AUSTRALIAN MUTUAL PROVIDENT SOCIETY v CHAPLIN and ANOTHER

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

LORD DIPLOCK, LORD SIMON OF GLAISDALE, LORD FRASER OF TULLYBELTON, LORD RUSSELL OF KILLOWEN and LORD SCARMAN

14 March 1978 — London

Industrial law — Long service leave — Entitlement to — Insurance company representative — Whether employed under contract of service — Written agreement — Interpretation — Effect of subsequent conduct — Long Service Leave Act 1967 (SA) s 3(1).

Agency — Features of — Contract of service distinguished — Insurance company representative — Written agreement — Interpretation — Effect of subsequent conduct — Entitlement to long service leave — Long Service Leave Act 1967 (SA) s 3(1).

In 1967 the appellant appointed the respondent as one of its representatives, upon terms set out in a detailed written agreement. Clause 3 of the agreement stated: "The relationship between the Society and [the respondent] is that of Principal and Agent and not that of Master and Servant."

The respondent later claimed that he was entitled to benefits under the Long Service Leave Act 1967 (SA), because he was a "worker" as defined in the Act. That definition in s 3 said: " 'worker' means a person employed under a contract of service and includes a person so employed who is remunerated wholly or partly by commission." When the Full Court of the Supreme Court of South Australia held that the respondent was employed under a contract of service, the appellant appealed to the Privy Council.

Held, *per curiam*, allowing the appeal:—

(i) The possession by an alleged employer of the power to control the manner of doing the work was a very important indication of a contract of service, perhaps the most important of such indicia.

(ii) Clause 3 could not receive effect according to its terms if they contradicted the effect of the agreement as a whole. However, if the relationship of the parties was ambiguous and capable of being either service or agency, then the parties could remove that ambiguity by the very agreement itself which they made with one another. In the present case, where there was no reason to think that the clause was a sham, or that it was not a genuine statement of the parties' intentions, it must be given its proper weight in relation to other clauses in the agreement.

(iii) A detailed examination of the written agreement led to the conclusion that it provided for a contract of agency and not of service.

(iv) In relation to particular clauses:—

(a) Clauses imposing negative prohibitions of certain practices were entirely consistent with a contract of agency, and might be contrasted with the detailed positive instructions that would more appropriately be given to a servant.

(b) The power given to the respondent of unlimited delegation of the whole performance of his work to one or more sub-agent was almost conclusive against the contract being a contract of service.

Re Mutual Aid Permanent Benefit Building Society; Ex parte James (1883) 49 LT 530; *Robinson v Hill* [1910] 1 KB 94; *Murphy v Ross* [1920] 2 IR 199, distinguished.

(c) A further important indication against the agreement being a contract of service was the right of the respondent to incorporate himself.

Montreal v Montreal Locomotive Works [1947] 1 DLR 161, distinguished.

(v) It was proper to consider the actions of the parties subsequent to the written

contract for the limited purpose of seeing whether they had had the effect of varying the written agreement.

Whitworth Street Estates Ltd v Miller [1970] AC 583; *Wickman Tools v Schuler A G* [1974] AC 235; [1973] 2 All ER 39, followed.

(vi) In the present case the written contract had not been varied in any material respect by the subsequent conduct of the parties. The conclusion which necessarily emerged from the whole facts in the case was that the respondent was not employed under a contract of service.

Appeal

This was an appeal to the Judicial Committee of the Privy Council from a decision of the Full Court of the Supreme Court of South Australia, which had discharged an order *nisi* for certiorari directed to a judge of the Industrial Court of South Australia. The circumstances appear in the advice of their Lordships.

T R Morling QC, R G Matheson QC and *B A Beaumont*, for the appellant.

T M McRae and *C M Johnston*, for the respondents.

Cur. adv. vult.

Lord Fraser of Tullybelton delivered the judgment of their Lordships' Board: Mr Chaplin (the respondent) was appointed by the Australian Mutual Provident Society in 1967 to be one of their representatives, and he held the appointment until 1975. He claims that, as such representative, he was employed by the Society under a contract of service. The Society denies that he was an employee of theirs and maintains that the respondent was an independent contractor. The relationship between the parties was undoubtedly regulated by a contract of some sort; the question in this appeal is whether the contract was one of service or one of agency. If it was the former, then the respondent falls within the definition of "worker" in s 3(1) of the (South Australian) Long Service Leave Act 1967, and he is entitled to certain benefits under that Act to which he would not otherwise be entitled.

The only part of the Act that need here be quoted is that definition, which is as follows:—

> " 'worker' means a person employed under a contract of service and includes a person so employed who is remunerated wholly or partly by commission."

The appeal is from a judgment and order dated 5 August 1977 of the Full Court of the Supreme Court of South Australia, and is by leave of the Supreme Court. The order of 5 August discharged an order *nisi* for certiorari made by Hogarth J on 29 April 1977, directed to Judge Allan, a judge of the Industrial Court of South Australia. Judge Allan had found that the respondent was employed under a contract of service and was therefore a "worker" in the sense of the 1967 Act. The Supreme Court unanimously upheld the learned judge's finding. In the Supreme Court an issue was raised by the respondent as to whether certiorari would lie in this case, but that issue was

decided by the court in favour of the Society and their decision was not challenged before their Lordships' Board.

The appeal does not raise any general question of law. A number of decided cases was referred to in the course of the argument but, 5 except on certain particular points to be mentioned later, their Lordships consider that these cases are only useful as examples of facts which have been treated by the courts as indications for or against a contract of service. Their Lordships are content to adopt the following passages from the judgment of the learned Chief Justice in 10 the Supreme Court, in which Hogarth J concurred, as a correct summary of the law for the present purpose: "How, then, is one to distinguish between a contract of service and a contract for services? The older test was simple. It all turned on the right to control the manner of doing the work. If the alleged employer possessed such a 15 power the contract was a contract of service, not a contract for services: if not, then not. That power was both a necessary and sufficient condition of a contract of service."

After referring to a number of decided cases the learned Chief Justice went on: "It seems to me, then, that at the present time there is 20 no magic touchstone. The court has to look at a number of indicia and then make up its mind into which category the instant case should be put. It is a question of balancing the indicia pro and con . . . But the power of control over the manner of doing the work is very 25 important, perhaps the most important of such indicia."

The material facts are not in dispute. They were set out fully and clearly by Judge Allan, whose findings were accepted by the Supreme Court, and, except on one matter, they were not challenged before the Board. In 1966 or 1967 the respondent, who was then 30 employed by South Australian Railways, applied to the Society for appointment as one of their representatives. He had several extensive interviews with employees of the Society, one of whom visited his house and interviewed the respondent and his wife. His application was successful. Thereafter matters proceeded in stages. By letter 35 dated 18 April 1967 he was informed that, subject to satisfactory completion of a training course, he would be appointed as a representative of the Society on probation as from 8 May 1967. With the letter there was enclosed a booklet entitled "Benefits and Conditions of Appointment as an AMP Representative" (hereinafter 40 referred to as the written agreement), which set out in considerable detail the terms and conditions of his appointment. The written agreement is divided into several sections of which there appear now to be eight in all, but at that time he was issued only with Sections I to V. He was invited, if he was in agreement with the terms mentioned 45 therein, to sign and return to the Society a form of acceptance and undertaking. He did so and his acceptance marks the beginning of the first stage of his contractual relationship with the Society. The training course on which he then embarked was a full-time course and lasted for two weeks, during which he was paid an allowance of $40 per 50 week

Stage 2 began about 22 May 1967 when, after completing the training course, he was appointed as a representative on probation. During his probationary period he was required to attend a training school for about two hours every week and he was paid regular advances against future commission, for the purpose of assisting him to meet reasonable living and working expenses while he was building up new business.

Stage 3, the final stage, began on 24 November 1967 when his probationary period ended and he was appointed as an ordinary representative. The appointment was "confirmed" by letter dated 29 November 1967 from the Society with which was enclosed Section VI and probably also Section VII of the written agreement. Section VIII may have issued at some later date. From that time on the fortnightly advances ceased but he received an expense allowance of $18 per month — see Section II, cl 41. The contract which regulated the respondent's appointment as an ordinary representative, and which alone is material for the present purpose, began on 24 November 1967. The relations of the parties during the previous stages is relevant, if at all, only as background.

One minor matter can be disposed of now. The letter of 18 April 1967, by which the respondent was advised that he would be appointed as a representative of the Society on probation, advised him that he had also been appointed an agent for a subsidiary company of the Society called the AMP Fire and General Insurance Co Ltd, on the terms stated in Section III of the written agreement, "subject to completion of the enclosed application", and that the Society had no objection should he wish the agency to be registered in the name of his wife. The respondent did so wish, and the agency was registered in name of his wife, but notwithstanding that fact it was apparently conducted in his name. It was suggested in argument that the existence of the fire agency threw some light on the nature of the contractual relationship between the respondent and the Society but their Lordships do not agree. The respondent's fire agency and his relationship with the Society were separate (as stated in cl 1 of Section I of the written agreement), and their Lordships agree with the learned Chief Justice and with Judge Allan that the circumstances and the nature of the fire agency have no relevancy to the question now falling to be decided.

The written agreement is the principal, though not the only, source of information as to the nature of the contractual relationship between the parties. Section I is headed "General Terms of Appointment as an AMP Representative" and the following clauses in that section appear to their Lordships to be of particular importance for the purpose of this appeal, *videlicet:—*

"3. The relationship between the Society and yourself is that of Principal and Agent and not that of Master and Servant.

"5. The business of your agency is to be conducted in a manner approved by the Society and in accordance with practices set out in this booklet (including the rates of commission payable by the Society from time to time) and as laid down by the Society and advised to you from time to time Continuance of your agency after issue by the

Society of a letter to you, or of a memorandum or circular to agents, adding to, amending or rescinding any of the terms set out in this booklet, will be taken as your acceptance of the altered terms.

"6. Your appointment as an agent may be terminated by yourself or
5 by the Society at any time, without prior notice and without assigning any cause. . . .

"7. All matters affecting your agency and the Society's business are to be treated as strictly confidential.

"8. All books, maps, literature and other material of every
10 description supplied by the Society, and all records of the Society's business whether supplied by it or compiled by you, are to be held by you as the property of the Society and handed over to it on request.

"9. Literature or letterheads, other than those supplied by the Society, are not to be used on its business without its consent. Except
15 at the written request of the Society, no leaflet or other of its publications is to be modified in any way other than by writing or stamping your name, designation and address thereon.

"10. You are not to send letters to the press or advertise in connection with your agency or the Society's business without its
20 consent.

"11. You are not to pay a premium (or portion of a premium) for a proponent or policy holder unless he or she is a member of your own family.

"12. The Society's consent is required before you enter into any
25 partnership in connection with its business or any continuing arrangement which provides for your commission earnings to be shared with another agent of the Society.

"13. Your name should not be endorsed on any proposal for insurance obtained by another agent without the Society's consent.

30 "14. *As amended March 1970:* While you remain an agent of the Society neither you, nor your spouse or child, nor any employee of yours is, without the prior consent in writing of the Society, to hold shares or any financial interest in any 'competing institution' or to act directly or indirectly as the agent or representative of a 'competing
35 institution'."

Clearly cl 3, which, if it stood alone, would be conclusive in favour of the Society, cannot receive effect according to its terms if they contradict the effect of the agreement as a whole. Nevertheless, their Lordships attach importance to cl 3, and they consider that the
40 following statement by Lord Denning MR in *Massey v Crown Life Insurance Co* (4 November 1977, unreported) correctly states the way in which it can properly be used: "The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that
45 relationship by putting a different label upon it . . . On the other hand, if their relationship is ambiguous and is capable of being one or the other [ie either service or agency], then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material
50 from which to gather the true legal relationship between them "

In the present case, where there is no reason to think that the clause is a sham, or that it is not a genuine statement of the parties' intentions, it must be given its proper weight in relation to other clauses in the agreement. It is particularly important in relation to cl 5, where the obligation to conduct the agency in accordance with practices "as laid down by the Society . . . from time to time" is capable of being read as giving the Society complete control over the work of the respondent. If cl 5 stood alone it would be a strong indication of a relationship of master and servant. But in the opinion of their Lordships the effect of reading the clauses together is that cl 5 is coloured by cl 3 and ought to be read as applying only to such practices as could be laid down by a principal for his agent. That is in no way a forced reading of cl 5, and it consists with the provision in the first part of the clause that the practices in accordance with which the representative is to conduct his agency include observing the rates of commission payable by the Society from time to time; these rates must clearly be laid down by the Society for its representatives even if they are not its servants.

Clause 6 was regarded by the learned Chief Justice as an indication in favour of a contract of service but their Lordships are unable to regard it in that light. His Honour relied as supporting his view of the clause upon a passage from *Atiyah on Vicarious Liability in the Law of Torts* at pp 53 to 56 which is headed "The Power of Dismissal". But the passage is not applicable to cl 6, which does not confer on the Society a power to "dismiss" its representatives, but merely provides that the appointment may be terminated by either party without notice. Accordingly their Lordships regard this clause as neutral.

Clause 7 is relevant for the present purpose only because it pointedly draws a contrast between "your agency" and "the Society's business". The two things are, of course, intimately connected but they are not the same. The separate nature of the agency is emphasized in the written agreement in the part headed "conclusion to Sections I to V", where one of the advantages of the job as an AMP representative is described as "freedom of action to run *your own business*" (emphasis added). The distinction between the representative's agency and the Society's business is of importance in relation to cll 8 and 9. The latter part of cl 8 provides that "all records of the Society's business . . . compiled by you" are to be held as the property of the Society, but it does not apply to records relating to the representative's agency in so far as they can be distinguished from records of the Society's business. Similarly cl 9 deals with the use of literature or letterheads, but only if used on the Society's business.

Clauses 10 to 15 inclusive in Section I impose prohibitions of certain practices, but these negative prohibitions are entirely consistent with a contract of agency and may be contrasted with the detailed positive instructions that would more appropriately be given to a servant. The learned Chief Justice pointed out that the prohibition in cl 14 (both in its unamended and its amended form) against the agent's acting for any "competing institution" was inconsistent with his carrying on a separate occupation "as a general insurance agent available to work

for all customers". That is true, but it does not necessarily imply that he was the Society's servant, as he was free to carry on any other decorous business that he liked. He did, in fact, carry on a market gardening business, as well as assisting a bookmaker.

5 The matters so far mentioned are inconclusive on the question of whether the contract is one of service or for services. But there are a number of clauses which, in the opinion of their Lordships, point clearly to the latter conclusion. The first of these is cl 12 which recognizes that the respondent has a right to enter into a partnership 10 in connection with the Society's business. It may not be absolutely inconsistent with a relationship of master and servant that the alleged servant should be a partnership, but it would certainly be unusual. Its significance is not affected by the requirement for the Society's prior consent. An even stronger indication to the same effect is the agent's 15 right to appoint sub-agents defined in Section II cl 4 and recognized in Section I cl 6(d) (as amended September 1971). This power was recognized by the learned Chief Justice as perhaps the greatest obstacle to his view in favour of a relationship of master and servant, but he concluded that it was not insuperable. Their Lordships are 20 unable to agree. With respect they do not consider that the three cases on which his Honour relied in support of this part of his judgment are in point: ***Re Mutual Aid Permanent Benefit Building Society; Ex parte James*** (1883) 49 LT 530; ***Robinson v Hill*** [1910] 1 KB 94; ***Murphy v 25 Ross*** [1920] 2 IR 199. These cases concerned respectively a private clerk employed by the secretary to a society and boys employed by a vanman and a lorry driver to help them in their work, and in each of them the servant himself (the secretary and the driver) continued to do the main part of the work; the sub-servant or sub-agent was not in 30 a position to do more than assist him in relatively minor ways. In the present case there appears to be nothing in the written agreement to prevent the respondent from delegating the whole performance of his work to one or more sub-agents. In the opinion of their Lordships this power of unlimited delegation is almost conclusive against the 35 contract being a contract of service — see ***Atiyah op cit*** p 59, a passage cited by the learned Chief Justice. The unlimited extent of the power of delegation is one consequence of the striking absence of any express obligation upon the respondent to perform any particular duties, or to work any particular hours, or indeed to do any work at 40 all on behalf of the Society. The assumption is that the payment of commission will be sufficient inducement to him to do some work. Payment wholly by commission is not by itself fatal to the respondent's claim having regard to the definition of "worker" in the Act, but the absence of an obligation to do any work for the Society 45 is, in their Lordships' opinion, a strong indication that he is not their servant. In Section IV, which is headed "Death, Permanent Disablement and Retirement Benefits Plan", there is a reference in cl 10 to "your full-time life agency", which indicates an expectation that the representative will devote his whole time to the work, but it 50 does not purport to impose any obligation to do so The expense

allowance of $18 per month to which he is entitled under cl 41 of Section II of the written agreement may possibly imply an obligation on him to have some work (minimal in amount) performed on behalf of the Society, but not necessarily to perform it himself.

A further important indication against this being a contract of service is the right of the respondent to incorporate himself — see the latter part of cl 14 of Section I (as amended March 1970). It may not be impossible for a body corporate to be a servant but the concept is certainly unfamiliar. The case of *Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 mentioned by the learned Chief Justice was concerned with the special position of an agent or mandatory acting on behalf of the Crown and it does not appear to their Lordships to be an authority for any general proposition that a body corporate can be a servant. Clause 14 (as amended) also refers to employees of the agent and this again is an indication against a contract of service. It is true that the reference, read literally, might apply to any employee, such as a domestic servant, even if his work was not directly connected with the Society's business, but it seems unlikely that it was intended to be limited to employees of that type; cl 14 prohibits any employee of the agent, together with the agent and members of his family, from holding shares in or acting as agents of a competing institution, and it would have little point unless the employees in contemplation were those whose work would be connected with the Society's business.

The later sections of the written agreement for the most part do not bear directly on the present question, but their Lordships observe that in Section V headed "Fringe Benefits" cl 7 at least gives fair warning to the respondent that "as the relationship between the Society and its representatives is that of principal and agent, they are not covered under the terms of the various State and Federal Workers' Compensation Acts . . .".

The conclusion that their Lordships draw from a detailed examination of the written agreement is that it was providing for a contract of agency and not of service. The learned Chief Justice said that the Society had "done its best to make the contract a contract for services or a contract of agency" and his Honour seems to have thought that they were attaching a false label to it. Their Lordships do not share that view. They consider that the label attached by cl 3 of Section I is entirely consistent with the contract as a whole.

As Lord Reid said in *Whitworth Street Estates Ltd v Miller* [1970] AC 583 at 603E; [1970] 1 All ER 796 at 798 (h): ". . . it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made" — and see also *Wickman Tools v Schuler A G* [1974] AC 235; [1973] 2 All ER 39. But it is possible that the contract made on 24 November 1967 might have been amended or varied by the subsequent actings of the parties, as well as by the written amendments expressly contemplated by cl 5 of Section I. It is therefore proper to consider the subsequent actings, so far as they have been relied on by counsel

in argument or by the learned judges of the Supreme Court, for the limited purpose of seeing whether they have had the effect of varying the written agreement. In general their Lordships regard the freedom enjoyed by the respondent to work when and where he chose, as indicia in favour of agency. King J mentioned the "relative lack of supervision" as a feature of the respondent's work, although at a later part of his judgment his Honour referred to a "considerable amount of supervision". In so far as these descriptions of the position are in conflict, their Lordships consider that the former is the more correct. They have in mind particularly that the respondent was not required to report his whereabouts or his activities in agency work, or to ask for leave of absence when he took a holiday, that he used a room in his own house as an office, paid his own clerical staff, and appointed three sub-agents during his period in office. His freedom in these respects involved no departure from the terms of the written agreement.

One matter specifically mentioned by the court was the attendance of the respondent from time to time at the Society's offices, in accordance with a roster, to deal with inquiries from the public. Judge Allan found that these rostered attendances were obligatory. This finding was accepted by the Supreme Court and was one of the factors relied upon by the learned Chief Justice. This was the only finding of fact that was disputed by counsel for the Society before their Lordships, and unfortunately this finding is erroneous — see transcript of respondent's evidence (p 47). Accordingly there is no indication here in favour of service.

The respondent also attended meetings referred to as sales meetings, at the Society's offices, at least once a month. Attendance at these meetings was regarded by the respondent as obligatory and Judge Allan held that he was justified in so regarding it. But their Lordships do not consider that this is of great significance, as the reason for attendance was that it was necessary for the agents to be kept informed and instructed about new forms of insurance contract, changes in the relevant law, and other current matters. Reference was made to a circular memorandum dated 13 September 1973 calling a special meeting of all representatives, and including the statement: "Attendance at this meeting should be regarded by yourself as obligatory." It was argued that the circular was an indication that the addressees were servants of the Society. But their Lordships regard it as an indication to the contrary. In their view the terms of the memorandum are not such as would be used by a society to its servants; the statement that attendance "at this meeting" should be regarded as obligatory implies that it was exceptional and suggests that the writer thought attendance at meetings would not normally be obligatory.

The learned Chief Justice also mentioned, as one of the indicia in favour of service, the fact that the respondent acquired no goodwill or other saleable assets in his agency. Their Lordships are unable to regard this as significant for this purpose, because it arises from the

nature of the activities of a representative of the Society, *videlicet* the obtaining of life assurance contracts. Such contracts are not normally renewable each year, and there is little room for goodwill. In that respect they are in contrast with other types of insurance contract which are normally renewable annually. (In the fire agency the respondent built up a "register" which he sold when his, or his wife's agency came to an end.)

The last matter to which it is necessary to refer is in connection with the respondent's income tax returns. Their Lordships attach no importance to the fact that he described himself in the return as a consultant. But what does appear to be important is the relatively large amount that he claimed in respect of business expenses as a deduction from his gross income. The items in the claim included commission to sub-agents, wages to secretarial staff, depreciation of motor car and office furniture and equipment, and other typical business expenses. In the year ended 30 June 1974 the total amount of expenses claimed was $9030, which was deducted from his gross income of $19,617 (of which $17,594 was in respect of commission from the Society). That is to say nearly half his gross income, and more than half his commission, went in expenses. In each of the three years for which returns were produced the ratio of expenses to income was between 40 and 50 per cent. Such a high ratio appears much more consistent with the view that the taxpayer was carrying on a business of his own than with the alternative view that he was an employee under a contract of service. The returns therefore do not in any way suggest that the written agreement had been varied. They could not by themselves have effected, or have contributed to, a variation because the Society was, of course, not a party to them.

For these reasons their Lordships are of opinion that the effect of the written contract was not varied in any material respect by the subsequent conduct of the parties, and that the conclusion which necessarily emerges from the whole facts in the case is that the respondent was not employed under a contract of service. Their Lordships appreciate that in coming to that conclusion they are differing from the unanimous decision of the Supreme Court and also from the decision of Judge Allan. They do so only after most careful consideration, and for the reasons which they have set out at some length above, and which they regard as compelling.

Their Lordships will humbly advise Her Majesty that the case be remitted to the Supreme Court to make absolute the order *nisi* of 29 April 1977. Counsel for the Society stated that, in the event of the appeal being successful, he would not ask for the costs of the appeal. Their Lordships consider this was the proper course in the circumstances and they make no order for costs in the appeal.

Solicitors for the appellant: *Knox & Hargreave*.

Solicitors for the respondents: *Reilly, Ahern & Kerin*.

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