According to Wigmore and Professor Stone it was the failure to distinguish between them which led so many decisions astray. Wigmore states that the requirement of exact contemporaneity as adumbrated in *Bedingfield* is only necessary for the verbal act doctrine. Contemporaneity in this sense is not requried for "spontaneous exclamations" which occur as "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. . . . Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy, . . . . and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."[17]

*Ratten* v. *R.* appears to have recognised this distinction and the different "contemporaneity" requirement applicable to "spontaneous exclamations" is satisfactorily formulated. While some difficulties may still persist, as ultimately the sound exercise of court discretion will determine each issue, a new and rational basis has been laid to resolve an old controversy.

Gurdial Singh Nijar

## DISTINGUISHING A CONTRACT OF SERVICE

### *Employees Provident Fund Board* v. *M.S. Ally & Co. Ltd.*[1]

The task of distinguishing between a contract of service and a contract for services has once again taxed the ingenuity of our courts. In *E.P.F.* v. *M.S. Ally & Co. Ltd.*, the Federal Court had to determine, inter alia, whether a group of persons designated "working assistants" conducting and managing the business of the respondents – a private company dealing in provisions, medical supplies and general merchandise – were "employees" within the meaning of the Employees Provident Fund Ordinance 1951. As the creation of the relationship of employee and employer is still a matter primarily of contract between the parties, the court determined this question by reference to the common law, there being no provision in the Contracts Act (Malaysia Act No. 136) on this point. Rejecting the traditional control test as a survival of simpler socio-economic conditions of a

[17] *Op. Cit.* n. 81.

[1] [1975] 2 M.L.J. 89.

by-gone age, Wan Suleiman F.J., delivering the judgment of the Federal Court, emphasised the need for the test to "be modified if it is to be valid." The court quoted extensively from the trial court's comprehensive review of the two major tests evolved to mitigate the awkwardness and difficulties of the control test viz., the "integral-part-of-the business" (or "organisation") test and the "economic reality of the situation" test. The court finally rested its decision on the "organisation" test and concluded that the working assistants were engaged under a contract of service with the company, thus reversing the trial court's decision on this point. (The further question, that is, whether contributions were payable to the employees provident fund which was answered in the negative does not form the subject of this comment). The decision, it is respectfully submitted, is unfortunate in two respects: *first* the test chosen has been judicially disapproved of on the ground that it is difficult to apply and *secondly*, the differing tests were so freely interchanged in the judgment as to suggest that their distinguishing features were not sufficiently appreciated. What follows is an elaboration of these propositions.

The "integral-part-of-the-business" test, first espoused by Lord Denning in *Cassidy* v. *Ministry of Health* ([1951] 2 K.B. 343), was reaffirmed by him in *Stevenson, Jordan and Harrison Ltd.* v. *MacDonald & Evans* ([1965] 1 T.L.R. 101, 111), in these terms:

> "...Under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for service, his work, although done for the business, is not integrated into but is only accessory to it."

Denning L.J. reiterated this test in *Bank Voor Handel* v. *Slatford* ([1953] 1 Q.B. 248, 295), in these terms:

> "The test of submission to orders does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."

This test, it is submitted, bring us no closer to the proper determination of a master-servant relationship and was dismissed by MacKenna J. in *Ready Mixed Concrete* v. *Minister of Pensions and National Insurance* ([1968] 1 All E.R. 433) as:

> "...(raising) more questions than I know how to answer. What is meant by "part and parcel of the organisation? Are all persons who answer this description servants? If only some are servants, what distinguishes them from others if it is not their submission to orders?".

There are dicta emanating from our courts as well high-lighting the inadequacy of this test. Thus in *Bata Shoes Co. Ltd.* v. *E.P.F.* ([1967] 1 M.L.J. 20) Gill J. (as he then was), in determining the relationship between a manager who employed his own salesmen and the company said: "The work which such salesmen do is undoubtedly an integral part of the

plaintiff's business but that fact alone, in the absence of the basic indicia of the relationship of master and servant, is insufficient to make them the servants of the company." It is noteworthy that Justice Wan Suleiman's conclusion that the working assistants were in fact employees on the basis of this test was not preceded by a discussion demonstrating how in fact the terms of their contract made them an integral part of the business.

The "economic reality of the situation" test stated by McKenna J. in *Ready Mixed* involved an evaluation of 3 *indicia* to determine the existence of a contract of service viz.,

i) An agreement by the servant that, in consideration of a wage or other renumeration, he would provide his own work and skill in the performance of some service for his master.

ii) His agreement, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

iii) The other provisions of the contract must be consistent with its being a contract of service.

Of these the most important, in MacKenna J.'s opinion, was the third consideration. To establish this, various factors in addition to control, had to be evaluated. These included: ownership of the tools, chance of profit, risk of loss and permanency of relations. This approach was relied upon by Cooke J. in *Market Investigations Ltd.* v. *Minister of Social Security* ([1969] 2 W.L.R. 1). Justice Wan Suleiman made extensive references to these cases as well as the cases they relied upon to formulate the rule. This is welcome in that "by admitting an entrepreneurial test it marks a stage towards the frank admission of a multiple test ranging over a wide variety of factors and allowing of the totality of circumstances to be taken into account." (Drake: 31 M.L.R. 408, 418). Yet the court sought to define the master-servant relationship by reference to the more restricted multiple test enunciated by Lord Thankerton in *Short* v. *Henderson* ((1946) 62 T.L.R. 427) which eschewed reference to the factors which the *Ready Mixed* line of cases placed emphasis on. Indeed, of the 4 indicia stipulated by Lord Thankerton in *Short* v. *Henderson* (*supra*) viz., (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal], (a), (d) and even (c) were considered by MacKenna J. in *Ready Mixed* to be "...of little use in determining whether the contract is one of service." And to confuse matters further, Justice Wan Suleiman concluded his judgment on the basis of Lord Denning's "organisation" test. It may be possible to suggest that Justice Wan Suleiman cited both this and the "economic reality" test to demonstrate that the control test had diminished in importance; nonetheless, his decision failed to differentiate between the tests. What then is the precedent value of *Ready Mixed* and *Market Investi-*

*gations*? Insofar as the proposition in these cases was referred to and not affirmatively rejected, this case itself may be authority for the incorporation of the "economic reality of the situation" test. It is to be hoped that this test will be accorded prime importance in determining employer-employee relationships. An application of this test to the facts of the case would have resulted, it is submitted, in the same conclusion: that the working assistants were employees of the respondent company. Numerous terms of the contract were consistent with this conclusion. The assets were owned by the company whilst the loss, if any, was to be borne by it as well. The stock-in-trade was the company's. The ownership of all the instrumentalities of production by the company is surely indicative of the existence of a contract of service. Additionally, the company directors engaged and dismissed the working assistants. The working assistants, acting as agents for the company, employed the shop assistants. The rest of the circumstances which tended to go the other way suggested no more than that the company had drawn up an interesting incentive scheme to guarantee an efficient profitability of their business. Admittedly, the test in *Ready Mixed* is not absolutely precise and "may not bring us any closer to being able to determine a situation accurately as to whether a contract of service is in existence" [Douglas Brown, *"The test of service* (1969) J. Business Law 177]; Nonetheless, it is respectfully submitted that of all the tests evolved thus far the *Ready Mixed* test involves an evaluation of indicia which is more capable of yielding a result which is in close accord with the actual economic reality of the situation.

If this case is accepted as approving the test in *Ready Mixed*, one further difficulty may arise in future. MacKenna J. rejected control as a sufficient condition but reinstated it as a necessary condition. Justice Wan Suleiman referred to the trial court's citation of this dictum without comment, which is unfortunate as it has been the subject of adverse criticism. Atiyah in "*Vicarious Liability in the Law of Torts*" relies on *Morren* v. *Swinton and Pendlebury Borough Council* ([1965] 1 W.L.R. 576) to show that in exceptional circumstances control, even at its narrowest definition, is not a necessary condition. This view is adopted by C.D. Drake ("Wage Slave or Entrepreneur?" (1968) 31 M.L.R. 408 at p. 416), and MacKenna J.'s formulation that control is a necessary condition is described as "startling" by G. de Clark (see (1968) 31 M.L.R. 451).

One final comment is necessary. Our courts have consistently decided that the relationship of employer and employee in any given case is a question of fact. (See *Bata Shoes Co. Ltd.* v. *E.P.F., supra*) The Federal Court in *M.S. Ally*, countenanced a similar view. It is submitted that the determination of the relationship is not purely a factual question. If the contract is in writing or, otherwise, once the primary facts have been determined, the inference to be drawn from the terms of the contract or the facts, it is submitted, ought to be a pure question of law.

Gurdial Singh Nijar.

# TESTAMENTARY CAPACITY AND THE BEQUEATHABLE THIRD IN THE ISLAMIC LAW OF WILLS

*Amanullah bin Haji Ali Hasan*
v.
*Hajjah Jamilah binti Sheik Madar*[1]

In Malaysia, intestacy is the rule rather than the exception, particularly among Muslims. The Holy Quran lays down clearly and meticulously the rules for the distribution of the estate of a deceased Muslim and perhaps because of this reason Muslim sentiment is in most cases, opposed to testate succession.[2] Malaysian cases on Muslim wills are therefore rare and as *Amanullah's* case is one of these rare treats it must not go unnoticed and uncommented.

The case involved a Muslim will which, though prepared under legal advice, conflicted with three basic principles of the law relating to Islamic wills. This is not the first case where a Muslim will prepared in a solicitor's office disregarded basic principles of Islamic law.[3] It is suggested that the reason for this apparent shortcoming is the general belief among some lawyers that, beyond the fact that a Muslim cannot bequeath more than one third of his property, the law of wills applicable to Muslims and non-Muslims is the same. Since, in general, the Probate and Administration Act 1959, the Small Estates Distribution Act 1955 and the Rules made under both apply to Muslims and non-Muslims it is tempting to misconceive that the requirements of the Wills Ordinance 1959 must also apply to both groups. The reverse is nearer the truth and for this reason *Amanullah's* case is worthy of study and comment because it deals with the common errors of Muslim testators and their legal advisers.

The facts of the case were as follows. The deceased, Haji Ali Hasan bin Zufran, made a will on May 7, 1961 (hereinafter referred to as the "1961 will") which named the plaintiff and the defendant as executors and trustees and directed them to distribute his estate according to Muslim law. About seven years later, on February 13, 1968, the deceased, who suffered from chronic diabetes, was admitted into the General Hospital, Johore Bahru. On February 18, he was discharged at the request of his

[1] [1975] 1 MLJ 30. Affirmed on appeal by the Federal Court (as yet unreported).

[2] See Fyzee A.A., *Outlines of Mohammadan Law*, (1964) 3rd ed., p. 348. See also Taylor E.N., *Customary Law of Rembau* (JMBRAS Vol. VII) p. 92 and the Small Estates (Distribution) Act 1955 s. 22.

[3] See *Siti binte Yatim* v. *Mohamed Nor bin Buyai* (1928) 6 F.M.S.L.R. 135.