> The amassing of wealth by organised religions often means that the leaders live richly (sometimes in palaces) even though many of the believers live in poverty. Many religions have been notorious for corrupt trafficking in relics, other sacred objects, and religious offices, as well as for condoning sin even in advance, for money.[37]

On balance, Murphy J. found that the case for granting special leave was 'overwhelming' and the allowing of the appeal essential to prevent the sort of religious descrimination which might ensue if the Victorian Supreme Court approach was endorsed. His Honour's final comment on the Victorian Supreme Court decision was to speculate on how the early Christians would have fared in that forum:

> Christianity claims to have begun with a founder and twelve adherents. It had no written constitution, and no permanent meeting place. It borrowed heavily from the teachings of the Jewish religion, but had no complete and absolute moral code. Its founder exhorted people to love one another and taught by example. Outsiders regarded his teachings, especially about the nature of divinity, as ambigous, obscure and contradictory, as well as blasphemous and illegal. On the criteria used in this case by the Supreme Court of Victoria, early Christianity would not have been considered religious.[38]

4. *CONCLUSION*

We now have a set of judicial pronouncements of the highest authority for Australian courts on what is meant by a religion and a religious institution in this country. It remains to be seen whether the very broad guidelines set by the High Court are in fact manageable or whether the 'charlatanism' considered by Mason A.C.J. and Brennan J. 'to be the necessary price of religious freedom' will be too high a price to pay.

MARK DARIAN-SMITH*

NARICH PTY LTD v. COMMISSIONER OF PAY-ROLL TAX (N.S.W.)[1]

Whether contract for service or of service — express agreement that independent contractor — was relationship that of employer — employee — Payroll Tax Act 1971 (N.S.W.).

In this case, as taken from the headnote[2],

> the appellant held the Australian franchise to conduct Weight Watchers classes for people wishing to lose weight. It engaged lecturers under agreements by which a lecturer agreed to teach the programme detailed in *The Weight Watchers Lecturers' Handbook* to classes arranged by the appellant. The agreements provided a scale of fees, and allowed an engagement to be terminated without notice if the lecturer failed to carry out her duties in a proper manner, or if her weight exceeded her goal weight. Clause 3 stated that 'the lecturer is not an employee of the company but is an independent contractor . . .'. In practice, lecturers deducted their fees from money collected by them for the appellant from the members of each class.
>
> The Commissioner of Pay-roll Tax for New South Wales issued an assessment of tax on amounts of remuneration paid by the appellant to lecturers from 1973 to 1977, on the basis that they were wages 'paid to an employee as such' within s. 3(1) of the Pay-roll Tax Act 1971 (N.S.W.). The appellant's objection [based mainly upon the contention that the lecturers were not 'employees'] was disallowed by the Supreme Court of New South Wales.

On appeal from the decision of Woodward J. to the Judicial Committee of the Privy Council, the Committee advised Her Majesty that the appeal be dismissed. In short, the Committee was of the view that:

(i) 'subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances

[37] *Ibid.* 800.
[38] *Ibid.*
* B.A. (Hons); LL.B. (Hons); Barrister and Solicitor of the Supreme Court of Victoria.
[1] (1983) 50 A.L.R. 417.
[2] *Ibid.*

surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have amounted to an agreed addition to, or modification of, the original written contract, such conduct may be considered and taken into account by the court'[3] following the previous decision of the Judicial Committee in *Australian Mutual Provident Society v. Chaplin*[4].

(ii) 'while all relevant terms of the contract must be regarded, the most important, and in most cases the decisive, criterion for determining the relationship between the parties is the extent to which the person, whose status as employee or independent contractor is direction and control of the other party to the contract with regard to the manner in which he does his work under it',[5] again following the *AMP* case.

(iii) 'where the parties have, as in the present case, included in their written contract an express provision purporting to define the status of the party engaged under it, either as that of employee on the one hand, or as that of independent contractor on the other',[6] a passage taken from the judgment of Lord Fraser of Tullybelton in the *AMP* case[7] correctly states the law:

> '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 following statement by Lord Denning M.R. in *Massey v. Crown Life Insurance Co.* [1978] 1 W.L.R. 676 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 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 [i.e. 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 from which to gather the true legal relationship between them.'

(iv) In light of (iii) above, effect could not be given to cl. 3 according to its terms, as the effect of the contract as a whole, as written and as modified by the parties subsequent conduct, was to contradict cl. 3.

(v) An employer and employee relationship was created between the appellant and a lecturer by the contract of engagement; this was because the practical effect of that contract was to require compliance with the handbook by the lecturer, and the handbook directed and controlled the nature, scope and manner of the lecturers' work.

(vi) The fees received by the lecturers were 'taxable wages' within the meaning of that term in sub-section 3(1) of the New South Wales Pay-roll Tax Act 1971 because in the words of their Lordships[8],

> the substance of the matter is that the lecturers have their fees paid to them out of moneys belonging to Narich, and must therefore, as a matter of common sense, be regarded as being paid by Narich.

Their Lordships' judgment, delivered by Lord Brandon of Oakbrook, predominantly consisted of a detailed analysis of the factual and contractual aspects of the case touching upon the relationship between the appellant and the lecturers. Preliminary to that analysis, Lord Brandon outlined the relevant provisions of the New South Wales Pay-roll Tax Act 1971. Sub-section 3(1), the definition section, specifies the following meanings:

> 'Employer' — any person who pays or is liable to pay any wages;
> 'Taxable wages' — wages that, under s. 6, are liable to pay-roll tax;
> 'Wages' — any wages, salary, commission, bonuses or allowances paid or payable (whether at piece work rates or otherwise and whether paid or payable in cash or in kind) to an employee as such. . . .[9]

[3] *Ibid.* 420-1.
[4] (1978) 18 A.L.R. 385.
[5] (1983) 50 A.L.R. 417, 421.
[6] *Ibid.*
[7] (1978) 18 A.L.R. 385, 389-90.
[8] (1983) 50 A.L.R. 417, 427.
[9] *Ibid.* 419.

Paragraph 6(1) (a) provides, *inter alia*, and subject to an exception which is not material, that wages liable to pay-roll tax are wages payable in New South Wales after the month of August 1971.

Lord Brandon then set the scene for the rest of their Lordships' judgment by stating [10] that:

> '[I]t was common ground that the main question falling to be determined on this appeal was whether the nature of the contracts between Narich and its lecturers was that of contracts of service, under which the lecturers were employees of Narich, or that of contracts for services, under which the lecturers were independent contractors of Narich.'

The remainder of the judgment consists of a detailed analysis of this question. It is to be noted that the Commissioner of Taxation did not concede that, if the lecturers were in fact independent contractors and not employees, the appellant would not be liable to pay pay-roll tax in respect of the payments made to the lecturers. However, in view of their Lordships' decision as to the nature of the relationship between the appellant and the lecturers, it was not necessary to decide this point. In Victoria this issue is now largely covered by the provisions of the Victorian Pay-roll Tax (Amendment) Act 1983.

The appellant was the franchisee under a franchise agreement with Weight Watchers International Inc., and that agreement obliged the appellant to ensure that the unique Weight Watchers methods would be stringently followed in the lectures and classes conducted by it in Australia. The handbook produced by Weight Watchers outlines the programme to be followed, and the franchise agreement prohibits any departure from this programme. Their Lordships thought that this was a significant circumstance in the interpretation of the contract between the appellant and the lecturers, as, in their Lordships' view, the contract was made by the appellant 'for the purpose of performing its obligations as franchisees of Weight Watchers' [11]. The Franchise Agreement further made it clear that the lecturers must themselves attain and keep their proper weight (known as their 'goal weight') within two pounds, failing which they are to be automatically disqualified from continuance in the position previously occupied by them. The contract between the appellant and the lecturers restates this obligation from the Franchise Agreement.

Now the contract between the appellant and the lecturers, to be read against the background of the Franchise Agreement, provided, *inter alia*: [12]

(B) the Lecturer has agreed to act as Lecturer at Weight Watchers classes and the Company has agreed to hire to her the "Weight Watchers Lecturers' Handbook" containing material for guidance only including the Programme Food Plan for use as a Weight Watchers Lecturer and which the Lecturer agrees contains information which is and remains the property of the Company and forms part of the weight control skills', . . .

'NOW THIS AGREEMENT WITNESSETH:

"1. (b) If the Lecturer fails or refuses to carry out her duties or obligations as a Lecturer in a proper manner or if the weight of the Lecturer exceeds her goal weight the Company may terminate her engagement without notice or, with the Company's permission, she may arrange a substitute Lecturer until these deficiencies have been corrected." . . .

"2. The Company will pay the Lecturer a fee for each lecture and agreed ancillary tasks calculated as follows or such other fees as may from time to time be agreed between the parties", [then follows a scale of fees].

"3. The Lecturer is not an employee of the Company but is an independent contractor and shall perform her duties free from the direction and control of the Company and she will attend without payment one Saturday Meeting of Lecturers per month at which she will, *inter alia*, be weighed."

"4. The Lecturer shall to the best of her ability:—
   (a) deliver the lectures and teach the Programme and Plateau and Maintenance Plans; . . .
   (e) account to the Company for fees and dues received from the members of each class at which she lectures and in this regard the Lecturer shall be the Company's agent for collection and shall as soon as possible thereafter deposit the nett receipts to the credit of the Company's account at the National Bank of Australasia Limited, 249 Pitt Street, Sydney;

[10] *Ibid.*
[11] *Ibid.* 422.
[12] *Ibid.* 423-4.

(f) conduct the class so as to advance the welfare of the members according to the principles of Weight Watchers International Inc;." '

"6. The Company agrees to rent to the Lecturer for the period of her engagement hereunder the "Weight Watchers Lecturers' Handbook" for a rental of $5. The Lecturer undertakes that forthwith on the termination of her engagement hereunder for whatever reason she will immediately return to the Company her "Weight Watchers Lecturers' Handbook" and all other documents supplied to her in connection with such engagement and any copies thereof. When the said Handbook is returned in good condition, the Company will refund to the Lecturer the said rental of $5." '

Much evidence was adduced in the Supreme Court concerning the performance of the lecturers' contracts in practice and the extent to which the appellant directed and controlled the lecturers. However, in light of point (i) mentioned at the commencement of this note, their Lordships held that a great deal of that evidence was irrelevant and should be disregarded. Their Lordships did, however, treat as being relevant, consistently with the exception to point (i), that evidence which established that:

> the parties did, by their conduct subsequent to the making of the written contracts between them, impliedly add to, or modify, the terms of those contracts. That addition or modification related to the manner in which the lecturers were to be paid by Narich the fees in respect of Weight Watchers classes prescribed by cl. 3 of the earlier contract and cl. 2 of the later contract. What was further agreed by conduct in that respect was that the lecturers, at the conclusion of a class, should deduct their fees from the moneys paid by the members before remitting the balance to Narich's bank in Sydney;[13]

Following the principles enunciated in point (i), their Lordships then proceeded to determine the true nature of the relationship between the appellant and the lecturers, paying particular consideration to certain terms in their contract. The two terms accorded the most weight by their Lordships were:

(i) the arrangement referred to in Part (B) of the recitals for the hire by Narich to the lecturer of the Weight Watchers Lecturers' Handbook, described as being 'for guidance only', but the use of which, for reasons which will appear, cannot sensibly be limited in the way that these words would suggest; and

(ii) cl. 4(a), which required the lecturer, in delivering her lectures, to teach what is described as 'the Programme and Plateau and Maintenance Plans.'

Their Lordships then stated, in relation to these two terms above[14] that:

> the reference in cl. 4(a) to 'the Programme and Plateau and Maintenance Plans' is a clear reference to the contents of the Weight Watchers Lecturers' Handbook stated to be hired to the lecturer in part (B) of the recitals . . .
>
> The body of the handbook contains lengthy, detailed and specific instructions as to how each of the 28 subjects set out above is to be taught or handled by a Weight Watchers lecturer. It is impossible for a lecturer, who is required to teach and act, at or in connection with Weight Watchers classes, in accordance with this handbook, to use it 'for guidance only'. She either teaches and acts in the way prescribed in all its elaborate detail, or she does not. If, on the one hand, she does teach and act in the manner prescribed, not only the nature and scope of her work, but also the precise manner in which she does it, is closely controlled and directed by Narich through the medium of the handbook. Such close direction and control is clearly essential if Narich is to comply with its own obligations to Weight Watchers under the Franchise Agreement. It is, accordingly, not surprising to find such a close degree of direction and control provided for in a lecturer's contract: it would, on the contrary, be surprising not to find it. If on the other hand a lecturer fails or neglects to teach and act in the manner prescribed in the handbook, she is liable to have her engagement terminated, immediately and without notice, by Narich. She is liable to suffer the same fate if periodical weighing, which she is obliged to undergo, reveals that her weight exceeds her goal weight.

Thus their Lordships make it clear that, upon a true construction of the contract, its practical effect was to require compliance with the handbook by the lecturer, and the handbook, in turn, controlled the nature, scope and manner of the lecturer's work. Thus, through the medium of the handbook, the

[13] *Ibid.* 424-5.
[14] *Ibid.* 425-6.

appellant completely controlled and directed the work to be done by the lecturers. This is a clear and strong indication of the relationship of employer and employee existing. The appellant argued that the fact that the contract directs and controls the lecturer's work in this way does not of itself mean that the lecturer is under such direction and control of the appellant as to create a relationship of employer and employee between them. In fact, the appellant submitted that:

> the greater the detail in which the way in which the person engaged is to do his work is prescribed by the contract concerned, the less scope there is for direction and control of the way in which the work is done during and in the course of its performance.[15]

However, their Lordships rejected this argument, drawing attention to its paradoxical quality, and concluding that:

> It matters not by what means the engagor is contractually entitled to direct and control the manner in which the engagee does his work. What matters is that, by one means or another, the engagor is, as a matter of law arising from the terms of the contract concerned, entitled to do so.[16]

As a final summary of the effect of the lecturer's contract, their Lordships adopted a passage from the judgment of Woodward J. in the Supreme Court, that:

> [T]here was imposed upon every lecturer a number of obligations as to the manner in which the lecture was to be conducted, the information to be imparted to the members and an obligation not to exceed a specified weight. With the right to terminate such as it was the plaintiff was clearly able to control not only the task allotted to the lecturer but the manner in which the task was performed.[17]

Other terms of the contract showing that the relationship was one of employer and employee were:

(i) the elaborate description in part (A) of the recitals of the 'weight control skills' possessed by the appellant;
(ii) Clause 1(a), which provides that any substitute lecturer must be approved by the appellant, and that classes are to be held at such times and places as the appellant may arrange;
(iii) Clause 1(b), which entitles the appellant to terminate the engagement of the lecturer, immediately and without notice, if she fails to carry out her duties and obligations as a lecturer in a proper manner, or if her weight exceeds her goal weight; and
(iv) Clause 4(f), which requires the lecturer so to conduct her classes as to advance the principles of Weight Watchers.

These terms further strengthen the conclusion that the lecturers were under the total control and direction of the appellant and therefore were employees of the appellant.Only one question remained for their Lordships' determination, that being the effect of cl. 3 of the contract. Their Lordships quickly disposed of this question, stating[18] that:

> Having regard to the statement of principle by Lord Fraser of Tullybelton in the *AMP* case, it is impossible for cl. 3 of the later contract to receive effect according to its terms if they contradict the effect of the agreement as a whole. In their Lordships' view, for the reasons which have been given, the effect of the contract as a whole does contradict cl. 3, and effect cannot therefore be given to that clause according to its terms. The effect of the contract as a whole is to create between Narich and the lecturer the relationship of employer and employee, and, in so far as cl. 3 purports to provide otherwise, it must be treated as failing in its purpose. This is so, even though there has never been any suggestion either that cl. 3 was a sham, or that the parties did not include it in the contract in good faith and with the desire that it should be effective.

In conclusion, I can usefully add nothing to the final remarks of their Lordships that:

> The plain situation in law is that a lecturer is tied hand and foot by the contract with regard to the manner in which she performs her work under it. In these circumstances it is not possible to hold that she is, in relation to Narich, an independent contractor. On the contrary, the only possible conclusion is that she is an employee.[19]

[15] *Ibid.* 426.
[16] *Ibid.*
[17] (1981) 12 A.T.R. 478, 508.
[18] (1983) 50 A.L.R. 417, 426-7.
[19] *Ibid.* 427.

As a subsidiary contention, the appellant argued that the lecturers' fees were not 'wages' because lecturers take them out of the moneys collected from members, and therefore there is nothing more than an accounting situation between them and the appellant without any actual payment being made to them at all. Furthermore, it was argued that the fees were not 'taxable wages' because they were paid indirectly rather than directly. Their Lordships disposed of these contentions, stating that in substance the lecturers' fees are paid to them out of moneys belonging to the appellant, and thus as a matter of common sense those fees must be regarded as being paid by the appellant.

As a result, the fees received by the lecturers were wages paid by an employer to its employees, were subject to pay-roll tax under paragraph 6(1)(a) of the Act, and thus their Lordships advised Her Majesty that the appeal ought to be dismissed.

Whilst the decision in the *Narich* case as to the distinction between an employee and an independent contractor is now of less relevance to Victorian pay-roll tax law following the enactment of the Pay-roll Tax (Amendment) Act 1983, it is still of importance in other areas of the law where the distinction above raises its ugly head.

In hindsight it seems that, with all due respect, in light of the recent decisions concerning the distinction between an employee and an independent contractor, culminating in the *AMP* case, the submissions of the appellant in the *Narich* case never had any more than a remote chance of success, and it is indeed surprising that leave to appeal to the Judicial Committee of the Privy Council was ever contemplated.

PETER D. J. ICKERINGILL*

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