Matters Spiritual and Temporal:

The Intersection of Law and Religion in an Employment Context and on the operation of Discrimination Laws

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Introduction

This paper:

(a) examines a number of the key cases which were concerned with questions about the existence of contracts and the incorporation of religious law in contracts relating to the engagement of ministers of religion; and

(b) briefly considers the intersection of law and religion in the context of the current debate about legal recognition of same-sex marriage and existing discrimination laws which provide some exemptions for religious bodies.

Ministers of Religion and Contractual Relations

In Australia and the UK, disputes involving religious bodies were historically determined on the basis that spiritual functions negate legal relationships[1]; and in the US on the basis that such disputes were non-justiciable on First Amendment grounds.[2]

However, there has been a shift in the UK, the US and Australia towards a stronger recognition of the application of the general law to spiritual arrangements. In *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 the Court rejected the notion that there is a presumption that contracts involving ministers of religion are not intended to be legally enforceable.

More recently, Brereton J recently found that a Rabbi's contract could not be terminated on the basis of a redundancy because the relationship between the parties was governed by religious law (*Halacha*): *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 (Brereton J).[3] At one level, this decision gave preference to a religious concept of life tenure (*Hazakah*) – that is, that the Rabbi had life tenure or employment for life. However, on closer scrutiny, the decision was made on the basis of existing principles of contract law, including that "(T)he parties to a contract governed by Australian law can incorporate into the contract, as terms of the contract, provisions of another system of law, including Jewish law."

[1] *Diocese of Southwark v Coker* [1997] EWCA Civ 2090; [1998] ICR 140
[2] *Jones v Wolf* [1979] USSC 147; 443 US 595 at 602 (1979)
[3] *Cf* the Court's approach to the termination of tenured employment in *NSW Cancer Council v Sarfaty* (1992) 28 NSWLR 68.

Whether there is a presumption against an intention to create contractual relations in the engagement of a Minister of Religion?

A common intention of the parties to create legal relations is a necessary element in the formation of a contract. Absent mutuality of obligation, there can be no contract.[4] The test of intention is objective and its presence or absence depends on the facts of each case.[5] In certain circumstances, for instance in the case of commercial agreements, there is a presumption that the parties intend to be legally bound. However, in other circumstances, such as in relation to social and domestic agreements, there is a rebuttable presumption that such agreements are not binding on the basis that they are not accompanied by any contractual intent.

In respect of Religious Ministers, Wright J of the Industrial Relations Commission of New South Wales in ***Knowles v The Anglican Church Property Trust, Diocese Of Bathurst*** (1999) 89 IR 47 reviewed various authorities and stated as follows at pp 76-77:

> … The authoritative statements of the Court of Appeal in *Scandrett v Dowling* [(1992) 27 NSWLR 483] are binding on the Commission and clearly indicate that the nature of the relationship between members of the church in New South Wales is that of a ‘‘consensual compact’’ the binding nature of which is not contractual but rather spiritual. See, for example, the passages from the judgment of Priestley JA cited above from 554 and 558 of the report; and also the following passages extracted from 513:
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>> ‘‘I do not agree with this either. In my opinion the parties to the consensual compact upon which the plaintiffs rely are bound to it by their shared faith, not the availability of the secular sanctions of the judgments, orders or decrees of State courts of law. The belief of Church members is that they are all one in Christ Jesus; an acceptable way of describing the Church, as I understand it, is that it is constituted by this unity.
>>
>> The consensual compact is thus based on religious, spiritual and mystical ideas, not on common law contract. It has the same effect as a common law contract when matters of church property become involved with the other matters dealt with by the conceptual compact. I do not think the claims made in this case get out of the area of the consensual compact which does not have the legally binding effect here relied upon.’’

In then dealing with the question of whether an Anglican minister could bring proceedings for unfair dismissal, and starting on the basis of the above presumption, Wright J found that, in the context of the evidence concerning the relationship, the provisions of the relationship were inconsistent with its being a contract of employment. It was noted that even on the applicant’s own evidence, he saw his role of chaplain as being sacramental and spiritual and quite distinct ‘‘… from others working in the helping professions — he stands out as ‘God’s man’’.

A different approach was taken in ***Ermogenous v Greek Orthodox Community of SA Inc*** [2002] HCA 8; 209 CLR 205 (***Ermogenous***).

[4] *Australian Woollen Mills v Commonwealth* (1954) 92 CLR 424 at 457
[5] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 178

Ermogenous v Greek Orthodox Community of SA Inc

In *Ermogenous,* the High Court considered the presumption in the context of a finding by an Industrial Magistrate that a claim by Archbishop Ermogenous against the respondent, for payment of accrued annual leave and long service leave, was *"a claim for a sum due to an employee or former employee form an employer or former employer under…a contract of employment*", pursuant to s8 of the *Industrial Arbitration Act 1912* (SA).

"Contract of employment" was defined by s7 of the Act as including "a contract recognised at common law as a contract of employment under which a person is employed for remuneration in an industry."

The Industrial Magistrate had found that the Archbishop was entitled to recover benefits under the Act. The findings of the Industrial Magistrate were confirmed on appeal to a single judge of the Industrial Relations Court of SA and reconfirmed on appeal to a Full Bench of that Court.

However in the third appeal to the Full Court of the Supreme Court of SA, the majority (Doyle CJ and Bleby J) concluded that the magistrate had erred by failing to consider whether the parties had intended to enter into contractual relations. The majority decided that no intention to create legal relations had been proved, so that there was no contract and, so it followed, no contract of employment and the order of the magistrate was set aside.

From that decision special leave was granted by the High Court who upheld the appeal.

<u>Industrial Magistrate's Findings</u>

As was noted in the joint decision of the High Court (Gaudron, McHugh, Hayne and Callinan JJ), the Industrial Magistrate had made a number of findings including:

- the appellant was for more than twenty years the Archbishop of the autocephalous Greek Orthodox Church (or churches) in Australia;
- before the events which gave rise to the 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";
- 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;
- 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;
- 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;

- The appellant came to Adelaide in March 1970. He met members of the respondent being in effect the committee of management of the SA Community. 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"
- "there was an agreement reached at this meeting which covered the functions of the archbishop and the terms of his engagement for the time being";
- 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";
- the agreement "was to remain in force until it was legally and consensually replaced by something different"; and
- 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".

In concluding that the appellant had been employed by the respondent under a contract of employment, the Industrial Magistrate:

- rejected the respondent's contention that there could be no binding agreement for employment of a minister of religion;
- found that the respondent reserved the right to control the way in which the appellant went about his duties - 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;
- 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; and
- found that he was a part of the organisation of the respondent.

The Respondent's Challenge

The respondent had argued at first instance, in absolute terms, that "a minister of religion - any religion - can not in law be considered an employee of any other person or legal entity".

Kirby J [at [55] described the proposition thus:

> "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."

The respondent's argument had been rejected by the Industrial Magistrate and by two appeal courts, but the majority in the Supreme Court concluded 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, relying on a number of decisions in the UK, the US and a decision of the Industrial Relations Commission of NSW.

The majority in the High Court noted at [24] that:

> It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty. 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.
>
> 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, and that 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.

At [25] the majority said:

> Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties 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. It is not a search for the uncommunicated subjective motives or intentions of the parties.

The Earlier Cases

With that background, the majority at [29] – [35] and Kirby then considered 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. Some of those cases were distinguished by the majority on a number of bases, including:

- the source of the authority over the Minister in the English cases, came not from some contractual relationship, but from the fact that the particular Minister held an *office* subject to the laws of the Church in which that office was held;
- assistant ministers in the Church of Scotland and 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;
- there being a real question about who the employer would be, if there was a contract of employment, having regard to: statutory provisions for example in the Methodist church; the difficulties attendant on suing unincorporated associations; the absence of a juridical person able to sue or be sued; the absence of a contracting party to the suit; or the person with legal responsibility for appointment and termination of appointment, could not be regarded as the employer because the relevant relationship was governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement.

Kirby J (at [58] – [65]) based his analysis of the UK cases on the historical position of the Church of England and the Church of Scotland and the holding of an ecclesiastical office by Ministers and the trend with later claims of ministers of religion associated with non-established denominations and beliefs being seen in a similar light. He contrasted the position in the New South Wales colony, where the Church of England may have been, and for some decades afterwards may have remained, an established church, but noted that subsequently it was accepted in the Australian colonies that the legal status of the church rested on nothing more than the "voluntary consensual compact" between its members.

Kirby J at [66-67] highlighted what he described as a dichotomy:

> If one starts with the proposition that a religious vocation being 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 other religious organisations in this country. Courts here, as elsewhere, will be hesitant to enforce purely spiritual and theological rules. 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.
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> 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.

Kirby J at [68]- [73] distinguished the US cases on First Amendment grounds although he noted that:

> 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.

Spiritual not contractual

The joint reasons at [36] – [38] dealt with 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. While the majority accepted that the relationship, "at its root, is concerned with matters spiritual" and that "the minister's conduct as minister will at least be informed, if not wholly governed, by consideration of matters spiritual", it did not follow "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…"

They pointed out that "it has been recognised that there *are* aspects of that relationship which may give rise to legally enforceable rights and duties", or where 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*, "a school, or a duke, or an airport authority" or, we would add, an incorporated body having the characteristics of the present respondent.

(Our emphasis.)

Kirby J at [74] said there was

> "…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 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."

Redeemer Baptist School Ltd v Glossop & Ors

A similar issue as to intention to create a contractual relationship, arose in ***Redeemer Baptist School Ltd v Glossop & Ors*** [2006] NSWSC 1201, where the plaintiff sued for defamation, but having regard to section 8A of the Defamation Act 1974, it could only maintain a cause of action under an exemption in 8A(3)(a) if as a corporation *"it employs fewer that 10 persons at the time of the publication of the matter"*.

Nicholas J determined the s8A issue by separate trial, finding that:

- Absent qualification, the meaning of the word "persons" in sub-para (a) includes individuals who are employees and those who are not. There is no justification for confining its meaning to individuals under a contract of employment with the corporation (at [21]);
- The use of the word "persons" indicates that it was not intended that "employs" be understood in an industrial sense referable to a relationship of master and servant under a contract of service. In my opinion, in the context of sub-para (a), the proper construction of "employs" is that it means "to use the services of (a person)" or "to make use of (a person)" (at [22]); and
- It follows, in my opinion, that the nature of the arrangement or understanding under which a person provides services, and whether or not the arrangement or understanding is legally enforceable, and whether or not the person is paid for the services or is a volunteer, are irrelevant considerations. The only relevant issue is whether or not, as a matter of fact, the number of persons whose services the corporation used in its business at the time of publication is fewer than 10 (at [23]).

It was however necessary for the Court to determine an alternative submission of the plaintiff, namely that *"its staff were volunteers who were ordained members of the Ministry Order of the Redeemer Baptist Church and were not employed by it under contracts of employment. It argued that, as its staff members were not employees, it was a corporation within subs (3)(a) and hence entitled to maintain its claims in each set of proceedings"*.

In this respect the Court had to consider some of the same principles as in *Ermogenous*, but unlike that case the parties in Redeemer were the plaintiff who was the putative employer asserting no intention by it or its teachers to create legal relationships and a the defendant who was a stranger to the arrangements. Unsurprisingly the facts were very different to those in *Ermogenous*, and that accounted for the different result on the question of intention to create legal relations.

Nicholas J after canvassing the facts and the relevant principles, including the statement of the majority in *Ermogenous* at [25], concluded (at [85] – [89]):

> In my opinion the evidence of the witnesses, which was undisputed, provides ample support for the finding, which I make, that each had the same relationship with the plaintiff for working at the school, which was also the same for all other teachers.
>
> In my opinion, when considered from the viewpoint of the teachers, the evidence negates the conclusion that they intended that their arrangements with the plaintiff would place them under a legal obligation to provide services to the school. Rather, it demonstrates that their underlying arrangement with the plaintiff was with and

> through the Church, and that their intention was to effect a calling to serve God in accordance with the Ministry Order. Put another way, I find that their service to the school was provided in fulfilment of the intention to serve a ministry of the Church. I generally accept the plaintiff's submissions on this issue.
>
> There was no evidence that any member provided services to the plaintiff pursuant to any arrangement other than the Ministry Order, or that any member contemplated the creation of legal relations with the plaintiff under some different arrangement. For example there was no evidence of any communication between the plaintiff and a teacher on subjects which would be ordinarily regarded as requiring agreement such as duties, hours, wages, or leave. In fact, no payments for wages, salaries, or leave were paid by the plaintiff.
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> The Ministry Order describes itself as a religious order under the direction and supervision of the Church, which has as its goal the support of ministries operated by the Church and its associated organisations. It records that the primary activity of all members is the practice, study, teaching, and propagation of religious beliefs. Members renounce in principle any possession of property, and are willing to make any self-sacrifice to uphold the goals of the Order, even if this results in loss of material well being of the member. It demonstrates the consensual basis upon which members have combined to serve the Church, and it was common ground that it has no contractual effect.
>
> The evidence was that stipends were paid at the discretion of the elders according to the needs of the member and the Church's capacity to pay. Accordingly, any obligation to pay was illusory in that it was unenforceable… Stipends were not calculated with regard to time spent working for the school or other ministries, or to the value of services provided. In my opinion, the evidence makes it very clear that the work of the teachers was not done in consideration of, or in return for, or in order to earn, a stipend.

His Honour found at [95] that taken overall, the circumstances show that the plaintiff and the teachers did not intend, and cannot be regarded as having intended, that their relationship would be legally enforceable. That common intention must be respected. It follows that their relationship was not contractual and did not give rise to legal rights and obligations.

It followed that if subsection (3)(a) referred only to employees under contracts of employment, it operated to enable the plaintiff to assert or enforce its causes of action.

However, given his Honour had already held that subs3(a) was not so limited, the plaintiff's success on the alternative case did not affect the outcome of these proceedings which were dismissed.

Whether elements of religious law can be implied into a contract of employment?

In ***Gutnick v Bondi Mizrachi Synagogue*** [2009] NSWSC 257, the plaintiff Rabbi sought an injunction in the Supreme Court of NSW to prevent the termination of his employment by the Synagogue, on the grounds of redundancy, on the basis that there was an express or implied term in his contract of employment that he had *hazaka* or life tenure. If so, that meant that his employment could only be terminated by consent (and payment for life), or pursuant to a determination in accordance with Jewish law, by a properly constituted *Din Torah* or religious court. The plaintiff

argued that, if he had *hazaka,* termination of his employment could only be justified if there has been a fundamental failure to perform his duties and not for redundancy.

The plaintiff also contended that the contract contained an arbitration clause whereby disputes could be submitted to a tribunal specially constituted under Jewish law by a nomination process (*zabla*) where each party appoints one member of the tribunal and those two members appoint the third member.

The defendant denied that the plaintiff had *hazaka* or that the contract contained the arbitration clause.

Whilst the plaintiff's written contract made in 1987 for a term or 3 years contained a clause expressly excluding *hazaka* in respect of the plaintiff's tenure, the plaintiff alleged an oral agreement made in 1990 renewing the contract with *hazaka.* The evidence of such an agreement was inconclusive.

The plaintiff also alleged that in 1994 or 1995 a memorandum was prepared reflecting the 1990 decision to give the plaintiff *hazaka*, but as the Court noted, that memorandum was not signed and a contract did not appear to have been made in accordance with the Articles of Association of the defendant. The plaintiff continued to serve as Rabbi up to the time of the proceedings.

The plaintiff's evidence which in that respect was not contradicted, included a statement that his Honour regarded the plaintiff as qualified to make, viz: "*In accordance with Halachah ... a rabbi's continued employment in the absence of a contract that is specifically expressed to be for a fixed term and without any specific and express exclusion of Hazaka contained in such a contract is sufficient to constitute a creation of a Hazaka.*"

After discussing the factual background, White J said (at [24]):

> I think there are substantial obstacles in the way of a conclusion that it was an express term of a contract adopted in accordance with the articles of the company that the plaintiff should have hazaka. No such contract was ever submitted for the approval of members in accordance with article 87 of the original articles. Nor does there appear to have been any formal resolution of the Board as to the terms of such an agreement. However, there is a serious question to be tried that after the expiry of the 1987 contract the employment of the plaintiff as rabbi continued without there being an express exclusion of hazaka as was provided for in the 1987 agreement. There is a serious question to be tried that hazaka applies unless it has been expressly excluded.

His Honour held that there is a serious question to be tried that there was an implied term of the contract between the parties that the plaintiff is entitled to hazaka. His Honour also noted (at [27] –[28]) that:

- The question would also arise at a final hearing whether the plaintiff's insistence from 2004, if not earlier, that he have hazaka would entitle him to the benefit of hazaka in the absence of his position being rejected by the Board, and notwithstanding the fact that the contract incorporating hazaka was not submitted to members for their approval.
- the insistence of the plaintiff that he have hazaka from 2004 and the acquiescence or at least the failure of the Board to reject that assertion raises substantial questions as to whether the plaintiff may be entitled to the benefits of hazaka, even if it was not an implied term of his contract prior to 1997.

As to the defendant's argument that whether or not the plaintiff had hazaka his contract of employment would not be specifically enforced and that Equity would not compel the parties to adhere to a relationship involving the provision of personal services, or compel adherence to a relationship of trust or confidence, his Honour considered whether that question should be determined by a Din Torah, noting that the defendant had accepted that if it is required to submit to a Din Torah under Jewish law, it will do so.

In that respect the plaintiff's evidence which was not contradicted, was that whether or not there is a contractual submission to arbitration or other determination under Jewish law, the defendant is required to submit its dispute to a court under Jewish law.

His Honour accepted (at [33]), that if the question were to be determined in a civil court there is a serious question to be tried that the plaintiff at a final hearing, if he makes good his claim to *hazaka*, would be entitled to an order for specific performance., noting that one of the exceptions to the principle that the courts will not enforce contracts for personal services is the case of ecclesiastical offices.

On the question of balance of convenience, his Honour noted the plaintiff's proffered undertaking to waive his entitlement to salary and benefits pending the final determination of a Din Torah, in response to the defendant's argument that on the balance of convenience interlocutory relief ought not be granted because of the defendant's financial position which would result in an administrator being appointed if the termination of the Rabbi's employment were enjoined, so that the defendant would not trade whilst insolvent.

His Honour concluded (at [40]), that:

> … the balance of convenience favours this dispute being determined by a Jewish tribunal in accordance with Jewish law. The evidence before me would not justify an order compelling such an arbitration, and that is not the relief sought in the present application. But in the light of the attitude expressed by both parties in the open offers which have been exchanged, I think it likely that if injunctive relief is granted the dispute will be referred to an appropriate Jewish tribunal for determination and I see no reason that that determination would not take place within a reasonably prompt time.

The decision in *Gutnick* is to be seen not as the final determination of the Court, but as the determination of serious questions to be tried, based in part on propositions of Jewish law which essentially were not contradicted and their potential implication into the contract between parties bound by and committed to uphold Jewish law.

In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)

The *Gutnick* matter was followed in ***In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)*** [2017] NSWSC 823 (22 June 2017), where an employer Synagogue (company), unlike in *Gutnick*, had appointed an Administrator who had terminated the Rabbi on the grounds of redundancy. The administrator then approached the Court for declarations as to whether the Rabbi's employment could be terminated other than by decision of a Din Torah in

accordance with Jewish law and the Rabbi filed a cross summons seeking declarations and an injunction.

The Rabbi had commenced employment with the Synagogue in 1985 and his most recent (1999) contract contained the following relevant terms:

> 2. The relationship between the Rabbi and the congregation shall be defined in accordance with Halacha.
> …
> 9. Any irreconcilable disputes between Rabbi and congregation shall be decided according to Halacha. The Dayanim are to be decided by the Chief Rabbinate of Israel or by mutual agreement between the Rabbi and the Board of Management.

The issues for determination by the Court were:

1. were the administrators entitled to terminate the Rabbi's employment other than pursuant to an adjudgment by a Din Torah in accordance with orthodox Jewish law that it was justified on a ground recognised by the usages, customs, practices and traditions of Judaism? If not, the dismissal was wrongful;
2. if the dismissal was wrongful, then, the Rabbi having elected to affirm the contract, should the court grant injunctive relief restraining the administrators from giving effect to the purported dismissal, or leave the Rabbi to his remedy in damages for wrongful dismissal?

The evidence before the Court included that of a Rabbinic expert (which was unchallenged and uncontradicted), that

- "Halacha" denotes orthodox Jewish law and jurisprudence, constituting a divine or divinely inspired 'code of law that regulates every facet of human life, including laws that regulate relations between mankind', obedience to which 'in every aspect of life is an inviolable religious
- it includes 'laws that regulate the legal relationship between a Rabbi and a Synagogue', one of which provides that any dispute between a synagogue and its Rabbi, unless resolved by agreement, must be adjudicated before a Beth Din (which is a court of Jewish law).
- Another aspect, compendiously known as 'Hazakah', is that a Rabbi who has been appointed by a congregation, however constituted, has life tenure, in that he is entitled to be and remain employed in the position, with all its rights, privileges and benefits, for the rest of his life, and cannot have his appointment terminated, except by agreement, or pursuant to a decision of a properly constituted Din Torah (that is, a hearing or adjudication of a dispute conducted in accordance with Halacha by persons who, by agreement or standing, are qualified to determine the dispute as a Beth Din) in accordance with Halacha that the termination of the Rabbi's appointment is justified on a ground recognised in Halacha, the only such grounds relating to fundamental failure by the Rabbi to perform his Rabbinical duties. Redundancy is not such a ground.

The concept of *Hazakah* had been considered in the decision of the London Beth Din in *Rabbi Gutnick v Bondi Mizrachi Synagogue* (following the *Gutnick* decision discussed

above). However, this decision was not adverted to, or indeed brought to the attention of the Court, in outlining the concept of *Hazakah*. The London Beth Din decision is of significance because it articulated *Hazakah* in a more qualified manner and with limitations. In particular, the Court of the Chief Rabbi said as follows on this point:

> At this point, we would like briefly to address the question of chazaka. Chazaka in the context of the employment of a communal rabbi, is the Halachic (Jewish legal) principle that a rabbi who has been appointed by a community should not have his employment with the community terminated save in exceptional circumstances such as misconduct or inability to fulfil the terms of his contract. The law of chazaka imposes a prohibition on the communal managers, preventing them from dismissing the rabbi. It is to be distinguished from an obligation to employ and remunerate the rabbi indefinitely. Thus, for example, if a synagogue was unable to afford to pay for a rabbi but the rabbi was prepared to continue to serve the community without drawing a salary then the law of chazaka would prevent the synagogue from dismissing the rabbi but would not impose upon the synagogue, the duty to remunerate the rabbi in those specific circumstances …

In the present matter, the Court noted that the objects of the company gave primacy to the practice and advancement of Orthodox Judaism and included:

> (a) To establish and conduct a congregation and synagogue wherein will be practised the customs and observances of Orthodox Judaism…
>
> (c) To promote and disseminate the doctrines and beliefs of Orthodox Judaism…
>
> (f) To bring about and encourage the development of synagogue life according to Orthodox Judaism.

The significance of the expert evidence and the company's objects as his Honour noted (at [25]) was that "Halacha is co-extensive with the customs, observances, doctrines and beliefs of Orthodox Judaism that are referred to in the company's objects".

His Honour noted (at [27]) that:

> It is inconceivable – in the light of the objects of the company, the purpose and terms of the contract, and the evidence that Halacha regulates *inter alia* the legal relationship between a Rabbi and a synagogue and that obedience to it is an inviolable religious obligation – that the parties to the contract did not intend that Hazakah (life tenure) be a term of the contract. Clause 2 was intended to provide that the legal relationship between the congregation – the legal emanation of which was the company – and the Rabbi, would be defined by that subset of Halacha that regulates the legal relationship between a Rabbi and a synagogue. The circumstances in which the Rabbi's employment can be terminated are an aspect of "the relationship between the Rabbi and the congregation" in clause 2.

Having regard to the proposition that parties to a contract governed by Australian law can incorporate into the contract, as terms of the contract, provisions of another system of law, including Jewish law, in the circumstances his Honour had "no difficulty in relying on

orthodox Jewish law as part of the contractual framework, and its content, at least for relevant purposes, is not controversial, unclear or uncertain" [(at 32]).

His Honour found alternatively (at [33]), that if not incorporated, then "Hazakah" is an implied term of the contract. The implication arises from the express terms (including clause 2 and clause 9), from the absence of any other provision as to duration, and from custom. Had the officious bystander observed, when the contract was being made, that it contained no provision about duration, he or she would have been testily suppressed with an "of course, the Rabbi has Hazakah, as an aspect of Halacha". It needs to be borne in mind that any other arrangement would have been antithetical to the Orthodox Jewish life to which the company, the Rabbi and the congregation all subscribed.

It followed in his Honour's view that the Rabbi's employment was for life, unless a properly constituted Din Torah has first determined in accordance with Halacha that the termination of his appointment was justified on a ground recognised in Halacha, involving a fundamental non-performance of his rabbinical duties. It is uncontroversial that this has not happened. It follows that his "termination" by the letter of 27 April 2017 was an unlawful dismissal.

In the result his Honour held (at [45]) that:

> "The Rabbi's contract includes Hazakah, by implication if not by incorporation. The status of voluntary administration under Part 5.3A has no special significance for the company's contractual obligations, and the company was not entitled to terminate the Rabbi's employment, for redundancy or otherwise, in the absence of a finding of a Din Torah that there were grounds for termination. The purported termination was therefore a wrongful dismissal. The Rabbi has not accepted the repudiation, and the contract remains on foot. The infringement of his procedural right to a Din Torah, coupled with the nature of his employment in an ecclesiastical office, and the absence of issues of personal trust and confidence or any necessity for continual supervision by the court, means that absent the question of insolvency, this would be an appropriate case for injunctive relief. The circumstances of insolvency, short of liquidation, do not justify withholding the specific relief which would otherwise be granted.

Subject to the above comment about the articulation by the London Beth Din (which was not put before the Court), the decision in the *South Head and District Synagogue* case, like *Gutnick,* was based on propositions of Jewish law which were not contradicted and their incorporation or implication into the contract between parties bound by and committed to uphold Jewish law.

Legal recognition of same-sex marriage and existing discrimination laws

There has been a deal of discussion of late about religious freedom and the issue of same sex marriage.

One of the concerns which has been raised in respect of the supposed conflict between legal recognition of same-sex marriage and religious freedom is that the enactment of law recognising same sex marriage may impinge on the ability of persons ascribing to religious beliefs to practice their religion vis-à-vis the acceptance of same sex marriage.

Examples which have been presented of situations which may give rise to conflict include the refusal by religious ministers to undertake religious ceremonies and religious organisations whose work might intersect with same sex marriage in various ways, for instance, religious schools teaching on the subject of marriage in terms of their traditional precepts and otherwise refusing to countenance the acceptability of same sex marriage.

Those who raise the above examples note that Australia does not have any bill of rights which broadly enshrines freedom of religion and religious practices. In this regard, section 116 of the Constitution, which states that "the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth", is argued to be limited in terms of providing any protections.

With the above issue in mind, it is worth noting the existing provisions of the discrimination laws which provide some protection.

Commonwealth Legislation

The *Sex Discrimination Act 1984* (Cth) makes it unlawful to discriminate against another person by reason inter alia, of that other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status.

Section 37 provides an exemption from Division 1 (discrimination in work) or Division 2 (discrimination in other areas) in respect of:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order;

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;

(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; and

(d) or any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Section 38 provides that it is not unlawful for a person:

(a) offering employment or engagement; or

(b) dismissing from employment or engagement; or

(c) for an educational authority

to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

In contrast to the above, the *Racial Discrimination Act 1975* (Cth) provides no protections on religious as opposed to racial grounds

State Legislation

The current State discrimination laws vary from State to State. In respect of the New South Wales legislation, namely the *Anti-Discrimination Act 1977*, discrimination on the basis of race, nationality, descent and ethnic, ethno-religious or national origin, sex, marital or domestic status, disability, homosexuality, age, transgender status, and carer responsibilities is prohibited.

As to the exemptions, s56 states:

> **56 Religious bodies**
> Nothing in this Act affects:
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
> (c) the appointment of any other person in any capacity by a body established to propagate religion, or
> (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Although “body” is not a defined term, arguably organisations directly connected with a religious institution fall within the scope of 56(d).

On its terms, s56 would currently enable ministers of religion to refuse undertake religious ceremonies for same-sex marriages.

In relation to schools, there is a broad exemption in respect of discrimination on the ground of homosexuality in respect of private educational authorities. In this regard, s49ZO provides:

> **49ZO Education**
> (1) It is unlawful for an educational authority to discriminate against a person on the ground of homosexuality:

(a) by refusing or failing to accept the person's application for admission as a student, or
(b) in the terms on which it is prepared to admit the person as a student.
(2) It is unlawful for an educational authority to discriminate against a student on the ground of homosexuality:
(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or
(b) by expelling the student or subjecting the student to any other detriment.
<u>(3) Nothing in this section applies to or in respect of a private educational authority.</u>

(Our emphasis.)

The Victorian discrimination laws go further in terms of providing definitions and protections. The following provisions of the *Equal Opportunity Act 2010* are worthy of note

81 Definition of religious body

For the purposes of sections 82 and 83, "religious body" means—

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

82 Religious bodies

(1) Nothing in Part 4 applies to—

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or

(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

83 Religious schools

(1) This section applies to a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles.

(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution that—

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

84 Religious beliefs or principles

Religious beliefs or principles Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The Federal Government as acknowledged that, if the plebiscite yields a majority support for recognition of same sex marriage, it will look to enact legislation which will reflect the majority view and also provide for adequate protections in respect of religious freedom. However, a question which has not been answered is the form of the provisions of the protections and exemptions. This will be important because, given the existing State discrimination laws prohibiting discrimination on the basis of, inter alia marital or domestic status, homosexuality and transgender status.

As a side note, there will be the related question of the interaction of any new Federal law and existing State laws. To the extent that the State discrimination laws currently operate to prohibit discrimination on the specified grounds, there will be a question of whether any new Federal law operates to provide a justification to disregard, and/or render as inconsistent, the prohibitions in State laws which would otherwise need to be observed.

Therefore, despite the arguments raised by those whom suggest there is an unavoidable clash between religious freedom and recognition of same sex marriage, it appears that there is already a level of protection provided in respect of religious institutions. The scope of any new protections or exemptions will depend on the provisions of new Federal law and their interaction with existing State discrimination laws.