HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

SPYRIDON ERMOGENOUS APPELLANT

AND

GREEK ORTHODOX COMMUNITY OF SA INC RESPONDENT

Ermogenous v Greek Orthodox Community of SA Inc
[2002] HCA 8
7 March 2002
A22/2001

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 3 to 6 inclusive of the order of the Full Court of the Supreme Court of South Australia dated 5 October 2000.*

3. *Remit the matter to that Court for further hearing and determination conformably with the reasons of this Court.*

On appeal from the Supreme Court of South Australia

Representation:

A J Besanko QC with A Rossi for the appellant (instructed by Mantzoros & Partners)

T M McRae for the respondent (instructed by Niarchos & Co)

CATCHWORDS

Ermogenous v Greek Orthodox Community of SA Inc

Contract – Intention to create contractual relations – Engagement of a minister of religion – Whether presumption against intention to create contractual relations.

Churches and Religious Associations – Appointment and removal of ministers of religion – Discussion of presumption that no intention to create contractual relations.

Primary decision-maker was a Magistrate – Appeals – Finding by primary decision-maker – Whether primary decision-maker failed to consider parties' intention to create contractual relations – Appellate review of findings by primary decision-maker.

1 GAUDRON, McHUGH, HAYNE AND CALLINAN JJ. In September 1994, Archbishop Spyridon Ermogenous made a claim in the Industrial Relations Court of South Australia against the Greek Orthodox Community of SA Inc (the respondent in this Court) for sums he claimed were due to him for annual leave and long service leave. He alleged that he had been employed by the respondent since 18 March 1970 but had never received any payment for annual leave and that, on termination of his employment, he had not been paid his long service leave entitlements. While the claim was being heard, a number of Greek Orthodox Communities (some incorporated, some apparently not) were added as respondents. An Industrial Magistrate (Mr A R Cunningham) found that the present respondent was liable to pay to the Archbishop an amount ($23,989.35) for payment in lieu of accumulated annual leave and a further amount ($10,672.80) for accumulated long service leave. Judgment was given against the respondent for the total of these amounts, together with interest[1]. The claims made in the alternative against the other Greek Orthodox Communities which had been joined need not be considered. They did not succeed at trial and they have not been pursued in this Court.

2 The respondent appealed against the judgment to a single judge of the Industrial Relations Court of South Australia who ordered that the order of the Industrial Magistrate should be varied in some respects that need not be noticed but otherwise dismissed the appeal[2]. The respondent appealed against this decision, this time to the Full Court of the Industrial Relations Court, but that Court dismissed the appeal[3]. Again the respondent sought to appeal, this time to the Full Court of the Supreme Court of South Australia. That Court, by majority (Doyle CJ and Bleby J; Mullighan J dissenting) granted leave to appeal, allowed the appeal, set aside the order of the Full Court of the Industrial Relations Court and (in effect) substituted an order that the Archbishop's claims be dismissed[4]. By special leave, the Archbishop now appeals to this Court.

3 Two issues were argued on the appeal to this Court – whether the Full Court of the Supreme Court was wrong to hold, as it did, that there had been no intention to create legal relations between the Archbishop and the respondent, and whether it had been open to the Full Court to make (or whether it had erred

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1 *Ermogenous v Greek Orthodox Community of SA Inc* (1997) 64 SAIR 622.

2 *Greek Orthodox Community of SA Inc v Ermogenous* (1998) 65 SAIR 514.

3 *Greek Orthodox Community of SA Inc v Ermogenous* (1999) 66 SAIR 136.

4 *Greek Orthodox Community of SA Inc v Ermogenous* (2000) 77 SASR 523.

in making) the findings of fact which it did. It is convenient to begin by identifying the chief features of the legislative framework in which these issues are to be decided.

The legislative framework

4 The Industrial Court of South Australia, originally established under *The Industrial Arbitration Act* 1912 (SA), was continued in existence as the Industrial Relations Court of South Australia ("the IR Court") by s 8 of the *Industrial and Employee Relations Act* 1994 (SA) ("the Act"). The Act gave[5] the IR Court jurisdiction to hear and determine monetary claims of various kinds, including[6]:

> "a claim for a sum due to an employee or former employee from an employer or former employer under–
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> (i) … [a] contract of employment".

"Contract of employment" was defined in the Act[7] as including "a contract recognised at common law as a contract of employment under which a person is employed for remuneration in an industry". (Nothing in this case was said to turn on the reference to "industry" which was defined to mean, among other things, an "occupation in which employees are employed"[8].)

5 Sections 187, 188 and 191 of the Act provided for appeals. They provided:

> "**Appeals from Industrial Magistrate**
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> **187.** An appeal lies from a judgment, order or decision of the Court constituted of an Industrial Magistrate to the Court constituted of a single Judge.

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5 s 14.

6 s 14(a).

7 s 4(1).

8 s 4(1).

Appeals to Full Court

188. An appeal lies from an order or decision of the Court constituted of a single Judge to the Full Court.

Appeal to Supreme Court

191. (1) An appeal lies to the Supreme Court from a judgment, order or decision of the Full Court if–

(a) the appeal is based on an alleged excess or deficiency of jurisdiction; or

(b) the Supreme Court grants leave to bring the appeal.

(2) The appeal must be heard by the Full Court of the Supreme Court.

(3) On the hearing of an appeal under this section, the Full Court of the Supreme Court may–

(a) confirm, quash or vary the judgment, order or decision appealed against; or

(b) refer the judgment, order or decision back to the Court with directions the Full Court of the Supreme Court considers appropriate.

(4) An application for leave to appeal under this section must be made within 14 days of the date of the judgment, order or decision against which the leave to appeal is sought."

The Act was otherwise silent about the nature of an appeal to the Supreme Court from the Full Court of the IR Court.

6 In the Supreme Court it was contended that, in this case, there was an appeal as of right because, so the present respondent submitted, the appeal was based on an alleged excess or deficiency of jurisdiction. Doyle CJ considered it unnecessary to decide whether this submission was right, being of the view that leave should be granted under s 191(1)(b)[9]. Bleby J, the other member of the majority, concluded that the appeal was brought as of right but went on to say

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9 (2000) 77 SASR 523 at 524 [2].

that, if necessary, he too would have granted leave to appeal[10]. An order was made granting leave. The correctness of that order is not now challenged and there was no debate in this Court about whether the appeal to the Supreme Court was based on an alleged excess or deficiency of jurisdiction. That question can, therefore, be put aside. Nonetheless, that leaves open whether, on the hearing of the appeal, the Full Court of the Supreme Court could substitute its findings of fact for those made below.

7 Before turning to that question it is as well to set out the principal findings made in the IR Court but to preface what is said by reference to one fundamental consideration. No assumption can or should be made that the organisation or institutions of the church and community in and with which the appellant worked in Australia was necessarily similar to the organisation or institutions of the churches of the western or Latin tradition. To take a seemingly small example noted by the Industrial Magistrate[11], the witnesses before him spoke of the "consecration" of priests but the "ordination" of bishops, reversing the customary usages of the western or Latin tradition. This is no more than one example of the error that may be made if there is an unthinking application of the practices of one tradition to another. Especially is that so if the questions concern the structures of church governance, the relationship between clergy and laity, or the relationship between the community and whatever may be the group or institution that is identified by that community as the "church". It will be necessary to return to this subject in considering the decision of the Supreme Court.

The facts found in the IR Court

8 As the Industrial Magistrate said in his reasons for judgment, the appellant "was for more than twenty years the Archbishop of the autocephalous Greek Orthodox Church (or churches) in Australia"[12]. ("Autocephalous" was used in the proceedings below to indicate that the church appointed its own bishop although still in communion with the Ecumenical Patriarch.) The appellant was originally engaged in 1970 following a request he received in 1969, in America,

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10 (2000) 77 SASR 523 at 545 [93]-[94].

11 (1997) 64 SAIR 622 at 640.

12 (1997) 64 SAIR 622 at 628.

where he was archbishop of an autocephalous church. As the Industrial Magistrate went on to say[13]:

> "For the whole of his period in Australia [the Archbishop] was the most senior cleric of the autocephalous church and in spiritual affairs regarded as its earthly head. The autocephalous church commanded the adherence of some, but not all, of the churches in Australia who observe the beliefs, observances and rites of the Greek Orthodox Faith."

9 For many years before the events which gave rise to these proceedings, Australians professing the Greek Orthodox faith, and following Hellenic cultural values, had combined in associations, often incorporated, which, among other things, acquired land, built churches and recruited consecrated clergy of the Greek Orthodox Church. These associations were referred to as "Communities" and it is convenient to continue to adopt that term. The Industrial Magistrate found that the clergy were recruited by the Communities "to provide the religious and spiritual dimension which was seen as an integral basic component of Hellenic and Orthodox culture"[14]. Importantly, he found that, upon appointment, these clergy "were recognised and treated as being employees of [the] [C]ommunity for the duration of their appointments, and were subject to the directions of its officers in their ministrations, subject however to the personal obligations that came with their consecration and the priestly nature of their employment"[15]. This finding that the Communities employed clergy has not been challenged.

10 The Communities' functions were not confined to matters religious. They organised the cultural, social and sporting lives of their members and people were allowed to continue to participate in Hellenic social and cultural activities whether or not they were religiously observant. Since at least the late 1960s, representatives of the various Communities in Australia met from time to time to co-ordinate what the Industrial Magistrate referred to as "the collective efforts and aspirations of the [C]ommunities in both ecclesiastical and secular affairs"[16]. This body was not incorporated but it was known as the Federation of Greek Orthodox Communities of Australia ("the Federation").

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13 (1997) 64 SAIR 622 at 628.

14 (1997) 64 SAIR 622 at 636.

15 (1997) 64 SAIR 622 at 636.

16 (1997) 64 SAIR 622 at 636.

11 By 1969, when the appellant was approached to become Archbishop of the autocephalous church in Australia, there was some tension among Communities in Australia about the organisation of their ecclesiastical affairs. That tension concerned the activity of the Archbishop of Sydney as the immediate representative in Australia of the Patriarch of Constantinople as Ecumenical Patriarch. Some years before 1969, this had led in South Australia to the withdrawal by most of the then members of the respondent (in other Communities to the withdrawal by some of their members) from obedience to the Archbishop of Sydney and later, to the appointment by the South Australian Community, of Archbishop Sergei, a bishop of the Russian Orthodox Church, who was to be available to any participating autocephalous Community.

12 When Archbishop Sergei became ill, the then president of the respondent, Mr Manos, and the then president of the Federation, Mr Elefantis, decided, in late 1969, to approach the appellant and ask him to accept appointment as Archbishop and head of the autocephalous church in Australia. Some, but not all, of the ensuing correspondence between the appellant and Mr Elefantis was tendered in evidence before the Industrial Magistrate. Other letters had been lost or destroyed. The correspondence led to the making of arrangements for the appellant to come to Australia but it was found that both sides to the correspondence accepted that "a more formal engagement [of the appellant], and discussions of the terms and conditions of that engagement, would await [his] arrival in Australia"[17].

13 The appellant came to Adelaide in March 1970. He met members of the respondent whom the Industrial Magistrate described as "in effect the committee of management of the SA Community"[18]. Although no minute or record of the meeting survived, the appellant and others gave evidence about what was said at that meeting. In particular, the appellant gave evidence that he was told by two of the committee members of the respondent that he "would be paid similarly to the priest and … [would] be one of [the respondent's] employees"[19].

14 The Industrial Magistrate accepted the appellant's evidence about what was said at the meeting and concluded that "there was an agreement reached at

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17 (1997) 64 SAIR 622 at 651.

18 (1997) 64 SAIR 622 at 651.

19 (1997) 64 SAIR 622 at 651-652.

this meeting which covered the functions of the archbishop and the terms of his engagement for the time being"[20]. He confined his finding, by adding the reference to "the time being", because, so he found, it was expected that at a meeting of the Federation planned for some weeks later there may be some further developments which might ratify or modify the agreement that had been reached. Nonetheless, the Industrial Magistrate found that the arrangements made at the meeting in Adelaide constituted "a complete and binding agreement … between the [appellant] and the [respondent] which was to subsist at least until other and more formal arrangements had been made with the other communities and agreed by the principal parties"[21]. That is, the Industrial Magistrate found that the agreement "was to remain in force until it was legally and consensually replaced by something different"[22].

15 Despite various proposals that were made at the meeting of the Federation that followed the Adelaide meeting, no other arrangements were made. During the ensuing period of more than 23 years, the respondent paid the appellant the stipend or salary that had been agreed in Adelaide, subject to some occasional increases, until he resigned with effect in December 1993. Throughout this period the respondent deducted PAYE amounts for tax from the amounts it paid the appellant, and it sent the amounts deducted to the Australian Taxation Office. It issued group certificates to the appellant describing him as the employee and itself as the employer. It recorded the payments it made in its own books of account in a ledger called "Salary and House Maintenance for Archbishop etc" as being for "wages-maintenance".

16 It is necessary to notice at this point the formation of an incorporated association under the name "Autocephalic Greek Orthodox Church of America and Australia". This body was established in June 1970 and, at the time, it was intended that it should consist, on the one hand, of "the Religious Leadership comprising the Archdiocese of the Church [of which the appellant was named as being Archbishop] and on the other hand of the Laity comprising of the Communities and their members". In fact, however, the Communities other than the respondent (which had been the moving force for the establishment of this body) did not join in the proposed arrangements. As the Industrial Magistrate

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20 (1997) 64 SAIR 622 at 655.

21 (1997) 64 SAIR 622 at 664.

22 (1997) 64 SAIR 622 at 664.

found[23] "[n]one of the necessary subsequent steps were ever taken, and no change was effected in existing rights of organisation and control, or of property or funds. Everything went on as before."

17 The Industrial Magistrate concluded that the appellant had been employed by the respondent under a contract of employment. Three steps on the way to that conclusion may be noted. First, the respondent's contention that there could be no binding agreement for employment of a minister of religion was rejected. Secondly, the Industrial Magistrate found that the respondent reserved the right to control the way in which the appellant went about his duties. He found[24] that the respondent's officers insisted that the appellant:

> "should adhere to their will and preference in the running of the affairs of the church, whether the issues related to mundane matters of organisation, property and finance, or to the designated reserved area of 'spiritual' matters such as the consecration of priests, the exercise of discipline over the clergy of the church or the calling and conduct of a synod. Those officers clearly reserved to themselves the right of final arbitration over issues as to what matters lay within the [appellant's] jurisdiction of spiritual affairs, and appear to have left very little indeed to the [appellant]. All questions of the basic organisation of the church were theirs to decide, and they appear to have intervened strongly to resist any initiative which the [appellant] himself thought of taking in, for example, the resolution of the fundamental differences with the Ecumenical Patriarch."

Thirdly, the Industrial Magistrate found that the appellant was recruited to join an existing organisation in the evolution of which he was allowed no say and in which he was required to play his role and discharge his duties[25]. He was, in the view of the Industrial Magistrate, a part of the organisation of the respondent.

18 The findings made by the Industrial Magistrate were not varied on the appeals to a single judge of the IR Court or the Full Court of that Court. It is, therefore, convenient to turn to the reasons of the Full Court of the Supreme Court.

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23 (1997) 64 SAIR 622 at 682.

24 (1997) 64 SAIR 622 at 757-758.

25 (1997) 64 SAIR 622 at 759.

The Supreme Court decision

19 Both members of the majority in the Full Court of the Supreme Court (Doyle CJ and Bleby J) took, as their stated starting point, the proposition that an intention to enter a contractual relationship about the remuneration and maintenance and support of a minister of religion is not to be presumed[26]. This proposition was said to find its origin, or at least its support, in several decisions in the United Kingdom (particularly *In re National Insurance Act 1911*; *In re Employment of Church of England Curates* ("the *Curates Case*")[27], *Re Employment of Ministers of the United Methodist Church*[28], *Scottish Insurance Commissioners v Church of Scotland*[29] (sometimes referred to as *Scottish Insurance Commissioners v Paul – "Paul"*), *Rogers v Booth*[30], *President of the Methodist Conference v Parfitt*[31], *Davies v Presbyterian Church of Wales*[32], *Santokh Singh v Guru Nanak Gurdwara*[33], *Birmingham Mosque Trust Ltd v Alavi*[34] and *Diocese of Southwark v Coker*[35]), New Zealand (*Mabon v Conference of the Methodist Church of New Zealand*[36]), Canada (*McCaw v United Church of Canada*[37]) and the United States (*Moses v Diocese of Colorado and Frey*[38],

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26 (2000) 77 SASR 523 at 524-525 [4] per Doyle CJ, 575-576 [207] per Bleby J.

27 [1912] 2 Ch 563.

28 [1912] 107 LT 143.

29 [1914] SC 16.

30 [1937] 2 All ER 751.

31 [1984] QB 368.

32 [1986] 1 WLR 323; [1986] 1 All ER 705.

33 [1990] ICR 309.

34 [1992] ICR 435.

35 [1998] ICR 140.

36 [1998] 3 NZLR 513.

37 (1988) 51 DLR (4th) 86.

38 863 P 2d 310 (1993).

Minker v Baltimore Annual Conference of the United Methodist Church[39]) and one Australian decision (*Knowles v Anglican Church Property Trust, Diocese of Bathurst*[40] a decision of the Industrial Relations Commission of New South Wales). Both Doyle CJ[41] and Bleby J[42] concluded that the Industrial Magistrate had not considered, as a distinct issue, whether the parties had intended to enter a legally binding relationship. Their Honours then proceeded to consider whether there had been such an intention and concluded that there had not.

20 Fundamental to the reasoning of Doyle CJ on this issue was the proposition that a distinction could, and should, be drawn between the "church" and the respondent. As his Honour said[43]:

> "[I]t is important to bear in mind that the [respondent] is not a church, in which the [appellant] held a clerical office. Nor was the [appellant] in any capacity an officer of the [respondent]. The [respondent] is a body that fosters Greek culture in South Australia in the broadest sense. The [respondent] also fosters the practice of the Greek Orthodox faith in South Australia. The [respondent] does not restrict involvement in its affairs to adherents to the Greek Orthodox faith."

Later in his reasons, his Honour said that[44]:

> "In considering the inference to be drawn from the discussions in Adelaide, it is also relevant that the [appellant] was not providing services to the [respondent], but to members of the local Greek Orthodox Church. The role of the [respondent] was to facilitate the availability of the [appellant] to the local church".

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39 894 F 2d 1354 (1990).

40 (1999) 89 IR 47.

41 (2000) 77 SASR 523 at 529 [19]-[20].

42 (2000) 77 SASR 523 at 577-578 [212].

43 (2000) 77 SASR 523 at 526 [9].

44 (2000) 77 SASR 523 at 528 [17].

21 Bleby J drew a similar distinction, speaking[45] of the appellant coming to Australia "to be the spiritual head of a then unincorporated body" and to "provide spiritual ministrations not to the [C]ommunities but to the church".

22 Neither the evidence before the Industrial Magistrate, nor the findings he made, warranted a conclusion that the "church" was to be seen as standing apart from the respondent. This premise for the conclusion reached by the majority of the Full Court of the Supreme Court should, therefore, not be accepted.

23 It is convenient to deal first with the more general issue of intention to create contractual relations.

Intention to create contractual relations

24 "It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty."[46] To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet "[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts"[47].

25 Because the inquiry about this last aspect may take account of the subject-matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances[48], not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs

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45 (2000) 77 SASR 523 at 584-585 [240].

46 *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 457 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ.

47 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 154 per Windeyer J.

48 (1962) 108 CLR 130 at 154; *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353 at 367 per Windeyer J.

between the parties[49] (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened[50]. It is not a search for the uncommunicated subjective motives or intentions of the parties.

26 In this context of intention to create legal relations there is frequent reference to "presumptions". It is said that it may be presumed that there are some "family arrangements" which are not intended to give rise to legal obligations and it was said in this case that it should not be presumed that there was an intention to create legal relations because it was a matter concerning the engagement of a minister of religion. For our part, we doubt the utility of using the language of presumptions in this context. At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof. In this case, where issue was joined about the existence of a legally binding contract between the parties, there could be no doubt that it was for the appellant to demonstrate that there was such a contract. Reference to presumptions may serve only to distract attention from that more basic and important proposition.

27 More importantly, the use of the language of presumptions may lead, as it did in this case, to treating one proposition (that an intention to create legal relations is not to be presumed) as equivalent to another, different proposition (that generally, or usually, or it is to be presumed that, an arrangement about remuneration of a minister of religion will not give rise to legally enforceable obligations). References to "the usual non-contractual status of a priest or minister" and factors which "generally militate against" a finding of intention to

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49 *Masters v Cameron* (1954) 91 CLR 353 at 362 per Dixon CJ, McTiernan and Kitto JJ; *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548-549 per Gleeson CJ.

50 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348-353 per Mason J; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5.

create legal relations[51] illustrate the point. The latter proposition may then be understood as suggesting, in some way, that proof to the contrary is to be seen as particularly difficult and yet offer no guidance at all about how it may be done. Especially is that so when the chief factor said to justify the proposition that an intention to create legal relations must be proved (the essentially spiritual role of a minister of religion) is then put forward as the principal reason not to find that intention in a particular case, and any other matters suggesting that there may be an intention to create legal relations are treated as dealing only with "collateral" or "peripheral" aspects of the relationship between the parties[52]. In practice, the latter proposition may rapidly ossify into a rule of law, that there cannot be a contract of employment of a minister of religion, distorting the proper application of basic principles of the law of contract.

28 It is equally important to notice that the second form of proposition that we have identified may hide the making of some unwarranted assumptions that certain principles and practices of church governance are "usual" or "general", or that a particular kind of relationship between clergy and the church or community in which they work is the norm. No such assumptions can be made.

29 It is convenient to turn now to examine some of the cases said to support the proposition that an intention to create legal relations about remuneration of a minister of religion is not to be presumed. As Bleby J pointed out[53], it was held in most of the cases to which he referred that the minister of religion concerned was not employed under a contract of employment. The cases did not all take the same path to reach that conclusion and, on analysis, it can be seen that there are several different and distinct questions that were seen as determinative.

30 In the *Curates Case*, Parker J noted[54] that a curate in the Church of England owed duties to the vicar of the parish and to the bishop of the diocese, but his Lordship concluded that the authority which each had over the curate came not from some contractual relationship, it came from the fact that the curate held an *office* subject to the laws of the Church in which that office was held. So too, in *Paul*[55], it was held that assistant ministers in the Church of Scotland and

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51 cf (2000) 77 SASR 523 at 576 [207] per Bleby J.

52 (2000) 77 SASR 523 at 576 [207] per Bleby J.

53 (2000) 77 SASR 523 at 563 [173].

54 [1912] 2 Ch 563 at 568-570.

55 [1914] SC 16 at 23-24 per Lord Kinnear, 27 per Lord Mackenzie.

the United Free Church of Scotland held an office the duties of which were defined by the laws of the Church rather than a contract with an employer.

31 In the present case, any conclusion that the appellant was appointed to an office, let alone an ecclesiastical office, would depend upon the conclusions that are to be reached, first about who it was that appointed or engaged him, and secondly, about what was the entity or organisation within which the "office" existed. Both of those issues require consideration of the structures of the organisation in which the office is said to exist. In the *Curates Case* and in *Paul* those issues were readily resolved – by reference, in the former case, to the structures of a church by law established and, in the latter, by reference to the internal rules of the church under which the authority of an assistant minister derived from the licence given to him by the presbytery concerned. By contrast, the question for decision in the present matter required examination of whether "the church" was to be regarded as separate from the respondent and whether the appellant was appointed to an office identified and regulated only by the internal rules of that "church". It should go without saying that those matters of church structure and governance may very well differ in the present case from those that exist in other churches and communities and that there can, therefore, be no automatic translation of what was decided in the *Curates Case* or *Paul* to the present. Whether a conclusion that the appellant had been appointed to an ecclesiastical office would preclude a conclusion that he served in that office under a contract of employment[56] is a question we need not explore.

32 In other cases to which reference was made, both in argument and in the reasons of Bleby J, there was a real question about who would be the employer if there was a contract of employment. In *Parfitt*[57], a minister sued the President of the Methodist Conference because that person was nominated by statute to represent the Methodist Church in all legal proceedings[58] but the contract which he sought to establish was one to which it was said that the Church (an unincorporated body) was party. Likewise, in *Davies*[59], the minister sued an unincorporated body. That body was described by Lord Templeman[60] as the

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56 cf (2000) 77 SASR 523 at 573-575 [203]-[206] per Bleby J; *Marks v The Commonwealth* (1964) 111 CLR 549 at 567-568 per Windeyer J.

57 [1984] QB 368.

58 [1984] QB 368 at 371.

59 [1986] 1 WLR 323; [1986] 1 All ER 705.

60 [1986] 1 WLR 323 at 325; [1986] 1 All ER 705 at 706.

"body of persons who agree to bear witness to the same religious faith and to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed" of that body. Although the reasons in neither case dealt expressly with it, there was an obvious question in each about who it was who was said to be the minister's employer. That question, difficult as it always is in connection with any unincorporated body, was made none the less difficult in *Parfitt* and in *Davies* when it was recognised, as it was in each case, that the terms on which the minister performed his duties were regulated by the various rules of the relevant unincorporated body. No doubt, as Lord Templeman observed in *Davies*, there is an agreement between the members of an unincorporated body to perform and observe the rules of the body, but the extent to which that agreement is enforceable at law, other than in respect of property rights to which a member is entitled under the rules, is at least open to question[61].

33 As was pointed out in *Cameron v Hogan*[62], there are at least two difficulties that arise if action is brought to enforce a contract said to have been made with an unincorporated body. First, there is difficulty in properly constituting the action by sufficiently identifying all the proper parties to the suit (difficulties that may not always be met by constituting the action as a representative proceeding). Secondly, there is the further difficulty[63] of identifying who it is who is said to be responsible for the breach which is alleged. Are all members of the body to be said to be in breach of the contract; are only some to be said to be in breach? These are not mere formal difficulties. They invite close attention to identifying the contract that is alleged to have been made and, in particular, the identification of its parties.

34 Similar but not identical problems in identifying who it is who is said to be the employer can be seen to be reflected in the decision in *Diocese of Southwark v Coker*[64]. The "Diocese of Southwark", initially named by Dr Coker as the respondent to his claim for unfair dismissal, was a description of the district under the jurisdiction of the Bishop of Southwark. It was not a juridical

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61 *Cameron v Hogan* (1934) 51 CLR 358; *Forbes v Eden* (1867) 1 LR Sc & Div 568; *Davies* [1986] 1 WLR 323 at 329-330; [1986] 1 All ER 705 at 710.

62 (1934) 51 CLR 358 at 371.

63 (1934) 51 CLR 358 at 372.

64 [1998] ICR 140.

person and, thus, it was unable to sue or to be sued[65]. The Bishop, and the Diocesan Board of Finance which had paid Dr Coker's stipend as an assistant curate first at one parish and then another, were added as respondents to the claim. But the vicar, whose letter offering appointment "on the diocesan payroll" was found by the industrial tribunal to be an offer to enter a contract of employment, was not a party[66].

35 It is right to notice, as Bleby J did[67], that the reasons of the members of the Court of Appeal in *Coker* said quite a deal about whether there should have been found in that case to have been any intention to create legal relations[68]. For present purposes, however, it is also important to notice that a critical circumstance taken to account in reaching that conclusion was the difficulty in identifying who was to be said to be the employer. Neither the Church Commissioners who actually paid Dr Coker's stipend, nor the Diocesan Board of Finance who made the necessary arrangements for that to be done, appointed him, removed him, controlled the performance of his functions, or had any contract with him[69]. It was the Bishop who had legal responsibility for licensing the appointment of assistant curates, and for the termination or revocation of such an appointment. But as Mummery LJ pointed out[70], the Bishop could not be regarded as the employer:

> "[T]hat relationship [between bishop and curate], cemented by the oath of canonical obedience, is governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement."

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65 [1998] ICR 140 at 142 per Mummery LJ.

66 [1998] ICR 140 at 142-144 per Mummery LJ.

67 (2000) 77 SASR 523 at 569-571 [193]-[195].

68 [1998] ICR 140 at 147 Mummery LJ, 150-151 per Staughton LJ.

69 [1998] ICR 140 at 148 per Mummery LJ.

70 [1998] ICR 140 at 148.

36 Finally, reference must also be made to the statements, found in several cases, that the relationship between a minister of religion and a church is pre-eminently or even entirely spiritual, not contractual[71].

37 That the relationship between a minister of religion and the relevant religious body or group in which, and to which, he or she ministers is, at its root, concerned with matters spiritual is self-evidently true. That the minister's conduct as minister will at least be informed, if not wholly governed, by consideration of matters spiritual is likewise self-evident. It by no means follows, however, that it is impossible that the relationship between the minister and the body or group which seeks or receives that ministry will be governed by a contract, and the respondent in this appeal did not seek to advance any such absolute proposition. Rather, the respondent advanced the more limited proposition, adopted by Doyle CJ and Bleby J, that an intention to enter contractual relations is not to be presumed where the arrangement concerns the engagement of a minister of religion but must affirmatively be proved[72]. Nevertheless, it is as well to identify some aspects of the more absolute proposition earlier identified – that the relationship between minister and church is pre-eminently or even entirely spiritual because, in the end, the conclusion at which the majority of the Full Court arrived, was that the only arrangement or relationship which the appellant had was with a church not the respondent, and was a spiritual, not a contractual relationship.

38 First, although the proposition that the relationship between minister and church is pre-eminently or even entirely spiritual is couched in apparently absolute terms, it has been recognised that there *are* aspects of that relationship which may give rise to legally enforceable rights and duties. As was pointed out in *Davies*[73]:

> "Until the applicant [in that case] was deprived of his pastorate in accordance with the procedures laid down in the book of rules, he was *entitled to be paid his stipend* out of the income of the sustentation fund and *to occupy his manse*." (emphasis added)

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71 *Rogers v Booth* [1937] 2 All ER 751 at 754 per Sir Wilfrid Greene MR; *Lewery v Salvation Army in Canada* (1993) 104 DLR (4th) 449 at 453.

72 (2000) 77 SASR 523 at 524 [4] per Doyle CJ, 576 [207], 584 [236] per Bleby J.

73 [1986] 1 WLR 323 at 329 per Lord Templeman; [1986] 1 All ER 705 at 710.

Secondly, the "essentially spiritual" character of the relationship may take on a different character when one of the parties to the arrangement (the putative employer) is not itself a spiritual body but is, as Staughton LJ said in *Coker*[74], "a school, or a duke, or an airport authority" or, we would add, an incorporated body having the characteristics of the present respondent. To say that a minister of religion serves God and those to whom he or she ministers[75] may be right, but that is a description of the minister's spiritual duties. It leaves open the possibility that the minister has been engaged to do this under a contract of employment.

39 Against the background of this examination of some of the cases relied on by the respondent, it is convenient to turn again to the facts of the present case.

The present case

40 The Industrial Magistrate's finding that the appellant was employed by the respondent under a contract of employment proceeded from the premise of his unchallenged finding that the respondent (and other similar Australian bodies in the same tradition) had previously recruited and employed clergy who were, as we noted earlier, generally subject to the directions of the Communities. Those clergy were, and were treated as, employees of the relevant Community. The respondent, and other Communities, had employed clergy because to do so was to provide for a fundamental element in the preservation of the Hellenic and Orthodox culture they had been formed to enhance and preserve.

41 As the Industrial Magistrate recognised, the respondent was not a "church". Its functions were concerned with more than religious matters. Its members were not all observant practitioners of the Greek Orthodox faith. Attempts were made to establish an incorporated association that would be the civil law expression of what might be described as the "church" as an institution. Those attempts did not succeed. It may be, as Bleby J said, that the constitution of that body accurately reflected the "practical position as it emerged"[76] in relation to some aspects of the way in which these parties ordered their affairs in the 23 years after the appellant came to Australia. But it is not right to say that

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74 [1998] ICR 140 at 150.

75 *Diocese of Southwark v Coker* [1998] ICR 140 at 150 per Staughton LJ.

76 (2000) 77 SASR 523 at 559 [154].

the constitution of the incorporated association reflected the "identity … of an institutional church distinct from the [C]ommunities"[77].

42 It is important to bear steadily in mind that the arrangement which the Industrial Magistrate found to have been made was an agreement between the appellant and the respondent. It was not an arrangement between the appellant and either some subset of the membership of the respondent, or some larger group of bodies or persons. The finding that was made in this respect was one which depended in part upon the Industrial Magistrate accepting, as he did, the appellant's evidence of what was said at the meeting in Adelaide which was held soon after the appellant's arrival in Australia. It was not a finding which was open to appellate review except on the well-known and confined bases described, for example, in *Devries v Australian National Railways Commission*[78], and there was no sufficient basis in this case for departing from the finding that was made. Yet, by separating the "church" from the respondent, that is, in effect, what the majority in the Full Court did.

43 We do not accept that the Industrial Magistrate failed to consider the question of intention to create legal relations. The Industrial Magistrate described the issue as being "Can a minister of religion be in law an employee?" and he dealt at length with the principal cases upon which the respondent relied both in this Court and in the Full Court of the Supreme Court. It seems that, at trial, the respondent advanced an argument framed in absolute terms. The Industrial Magistrate recorded it as being that "a minister of religion – any religion – can not in law be considered an employee of any other person or legal entity". This proposition was rejected. But, read as a whole, the reasons of the Industrial Magistrate reveal that whether the arrangement which he had found to have been made between the appellant and the respondent was intended by them to be subject to the adjudication of the courts was a question at the centre of his consideration.

44 No less importantly, the Industrial Magistrate expressly recognised that, in each of the several cases to which the respondent had referred in support of its submissions, there had been[79]:

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77 (2000) 77 SASR 523 at 559 [155].

78 (1993) 177 CLR 472 at 479.

79 (1997) 64 SAIR 622 at 734.

> "a close consideration of the particular facts of the matter, including the charters, statutes and documents of fundamental belief of each creed considered, the documented position of the clergy in respect of each of the churches mentioned, and the special provisions of statute which govern the actual situation in the law of that particular church."

He undertook a similarly close examination of the evidence that had been called at the trial of this matter about those subjects. That is, he examined, with care, all of the objective circumstances which bore on whether the parties intended to make a contract, as distinct from an arrangement binding only in honour.

45 The Industrial Magistrate did not make the error which the majority in the Full Court of the Supreme Court attributed to him. Even if the Industrial Magistrate did make that error, the inference which the Full Court drew about the absence of an intention to create legal relations was an inference that was not open on the facts that had been found at trial. An inference that there was no intention to create legal relations depended upon making an assumption, contrary to the facts found below, that the "church" was distinct from the "Community", or it depended upon discerning from the decided cases a proposition more general or absolute than those decisions warrant.

46 In its appeal to the Full Court the respondent had put forward, as a separate ground of appeal, that "[i]f there was any enforceable contract it was not in law a contract of employment". The leave to appeal granted by the Full Court was not restricted and it follows that this ground was before it, but the conclusions reached by the majority on the question of intention to create legal relations made it unnecessary for their Honours to decide it. Accordingly, as things now stand, there remains for further argument in the Full Court, the issue whether the contract found to have been made between the appellant and the respondent was a contract of employment. Given the resolution of the question which appears to have been the chief foundation for the Full Court granting leave to appeal to it, despite there having been two previous unsuccessful appeals in this matter, there may be an issue whether this remaining question should be agitated further or, instead, the leave previously granted by the Full Court should to that extent now be revoked. That is a matter for the Full Court.

47 The appeal to this Court should be allowed with costs. Paragraphs 3 to 6 inclusive of the order of the Full Court of the Supreme Court should be set aside and the matter remitted to that Court for further hearing and determination conformably with the reasons of this Court.

48 KIRBY J. To hold that an archbishop is engaged under a contract with a community organisation, indeed a contract of employment, challenges common notions about the status and functions of an archbishop and the common features of contracts of employment as they are generally understood in Australian law. Confronted by such a proposition, it would not be surprising for a decision-maker to question whether such a legal relationship was apt to apply to a person such as an archbishop. Supposing that it was, it would be unsurprising to ask whether the archbishop was "employed" by anyone other than perhaps his God or possibly his church. Employment by a community organisation, whose members do not necessarily even adhere to the tenets of the religion espoused by the archbishop, seems at first blush to be a dubious proposition.

The history of the proceedings

49 By special leave, this appeal comes from a judgment of the Full Court of the Supreme Court of South Australia[80]. As explained in the reasons of Gaudron, McHugh, Hayne and Callinan JJ ("the joint reasons")[81], the judgment of the Full Court effectively reversed orders made at first instance.

50 The Industrial Magistrate had held that the archbishop concerned (Archbishop Ermogenous) was entitled to recover benefits under a State law for moneys due to him as an employee under "[a] contract of employment" with the respondent[82]. The expression "contract of employment" is defined by the State law to include a contract recognised by the common law as a "contract of employment". The Industrial Magistrate's findings were confirmed on appeal and reconfirmed on further appeal in the Industrial Relations Court of South Australia[83]. However, the majority in the Full Court of the Supreme Court, in the third level appeal, concluded that the magistrate had erred by failing to consider whether the parties had intended to enter into contractual relations. Because, in

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80 *Greek Orthodox Community of South Australia Inc v Ermogenous* (2000) 77 SASR 523.

81 *Industrial and Employee Relations Act* 1994 (SA) ("the Act"), s 14. See joint reasons at [2].

82 Reasons of Industrial Magistrate A R Cunningham: *Ermogenous v The Greek Orthodox Community of South Australia Inc* (1997) 64 SAIR 622.

83 Reasons of Industrial Relations Court of South Australia, McCusker J, *The Greek Orthodox Community of SA Inc v Ermogenous* (1998) 65 SAIR 514; reasons of Full Industrial Relations Court (Jennings, Cawthorne and Parsons JJ), *The Greek Orthodox Community of SA Inc v Ermogenous* (1999) 66 SAIR 136.

the view of the majority, it was open to the Supreme Court to draw its own inferences from the facts on this issue, the majority proceeded to do so. On their analysis of the evidence they decided that no intention to create contractual relations had been proved. Hence there was no contract and thus no "contract of employment". The order in favour of the archbishop was therefore set aside.

51 This Court granted special leave to appeal on terms confining the appeal to two questions. These were whether the Supreme Court had erred in holding that it was open to it, in an appeal from the Industrial Relations Court[84], to make the findings of fact that it did, contrary to the findings made at first instance by the Industrial Magistrate. Depending on the answer to that question – which involved a challenge to the jurisdiction and powers of the Supreme Court – the second question was whether the Supreme Court had erred in holding that there had been no intention to create legal relations between the parties.

The issues

52 In the way in which the appeal was argued, four issues require consideration:

1. Whether the Supreme Court erred in concluding that the Industrial Magistrate had failed to consider whether the parties had intended to enter into contractual relations enforceable at law;

2. Whether, if the answer to 1 is in the negative, the Supreme Court erred in concluding that it was open to it to decide the issue of the intention of the parties for itself and, if not, whether it erred in the decision that it made on that issue, taking into account the Industrial Magistrate's findings at first instance;

3. Whether, if the Industrial Magistrate did decide that the parties intended to enter into enforceable contractual relations he erred in so deciding by reason of the character of those relations having regard to the spiritual vocation of one of the parties; and

4. Whether, if the Industrial Magistrate correctly held that the relationship between the parties was regulated by a contract enforceable at law, it was, as he found, a contract characterised as a "contract of employment".

53 In my opinion the first issue should be decided in the affirmative. The second issue does not then arise. The third issue should be decided in the

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84 The Act, s 191.

negative. The fourth issue must be returned to the Full Court of the Supreme Court for decision.

The Industrial Magistrate implicitly addressed contractual intention

54 I agree with the joint reasons that the premise upon which the majority in the Supreme Court rested their conclusion justifying the error that warranted their disturbance of the findings of the Industrial Magistrate, is not made good[85]. In fact, the Industrial Magistrate examined closely the question whether a minister of religion could, in law, be an employee[86]. In stating the problem in that way it appears that he was responding to the manner in which the respondent's legal argument was presented at trial.

55 The suggestion that a priest, pastor, rabbi, mullah or minister of religion ("minister of religion"), including an archbishop, is by virtue of that status incapable of forming an employment contract with his or her church or religious organisation is but another way of saying that any arrangements made for sustenance and similar benefits with such a person are not ones that the law treats as justiciable. Or that such arrangements are not ones that, of their nature, the parties are taken to have intended would give rise to obligations that may be enforced in a court of law.

56 Once it is accepted that the Industrial Magistrate addressed his attention to the issue of the legal character of the relationship between the parties, the defects suggested as constituting the error, justifying the intervention of the Supreme Court, fall away. The Industrial Magistrate may not have used the formula of "intention to enter contractual relations". However, he certainly dealt with the substance of the argument in resolving the challenge to the existence of a legally enforceable contract between the parties. Clearly enough, he rejected the threshold proposition that the relationship of a minister of religion to those who provided for the minister's necessities of life was, of its nature, incompatible with a "contract of employment" as recognised by Australian law. In the case of Archbishop Ermogenous, he also rejected the subsidiary argument that the arrangements were such as to be non-justiciable or outside the contemplation of legal enforceability.

57 These conclusions confine the attention of this Court to the second special leave point and the third issue stated above. By the applicable law, the Full Court of the Supreme Court was entitled to grant leave to appeal from a

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85 Joint reasons at [38]-[45].

86 *Ermogenous* (1997) 64 SAIR 622 at 725-746.

judgment of the Industrial Relations Court not only for an alleged excess or deficiency of jurisdiction on the part of that court but also where the case concerned a question of importance warranting the grant of leave to bring the appeal[87]. As all judges of the Supreme Court were persuaded to grant leave on the latter basis and as the case was one concerned with novel questions of law, this presents for consideration whether the Supreme Court was right to hold that the absence of intention to create legal relations deprived the relationship between the parties to these proceedings of the essential characteristics of an employment contract.

Distinguishing the English cases

58 In support of the conclusion to which Bleby J[88] in the Full Court came (with the general concurrence of Doyle CJ[89]) extensive argument was directed in the Supreme Court, and in this Court, to the case law concerning claims at common law by ministers of religion to enforce contractual rights[90]. Many of the cases mentioned are referred to in the joint reasons. They include cases in the United Kingdom and in Commonwealth countries as well as in the United States of America. One Australian case, *Knowles v Anglican Church Property Trust, Diocese of Bathurst*[91] was also referred to by Bleby J with approval. The judge deciding *Knowles* rejected the submission that the English cases were of no relevance in Australia because of the differing legal status of the Christian churches in the United Kingdom and in this country[92].

59 There are important distinctions between the approaches adopted by courts in England (and the United States) and those taken by courts in Commonwealth jurisdictions, including Australia, where the same legal suppositions are missing.

60 It is true to observe, as Bleby J does, that a number of the more recent decisions in England about alleged employment contracts with ministers of religion have concerned clergy of churches and religions other than the Church of

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87 The Act, s 191(1)(b).

88 *Ermogenous* (2000) 77 SASR 523 at 575-576 [207].

89 *Ermogenous* (2000) 77 SASR 523 at 531 [27]-[28].

90 Joint reasons at [19], [26]-[36].

91 (1999) 89 IR 47.

92 *Ermogenous* (2000) 77 SASR 523 at 571 [197].

England and indeed religions other than Christianity. To that extent, the cases have involved churches that are not "established", in the sense of enjoying a special legal status as the official church of the State. Indeed, they have involved religious institutions that are not churches at all. However, it is not particularly surprising that, in the United Kingdom, the principle earlier adopted by the courts in respect of claims by priests and officer-holders of the Church of England should have been applied with adaptation, by analogy, to the alleged contracts with ministers of religion of other religious denominations. Such a process of reasoning is natural enough when a similar but slightly different problem falls to be considered judicially.

61 In England (and formerly in Ireland) the church was established by law and a curate and other ministers of religion held an ecclesiastical office[93]. In such a context, reinforced by Scottish decisions concerned with the Church of Scotland[94], it was understandable that later claims of ministers of religion associated with non-established denominations and beliefs should have been seen in a somewhat similar light. The English decisions about ministers of religion of the Methodist Church[95], the Salvation Army[96] and other faiths[97] are to be understood in this light.

62 However, to designate the relationship between a minister of religion and a suggested employing body associated in some way with the minister's religion as, of its nature, outside a legally enforceable contract of employment, because of the "spiritual character" of the minister's vocation[98], supposes a principle that is too widely expressed. At least, it is too widely stated when such relationships are viewed with Australian eyes taking into account the very different history of religious organisations in this country and the different character of the polity established by the Australian Constitution, when compared with the position of the churches in the United Kingdom or, for different reasons, in the United States.

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93 *In re National Insurance Act 1911; In re Employment of Church of England Curates* [1912] 2 Ch 563 at 568; *Diocese of Southwark v Coker* [1998] ICR 140.

94 *Scottish Insurance Commissioners v Church of Scotland* [1914] SC 16 at 23-24.

95 *President of the Methodist Conference v Parfitt* [1984] QB 368 at 375-377.

96 *Rogers v Booth* [1937] 2 All ER 751.

97 *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 at 329; [1986] 1 All ER 705 at 709; *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309; *Birmingham Mosque Trust Ltd v Alavi* [1992] ICR 435.

98 *Rogers v Booth* [1937] 2 All ER 751 at 754.

63 The different history to which I refer is described in *Attorney-General v Wylde*[99] and *Wylde v Attorney-General (NSW) (at the Relation of Ashelford)*[100]. It is unnecessary to traverse the same ground again. Suffice it to say that upon the foundation of the New South Wales colony, the Church of England may have been, and for some decades afterwards may have remained, an established church[101]. However, subsequently it was accepted in the Australian colonies (and elsewhere in the British Dominions beyond the seas) that the legal status of the church rested on nothing more than the "voluntary consensual compact" between its members[102]. Later imperial and local legislation reinforced this conclusion concerning the status of that Church in Australia. In *Scandrett v Dowling*[103], Priestley JA cited conclusions expressed in the *South Australian Register* of 1855[104] which described the position attained in Australia by the middle of the nineteenth century:

> "The Church of England, incorporated with the constitution of the mother-country, has no peculiar connection with the Local Government or Civil Courts of the colony beyond any other Christian body. Nor are there special voluntary agreements between the Bishop, Clergy and Laity, like the model trust-deed prepared by John Wesley for the members of his society, which can be enforced by ordinary process in the Civil Courts upon those who depart from their engagements."

64 It was in this way that, from colonial times, a completely different legal relationship was recognised in this country between the civil authority and religious bodies of every kind. From that time, unless governed by statute, churches and other religious organisations were regarded in law as nothing but "voluntary associations … combined to further some common end or interest"[105]. That being so, some aspects of the relations *inter se* of members of such bodies,

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99 (1948) 48 SR (NSW) 366 at 380-387.

100 (1948) 78 CLR 224.

101 (1948) 78 CLR 224 at 284.

102 *Scandrett v Dowling* (1992) 27 NSWLR 483 at 527.

103 (1992) 27 NSWLR 483 at 533.

104 Extracted in Brown, *Augustus Short DD* (1974) cited in *Scandrett v Dowling* (1992) 27 NSWLR 483 at 533.

105 *Cameron v Hogan* (1934) 51 CLR 358 at 370.

would not be treated by courts as "amounting to an enforceable contract"[106]. Yet in other cases by statute, and sometimes by the common law, it was open to such religious bodies and their members and ministers of religion of various ranks to resort to the courts to uphold or enforce proprietorial claims[107]. Their right to do so might be accepted by Australian courts without necessarily entering upon the debate as to whether the approach to the enforceability of the arrangements made by members of a voluntary association, as explained in *Cameron v Hogan*[108], requires reconsideration[109]. The tendency of recent times has been towards viewing such arrangements as contractual, and therefore enforceable. At least this has been the trend of the case law so far as the alleged proprietoral rights of the institutions of religious denominations are concerned[110].

65 In respect of voluntary associations of a religious or semi-religious character, Australian courts may not be prepared to adjudicate upon "an irregularity or departure within the church itself in the observance of the prescribed liturgy". But "juridical rights in property"[111] have been treated as having a different character, one familiar to the courts and upon which courts would not refuse their intervention in an otherwise appropriate case.

66 I am unconvinced that the English cases cited by Bleby J warrant a conclusion that, in Australia, a contract partaking of the usual features of one of employment, necessarily loses that character because it relates to the vocation of a minister of religion. A minister of religion must be housed, must eat, be clothed and otherwise be provided for. The fact that his or her vocation is, at one level, spiritual in purpose and character does not, of itself, remove the possibility that arrangements for necessities may have been intended to be enforced when it is proved that such arrangements have been breached. If one starts with the proposition that a religious vocation is in law an "office" created by the public law and in its essential character is only a "spiritual" one, it is comparatively simple to arrive at a different result than if one accepts the postulates that have developed in Australian law because of the different history of churches and

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106 *Cameron v Hogan* (1934) 51 CLR 358 at 371.

107 *Scandrett v Dowling* (1992) 27 NSWLR 483 at 493, 503-504.

108 *Cameron v Hogan* (1934) 51 CLR 358 at 370.

109 *Scandrett v Dowling* (1992) 27 NSWLR 483 at 505 referring to *McKinnon v Grogan* [1974] 1 NSWLR 295.

110 *Scandrett v Dowling* (1992) 27 NSWLR 483 at 504.

111 *Wylde* (1948) 78 CLR 224 at 281.

other religious organisations in this country. Courts here, as elsewhere, will be hesitant to enforce purely spiritual and theological rules[112]. But they will not hesitate to enforce, as arrangements intended to have contractual or other binding force, rules of a proprietorial character concerned with proprietoral rights.

67 Within this dichotomy, a proved agreement with a body such as the respondent to provide for the necessities of life of a minister of religion, or even of an archbishop, is an arrangement of the second kind. It is not one which, of its character, Australian law will refuse to enforce because the law presumes a lack of intention to enter legal relations or classifies the resulting dispute as non-justiciable. To the extent that English decisions, starting from a different history and legal foundation and taking a different approach, reach a different conclusion, they do not express the common law of Australia.

Distinguishing the United States cases

68 In the Full Court[113], Bleby J remarked, correctly, that most of the decisions in United States courts concerning proceedings brought by ministers of religion against their churches or religious organisations have reflected a theme similar to that emerging from the English cases. However, in order to understand the United States cases, it is necessary to appreciate the way in which the First Amendment to the Constitution of that country has influenced the decisions.

69 The First Amendment forbids "law[s] respecting an establishment of religion" and prohibits laws interfering with the free exercise of religion[114]. These provisions in the Bill of Rights have been construed broadly[115]. The ordinary reluctance of secular courts to be drawn into resolving disputes of a purely theological or religious character has been reinforced in the United States by a constitutional doctrine elaborating the foregoing promises.

70 Cases that would involve extensive inquiries into, or turn upon, purely ecclesiastical subjects have been held to be outside the jurisdiction or powers of

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112 As in *Wylde* (1948) 78 CLR 224 and *Scandrett v Dowling* (1992) 27 NSWLR 483.

113 *Ermogenous* (2000) 77 SASR 523 at 572-573 [200]-[203].

114 *Everson v Board of Education* 330 US 1 at 8 (1947); *Murdock v Pennsylvania* 319 US 105 at 108 (1943).

115 *Watson v Jones* 80 US 679 at 728 (1871). See also *Everson v Board of Education* 330 US 1 (1947); *Lemon v Kurtzman* 403 US 602 (1971) and *Witters v Washington Department of Services for the Blind* 474 US 481 (1986).

the civil courts[116]. In part, this attitude reflects the disinclination of a secular court to embarrass itself by seeking to resolve disputes about matters in respect of which the court has no specific legal competence. In part, the approach reflects a rule of deference to the entitlement of religious organisations to establish their own tribunals and procedures for doctrinal dispute resolution[117]. And, in part, the approach has been explained in purely contractual terms. Persons joining religious organisations will be held implicitly to consent to be bound by the decisions and rules of the organs of religious bodies concerning doctrinal questions, to the exclusion of the ordinary courts of the land[118].

71 Despite certain similarities between the provisions in the First Amendment and the language of s 116 of the Australian Constitution, the Australian provision has not been given the expansive interpretation that its counterpart in the United States has enjoyed[119]. The United States cases concerned with employment or similar claims by ministers of religion are therefore only of limited relevance to Australian adjudication of like controversies[120]. Yet it is worth noting that in recent times in the United States the courts have been more willing to scrutinise and uphold employment claims against church organisations than was previously the case[121].

72 In *Minker v Baltimore Annual Conference of United Methodist Church*[122], it was held that the First Amendment did not preclude the legal enforcement of a claim under an alleged employment contract made against a religious organisation. In that case it was pointed out that religious organisations are "always free to burden [their] activities voluntarily through contracts, and such

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116 *Jones v Wolf* 443 US 595 at 602 (1979).

117 *Watson v Jones* 80 US 679 at 728-729 (1871).

118 *Watson v Jones* 80 US 679 at 728-729 (1871).

119 *Krygger v Williams* (1912) 15 CLR 366 at 369; *Attorney-General (NSW) v Grant* (1976) 135 CLR 587 at 612-613; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 579, 615, 632.

120 cf Overstreet, "Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization" (1996) 81 *Minnesota Law Review* 263.

121 Overstreet (1996) 81 *Minnesota Law Review* 263 at 280-282.

122 894 F 2d 1354 (1990); cf *Alford v United States* 116 F 3d 334 (1997).

contracts are fully enforceable in civil court"[123]. The courts of the United States have recognised that there is a fine line to be observed between avoiding doctrinal entanglements and upholding the law of contract as applicable to everyone in society. Thus, the employment of a minister of religion may be relevant to the "well-being of religious community … [P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large"[124]. At the same time, it has been accepted that "[I]t would be unfair and illogical to deny access to the civil courts in non-doctrinal matters to parties who have voluntarily entered into civil contracts"[125].

73 The law in the United States on these questions, having started from a broad principle of non-enforcement, similar to that reflected in decisions of the English courts, is now moving towards a position not unlike that which I take to be the common law of Australia. Courts will seek to avoid entanglements in what are substantially issues of religious doctrine where there is no applicable legal norm or specific judicial competence. But courts will reject the notion that religious organisations, as such, are somehow above secular law and exempt from its rules. Like all others in a secular society, religious and associated bodies in Australia may be held accountable for the contracts which they voluntarily enter[126]. Proceedings brought by the parties to such contracts who seek to enforce them do not, as such, lack justiciability. Nor can a blanket answer be given that, in such arrangements, ministers of religion and organisations providing for their sustenance do not intend to enter legally enforceable arrangements simply because of the "spiritual calling" of the minister of religion concerned.

Spiritual functions do not negate legal relationships

74 There is therefore no presumption that contracts between religious or associated bodies and ministers of religion, of their nature, are not intended to be legally enforceable. At least where the contracts concern proprietary and economic entitlements, of the kind which in this case Archbishop Ermogenous sought to enforce (and certainly where they are not intertwined with questions of religious doctrine that a court would not feel competent to resolve according to

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123 894 F 2d 1354 at 1359 (1990) citing *Watson v Jones* 80 US 679 at 714 (1871).

124 *Rayburn v General Conference of Seventh-Day Adventists* 772 F 2d 1164 at 1167-1168 (1985).

125 *Reardon v Lemoyne* 454 A 2d 428 at 432 (1982).

126 Overstreet (1996) 81 *Minnesota Law Review* 263 at 297.

legal norms) there is no inhibition either of a legal or discretionary character that would prevent enforcement of such claims when they are otherwise proved to give rise to legal rights and duties.

75 At least some of the more recent decisions of Commonwealth countries outside the United Kingdom reflect this application of "a contemporary lens"[127] to the arrangements of a minister of religion with a putative employer[128]. The long trend of authority from colonial times in Australia and the more recent trend of case law in the United States, New Zealand and Canada supports the approach of the Industrial Magistrate in this case. That trend does not, in my judgment, sustain a broad proposition, still less a general legal rule, that ministers of religion (including archbishops) and those who make arrangements for their necessities cannot intend to enter contractual arrangements because the ministry involved is "spiritual" in character and for that reason is fundamentally incompatible with legal enforceability.

76 Even people of a spiritual vocation normally need stable arrangements for the necessities of life. In a case where such an agreement is proved with an identifiable party and it is breached, the victim of the breach is not beyond the law's protection. Australia is a secular polity. There is no general rule that the "spiritual character of the relationship" concerned "militate[s] against a finding that the necessary intention [to enter] into contractual relations has been formed[129]". In concluding otherwise, the Supreme Court erred in law. Its error led to the erroneous conclusion that the contract upheld by the Industrial Magistrate had failed because the necessary intention to enter into a legal relationship had not been proved.

The proved and conceded role of the respondent

77 It is also essential to remember the peculiarity of the arrangements entered into between the respondent and Archbishop Ermogenous. He was already a bishop in the United States when approached by persons associated with the

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127 *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 at 524.

128 cf *McCaw v United Church of Canada* (1988) 51 DLR (4th) 86 at 114 where it was held that the plaintiff, a minister of religion, was to be "considered an employee for purposes of determining whether the employment had been wrongfully terminated"; cf *Renault v Sheffield* (1988) 29 BCLR (2d) 171; *Lewery v Governing Council of Salvation Army in Canada* (1993) 104 DLR (4th) 449.

129 *Ermogenous* (2000) 77 SASR 523 at 576 [207.9].

respondent. The respondent had to persuade him to leave the security of his post in that country, come to Australia and assume his functions in South Australia. What followed was, therefore, in some ways, a unique arrangement. It was made with a body that was a cultural or ethnic one rather than a specifically religious organisation. As explained by Doyle CJ, "The [respondent] is a body that fosters Greek culture in South Australia in the broadest sense."[130] At no time did the respondent purport to cut across whatever spiritual and ecclesiastical relationship Archbishop Ermogenous enjoyed with his church, as such. The Industrial Magistrate, and the judges of the Industrial Relations Court, were fully aware of this special feature of the contract which Archbishop Ermogenous sought to enforce.

78 Even if, contrary to my view, there were something in the spiritual calling of a minister of religion (including an archbishop) that put that person in relation to his or her church beyond the kind of contractual relations that might be enforced in a court of law, any such rule would not apply to arrangements for the provision of necessities made with a secular community organisation such as the respondent. Every day of his life, Archbishop Ermogenous, like everyone else in Australia, made contractual arrangements of an express or implied kind with secular organisations and individuals of great variety. Most of these were insubstantial but some would be substantial. It would be contrary to basic principle to suggest that his spiritual calling somehow placed him outside the rights and duties of the law of obligations.

The employment character of the arrangement is arguable

79 On the evidence accepted by the Industrial Magistrate, there were numerous further indications of the existence of a contract with the respondent. Once it was conceded that the respondent employed priests under contracts of employment, it became at least extremely difficult to differentiate the legal character of the relationship with Archbishop Ermogenous upon a supposed disqualification because of the "spiritual" nature of his calling. Priests share a spiritual calling with archbishops. If it was common ground that the vocation of priest did not deprive priests of the entitlement to enforce their "contract of employment" with the respondent it is difficult to see how the opposite consequence necessarily followed for an archbishop.

80 The respondent's arrangements for the payment of the archbishop's salary, the cheques paid to him (for travel and other expenses) and the arrangements for the deduction and payment of income tax instalments by the respondent all support, as reasonably open to him, the conclusion reached by the Industrial

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130 *Ermogenous* (2000) 77 SASR 523 at 526 [9].

Magistrate that the respondent had engaged the appellant pursuant to a contract with it to minister to its members and others so as to assist in the preservation of Hellenic culture amongst people of Greek descent or connection in South Australia and elsewhere in Australia.

81 The nature of employment in contemporary Australia continues to undergo evolution. In *Hollis v Vabu Pty Ltd*[131], this Court explained that "control", the traditional *indicium* of the employment relationship, is only one relevant factor in determining the existence of an employment contract. Instead of having regard exclusively to considerations of "control", which may be less relevant to the variety of modern employment relationships, this Court took the view that it is necessary to consider the totality of the relationship between the parties[132]. It is not, therefore, enough to respond to the claim of Archbishop Ermogenous to suggest that his relationship with the respondent cannot be one of a "contract of employment" because a community organisation could not "control" the performance by an archbishop of his principal functions of office. That approach involves the narrow view of the employment contract that was rejected in *Hollis*.

82 Many modern employees perform specialist skills and exercise discretions that may yet be compatible with a modern notion of the "contract of employment". The contrary view would render the law of employment irrelevant to much economic activity in contemporary Australian society[133]. When this approach is adopted to the parties' relationship, the finding that Archbishop Ermogenous was a party to a "contract of employment" with the respondent becomes less surprising. Certainly, it is not unarguable[134].

83 As the joint reasons point out[135], whether the contract between Archbishop Ermogenous and the respondent could properly be classified as one of

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131 (2001) 75 ALJR 1356 at 1366 [45]; 181 ALR 263 at 276.

132 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29; cf *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 572-573; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 218.

133 Creighton, Ford and Mitchell, *Labour Law: Text and Materials*, 2nd ed (1993) at 48-50.

134 cf Creighton, Ford and Mitchell, *Labour Law: Text and Materials*, 2nd ed (1993) at 91-92.

135 Joint reasons at [46].

employment was not finally decided by the Supreme Court. In the conclusion which the majority of that Court reached, the Archbishop's claim in contract failed at the threshold. Because no contract had been entered, susceptible to legal enforcement, it was unnecessary for the Supreme Court to determine that additional question. I have examined that question solely to demonstrate that it would not be pointless to return the fourth issue to the Supreme Court. Having regard to what was said in *Hollis*, it cannot be said to be futile.

84 Whether, on its own, shorn of the other issues dealt with by this Court, the fourth issue[136] presents a question that warrants the grant of leave to permit a third level appeal is a question which the law reserves to the Full Court of the Supreme Court to decide. In saying this I am not to be taken as suggesting that the issue raised may not be an important one. Australian law has recognised clearly enough the weaknesses and limitations of the control (and right to control) tests as expressing the essential criteria for an employment contract. It has been less clear about what test or tests should take the place of control. That question may be presented by the present case. It should be left to the Supreme Court.

Orders

85 In all remaining matters I agree with the joint reasons. I therefore agree with the orders proposed.

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136 See my reasons at [52] above.