in spite of the fact that the MEAA has no legal standing in New Zealand, has no right to enter into collective bargaining with independent contractors and only represents one tenth of the actors working in New Zealand.

An Australian trade union is threatening us with an actor's boycott unless we agree to break the laws of our own country.

An Australian trade union is attempting to alter the tax status of NZ actors and the structure of employment contracts on NZ films in order to establish a political foothold in NZ.

The MEAA is attempting to redefine what it means under NZ law to be 'an employee' and current NZ employment law provides a loophole which could allow them to do it.

The MEAA is a minority group is falsely claiming to represent the majority of NZ actors. The MEAA has falsely represented The Hobbit as a non-union picture.

In the end, this is not about Actor's Equity, nor is it about The Hobbit - it is about an Australian trade union making a blatant play to take a controlling hand in the NZ film industry - for their own political and financial gain.

(From Peter Jackson and Fran Walsh)

[Cut and paste document]

1. The letter of non-objection for actor's work permits to be removed from NZ Equity/MEAA.
(Where will this authority be ceded? We would suggest the ministry of Economic Development or alternatively, Arts and Cultural Heritage, rather than Immigration - who have already been rolled once and who are supportive of NZ Equity.)

2. The Bryson loophole to be plugged. Need a clear and definitive legal description of who is an independent contractor and why? And who is and employee and why?

3. Address the two areas of weakness in The Commerce Act which are currently being used by the MEAA as the reason they can legally insert themselves into NZ cast negotiations. The opinion from Simpson Grierson to MEAA concludes that:

> "The Commerce Act does not absolutely prevent the producers of The Hobbit movie from entering into a union-negotiated agreement obtained through collective bargaining for the engagement of performers in New Zealand."

This conclusion is based on two alternative hypotheses. One is that the MEAA has more than 50 members and is therefore able to negotiate with the Producers as to the "recommended price for acting and other services" provided by independent contractors.

The alternative hypothesis is that those who work on the film could band together as joint venturers and then have the MEAA negotiate what is effectively a collective agreement on their behalf.

In the opinion of barrister Peter Churchman, both suggestions are "artificial and in a practical sense, unworkable". They also depend on an interpretation of the Commerce Act that is novel and questionable, as a matter of law.

(Legal Advice received by Peter Jackson and Fran Walsh)

Joint Venture

In providing the opinion, Simpson Grierson appear not to have considered the necessary requirements of a joint venture. The concept of joint venture was discussed by the Supreme Court in the case of *Chirnside v Fay* [2007] 1 NZLR 433. The Laws of New Zealand also makes some general observations about Joint Ventures. It says: "*..the term "joint venture" connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually(but not necessarily), contributing money, property or skill".* Time does not permit me to examine the indicia of a joint venture beyond saying that the sort of arrangement postulated in the Simpson Grierson letter would appear to lack the

mutual relationship of trust and fidelity, the fiduciary obligations, and the element of working together with a view to sharing profit obtained from the joint venture, that were identified by both the Supreme Court and by the editors of *Laws of New Zealand* as being essential attributes of such a relationship.
As the Simpson Grierson opinion notes, there is, in s 44(1)(f) of the Commerce Act, an exception for employees. However, the point is circular. In order to be able to obtain the benefit of the exception, the people concerned must be employees. As the individuals concerned are independent contractors rather than employees, this exception simply does not apply.

Recommended price exception

The Simpson Grierson opinion appears to assume that the MEAA is currently registered as a union in New Zealand The information that you have provided to me would tend to indicate that MEAA has been struck off the Register of Incorporated Societies in New Zealand. Only a registered trade union can participate in collective bargaining. In order to be registered, a trade union has to be incorporated in New Zealand.
It is a novel proposition to suggest that terms and conditions can be negotiated by way of a recommended price (and therefore falls within the exception in s 32 of the Commerce Act). I am unaware of any precedent where this approach has been sanctioned by either the Court or the Commerce Commission. Given the novelty of the proposition, it must inherently contain a degree of risk. However, perhaps the more important point is that noted in paragraph 22 of the Simpson Grierson opinion to the effect that the recommended price could not be mandatory. Issues would therefore arise as to enforceability upon the breach. The MEAA could not sue the Producer because all that had been negotiated was a recommended price. There is no doubt that individual employment agreements and/or individual independent contractors' agreements are enforceable according to their terms. However, the negotiation of a recommended price would not be enforceable should the Producers offer different terms. Any suggestion that enforceable legal rights were created by this process would almost certainly fall foul of the Commerce Act on the grounds of price fixing.

I have therefore formed the view that neither of the propositions identified in the Simpson Grierson opinion provide a workable solution to the problems presented by the Commerce Act.

Conclusion

There is no doubt that the Commerce Act does not apply to the contents of collective employment agreements. However, any attempt by independent contractors to fix the price upon which they are prepared to offer their services is likely to be either (a) unenforceable or (b) in breach of the Commerce Act or (c) both. You have advised that the logistics of the industry are such that the production of films such as The Hobbit is only viable where personnel are employed as independent contractors rather than employees. There does not appear to be any viable way in which independent contractors can band together using the MEAA (or anyone else) as their agent to fix the price upon which they are prepared to offer their services.

PETER CHURCHMAN
Barrister

(Legal Advice received by Peter Jackson and Fran Walsh ends)

Time frames

Immigration issue - immediately

Bryson Loophole and Commerce Act before Christmas 2010.

Sir Peter Jackson and Fran Walsh

Dear Sir Peter and Fran

The Hobbit Movie

1. Thank you for your email of 4 October 2010 raising issues of actors' work permits and possible amendments to the Commerce Act 1986 ("Commerce Act") and the Employment Relations Act 2000 ("ERA"). We address each issue in turn below.

2. Having considered the possibility of amendments to the ERA or Commerce Act carefully, our view, following extensive consultation with the Crown Law Office, is that, for the reasons set out below, it would not be appropriate to recommend such amendments.

3. You may wish to discuss some of the contents of this letter with your lawyers (and we emphasise that it is appropriate that you take independent legal advice – ideally from specialists in both competition and employment law). We would also be happy to discuss it with you.

Actors' work permits

4. [Minister's office to fill in]

Proposed legislative change

5. As indicated above, in our view, the relevant legislative provisions provide sufficient clarity such that no legislative amendments are required.

Commerce Act

6. We do not understand there to be any dispute on the following legal propositions regarding the Commerce Act:

   6.1 The fixing of prices, discounts, allowances, credits or rebates for the provision of services by independent contractors is prohibited by s 30.

   6.2 If the performers were employees under s 44(1)(f) of the Commerce Act, s 30 would not apply.

   6.3 Section 30 does not apply to non-financial conditions of work such as meal breaks, acknowledgments in the rolling credits etc.

7. There appears to be disagreement on whether the "recommendations as to price" exemption, in s 32, or the "joint venture" exemption, in s 31, could conceptually

apply (the reasons for which might usefully be explored between us because Crown Law's reasons differ slightly from those put forward by Mr Churchman).

8. However, at a practical level, we do not understand there to be any serious suggestion of either:

8.1 negotiations regarding "recommendations as to price" – because such negotiations would be commercially meaningless; or

8.2 the establishment of a "joint venture" – because the establishment of such a joint venture would be a practical impossibility.

9. We assume that these practical problems are the primary reason why neither exemption has been seriously advocated by the Media Entertainment and Arts Alliance ("MEAA").

10. We now understand the MMEA to argue that either:

10.1 the performers should be employed as employees – which we understand from you is not commercially viable and would, in any event, be unattractive to a number of performers; or

10.2 contrary to its previous position (as set out at paragraph 7 of Simpson Grierson's advice to the MMEA dated 17 September 2010), it now wants to discuss non-financial conditions.

11. Neither of these MEAA arguments raises immediate legal issues, save that, depending on the nature of the agreement reached, and the parties to it, an agreement resulting in binding non-financial terms might raise issues under s 27, regarding substantial lessening of competition in a market. Further, there might be some risk that, in the course of seeking to negotiate non-financial terms, the parties actually reached agreement on a condition that could be seen as a "price" for the purposes of the Commerce Act. These are the sorts of issues upon which we would expect all parties to such potential agreement to take their own specialist competition law advice in order to minimise any potential risk. Taking such advice is standard practice when competition law issues might arise.

12. In the circumstances, our view is that there is no need to amend the Commerce Act as a result of legal uncertainties. The current difficulties appear to arise because of the different policy underpinnings of labour law, which sets out principles for employee protection, and competition law, the express statutory purpose of which is to promote competition. In that regard, we understand that labour law principles should apply to employees while competition law principles should apply to those who are independent contractors. There does not appear to be any principled basis to change that in this context.

Employment Relations Act

13. While s 6 of the ERA requires the Employment Court (or Employment Relations Authority) to consider the "real nature of the relationship" between the parties, the intention of the parties, as reflected in the contractual terms, remains the starting point and is central to any consideration of the issue. The case law developed over many years remains relevant to the Court's enquiry.

14. We understand that it was the Employment Court's *factual* findings in *Bryson*[1], that it was not possible to establish a common intention between the parties as to the nature of their working relationship, and that there was no written record of engagement, that meant that the Court did not accept as determinative the company's assumption that Mr Bryson was an independent contractor. It was for that reason that the Court moved on to consider other factors, which the Court held were indicative of an employment relationship.

15. We also understand that the recent cases on this issue[2] apply a consistent test and support that where both parties intentionally enter into a contract for services, and operate in accordance with the contractual terms, that common intention will be upheld by the Employment Court.

16. In *Chief of Defence Force v Ross-Taylor,* the most recent decision on point, the Employment Court sounded a warning against people agreeing to be engaged on one basis and later asserting that the true nature of the relationship was different. Judge Travis emphasised the importance of the intention of the parties saying:

> It is a very serious matter for the Authority or the Court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of their relationship was completely different.

17. In summary, although the factual nature of any enquiry gives a degree of uncertainty to parties over the nature of their relationship, if the intention of the parties is that the relationship is a contract for services, and they enter into and operate under written terms that in form are an independent contract, the parties should be confident that their intention will be upheld by the Court in any subsequent dispute.

18. For this reason it is important that the parties take specialist employment law advice to ensure from the outset that the contracts used, and the process by which they are entered into, are robust and defensible as supporting an independent contractor relationship.

Appropriate way forward

19. While there are inevitable uncertainties in respect of both the Commerce Act and the ERA, these are of a type that should be relatively easy to work through with advice from specialist competition and employment lawyers. Early, considered and ongoing advice from such lawyers ought to be able to minimise any potential employment or competition law risk.

20. To the extent that there are any particular legal issues under the Commerce Act that prove to be sticking points in any negotiations seeking to resolve the Dispute, these could possibly be quickly and efficiently resolved by way of

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1 *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581, at [34] – [37].

2 E.g. *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22; *Singh v Eric James and Associates Limited* [2010] NZEmpC 1; *Tsoupakis v Fendalton Construction Ltd* [Chief Judge Colgan, WC 16/09, 18 June 2009].

declaratory judgment proceeding.[3] In that regard, we note that a declaratory judgment proceeding need not be hostile given that its sole purpose is to clarify a legal position.

21. As noted above, we would be happy to meet with you or your lawyers to discuss the contents of this letter. We would also be happy to discuss appropriate local competition and employment law specialists if that would assist.

Yours sincerely

Hon Gerry Brownlee
Ministry of Economic Development

Hon Christopher Finlayson
Attorney-General and
Minister of Arts, Culture and Heritage

3 Issues arising under the ERA tend to be factual in nature and therefore not suitable for declaratory judgment proceedings.

Tim Hurdle (MIN)

From: [Peter. Fran]
Sent: Sunday, 17 October 2010 1:48 pm
To: Penelope Borland
Cc: [Richard Fletcher] Tim Hurdle (MIN); Dave Gibson
Subject: Memorandum of Understanding

Dear Penelope, Richard, Dave and Minister Brownlee,

The more we think about it, the more we feel cannot be party to the SPADA/ Brownlee/ Equity Memorandum of Understanding. This is because the premise of the document obliges us to conform to the guidelines of The Pink Book. Under normal circumstances this would not be a problem, but in this instance it's just another back door manoeuvre by Whipp to claim Equity input into The Hobbit contract. So, unfortunately The Hobbit films cannot be party to this agreement and if we film in NZ it will have to be under the threat of actor litigation, which will offer little comfort to Warners.

By the way, we are sure you know Whipp has no respect for The Pink Book, he has previously sneered at it's 'inferior' terms and conditions, and this sudden about-face has only happened because he has struck upon The Pink Book as a means to contractually engage with us. He is using the exact same negotiating tactic with SAG in lifting the ban. His interest in The Pink Book only extends to his interest in claiming a stake in our residuals and securing for himself a permanent place at the NZ negotiating table.

Thank you for trying to resolve this, we appreciate everyone's efforts on our behalf, unfortunately Simon Whipp has made meaningful detente all but impossible. His actions indicate that his word cannot be trusted; the damage Simon Whipp has inflicted on the NZ film industry is incalculable and it is our opinion that if we engage with him in any capacity, it will be ongoing.

Best regards,

Peter and Fran

Tim Hurdle (MIN)

From: [Peter Jackson]
Sent: Friday, 15 October 2010 3:45 pm
To: Tim Hurdle (MIN)
Cc: Mark Da Vanzo (MIN)
Subject: Fwd: News from an Equity minded friend...

Hi Gerry,

This just in from Warners ... it's going from bad to worse. Warners had been talking to SAG, and had them agreeing to lift the Hobbit blacklist today. That was happening, as we notified you before your meeting yesterday.

Now, just as Warners were expecting the retraction, Whipp has appeared on the scene. This has just come in from Carolyn at Warners.

Obviously buoyed by the meeting you organised yesterday, Whipp has now placed Pink Book inspired conditions on the retraction. We know the meeting was designed to be positive, but Whipp has played you like a fool, and is using your goodwill to prolong and drag this out.

Unfortunately, you engaged with a snake, who now feels quite fearless. He is in revenge mode, intent on inflicting as much damage as he can, to our film, to our film industry, to our country.

Warners are obviously furious, because they had spoken with John McGuire of SAG in LA, and had resolved this with no mention of Whipp at all. If your Auckland meeting had been 24 hours later, we would have got our retraction - but that's not to be.

I really can't tale much more of this toxic nonsense. All I want to do is make films! I haven't been able to think about the movie for 3 weeks.

Warners are coming down mid-week - I hope you can all sit in a room and get a positive result.

Cheers,

Peter Jackson

Begin forwarded message:

From: "Blackwood, Carolyn (NLC)"
Date: 15 October 2010 3:02:24 PM
To: [Peter and Fran]
Cc: Ken Kamins
Subject: RE: News from an Equity minded friend...

NOT true - our residuals offer was voluntary! Has been all along! Whipp has also just now placed a condition of us agreeing to conform our terms to the Pink Book (facilities, meals and turnaround?) before he will retract the Do Not Work Order. I am on with all the lawyers right now. I am furious. Furious. Will update you soon.

Briar Charmley (MIN)

From: John Harbord (MIN)
Sent: Thursday, 30 September 2010 2:38 pm
To: Briar Charmley (MIN)
Subject: FW: Equity
Attachments: NZ Equity legal advice.pdf

Copy for your info.

-----Original Message---
From: Matthew Dravitzki (WINGNUT FILMS)
Sent: Thursday, 30 September 2010 2:25 pm
To: Mark Da Vanzo (MIN)
Subject: Equity

Hi Mark,

Attached is Equity's legal response to the Crown Law Office's opinion. They clearly do not place much weight on the sentence:

"There is some suggestion that the relevant contractors be treated as 'employees' on the grounds that section 30 does not apply to 'employees'. However it cannot be simply asserted that they are 'employees' for the purposes of the Act, if they are in truth, independent contractors."

They are using Simpson Grierson's assurance that they can proceed with cast contract negotiations as per actors becoming 'employees'. Is there any clarity the Minister can provide us which properly dismisses these claims, which however spurious, are being used as the basis for the MEAA moving forward with cast negotiations.

Incidentally, Simpson Grierson represented 3 Foot 6 Limited - The Lord of the Rings production company - in it's suit against James Byrson. (Pip Muir represented 3 foot 6 during the appeal) We would've thought that representing Equity/MEAA represents a conflict of interest for them?

Kind regards,
Matt

[Section 9(2)(h)

From: Kit Toogood QC
Sent: Tuesday, 12 October 2010 11:21 am
To: Hon. Christopher Finlayson (MIN)
Cc: James Christmas (MIN); Alan Sorrell
Subject: The Hobbit pictures - employee/contractor issue

Dear Chris

You may not be aware that Alan Sorrell and I have been advising 3 Foot 7 Ltd and Warner Bros. Pictures on the current employee/contractor issue relating to *The Hobbit* pictures. I would appreciate it if I could speak to you about the matter at some stage during the next 24 hours. I am somewhat reluctant to make a direct personal approach to you on a professional matter but, since you have been willing to step into the issue publicly, I have been asked by the producers and funders of the pictures to do so because of the urgency of getting actors and crew signed up.

[Section 9(2)(h)

I understand from comments made by the Prime Minister, which have been reported today, that good progress has been made at ministerial level towards settling the rather unfortunate public "spat" between Sir Peter Jackson and NZ Equity/union representatives. From the point of view of the producers and funders of the pictures, it would be very helpful to know that the Government's position is that it is highly desirable that the long-established practice of treating actors and crew on New Zealand made films as contractors rather than employees should be maintained. Putting aside the financial implications, which may be more or less manageable depending on the overall budget for the production, there would be seriously detrimental consequences for the making of films in this country if the producers were held to owe employer obligations to actors and crew; such consequences would almost certainly be fatal to the industry.

I would welcome a brief discussion with you, or a short email confirming the Government's position, the contents of which I would propose to keep strictly confidential. If you are able to confirm that the

Government's view is the same as that of the producers and funders, I would then simply reassure those whom Alan and I are advising that they need not have any concerns that the Government's position represents any threat.

Kind regards

Kit

CHRISTOPHER TODD QC

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'Immigration Policy Paper'
'Related Cabinet Minutes'

Cabinet

CAB Min (10) 39/13

Copy No: 22

Minute of Decision

Immigration Policy for Actors and Directors

Portfolios: Immigration / Economic Development / Arts, Culture and Heritage

On 1 November 2010, Cabinet **noted** that the submission under CAB (10) 553 had been withdrawn.

Rebecca Kitteridge
Secretary of the Cabinet

Reference: CAB (10) 553

Distribution:
Prime Minister
Chief Executive, DPMC
Director, PAG, DPMC
Minister of Finance
Secretary to the Treasury
Minister for Economic Development
Chief Executive, MED
Minister for Arts, Culture and Heritage
Chief Executive, Ministry for Culture and Heritage
Minister of Immigration
Secretary of Labour (Immigration)
Secretary of the Cabinet

IN CONFIDENCE

Cabinet

CAB Min (10) 37/12

Copy No: 22

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Immigration Policy for Actors and Directors

Portfolios: Immigration / Economic Development / Arts, Culture and Heritage

On 18 October 2010, Cabinet **noted** that the submission under CAB (10) 553 had been withdrawn.

Rebecca Kitteridge
Secretary of the Cabinet

Reference: CAB (10) 553

Distribution:
Prime Minister
Chief Executive, DPMC
Director, PAG, DPMC
Minister of Finance
Secretary to the Treasury
Minister for Economic Development
Chief Executive, MED
Minister for Arts, Culture and Heritage
Chief Executive, Ministry for Culture and Heritage
Minister of Immigration
Secretary of Labour (Immigration)

'Immigration Policy Paper'

NOTE: This paper was never considered by Cabinet.

Office of the Minister of Immigration
Office of the Minister for Economic Development
Office of the Minister for Arts, Culture and Heritage

REVIEW OF IMMIGRATION POLICY FOR ACTORS AND DIRECTORS

Proposal

1 This paper proposes changes to immigration policy for actors and directors, to facilitate the growth of New Zealand's screen production industry.

Summary

2 Under the immigration temporary work policy for performers and crew (Entertainers Policy), applicants must seek a letter of support from the relevant industry association (guild). The applicant must provide sufficient information to the guild to show that suitable New Zealanders have not been overlooked. If guild support is not forthcoming, the Associate Minister of Immigration makes a decision.

3 A body of evidence is emerging to indicate that the current immigration requirements are in need of an overhaul. Many industry stakeholders believe that the perception of a 'union veto' over key cast and crew members is damaging the industry's attractiveness to international studios, and will cost jobs in the sector.

4 Policy change is required to safeguard our screen production industry and the value it brings to New Zealand. The proposed approach is for work visa applications for actors and directors to go directly to the Department of Labour (the Department), without needing guild support first.

5 There is a strong case for the proposed policy amendment.

- The choice of who directs and stars in a production is a key part of creative control. New Zealand will be a more attractive destination for screen production if studios have surety that they will be free to choose the director and key cast members.
- Given the much greater costs of using foreign actors and directors over local ones (including airfares and accommodation), there is a relatively low risk of labour market displacement of New Zealand actors.
- The jobs and economic activity that screen production create for New Zealand generally outweigh any foregone opportunities for individual actors or directors.

6 The risks include adverse reaction from New Zealand actors and directors. The

Withheld under section 9(2)(g)(i)

7 Another proposed change is that, for official co-productions, no guild involvement will be required. A first principles review of the Entertainers policy will also be undertaken, to assess whether further change is warranted for the role played by the other industry guilds.

Background

How Entertainers Policy currently works

8 Under the current immigration policy for screen and theatre cast and crew, models, performers and musicians and their roadies, applicants must seek a letter of support from the relevant industry guild. The guilds include Actors' Equity (Equity), the Technicians Guild, the Screen Production and Development Association, the Directors Guild and the Musicians branch of the Service and Food Workers Union.

9 The applicant must provide varying amounts of information to the guild (depending on which guild is involved), to prove that suitable New Zealanders have not been overlooked. If guild support is not forthcoming, the application is referred to the Associate Minister of Immigration for a decision.

10 The policy has been in place for two decades. It was designed this way to ensure that applications can be speedily processed (as the labour market test is 'pre-approved' through an industry guild), and that industry knowledge is utilised in the labour market testing process.

11 The great majority of applications receive guild endorsement. For example, Equity claims to have issued more than 300 letters of support in the last 20 months, and objected to only six applications. In the case of a guild objection, the Associate Minister of Immigration makes the decision. Over the years, these have invariably been in favour of the applicant over the guild.

12 The equivalent immigration policy in the USA, Canada and Australia also involves industry guilds. In the United Kingdom, however, no guild involvement is necessary provided the film makers involved meet certain criteria.

Issues with the Entertainers policy

13 Many screen producers and other industry stakeholders believe that Equity has become increasingly difficult to work with since it joined the Australian Media Arts and Entertainment Alliance (MEAA) in 2008. They believe that Equity unreasonably seeks sensitive information from them (such as the names of actors auditioned and the reasons why they were not cast, and financial information about the production) for purposes that are not transparent and may not actually relate to immigration.

14 The screen producers think that Equity is insisting on casting processes that place the greater good of the industry at risk. They consider that Equity's perceived 'power of veto' has damaged New Zealand's appeal to overseas filmmakers, and that this will inevitably flow on into job losses for many New Zealanders.

15 Equity denies this. It considers that its role is critical to ensuring that New Zealand actors get a chance to be fairly auditioned. It believes the current problems are largely due to some producers not understanding and/or refusing to engage with the immigration process. It strongly rejects allegations that it is a 'shop front' for the MEAA. In Equity's view, some producers appear to want carte blanche to import foreign labour, and have issues with Equity simply on this basis.

16 Concerns have also arisen around the role played by the Directors' Guild. The good faith and reasonableness of this guild is not in question, but industry feedback is that work visas for film and television directors should not need a union check, given the absolutely critical creative and managerial role of these individuals.

Proposals for change

Work visa applications for directors and actors in screen productions

17 The choice of who directs and stars in a production is a key part of creative control. New Zealand will be a more attractive destination for screen production if studios have surety that they will be free to choose the director and key cast members. On balance, I consider that New Zealand's interests are best served by a more facilitative work visa policy that encourages production companies to our shores.

18 A new approach for the issue of work visas to actors and directors is proposed. These applications would no longer go to a guild for pre-approval, but would be lodged directly with the Department. Most applications would be express approved rather than subject to any substantive labour market checking, given the low level of risk that is generally involved. But if an application is considered to be risky (for example, if the terms and conditions appear to be below industry norms), it could still be referred to a guild for comment.

Work visa applications for cast and crew of official co-productions

19 Another proposal for change concerns the treatment of work visa applications pertaining to cast and crew from official co-productions. These productions (such as *Whale Rider* and *Dean Spanley*) are made under the auspices of treaty-level, bilateral agreements with partner countries overseas. Official co-productions require that a certain number of the cast and crew are from the partner country. But despite this, work visa applications for these people are currently still required to go to an industry guild for approval.

20 This policy needs updating. The New Zealand Film Commission are already responsible for checking off the foreign cast and crew members on official co-productions. There is no need for industry guilds to replicate this process. Therefore, it is proposed that for those international cast and crew members who are named on the New Zealand Film Commission's provisional certification, guild support will not be necessary to support their work visa applications.

Benefits and risks of the proposed change for actors and directors

21 A strong case can be made for the proposed policy change.

- The casting process for actors is almost uniquely subjective. Even Equity acknowledges that the filmmaker should be free to choose the look and sensibility of their cast.
- The choice of director is critical to the success or otherwise of the production. If studios cannot bring their first choice director to New Zealand, they may simply move the production elsewhere.
- Given the much greater costs of using foreign actors and directors over locals (including their airfares and accommodation), there is a relatively low risk of labour market displacement.
- The jobs, economic activity and career opportunities created for New Zealanders by the screen production industry outweigh the case for labour market checking individual actors and directors. In this case, the bureaucratic process involved actually risks jobs rather than protecting them.

22 The risks include potential for negative impacts on locals' opportunities or terms and conditions, either real or perceived. There could also be impacts on timeliness for some applications. In cases that warrant a referral to the Directors' Guild or Equity for comment (for example, where the terms and conditions do not appear to match local norms), the process could take longer than they do currently. Not many work visa applications, however, would be referred for comment in this way.

23 Withheld under section 9(2)(g)(i)

Need for a wider review

24 The proposed changes for actors and directors would not apply to other jobs in the industry (the proposed change for official co-productions will, however). But many of the arguments in favour of changing policy for actors and directors could also apply to other industry jobs. For example, Equity would issue letters of support for cast of stage productions and models. The benefits of this residual function should be explored, as should the continued relevance of the role played by the other industry guilds.

25 I therefore propose a first principles review of the Entertainers policy, in relation to the function currently played by all the industry guilds. It will be reported to me early in 2011, with any policy changes to be implemented from mid-2011.

Implementation

26 The policy changes proposed in this paper can be implemented in December 2010.

Consultation

27 The Department of Labour, Ministry of Economic Development and the Ministry of Culture and Heritage have been consulted. The Department of Prime Minister and Cabinet, the Treasury, Film New Zealand and the New Zealand Film Commission have been informed. Industry guilds (including Equity and the Directors' Guild) have not yet been consulted. This will take place when drafting the immigration operational policy.

Financial implications

28 There are no immediate financial implications. Measures to improve New Zealand's attractiveness to international filmmakers will, however, greatly assist economic growth and job creation.

Human rights implications

29 There are no human rights implications arising from this paper.

Legislative implications

30 There are no legislative implications arising from this paper.

Regulatory impact and business compliance cost statement

31 The Regulatory Impact Analysis requirements do not apply to this paper.

Publicity

32 Publicity will be managed by the Minister of Immigration with support from the Department of Labour. A media strategy will be prepared to 'front foot' the proposed changes, including open editorial articles for the major newspapers.

Recommendations

33 It is recommended that the Cabinet Domestic Policy Committee:

1. **note** that, under the immigration process for international actors and directors, applicants must first seek a letter of support from Actors' Equity or the Directors guild before lodging a work visa application;

2. **note** that many industry stakeholders believe that the perception of a 'union veto' over key cast and crew members is damaging the industry's attractiveness to international studios, and will cost jobs in the sector

3. **agree** to the following policy changes for work visa applications:

   3.1 for official co-productions (made under the auspices of bilateral, treaty-level arrangements), no industry guild involvement will be required;

   3.2 for actors and directors, no industry guild involvement will be required;

4. **note** that there is a strong case for the proposed policy amendment, as:

   4.1 the choice of who directs and stars in a production is a key part of creative control. New Zealand will be a more attractive destination for screen production if studios have surety that they will be free to choose the director and key cast members;

   4.2 given the much greater costs of using foreign actors and directors over local ones (including airfares and accommodation), there is a relatively low risk of labour market displacement;

   4.3 the many jobs that screen production creates for New Zealand outweigh any foregone opportunities for individual actors or directors;

5. Withheld under section 9(2)(g)(i)

6. **note** that a first principles review of immigration policy for all visiting entertainers and cast/crew will also be undertaken, to assess whether further change is warranted to the role played by the other industry guilds (for example, the Musicians union and the Technicians' guild).

Hon Gerry Brownlee
Minister for Economic Development
____/____/_____

Hon Chris Finlayson
Minister for Arts, Culture and Heritage
____/____/_____

Hon Dr Jonathan Coleman
Minister of Immigration
____/____/_____

Two documents

1. Note from Peter Jackson and Fran Walsh setting out their thoughts/feedback.

Dear Ministers,

We take your point about The Commerce Act and do not necessarily disagree with your findings, but from our point of view, it would be a mistake not to address the ongoing problems created by the Bryson Decision.

We feel this is where the film industry is most vulnerable because of the perceived lack of clarity under the law about who is an employee and who is an independent contractor and why. This 'grey area' is something we must assume Simon Whipp will endlessly exploit, whether or not the law is technically on his side, because he has already cited it as a legal precedent. Frankly, the threat of industrial disruption is enough to do serious damage to the long term future of the NZ film industry, whether or not Simon Whipp has legitimate grounds to challenge the law as it stands, or not. Currently it provides him 'a way in' and no one believes he will back away from NZ, even if we eventually prevail in the war over The Hobbit. It will be a temporary win at best, if the Bryson Loophole is not addressed.

If the government wrote an amendment to the Employment Relations Act specifically addressing the employment status of actors and crew engaged to work in the NZ film and television industry and if this amendment shut down any room for misinterpretation or legal challenge, this would help to provide some much needed certainty for film makers and overseas investors.

We are very concerned, that studios no longer view NZ as a safe place to make films, as the perceived risks are now simply too great.

Yours Faithfully,

Fran Walsh and Peter Jackson

2. 'Borland feedback' is a cut & paste from three emails into a single Word document. It includes an email from Fran Walsh to SPADA and two emails from Penelope Borland at SPADA

Thanks too, for your notes on the Bryson loophole. Our concern is that Whipp has been quoting it specifically as the MEAA's way into unionizing NZ film. Not sure how we can fend this off without some kind of tightening of the law. We are shooting two movies with a 10 week break in between. During these breaks (on legal advice) we are standing our cast down in an attempt to limit 'length of term engagement issues. But this also leaves us open to an actor returning to production and wanting to be rehired, only this time as a fixed contract 'employee'. At this point we are hamstrung - we cannot hire anyone else because the actor is already established in the role. Regardless of the rights or wrongs of the situation (and God knows Equity were legally in the wrong the last time around) this is an argument we can't afford to have. Equity hold all the cards and we could well be compelled into negotiating with the union, just to get the actor back on set. The MEAA has a history of changing the rules as they go and manipulating situations to their political advantage. They also have the power to call upon the SAG members of our cast to support a fellow cast member and if we don't cooperate, we could well be facing a walk out.

This scenario may not sound likely - but it's enough to make us feel very uneasy going into production, more to the point, it has the studio rattled. The government would be wise to address this issue, if only to help industry confidence and offer producers and studios reassurance we won't be blitz attacked by an Aussie union, hell bent on creating industrial disruption.

Appreciate that it's a fraught issue, but given the way the union has behaved, we don't think the law as it stands, will be an impediment to them taking another run at us.

Franx

Hi John

Just thought I should show you my original email in the context of another communication to WingNut, which certainly wasn't meant to be any substitute for legal advice but was just to reassure about the possible significance of the Bryson decision as this has been very a very frightening spectre for the production and WB had been saying that the Supreme Court had found that Bryson was an employee.

I gave an Affadavit in the Bryson case on practice in the film industry on behalf of film production companies:

I know that others are looking at this and there will be a legal opinion on it. However, the facts in the Bryson case showed that a major factor was the circumstances of his employment all weighed together (training provided, direction on work and hours, no use of own equipment, full integration into

company etc) despite the deal memo saying he was a contractor, but not in reality much altered from the US deal memo.

[Section 9(2)(h)

]

We sent out advice to SPADA members at the time that the case was a timely reminder that production companies need to make sure that their contractual documentation is clear and that it is consistent with what happens on a day to day basis between the parties.

Think that there may be a misconception about what the Supreme Court actually said. It didn't say that it thought Bryson was an employee. What it said was that the Court of Appeal had not been entitled to hear the appeal (and thereby overturn the decision) in the first place as the Employment Court had not committed any error of law in reaching its decision. Therefore, as a matter of legal process, the initial Employment Court decision was restored, which had found, after applying the law on analysis of the facts, that Bryson was an employee. So the Supreme Court never ruled that he was an employee.

In its summary of the Employment Court decision, the Supreme Court highlighted that the Employment Court judge had emphasized that her decision was based solely on the individual circumstances of Bryson's "employment" which, when all the circumstances were weighed together, was more in the nature of employment rather than a contractor, contrary to what was stated in the crew deal memo. She also said that her decision was not to be regarded as affecting the status of anyone else working in the film industry.

However, all this aside it's scared the hell out of companies ever since.

Penelope

[Section 9(2)(h)

]