HIGH COURT OF AUSTRALIA

GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

TIMOTHY VISSCHER APPLICANT

AND

THE HONOURABLE PRESIDENT
JUSTICE GIUDICE & ORS RESPONDENTS

Visscher v The Honourable President Justice Giudice
[2009] HCA 34
2 September 2009
S30/2008

ORDER

1. *Special leave to appeal granted.*

2. *Appeal treated as instituted, heard instanter and allowed.*

3. *Set aside the orders of the Full Court of the Federal Court made on 21 December 2007 and in lieu thereof order that:*

    a) *a writ of certiorari issue to the Australian Industrial Relations Commission quashing:*

        i) *the decision of the Full Bench of the Australian Industrial Relations Commission dated 9 October 2006 in matter C2006/132; and*

        ii) *the decision of Commissioner Redmond of the Australian Industrial Relations Commission dated 5 May 2006 in matter U2004/2387; and*

    b) *a writ of mandamus issue to the Australian Industrial Relations Commission, directing it to hear and determine matter U2004/2387 in accordance with law.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with N J Owens for the applicant (instructed by Yeldham Price O'Brien Lusk Lawyers)

G J Hatcher SC with B K B Cross for the second respondent (instructed by Deacons Lawyers)

Submitting appearance for the first respondents

CATCHWORDS

Timothy Visscher v The Honourable President Justice Giudice

Industrial law – Contract of employment – Where employee promoted to Chief Officer but promotion later sought to be rescinded by employer – Where employee continued to perform duties and receive salary equivalent to that of Chief Officer – Whether rescission of promotion effective to terminate contract of employment.

Contract – Contract of employment – Repudiation – Where employer repudiated contract of employment – Whether acceptance of repudiation by employee necessary to terminate contract of employment – Relevance of distinction between contract of employment and employment relationship – Whether employee estopped from denying that repudiation effective to terminate contract of employment.

Industrial law – Certified Agreement – Where annexure to Certified Agreement listed gradings of employees – Whether grading listed in Certified Agreement conclusive as to employee's position.

Words and phrases – "at the initiative of the employer", "contract of employment", "employment relationship", "repudiation", "termination".

Workplace Relations Act 1996 (Cth), ss 170CD(1B), 170CE(1)(a), 170CH(3).

1 GUMMOW J. The appellant (Mr Visscher) is an experienced merchant naval officer. On 9 March 2004 he filed an application to the Australian Industrial Relations Commission ("the AIRC"). He sought reinstatement in response to what he maintained was the harsh, unjust or unreasonable termination of his employment by the second respondent, Teekay Shipping (Australia) Pty Limited ("the employer"). Following a hearing on 1-2 March 2006, on 5 May 2006 the application was dismissed by Commissioner Redmond. After a hearing on 23 July 2006, an application for leave to appeal to the Full Bench was dismissed on 9 October 2006 by the President, Senior Deputy President Drake and Commissioner Bacon.

2 From this Court Mr Visscher now seeks special leave to appeal against the dismissal by the Full Court of the Federal Court (Ryan, Madgwick and Buchanan JJ[1]) of his application, commenced in this Court but remitted by consent to the Federal Court, for mandamus and certiorari directed to Commissioner Redmond and the Full Bench. These members of the AIRC together comprise the first respondent in this Court.

3 At the heart of Mr Visscher's case for mandamus and certiorari are the contentions that jurisdictional error attended the dismissal by Commissioner Redmond of his application to the AIRC and that the Full Bench therefore erred in refusing him leave to appeal; he submits that his employment had been terminated at the initiative of the employer, within the meaning of the legislation, and that to hold to the contrary was to fall into jurisdictional error.

4 The Full Court correctly approached the application for relief under s 75(v) of the Constitution on the footing that no question of the exercise by the Full Bench of its powers arose unless it was first shown that Commissioner Redmond had fallen into jurisdictional error.

5 The phrases "jurisdictional error" and "jurisdictional fact" take their content from the particular terms of the conferral of authority on the decision-maker in question. Even where that authority is conferred in terms of "satisfaction" that a stipulated state of affairs exists, it will still attract review under s 75(v)[2]. The present dispute does not fall in that category. Rather, the jurisdiction of the AIRC was enlivened only if, in the statutory sense, Mr Visscher was an employee whose employment had been terminated at the initiative of the employer.

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1 (2007) 170 IR 419.

2 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[136]; [1999] HCA 21.

The legislation

6 The first task is to construe the relevant statutory provisions. These appeared principally in Pt VIA, Div 3 Subdiv B of the *Workplace Relations Act* 1996 (Cth) ("the Act") as it stood at 22 February 2004[3], which, as outlined later in these reasons, is the date on which Commissioner Redmond found Mr Visscher to have resigned. Part VIA was headed "Minimum entitlements of employees" and Div 3 (ss 170CA-170HI) "Termination of employment". Subdivision B (ss 170CE-170CJ) was headed "Application to [AIRC] for relief in respect of termination of employment". Further, Pt VIB (ss 170L-170NI) provided for "Certified agreements". Part VIB had been introduced into the Act in 1996[4].

7 Mr Visscher was an "employee" for the purposes of the termination of employment provisions because he was a "Federal award employee" employed by a "constitutional corporation" (s 170CB(1)(C)). The expression "Federal award employee" includes "an employee any of whose terms and conditions of employment are governed by ... a certified agreement" (s 170CD(1)).

8 The relevant certified agreement in force on 22 February 2004 was the "Teekay Shipping Australia/Australian Maritime Officers Union (Deck Officers) Sea-Going Officers Agreement 2001", which had come into force from 5 May 2002 ("the 2001 Certified Agreement"). Mr Visscher was at all relevant times a member of the union ("the AMOU") and the 2001 Certified Agreement was expressed by cl 3 to be binding upon him (and other Masters and Deck Officers), the AMOU, and the employer. Accordingly, they were bound to the 2001 Certified Agreement by force of s 170M. As a matter both of law and practical reality, it would not have been open to the employer to deal with matters of promotion and seniority of Masters and Deck Officers contrary to provisions of the 2001 Certified Agreement.

9 Section 170CE(1) relevantly provided that "an employee whose employment has been terminated by the employer may apply to [the AIRC] for relief in respect of the termination of that employment ... on the ground that the termination was harsh, unjust or unreasonable ...". The word "termination" means "termination of employment at the initiative of the employer" (s 170CD(1)).

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3 Reprint No 6.

4 *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), Sched 8, Item 19.

10 Section 170CE(1) thus both creates a new right in the employee and confers jurisdiction on the AIRC[5]. The functions of the AIRC include those conferred on it by the Act (s 8A).

11 By his application to the AIRC, Mr Visscher sought the remedy of "reinstatement". This was an invocation of the power of the AIRC, if it considered it appropriate, to make an order requiring the employer to reappoint him "to the position in which [he] was employed immediately before the termination" (s 170CH(3)(a)).

The statutory framework

12 Before turning to the particular circumstances of the litigation, something more should be said respecting the statutory framework. It will be apparent that Mr Visscher did not claim any common law remedy and that, rather, he sought from the AIRC the statutory remedy of reinstatement on the ground that the alleged termination of his employment was, in the terms of the statute, "harsh, unjust or unreasonable". The reinstatement which he sought was to his position. But the terms and conditions of his employment were to a significant degree governed by the 2001 Certified Agreement.

13 It is well settled that, in those circumstances, the relationship between the 2001 Certified Agreement and the terms of any contract between Mr Visscher and the employer, was that the former controlled the relationship as to all matters to which it applied[6]. The result is that the "employment", the termination of which Mr Visscher complained pursuant to s 170CE(1), was a relationship which represented a compound of statutory elements (by operation of the Act upon the certified agreements) and of the common law of contract, but the statutory elements predominated. The employer correctly submits that it would be a distraction to construct and apply an hypothesis of what would have been the contractual relationship between the parties in the absence of the legislation.

14 This consideration received no adequate response in the submissions of Mr Visscher to this Court. He sought to show that in the events that happened there had been a contractual repudiation by the employer. However, as Buchanan J, who gave the leading judgment in the Full Court, pointed out, whatever Mr Visscher's position under the general law may have been in a

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5 See s 170CEA.

6 *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 422-423; [1938] HCA 19; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 254-255, 287-288; [1980] HCA 8; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421; [1995] HCA 24.

legislative vacuum, the general law was subordinated to the superior operation of the 2001 Certified Agreement from the time it came into operation on 5 May 2002. Accordingly, the treatment of the general law respecting unaccepted repudiation of employment contracts by this Court in *Automatic Fire Sprinklers Pty Ltd v Watson*[7] and the House of Lords in *Rigby v Ferodo Ltd*[8] cannot be determinative of the application of the Act in the present case.

Factual findings

15 The Full Bench agreed with the construction of the material events accepted by Commissioner Redmond. Mr Visscher was qualified for employment as Chief Officer on the oil tankers operated by the employer. In March 2000 Mr Visscher commenced casual employment and in March 2001 he was offered permanent employment as a Third Mate. At that time the relationship between Mr Visscher and his employer was governed by two industrial instruments given force and effect by the Act in the sense described above. They were the Maritime Industry Seagoing Award 1998 and the Teekay Australia/AMOU (Deck Officers) Agreement 1998 ("the 1998 Certified Agreement"). It follows that the relationship between Mr Visscher and the employer was not formed in circumstances in which it was governed exclusively by the general law respecting employment contracts.

16 Early in September 2001 Mr Visscher accepted an offer of promotion on merit from Third Mate to Chief Officer. The 1998 Certified Agreement had provided for positions to be filled "on merit, performance, experience and service", subject to qualification which in Mr Visscher's case was satisfied. However, the AMOU protested against the promotion of Mr Visscher and at least one other promotion. On 7 September 2001 the employer notified a dispute and sought the assistance of the AIRC to avoid industrial action. Thereafter, as Buchanan J remarked, Mr Visscher appears to have been caught up in a process where his personal interests were of little apparent importance to the other parties.

17 The AMOU had sought the holding open of vacancies for permanent First Mate positions to allow permanent deck officers to obtain masters' certificates (as already had Mr Visscher) and so become eligible for appointment as permanent First Mates. The dispute was listed before Commissioner Raffaelli and on 11 September 2001 he issued a statement. This was critical of the making of the promotions and recommended that the employer rescind them. The

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7 (1946) 72 CLR 435; [1946] HCA 25. See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 426-429, 453-457.

8 [1988] ICR 29.

Commissioner recommended that "the parties continue their enterprise bargaining discussion generally and in particular in respect of the Promotions Policy".

18 On 20 September an officer of the employer wrote to Mr Visscher. The letter referred to a statement by a member of the AIRC which was critical of the promotion of Mr Visscher. It continued:

> "Because of the threat of protected action by the AMOU and the commissioners' recommendations, [the employer has] decided to capitulate and rescind the promotions. This is extremely unfortunate as the promotions were made in good faith by the company and accepted in good faith by the individuals.
>
> What this will mean for you at this present time is still a little unclear. [The employer does] need to discuss the issue with the AMOU. Until the [Enterprise Bargaining Agreement ('EBA')] is agreed and registered, it means that no permanent promotions can be effected. It does not mean that you will not be promoted in the future. Also, [the employer is] committed to any promotions that are made after the registration of the new EBA, all promotions will be backdated to the effective date of the vacancy occurring."

19 The 2001 Certified Agreement was the product of negotiations which then were conducted between the employer and the AMOU. Clause 23 made detailed provision for the filling of positions on merit, performance, experience and service. But cl 23 also contained provisions to assist officers who "due to lack of sea-time" did not have the necessary certificate; they were allowed a period in which to complete requirements for the certificate and to obtain promotion instead of those already qualified.

20 Significantly for the situation of Mr Visscher, cl 23.4 stated:

> "The grading (or rank/service) list attached will be the basis for future promotions/transfers, etc."

Item 36 of the "Deck Officers Grading List", as at 15 February 2002, which was Appendix A, listed Mr Visscher as "3rd Officer", whose employment at that grade had commenced on 23 March 2001.

21 The context in which the Certified Agreement was negotiated, including the letter to Mr Visscher of 20 September 2001, as well as the express terms of cl 23.4 and Item 36, make it plain that this instrument laid down the basis upon which thereafter the gradings of currently serving officers was to be considered under the promotions system for which it provided.

22 i In the Full Court, Buchanan J remarked:

> "To the extent that it imposed obligations which were inconsistent with the position at common law (ie under Mr Visscher's contract of employment) [the employer] was bound by the superior legal force of the [2001] Certified Agreement (operating through [the Act])."

The treatment by the employer of Mr Visscher as holding a position other than that which accorded with the grading system in the 2001 Certified Agreement would be at odds with its statutory force given by the Act. It is not a matter simply of asking whether this grading system is conclusive as to the position of Mr Visscher; the question is to be answered by acceptance of the binding and paramount operation of the relevant law of the Commonwealth which is given by covering cl 5 of the Constitution[9].

23 Thus, in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[10], Stephen J, with reference to *Amalgamated Collieries of WA Ltd v True*[11], considered that a right to terminate the defendant's employment upon reasonable notice would conflict with the termination provisions in cl 6B of the relevant certified agreement under the Act. His Honour went on, with the other members of the majority, to decide the central issue in the case by holding that there was no inconsistency, in the sense of s 109 of the Constitution, between the certified agreement and the *Equal Opportunity Act* 1977 (Vict).

24 The further significance of the 2001 Certified Agreement and the events which followed, were explained by Buchanan J as follows:

> "There are three provisions in [the 2001 Certified Agreement] which are of particular significance for the present proceedings. They are:
>
> '*5.1 This agreement is binding on the employer, the officers and the AMOU. This agreement will be registered under division 2 of the Certified Agreement provision of the Act.*
>
> *5.4 The parties agree that no officer, including Deck Cadets, shall be employed other than [on] the terms of this agreement.*

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9 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563-564; [1997] HCA 25.

10 (1980) 142 CLR 237 at 254-255; [1980] HCA 8.

11 (1938) 59 CLR 417.

23.4 The grading (or rank/service) list attached will be the basis for future promotions/transfers, etc.'

Appendix A ... (the 'list attached') showed Mr Visscher ranking 36th in the seniority order of [the employer's] Deck Officers. He was shown as a Third Officer. At this time there were three positions of Chief Officer which were being held open for other officers who, unlike Mr Visscher, were not immediately qualified for permanent appointment as Chief Officer. It appears from the evidence that, at all relevant times thereafter, three or four positions as Chief Officer were held open for various other officers on this basis.

Mr Visscher was, on 5 July 2002, offered permanent promotion to the position of Second Mate. Mr Visscher's evidence is that he rebuffed this as unnecessary in view of his continuing contract of employment as Chief Officer but it appears to have formed the basis for payment arrangements to him, with his salary thereafter being calculated on the basis of the pay of a Second Mate plus a higher duties allowance to Chief Officer.

On 26 June 2003 Mr Visscher was advised that [the employer] had finally reached an agreed position with the AMOU 'regarding the Mate's grading list'. As part of this agreement the 'agreed 12 month qualifying period for Second Mates to attain their Masters Certification was increased to 20 months'. This arrangement appears to have further blocked Mr Visscher's permanent promotion to Chief Mate although throughout the relevant period, as was earlier noted, Mr Visscher continued to sail as Chief Officer in receipt of a higher duties allowance.

In November 2003 an incident occurred between Mr Visscher and the then Master of the *Samar Spirit* which Mr Visscher, on his evidence, found to be unacceptable. When the voyage was complete Mr Visscher informed [the employer] that he did not wish to remain on the ship for future voyages. This led to various communications, both oral and written, which brought the question of Mr Visscher's status to a head. Mr Visscher then sailed a voyage as Chief Officer on the *Broadwater*. He subsequently sailed one further voyage on the *Broadwater* as Chief Officer, without prejudice, before his relationship with [the employer] finally ended."

The events of 2004

25 Mr Visscher contends that from 7 September 2001 he was permanently employed as a Chief Officer. The employer accepts that Mr Visscher was promoted to such a position on that date but says that on 20 September 2001 it rescinded his promotion. Even if the rescission would have constituted a repudiatory breach of his contract of employment, the employer argues that it

would have been effective to bring any contract of employment with Mr Visscher as a permanent Chief Officer to an end.

26 Mr Visscher continued to carry out the duties of a Chief Officer for Teekay after 20 September 2001. He says he did so as a permanent Chief Officer. The employer says he was only acting in the position. As Buchanan J noted, after an incident in November 2003, matters came to a head. Mr Visscher left his employment with the employer. He says he did so because the employer again demoted him from the position of permanent Chief Officer and, on this occasion, he accepted the repudiation of his contract of employment. The employer says that Mr Visscher resigned. It stresses the finding by Commissioner Redmond that the employer did not intend to end the employment relationship, and, to the contrary, it wished the relationship to continue.

27 On 8-9 January 2004 there were conversations between Mr Visscher and Mr Bray, the employer's personnel officer. The Full Bench was prepared to accept the account given by Mr Visscher. This was that after his current tour of duty on the MV "Samar Spirit" he was to join MV "Broadwater" for a single tour of duty, thereafter, he would be sailing as Second Mate. With that latter proposal Mr Visscher disagreed.

28 On 22 February 2004, Mr Visscher wrote to his employer (by e-mail) recording that it had required him to sail as Second Mate. He continued, in a manner which the Full Bench described as pre-emptive, by saying:

> "This constitutes a demotion from my position of Chief Officer and it is unacceptable. Demotion is a constructive termination of our contract of employment by [the employer]. I will therefore consider my employment as being terminated by [the employer] upon leaving the MT Broadwater on or about 26 February 2004.
>
> At your earliest convenience please pay into my bank account all entitlements."

The employer responded on 24 February that he had "never been graded Chief Officer" and was "currently graded Second Mate", and continued:

> "You have a contract of employment with [the employer] as a Deck Officer. You were originally employed as a Third Mate. [The employer] does not consider a demotion in rank for any officer to constitute constructive dismissal.
>
> On this basis [the employer] is treating your email as a resignation."

29 Commissioner Redmond found that the actions of the employer had not repudiated the contract of employment, that there was no termination at the initiative of the employer and that Mr Visscher had brought his employment to

an end on 22 February 2004 by his resignation. It followed that he had no right conferred by s 170CE(1) to apply to the AIRC and the application had to be dismissed for want of jurisdiction.

Conclusions

30 There was no termination of the employment of Mr Visscher at the initiative of the employer. It may be accepted that "termination" for the purpose of s 170CE(1) may include a "demotion in employment" which involves a significant reduction in the remuneration or duties of the demoted employee (s 170CD(1B)). However, from its commencement the 2001 Certified Agreement had specified the place of Mr Visscher in the Deck Officers Grading List at a rank lower than that of Chief Officer.

31 Mr Visscher had been paid as a Second Mate with a higher duties allowance to Chief Officer and had performed those duties. But the employer correctly submits that, given the predominant operation which must be accorded to the 2001 Certified Agreement, whilst Mr Visscher was acting in the position of Chief Officer he was not permanently engaged as such. To construe the course of events by reference to no more than what in the absence of the Act would be the operation of the common law of contract would be to apply the remedial provisions of Pt VIA (in particular, of ss 170CE-170CJ) without giving effect to the certified agreement provisions of Pt VIB.

32 The relationship between the employer and Mr Visscher came to an end following his unjustified assertion by the 22 February 2004 email of "demotion from my position of Chief Officer" as constituting "constructive termination of our contract of employment".

33 The employer properly denied that there had been any demotion in Mr Visscher's current grade, and Commissioner Redmond correctly concluded that the jurisdiction of the AIRC under s 170CE(1) had not been attracted.

Orders

34 Special leave to appeal should be granted but the appeal should be dismissed. Section 347 of the Act makes special provision respecting costs in a matter, including an appeal, "arising under" the Act, and the general provision in s 26 of the *Judiciary Act* 1903 (Cth) is to be read accordingly[12]. No order under

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12 *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654; [1997] HCA 40. See also *Re Commonwealth; Ex parte Marks* (2000) 75 ALJR 470 at 476-477 [25]-[28]; 177 ALR 491 at 498-499; [2000] HCA 67.

s 347 is sought, and, in any event, this would not be a case for an order under that section.

35 HEYDON, CRENNAN, KIEFEL AND BELL JJ. In proceedings before the Australian Industrial Relations Commission ("the AIRC") the applicant, Mr Visscher, claimed that his employment with the second respondent, Teekay Shipping (Australia) Pty Limited ("Teekay") had been terminated and that the termination was harsh, unjust or unreasonable within the meaning of s 170CE(1)(a) of the *Workplace Relations Act* 1996 (Cth) ("the WRA")[13]. He sought reinstatement by appointment to the position in which he had been employed immediately before the alleged termination[14].

36 It was Mr Visscher's case that in January 2004 Teekay required him to undertake the role of a Second Mate on vessels in its fleet when his permanent position was that of a Chief Officer (also referred to as First Mate or Chief Mate). Teekay's response was that Mr Visscher had briefly been promoted to that position in September 2001 but that the promotion had been rescinded shortly thereafter, with Mr Visscher returning to the position of Third Mate. It had subsequently promoted him to Second Mate. However Mr Visscher continued to perform the duties of a Chief Officer and receive the same amount by way of salary as a Chief Officer. At a meeting in March 2004 a representative of Teekay said that Mr Visscher had only been acting in that role.

37 Mr Visscher regarded Teekay's requirement of him to sail as a Second Mate as a repudiation of his contract of employment. On his case the termination of the employment relationship was "at the initiative of the employer"[15]. Alternatively, Teekay's requirement could be viewed as a demotion. Section 170CD(1B)[16], by implication, treated a demotion as a termination of employment where it involved a significant reduction in the remuneration or duties of the employee. On either approach it was necessary for the AIRC to consider whether Mr Visscher was employed as a Chief Officer when the acts which resulted in the cessation of his employment occurred.

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13 Which ceased to have effect as of 1 July 2009, see *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth), s 2 and Sched 1. The relevant reprint of the *Workplace Relations Act* 1996 (Cth) is Reprint 6.

14 Pursuant to the *Workplace Relations Act* 1996, s 170CH(3).

15 See *Workplace Relations Act* 1996, ss 170CD(1), "***termination***" and 170CH(3).

16 Added by the *Workplace Relations Amendment (Termination of Employment) Act* 2001 (Cth), Sched 1, Item 9.

38 Mr Visscher was not successful in his application before Commissioner Redmond nor on appeal, before the Full Bench[17] of the AIRC[18]. The Full Court of the Federal Court dismissed his application for writs of mandamus and certiorari, which had been brought under s 75(v) of the Constitution to this Court and remitted to that Court[19].

39 The Full Court concluded that Mr Visscher was unable to establish the fact upon which his allegation of jurisdictional error on the part of the AIRC depended, namely that a contract whereby he was appointed a Chief Officer continued in existence in 2004[20]. Two grounds were given for that conclusion. It held that Teekay's actions in September 2001 were effective to "terminate Mr Visscher's employment as a permanent Chief Officer"[21]. This appears to have also been the view of the Full Bench of the AIRC[22] and was likely to have been influential in the decision reached by Commissioner Redmond. The second ground identified by the Full Court had regard to the terms of a Certified Agreement which came into force on 5 May 2002 ("the Certified Agreement")[23]. The Court held that Mr Visscher, as a Deck Officer who was a member of the Australian Maritime Officers Union ("the AMOU") and employed by Teekay, was bound by the terms of the Certified Agreement[24]. In the agreement he was listed as a Third Officer (or Third Mate), and subsequently as a Second Mate, but

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17 President Justice Giudice, Senior Deputy President Drake and Commissioner Bacon.

18 See *Workplace Relations Act* 1996, s 120 (Reprint 7) for matters in which an appeal lies to the Full Bench.

19 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419.

20 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 423 [18] and 432 [59].

21 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 431 [54].

22 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 13 [21].

23 The "Teekay Shipping Australia/Australian Maritime Officers Union (Deck Officers) Sea-Going Officers Agreement 2001".

24 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 425 [32].

never as a Chief Officer. The Certified Agreement was taken to be conclusive as to his position[25]. That conclusion is not correct as a matter of construction of the Certified Agreement, for the reasons which follow. Further, the approach of the Full Court and the AIRC to the rescission of Mr Visscher's contract as a Chief Officer proceeded upon a wrong assumption of law.

The facts

40 Mr Visscher commenced casual employment with Teekay in March 2000. In March 2001 he accepted an offer of permanent employment as a Third Mate. It was found by Commissioner Redmond that in August 2001 Mr Visscher was offered a promotion to the position of a Chief Mate, which he accepted on 7 September 2001. It does not appear to have been disputed that Mr Visscher satisfied the requirements of the Certified Agreement of 1998, then in force, for promotion to such a position.

41 An industrial dispute arose between Teekay and the AMOU concerning, relevantly, the promotion. The AMOU demanded that Teekay hold open vacancies for permanent positions as Chief Officer in order to allow employees with longer service to obtain the necessary qualifications. The Commissioner who dealt with the dispute recommended, on 11 September 2001, that "promotions recently made" be rescinded. Teekay notified Mr Visscher on 20 September 2001 that it intended to comply with the recommendation and that his "recent promotion to permanent 1st Mate is unfortunately rescinded". Mr Visscher did not accept the rescission. The Full Bench of the AIRC observed that he "thereafter maintained that it was of no legal effect"[26]. However he remained in Teekay's employ, continuing to undertake the role and duties of a Chief Officer and receiving an amount equal to the salary of a Chief Officer, as earlier mentioned.

42 On 5 March 2002 the AIRC certified the Certified Agreement. It was to take effect from 5 May 2002 and remain in force until 1 July 2004. It was expressed to be binding on employees of Teekay who were members of the AMOU and engaged as Masters or Deck Officers on vessels defined as the "fleet" operated or managed by Teekay. It dealt with a number of subjects including "Employee Performance & Career Progression". Clause 23.4 provided

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25 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 432 [58].

26 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 8 [3].

that the "grading (or rank/service) list attached will be the basis for future promotions/transfers etc". That was a reference to Appendix A to the Agreement, which comprised a "Deck Officers Grading List", and which was stated to be: "As at 15th February 2002". Mr Visscher was there listed as a "Third Officer", that is Third Mate. The Commissioner found that the gradings list was available to employees on a monthly basis. It may be assumed that Teekay updated the list when changes to staff or gradings occurred.

43 On 5 July 2002 Teekay wrote to Mr Visscher and offered him a permanent position as a Second Mate. His evidence was that he rejected the offer as unnecessary, given his existing contract of employment as a Chief Officer. Subsequent to this letter Mr Visscher appeared in the gradings list as a Second Mate.

44 At the time of his promotion to a Chief Officer Mr Visscher was engaged on the "Samar Spirit" and he continued to perform the duties of a Chief Officer on that vessel until early January 2004. The evidence before the Commissioner was that, from the time of the AIRC's recommendation that promotions be rescinded, Mr Visscher's payslips showed that he was paid a higher duties allowance, in addition to his pay which was at the rate of a Third Mate and later as a Second Mate.

45 On 8 and 9 January 2004 Mr Visscher had conversations with another employee of Teekay, Mr Bray. They concerned the position in which Mr Visscher would work after the conclusion of his current tour of duty on the "Samar Spirit" and a further tour of duty on the "Broadwater". Different accounts were given by Mr Visscher and Mr Bray as to what was said. In his email to Teekay of 22 February 2004, Mr Visscher claimed that Mr Bray had said that he, Mr Visscher, would be required to sail as a Second Mate. Mr Bray's evidence was that he said Mr Visscher would have to do so if no position as a Chief Officer was available and that Mr Visscher did not react negatively to that prospect. Commissioner Redmond did not make findings as to what was said. He made a general statement that he accepted Teekay's evidence as relevant to its belief about the employment relationship continuing but, as the Full Bench of the AIRC correctly observed, little reliance could be placed upon such a statement as findings concerning the events of 8 and 9 January 2004[27].

46 In his email of 22 February 2004 to Teekay, Mr Visscher said that the requirement to sail as a Second Mate constituted a demotion and that he

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27 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 10 [11].

considered his employment as terminated by Teekay upon his leaving the "Broadwater", the vessel upon which he was currently serving. Teekay responded by letter dated 24 February, expressing surprise at his comment about demotion. It said that he was currently graded as a Second Mate and had never been graded as a Chief Officer. It also said that it did not consider a demotion in rank for any officer to constitute constructive dismissal. Mr Visscher filed his application with the AIRC on 11 March 2004.

47 Mr Visscher undertook further work for Teekay for some months after his claim of termination of employment. The basis upon which he did so has not been the subject of findings in the AIRC. Teekay raised an issue before the Commissioner as to whether Mr Visscher's employment was terminated, or whether he resigned in June 2004, but the Commissioner made no determination and the issue does not appear to have been pursued in the following appeals.

The contract of employment

48 Commissioner Redmond did not make any findings as to what resulted from Teekay's notification of the rescission of Mr Visscher's contract as a Chief Officer on 20 September 2001. He noted that Mr Visscher advised Teekay that he did not accept it, but went on to find that Mr Visscher must have appreciated that he was not graded as a Chief Officer and that it must have been evident to him from his payslips what his ordinary rate of pay was and that he was in receipt of a higher duties allowance. This suggests that the Commissioner considered Teekay's repudiation effective to bring the contract to an end, with Mr Visscher continuing his employment in a Third Mate position. This is the view the Full Bench formed of the Commissioner's reasons[28]. Nothing in the Commissioner's reasons suggests that he regarded the Certified Agreement as conclusive of the question of Mr Visscher's position. He may have viewed it as confirming the demotion which had been achieved by Teekay.

49 The Commissioner's reference to Mr Visscher's knowledge about his grading and the basis of his pay is consistent with a view that Mr Visscher understood that he had been demoted. But the Commissioner made no findings about statements by Mr Visscher or conduct on his part following receipt of the notice of rescission which might have suggested his acceptance of what Teekay sought to do. The finding, that Mr Visscher had advised Teekay that he did not accept that his promotion had been rescinded, appears to the contrary of an

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28 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 13 [21].

election on his part to treat the contract as discharged by Teekay's breach[29]. However it is perhaps unwise to read too much into this finding. It stated the fact of the communication by Mr Visscher, not a conclusion about an election on his part. Plainly the Commissioner was not engaged upon such a determination, because he considered Teekay's notice of rescission to have been effective without more.

50 The members of the Full Bench of the AIRC were of the same view concerning the ability of Teekay to rescind the promotion. They determined that the conversations in January 2004 could not amount to a demotion constituting a termination of employment within s 170CD(1B) of the WRA because "the relevant demotion occurred in September 2001"[30].

51 The Full Court did consider the legal consequences of Teekay's notice. Buchanan J, with whom Ryan and Madgwick JJ agreed, held that Teekay's letter of 20 September 2001 amounted to a breach of contract[31]. However, his Honour considered that it had the effect in law of bringing Mr Visscher's employment as a Chief Officer to an end, even though Teekay's conduct was wrongful[32]. This consequence followed upon Mr Visscher being unable to insist upon performance of his contract[33]. Buchanan J said that many of the legal principles applicable to contracts generally apply to contracts of employment, but because they are contracts for personal service they have some special features. His Honour gave as one example "the principle that employment (or an employment relationship) may be effectively discharged by wrongful termination of a contract

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29 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; [1920] HCA 64; *Agricultural & Rural Finance v Gardiner* (2008) 83 ALJR 196 at 209 [58]; 251 ALR 322 at 336; [2008] HCA 57.

30 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 14 [25].

31 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 427 [40].

32 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 430 [49].

33 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 430 [49].

of employment"[34]. The decision of this Court in *Automatic Fire Sprinklers Pty Ltd v Watson*[35] was cited as authority for that proposition.

52 Buchanan J went on to say that the fact that Mr Visscher remained in employment and sailed as a Chief Officer did not lead to a different conclusion[36]. In his Honour's view he continued under a new contract, in a demoted position, as had the employee in *Brackenridge v Toyota Motor Corporation Australia Ltd*[37]. However, as his Honour himself observed[38], there was no breach of the contract of employment by the employer in that case. It was entitled to terminate the first contract and the parties replaced it with another[39].

53 The reasons of Buchanan J elide the concepts of termination of an employment relationship and the discharge of a contract of employment. The concepts are different. It does not follow from the fact that a wrongful dismissal is effective to bring the employment relationship to an end that it thereby discharges the contract of employment. In *Byrne v Australian Airlines Ltd* it was said that[40]:

> "It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation constituted by the wrongful dismissal and puts an end to the

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34 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 427 [42].

35 (1946) 72 CLR 435; [1946] HCA 25.

36 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 430 [50].

37 (1996) 142 ALR 99.

38 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 430 [51].

39 *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99 at 109.

40 (1995) 185 CLR 410 at 427 per Brennan CJ, Dawson and Toohey JJ; [1995] HCA 24.

> contract. That was accepted by both the majority and minority in *Automatic Fire Sprinklers Pty Ltd v Watson* …".

And in one of the passages from *Automatic Fire Sprinklers Pty Ltd v Watson* to which reference was made in *Byrne v Australian Airlines Ltd*, Latham CJ said[41]:

> "An employer terminates the employment of a servant when he dismisses him, though, as I say hereafter, such a dismissal does not put an end to the contract between the parties. An argument that a dismissal because wrongful was a nullity was raised and rejected in both *Williamson's Case*[42] and *Lucy's Case*[43]."

And Dixon J said[44]:

> "… there is nothing in the general law preventing the wrongful dismissal of a servant operating to discharge him from service, notwithstanding that he declines to accept the dismissal as absolving him from further performance but keeps the contract open and remains ready and willing to serve."

As was said in *Byrne*, the position was not always so clear in England[45]. For a time the opinion was maintained that contracts of employment are sui generis, in that certain forms of repudiation are effective automatically to terminate them without the need for their acceptance[46]. But, as has been observed, the theory

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41 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 454; cited in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427.

42 *Williamson v The Commonwealth* (1907) 5 CLR 174 at 185; [1907] HCA 60.

43 *Lucy v The Commonwealth* (1923) 33 CLR 229 at 237, 248, 249, 252 and 253; [1923] HCA 32.

44 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 469; cited in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427.

45 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427.

46 See for example *Vine v National Dock Labour Board* [1957] AC 488 at 500 per Viscount Kilmuir LC; *Sanders v Ernest A Neale Ltd* [1974] ICR 565.

was later rejected in favour of the "elective theory of termination"[47]. Such an approach accepts as correct the general principle in contract law that acceptance by the innocent party of a repudiation is necessary to terminate a contract[48].

54 This is not to say that in a case of dismissal there will ordinarily be anything to be gained by employees refusing to accept the repudiation. Even if they keep the contract of employment on foot, they cannot receive remuneration after the dismissal, because the right to receive it is dependent upon services having been performed[49]. Further, historically the courts would not grant specific performance of a contract of personal service, save in exceptional cases[50]. This was largely because of perceived difficulties in supervision and because the courts were unwilling to compel employers to tolerate an individual employee whom they considered incompatible[51]. In *Automatic Fire Sprinklers Pty Ltd v Watson*, Latham CJ said[52]:

> "… the wrongful dismissal determines the relationship of master and servant created by the contract, even though the servant may not have

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47 McMullen, "A Synthesis of the Mode of Termination of Contracts of Employment", (1982) 41 *Cambridge Law Journal* 110 at 121, see also at 118; and see *Gunton v Richmond-upon-Thames London Borough Council* [1980] ICR 755.

48 *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 250 per Kitto J; [1954] HCA 25; *Holland v Wiltshire* (1954) 90 CLR 409 at 419 per Kitto J; [1954] HCA 42; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 48 per Brennan J; [1985] HCA 14; *Foran v Wight* (1989) 168 CLR 385 at 395 per Mason CJ, 421 per Brennan J, 441 per Dawson J; [1989] HCA 51; see also *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 427 per Lord Reid, 432 per Lord Morton of Henryton.

49 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 465 per Dixon J; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 428 per Brennan CJ, Dawson and Toohey JJ.

50 McMullen argues that there should be no strict rule, especially in the case of large corporations where the personalised nature of the contract assumes less importance: "A Synthesis of the Mode of Termination of Contracts of Employment", (1982) 41 *Cambridge Law Journal* 110 at 127**.**

51 Freedland, *The Contract of Employment*, (1976) at 273 and 275.

52 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 451.

> accepted his dismissal as entitling him to regard the contract as discharged. Any other view would in effect grant specific performance of a contract of personal service, a remedy which the courts have always refused in such a case …".

55 It was said in *Byrne*[53] that, for all practical purposes, the contract of employment will be at an end upon dismissal. In the case of a wrongful dismissal, the possible continuation of it will rarely be of significance. In principle, however, it remains the case that an unaccepted repudiation does not terminate a contract. In the circumstances of this case this assumes importance. To view it as automatically discharged would be to elevate a problem concerning remedies to a substantive principle concerning the termination of contracts.

56 This is not a case involving dismissal, with a consequent destruction of the employment relationship. The employment relationship between the parties continued after 2001, as Buchanan J observed[54]. However his Honour assumed that that relationship continued by reference to a new contract of employment, one by which Mr Visscher was a Third Mate. It may be inferred that it was his Honour's view that, even if Mr Visscher said that he did not accept the rescission of his promotion, Teekay could not be required to permit him to perform his duties as a Chief Officer.

57 It is a feature of this case that the employment relationship continued with Mr Visscher undertaking the duties of a Chief Officer and being remunerated to the same extent. He was never required to undertake the duties of a Third or Second Mate, at least until January 2004, on his evidence. No issue as to the performance of the contract of 7 September 2001 arose.

58 In *Rigby v Ferodo Ltd*[55] the employer purported to reduce its employees' wages during the currency of the employment relationship. The employees made it clear that they were unwilling to accept the reduction and never did accept it. Lord Oliver of Aylmerton said[56]:

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53 (1995) 185 CLR 410 at 428.

54 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 431 [54].

55 [1988] ICR 29.

56 *Rigby v Ferodo Ltd* [1988] ICR 29 at 34-35.

> "Whatever may be the position under a contract of service where the repudiation takes the form either of a walk-out by the employee or of a refusal by the employer any longer to regard the employee as his servant, I know of no principle of law that any breach which the innocent party is entitled to treat as repudiatory of the other party's obligations brings the contract to an end automatically. No authority has been cited for so broad a proposition and indeed [counsel for the appellant] has not contended for it. What he has submitted is that where there is a combination of three factors, that is to say, (a) a breach of contract going to an essential term, (b) a desire in the party in breach either not to continue the contract or to continue it in a different form and (c) no practical option in the other party but to accept the breach, then the contract is automatically brought to an end. My Lords, for my part, I have found myself unable either to accept this formulation as a matter of law or to see why it should be so. I entirely fail to see how the continuance of the primary contractual obligation can be made to depend upon the subjective desire of the contract-breaker and I do not understand what is meant by the injured party having no alternative but to accept the breach. If this means that, if the contract-breaker persists, the injured party may have to put up with the fact that he will not be able to enforce the primary obligation of performance, that is, of course, true of every contract which is not susceptible of a decree of specific performance. If it means that he has no alternative to accepting the breach as a repudiation and thus terminating the contract, it begs the question. For my part, I can see no reason in law or logic why, leaving aside for the moment the extreme case of outright dismissal or walk-out, a contract of employment should be on any different footing from any other contract as regards the principle that 'an unaccepted repudiation is a thing writ in water and of no value to anybody' …[57]".

59 Mr Visscher's case is that he kept the contract alive by his refusal to accept the rescission and that Teekay resiled from its threat to demote him. Such an outcome is possible, for when a contract continues on foot it remains in force for the benefit of both parties and a party's refusal to perform may be withdrawn[58]. In *Automatic Fire Sprinklers Pty Ltd v Watson* Dixon J recognised the possibility that an employer might be induced to retract a discharge, where

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57 Citing *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 at 421 per Asquith LJ.

58 *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 250.

the employee kept his contract open, thereby allowing the employee to resume his service without a new contract[59].

60 Neither the Commissioner nor the Full Bench made express findings of an election, on the part of Mr Visscher, to accept the rescission. The Full Bench made a statement that Mr Visscher had elected to continue his employment and this statement requires consideration. It said[60]:

> "We think the true construction of events, the one the Commissioner accepted, is that the appellant elected to continue his employment after September 2001 in the full knowledge that the respondent had demoted him. Only in February 2004 did he decide to 'recognise' the demotion and characterise it as a termination of employment."

The Commissioner made no finding of an election by Mr Visscher with respect to Teekay's repudiation, which would be necessary to bring the contract of employment to an end, as discussed earlier in these reasons. This passage from the reasons of the Full Bench does not amount to such a finding. It is apparent that the Full Bench used the word "elected" to describe a choice by Mr Visscher to remain in employment with Teekay after the demotion, rather than in its legal sense, to describe a choice between inconsistent rights. On the approach taken by the Full Bench an election, in the latter legal sense, would not arise, because it took the view that Teekay's unilateral rescission was effective to demote Mr Visscher. That approach was based upon a misunderstanding of the law.

61 It does not appear from the arguments put for Teekay, as recorded by the Commissioner, that it contended that Mr Visscher was estopped from denying that the demotion was effective. It did not rely upon anything said, or not said, by Mr Visscher as affecting its belief as to the state of affairs which existed. The references by Teekay in the AIRC proceedings to what appeared in the payslips and in the annexure to the Certified Agreement were equivocal. They could have been relied upon to show that Teekay was acting in a manner consistent with its understanding of the contractual position, but this would not demonstrate any acceptance, on the part of Mr Visscher, to the demotion.

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59 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 465-466 (although the case his Honour then discusses is an example of a new contract).

60 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 13 [21].

62 The Commissioner made no finding about Mr Visscher's knowledge of the annexure to the Certified Agreement, although there was evidence that it was made available to employees on a monthly basis. He did find that Mr Visscher would have appreciated the basis upon which he was paid and said that Mr Visscher "at no time other than in the first instance contested the fact that he was receiving higher duties allowance." The background to this and other findings was an assumption, on the part of the Commissioner, that Teekay's demotion of Mr Visscher was effective. The point which the Commissioner was seeking to make was that Mr Visscher must have appreciated that fact. That assumption was incorrect.

63 In the Full Court Ryan J observed that it was open to the Commissioner to conclude that Mr Visscher had acquiesced in the decision of Teekay to rescind his promotion, because he did not challenge it. In his Honour's view that inference could be seen as reinforced if it were found that Mr Visscher was aware of what was in the payslips concerning his position and how he had been graded in the annexure to the Certified Agreement[61].

64 Acquiescence is a term which is used in a number of senses. In the sense used by Ryan J, it may refer to an estoppel of the kind which would arise in this case if Mr Visscher had stood by and done nothing when his rights were being violated[62]. However when Mr Visscher was advised of Teekay's purported rescission he made plain that he did not accept it. On his case Teekay thereafter did not deny his contractual rights; rather it performed its obligations by maintaining him in the position of a Chief Officer at a remuneration referrable to it.

65 That leaves for consideration the question of Mr Visscher's silence when faced with the payslips. The payslips themselves involved no interference with Mr Visscher's rights. His silence may possibly have conveyed to Teekay something approaching an assent to what was said about his position, although again there does not appear to be any evidence that Teekay was led to such an understanding. In any event there are difficulties in the way of holding him estopped on account of his conduct by his silence. In the first place it would be

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61 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 420-421 [3].

62 *Ramsden v Dyson* (1866) LR 1 HL 129; *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed (2002) at [36-010] and [36-090].

necessary for him to have been under some obligation to speak[63]. It would further be necessary that Teekay acted to its disadvantage or detriment on the basis of what was conveyed to it by Mr Visscher's conduct[64]. Teekay does not appear to have contended that it did so. It is neither necessary nor appropriate to deal further with these questions. They are among the matters yet to be determined by the AIRC.

66 Ryan J alluded to another possible view of Teekay's position, which might also be relevant to an assessment of the parties' conduct. The view is consistent with Mr Visscher's case, that Teekay was in fact performing its obligations under the contract appointing him a Chief Officer. His Honour observed that it may have been open to the Commissioner to find that Teekay's "demotion" of Mr Visscher was "a sham contrived to placate the AMOU and those officers with longer service with Teekay who had apparently complained that Mr Visscher [and another officer] had been promoted over them"[65].

67 The questions whether Mr Visscher may be taken to have accepted Teekay's notice of rescission at some point after his express refusal to do so or whether Teekay's actions showed that it resiled from its repudiation are not questions which have been considered in the AIRC. They are questions which require findings of fact, in particular as to what was said and done by the parties after Teekay's notice of rescission and in connection with Mr Visscher's continuing employment.

68 For the reasons which follow, the Certified Agreement provides no answer to Mr Visscher's claims. It is therefore necessary for the matter to be remitted to the AIRC to determine what occurred concerning the contract of employment, by which Mr Visscher was appointed a Chief Officer, and the basis upon which the employment relationship continued after 20 September 2001. The failure to determine these matters arose from a misunderstanding of the legal efficacy of a repudiation of the contract of employment by Teekay, considered alone. In not

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63 *Thompson v Palmer* (1933) 49 CLR 507 at 547 per Dixon J; [1933] HCA 61.

64 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; [1937] HCA 58; *Thompson v Palmer* (1933) 49 CLR 507 at 547. See also *Foran v Wight* (1989) 168 CLR 385 at 412 per Mason CJ, 436 per Deane J, 454 per Dawson J.

65 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 420 [2].

addressing the question of the terms upon which the employment relationship continued the Commissioner and the Full Bench fell into jurisdictional error[66].

69 Before turning to the issue concerning the Certified Agreement it is necessary to refer to one other aspect of the reasons of the Full Bench. It said that if it were wrong in its conclusion that Mr Visscher's demotion occurred in 2001, the conversations in January 2004 did not constitute a demotion, even on Mr Visscher's version of what was said. The Full Bench said[67]:

> "In light of the history of formal correspondence in relation to changes in classification, something more would be required than the conversations referred to. They were at most an indication of future intention on [Teekay's] part."

The Full Bench said that it had proceeded on the basis that Mr Visscher's version of events was correct, in the absence of findings by the Commissioner as to what was said. Mr Visscher's version, as recorded by the Full Bench, was that Teekay's representative, Mr Bray, said to him that after his tour of duty with the "Broadwater" Teekay would sail him as Second Mate. The Full Bench could not therefore be suggesting that Teekay's intentions, as conveyed, were unclear at this point. If the contract appointing him a Chief Officer remained on foot, Teekay did not intend to continue to carry it out. That would be sufficient to constitute a repudiation without more, which Mr Visscher could accept[68]. For the purposes of Mr Visscher's application, Teekay may have initiated what resulted in the termination of his employment. It is not clear whether the "something more" that the Full Bench thought to be required was a requirement that Teekay commit an actual breach. It would not be correct to recognise that such a requirement existed[69]. And, if Mr Visscher's version of events is correct, which is a matter yet to be determined in the AIRC, it is difficult to see that formal correspondence was necessary to confirm Teekay's stated intention.

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66 *Craig v South Australia* (1995) 184 CLR 163 at 179; [1995] HCA 58; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ; [2001] HCA 30.

67 *Visscher v Teekay Shipping (Australia) Pty Ltd* (2006) 157 IR 7 at 14 [25].

68 See *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 250 per Kitto J.

69 *Foran v Wight* (1989) 168 CLR 385 at 395 per Mason CJ, 416-417 per Brennan J, 433 per Deane J, 441 per Dawson J.

The 2001 Certified Agreement

70 The Full Court held that, regardless of the contractual position, Mr Visscher's interests were subordinated to the superior legal force of the Certified Agreement[70]. It is therefore necessary to turn to the legislative provisions respecting certified agreements and to the terms of the Certified Agreement in this case.

71 Buchanan J referred to the Certified Agreement as having that superior legal force, because of the provisions of the WRA[71]. So much may be accepted. An agreement which is certified by the AIRC[72] prevails over terms and conditions specified in a State law, award or employment agreement[73] and displaces conditions of employment specified in certain Commonwealth laws[74], to the extent of any inconsistency. Moreover an agreement made under Div 2 of Pt VIB, as this agreement was, binds the employer and all persons whose employment is, at any time when the agreement is in operation, subject to the agreement[75]. The terms of the Certified Agreement confirmed that to be so. In *Amalgamated Collieries of WA Ltd v True*[76] Latham CJ pointed out that where there was an award the legal relations between employer and employee are determined partly by the award and partly by the contract between them, but "[t]he award governs their relations as to all matters with which it deals."[77] And in *Byrne* it was said that the contract of employment cannot derogate from the

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70 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 432 [58].

71 *Visscher v Australian Industrial Relations Commission* (2007) 170 IR 419 at 431 [56].

72 Pursuant to the *Workplace Relations Act* 1996, s 170LT.

73 *Workplace Relations Act* 1996, s 170LZ(1).

74 *Workplace Relations Act* 1996, s 170LZ(4).

75 *Workplace Relations Act* 1996, s 170M(1).

76 (1938) 59 CLR 417; [1938] HCA 19.

77 *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 423.

terms and conditions of an award, which operates with statutory force[78]. The same may be said of a certified agreement. The question then is the extent to which the agreement has effect with respect to Mr Visscher's grading. That question is to be determined as a matter of the construction of the Certified Agreement, which involves considering the subjects with which it was concerned and its terms.

72 In submissions for Teekay it was suggested that the Certified Agreement was connected with the previous dispute which arose as to Mr Visscher's promotion. If this were the case the Certified Agreement and its gradings might be seen as directed to Mr Visscher. It may well be that the agreement resulted from a desire, on the part of the AMOU, to establish the system for which it contended, but it cannot therefore be assumed that it was directed towards the subject of Mr Visscher's status. The matters with which it was concerned may be gleaned from its terms. It may be seen, by reference to those subjects, that they were not concerned with Mr Visscher and that the Certified Agreement did not involve resolution of any dispute concerning Mr Visscher.

73 In *Byrne v Australian Airlines Ltd*[79] McHugh and Gummow JJ said that the concept of an "industrial dispute" was central to the legislation then under consideration[80]. The prevention and settlement of disputes was a keystone of the WRA[81]. Part VIB, Div 3 provided for the certification of agreements which may be made on terms for settling matters in dispute, preventing further industrial disputes or preventing a situation giving rise to a dispute[82]. In one sense it may be said that the Certified Agreement was addressed to the possibility of further disputes, in the arrangements it put in place for promotions and transfers, but it also concerned wider aspects of the relationship between Teekay and its officers.

74 Another stated aim of the WRA was to ensure that the responsibility for determining matters affecting the relationship between employer and employee

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78 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421 per Brennan CJ, Dawson and Toohey JJ.

79 (1995) 185 CLR 410 at 456.

80 *Industrial Relations Act* 1988 (Cth).

81 *Workplace Relations Act* 1996, s 3(h).

82 *Workplace Relations Act* 1996, ss 170LO and 170LP.

rests with them at the workplace or enterprise level[83]. The certified agreements referred to in Div 2 of Pt VIB were concerned with "matters pertaining to the relationship" between an employer who is a constitutional corporation and persons whose employment is subject to the agreement while it operates[84].

75 The Certified Agreement had as its stated objective high standards of efficiency and service and the aim "to ensure that all officers are provided with a performance based salary and satisfying, long term careers". Its subjects were "Agreement Formalities", "Consultation and Dispute Resolution", "Conditions of Employment", "Employee Performance & Career Progression", "Leave", "Occupational Health and Safety", "Employee Benefits", "Ship Operations" and "Claims and Ongoing Matters". It was in the Part dealing with "Employee Performance & Career Progression" that reference to the Grading List appears.

76 In the earlier Part, "Agreement Formalities", and after the reference to the binding nature of the Agreement, it was said that it applied so that:

> "5.3 An officer commencing their employment with Teekay after the date on which this agreement comes into operation shall be employed in accordance with the terms of this agreement.
>
> 5.4 The parties agree that no officer … shall be employed other than [on] the terms of this agreement".

Under the heading "Collective Bargaining" it was said:

> "6.2 The Terms [and] Conditions of this Agreement shall be a condition of employment and copies of this Agreement will be made available to all existing and new employed officers."

77 Mr Visscher submitted that if the Certified Agreement had the effect of altering his grading this would amount to an acquisition of property contrary to s 51(xxxi) of the Constitution; but he also argued that such an interpretation of the Agreement would be contrary to the "no disadvantage" provisions of the

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83 *Workplace Relations Act* 1996, s 3(b).

84 *Workplace Relations Act* 1996, s 170LI. Such agreements, with organisations of employers (see s 170LJ) or with employees (see s 170LK), require approval of a valid majority of the persons employed at the time and whose employment would be subject to the agreement.

WRA[85]. It is not apparent that those provisions have the protective effect claimed by Mr Visscher, but it is not necessary to further consider these submissions. The matter falls to be determined by reference to the terms of the Certified Agreement.

78 There is nothing in the Certified Agreement which suggests that its subject matter included a reallocation of the positions of individual officers. No reference to such an intention to deal with that subject matter can be found in the body of the Agreement. The only statements concerning Mr Visscher and other officers were made in the Grading List which was an annexure to the Agreement. They stated a fact as to his employment, not a matter expressed to have been the subject of the agreement of the parties to the Certified Agreement. The fact, as it was there stated to be, was that Mr Visscher was a Third Mate. It may have been assumed, at least by the AMOU, that that statement correctly reflected the position achieved by Teekay's letter of 20 September 2001. But if it was wrong, there would be no impediment to its correction, along with other changes to personnel made in the annexure and made available to employees on a monthly basis. The statement in the annexure did not constitute a term of employment to which Mr Visscher was bound.

79 It will also be recalled that the Grading List was said to be "the basis for future promotions/transfers, etc". While this confirms a view of that annexure as containing a statement of officers' present positions, it also reveals it to be an integer in determining what promotions and transfers should be made in the future. It does not reveal any intention to effect a change to the position of any officer upon the Certified Agreement coming into force. There is no referential importation of the gradings into the contracts of employment[86].

80 It follows that if Mr Visscher was employed in January 2004 as a Chief Officer under his contract of employment, nothing in the Certified Agreement was effective to alter that term.

Conclusion

81 Teekay's notice of rescission did not automatically bring the contract appointing Mr Visscher a Chief Officer to an end. It was necessary that

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85 See *Workplace Relations Act* 1996, Pt VIE.

86 Cf *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 255; [1980] HCA 8.

Mr Visscher accept the repudiation before the contract could be terminated. Nothing said in *Automatic Fire Sprinklers Pty Ltd v Watson* suggests any different contractual principle as applying to a contract of employment. In order to decide whether Teekay had repudiated Mr Visscher's contract of employment in January and February 2004 it was necessary for the AIRC to determine the true contractual position between the parties at that time. It was necessary then to determine whether what was said by Teekay at that time amounted to a repudiation such that the termination of the employment relationship could be said to be at its initiative; or whether it amounted to a demotion within the meaning of s 170CD(1B). The correct legal starting point was not that Teekay had rescinded the agreement. Neither the Commissioner nor the Full Bench of the AIRC asked the correct question, as to the contract under which the parties continued after September 2001. This was an error going to jurisdiction.

Orders

82 We agree with Gummow J that special leave should be granted. However we would allow the appeal. The orders of the Full Court of the Federal Court dated 21 December 2007 should be set aside and in lieu thereof it should be ordered that:

(a) A writ of certiorari issue to the Australian Industrial Relations Commission quashing:

(i) the decision of the Full Bench of the Australian Industrial Relations Commission dated 9 October 2006 in matter C2006/132; and

(ii) the decision of Commissioner Redmond of the Australian Industrial Relations Commission dated 5 May 2006 in matter U2004/2387.

(b) A writ of mandamus issue to the Australian Industrial Relations Commission, directing it to hear and determine matter U2004/2387 in accordance with law.