Judgment 7 of 1978

IN THE PRIVY COUNCIL No. 36 of 1977

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

AUSTRALIAN MUTUAL PROVIDENT SOCIETY Appellant

- and -

PETER THOMAS ALLAN and LANCELOT JOHN CHAPLIN Respondent

CASE FOR THE APPELLANT

INTRODUCTION RECORD

1. This is an appeal by leave of the Supreme Court of South Australia granted on 29th August 1977 from a judgment and order dated the 5th August 1977 of the Full Court of the Supreme Court of South Australia (Bray, C.J., Hogarth and King JJ.) discharging an order nisi of certiorari made by Hogarth J. in the Supreme Court of South Australia on the 29th day of April, 1977 and directed to the respondent Peter Thomas Allan, a Judge of the Industrial Court of South Australia, (hereinafter called "Judge Allan"). p.183 p.180 p.144

2. The issue raised in this appeal concerns the construction of certain provisions of the Long Service Leave Act, 1967 of South Australia, as amended (hereinafter called "the said Act") and in particular the definition of "worker" within the meaning of that Act.

3. The respondent Lancelot John Chaplin (hereinafter called "the respondent Chaplin") claimed that the appellant was bound to make a payment to him in lieu of Long Service leave pursuant to the provisions of the said Act.

RECORD

p.1

4. The respondent Chaplin alleged that he was employed by the appellant pursuant to a single contract of continuous service from 8th May, 1967 to 23rd April, 1975.

THE FACTS

5. The relevant basic facts are as follows:-

p.54 l.32
p.55 l.11
p.192

(a) The appellant is a mutual assurance society and its policies are sold by representatives remunerated by commission determined by reference to policies sold by them. The respondent Chaplin was appointed an ordinary representative on probation as from 8th May 1967. His appointment was confirmed with effect from 24th November 1967.

p.233

(b) The appellant has two types of agents, ordinary representatives and collector agents. A significant part of the activities of the latter type of agent is the regular collection of renewal premiums. This is no part of the function of the ordinary representative.

(c) The conditions of appointment of the respondent Chaplin were set out in a booklet entitled "Benefits and Conditions of Appointment as an A.M.P. Representative". So far as material, it provided as follows:-

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"SECTION 1 - GENERAL TERMS OF APPOINTMENT AS AN A.M.P. REPRESENTATIVE

Two separate Agency Appointments

1. As an A.M.P. Representative you hold two separate agency appointments. The first is from the Australian Mutual Provident Society (known as "the Society") whereby you are authorised to procure, on its behalf, new Ordinary life assurance, sickness and accident insurance and superannuation. The second is from the Society's wholly owned subsidiary A.M.P. Fire and General Insurance Company Limited (known as "A.M.P. Fire") whereby you are authorised to procure, on its behalf, general insurance

2. The terms and conditions set out in the remainder of this section apply to both these

agency appointments and references to "the Society" include A.M.P. Fire. Benefits and conditions applicable only to your appointment with the Australian Mutual Provident Society are set out in Section II and those applicable only to your appointment with A.M.P. Fire are set out in Section III.

Relationship with Society, General Conduct of Agency

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

4. For all purposes associated with your agency you should designate yourself as the Society's "Agent" or "Representative". These terms may, if desired, be qualified by any one, or an appropriate combination of, the following additional terms:-

"Consulting", "New Business", "Field", and "Metropolitan" or "District" (as appropriate).

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 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

Advertising, Literature etc.

8. All books, maps, literature and other material of every 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 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 consent.

Payment of Premiums.

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

Commission Arrangements with Other Agents of the Society.

12. The Society's consent is required before you enter into any 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.

Relations with Competing Institutions.

14. While you remain an agent of the Society you are not to act for any "competing institution" or receive a commission from it or its agent. By "competing institution" is meant any other insurance company or an institution such as a unit trust or mutual fund or superannuation fund which in the Society's opinion competes with it in any class of business.

15. The Society does not countenance any disparagement of a competing institution and you should be careful to confine yourself to fair criticism of published reports.

SECTION II - BENEFITS AND CONDITIONS APPLYING ONLY TO YOUR AGENCY WITH THE SOCIETY (i.e. Excluding A.M.P. Fire) p.199

2. You are not authorised to receive proposals outside the limits of your district nor to conduct "negotiations" outside your district with a view to receiving proposals from persons residing outside your district unless with the consent of the Society. The word "negotiations" include any approach to persons whether personally, by letter, telegram or telephone, by you or anyone acting on your behalf

Payment Away of Your Commission,

Sub-Agencies.

3. You are not to pay commission either directly or indirectly to any person other than a sub-agent approved by the Society.

4. Should you wish to appoint a sub-agent, the Society's approval should first be obtained. Until your appointment is confirmed it is not generally desirable for you to appoint sub-agents. It may, however, be desirable for you to continue a sub-agency already existing in your district. You should clearly understand and be sure that your sub-agents understand that:-

(a) Although their appointment has been approved by, and registered with, the Society it actually emanates from you and not the Society.

(b) they must look to you alone for payment of commission.

(c) Any prohibitions or obligations which apply to you in terms of this booklet apply equally to them, and

(d) you are responsible for every action of theirs in connection with the Society's

business

5. You are not to act as sub-agent to another agent of the Society without its consent.

Collection of Premiums.

7. You are authorised to collect provisionally first premiums in respect of proposals and amounts required to reinstate lapsed policies. Provisional premium receipt books provided by the Society are to be used to keep true accounts of all such amounts and to issue receipts for them. All such moneys are to be considered the property of the Society and are to be paid over to it immediately without any deduction. You have no authority to collect any other moneys on the Society's behalf.

P.216 SECTION V - "FRINGE" BENEFITS

Protection Against Disablement.

7. 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 (except in Queensland where specific provisions in the Act include agents).

p.8 1.4 (d) In the training course during the respondent Chaplin's probationary period, it was strongly emphasized that his relationship with the appellant was not that of master and servant.

p.8 1.13
p.343
p.350
p.358
p.364 (e) The respondent Chaplin was referred to as a "Consulting Representative" and, in his income tax returns, he referred to himself as a "Consultant".

(f) The respondent Chaplin was not required to report his whereabouts or his activities in the course of his

p.52 1.24 agency.

p.32 1.31
p.33 1.18 (g) The respondent Chaplin conducted his business from an office in his home.

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(h) He appointed three sub-agents over the period. He paid them remuneration out of his own income. They received no remuneration from the appellant. — p.33 1.20; p.35 1.10-1.15

(i) He paid his own clerical staff and other expenses. — p.35 1.28; p.36 1.24

(j) In his own income tax return, the respondent Chaplin claimed as tax deductions a number of expenditures including payments made to sub-agents, travelling expenses, stationery, telephone, entertainment, car registration and insurance, depreciation and running costs in that connection together with rental paid by him. — p.36 1.16-p.37 1.23; p.104 1.14-p.109 1.19

(k) A number of agents had with the approval of the appellant transferred their agencies to companies incorporated by them for that purpose. Shareholders of such companies could include members of the agent's family. — p.64 1.8-1.28

(l) If the respondent Chaplin used the telephone in the offices of the appellant, he paid for the use of it himself. — p.39 1.12

(m) Representatives were encouraged to attend sales meetings convened by the appellant's agency managers or by its sales manager. There was an average attendance of about eighty per centum of the representatives at the meetings. — p.46 1.24; p.67 1.3; p.112 1.30; p.113 1.3; p.114 1.8

(n) The agency manager did not give orders to the representatives. Advice was given but it was not always accepted. — p.61 1.21; p.110 1.31

(o) The respondent Chaplin had other part-time occupations. — p.47 1.18; p.107 1.22

(p) The respondent Chaplin could please himself what hours he worked and within the geographical limits of his agency where he worked. — p.22 1.10-1.15

(q) The conditions of appointment of the respondent Chaplin contained no provision relating to annual leave. He took holidays when and for whatever period he saw fit. He advised the appellant when he was doing so. — p.22 1.15

RECORD
p.64 1.29
p.65 1.3

(r) If any mail addressed to the respondent Chaplin was received by the appellant, it would not be opened by the appellant and would be handed to the respondent Chaplin unopened.

LEGISLATION

6. So far as material, the Long Service Leave Act, 1967, as amended provides as follows:-

"4.(1) Subject to this Act, every worker shall be entitled to long service leave or payment in lieu thereof in respect of his service with an employer.

(2) For the purposes of this Act, a worker whose service commenced before the commencement of this Act, shall be deemed to have commenced that service on the date:-

(a) on which he commenced service that has been continuous or is deemed to have been continuous under this Act;

or

(b) from which his service was, immediately prior to the commencement of this Act, calculated for the purposes of the repealed Act or any award, agreement or scheme then in operation that entitled the employer under section 13 of the repealed Act to be exempt from the obligations of that Act in relation to the worker,

whichever is the later.

(3) Subject to subsection (8) of section 5 of this Act, where a worker, after the commencement of the Long Service Leave Act Amendment Act, 1972 completes a period of not less than ten years' service with an employer, he shall be entitled as follows:-

(a) in respect of ten years' service so completed, to thirteen calendar weeks' leave;

and

(b) in respect of each ten years' service completed with the employer

after such ten years service to thirteen weeks' leave;

and

(c) on the termination of the worker's employment or his death, in respect of the number of years service the employer completed after such ten years' service, to a payment in lieu of leave on the basis of thirteen weeks for ten years service that has not been taken by him.

(4) Where the service of a worker is terminated and any long service leave to which he was entitled under this Act at the date of such termination has not been taken by him, the worker, or his personal representative, if the worker is deceased, shall be entitled to a payment in lieu of that long service leave.

(5) Subject to subsection (8) of section 5 of this Act, where a worker completes a period of not less than seven years' service but less than ten years' service with an employer, and his service is terminated after the commencement of this Act:-

(a) by the employer for any cause other than serious and wilful misconduct;

or

(b) by the worker, if he has lawfully terminated his contract of service;

or

(c) by the death of the worker, the worker, or his personal representative, if the worker is deceased, shall be entitled to a payment in lieu of long service leave calculated on the basis that the worker is entitled to that proportion of thirteen weeks' leave that the number of years service completed by the worker with the employer bears to ten years."

"5.(1) For the purposes of this Act, "service" means continuous service under a contract of service but a worker's service (whether before or after the commencement of this Act) shall be

deemed to have been continuous notwithstanding:-

(a) absence of the worker from work in accordance with the contract of service;

or

(b) absence of the worker from work for any cause by leave of the employer;

or

(c) absence of the worker from work on account of illness or injury;

or

(d) interruption or termination of the worker's service by any act or omission of the employer with the intention of avoiding any obligations imposed on him by this Act, the repealed Act, or any long service leave award, agreement or scheme in operation;

or

(e) interruption or termination of the worker's service arising directly or indirectly from an industrial dispute if the worker returns to the service of the employer in accordance with the terms of settlement of the dispute or was re-employed by the employer upon such settlement;

or

(f) the standing down of the worker by the employer on account of slackness of trade, if the worker is re-employed by the employer within six months thereof;

or

(g) interruption or termination of the worker's service by the employer

for any reason other than those referred to in paragraphs (d), (e) and (f) of this subsection if the worker returns to the service of or is re-employed by the employer within two months of the date on which the service was interrupted or terminated,

but the period during which the worker's service has been interrupted or terminated shall not, in the circumstances referred to in paragraphs (b), (e) (f) and (g) of this subsection be taken into account in calculating the period of the worker's service."

"6.(1) An employer shall pay to a worker on long service leave remuneration at the rate of the worker's ordinary pay applicable immediately prior to the commencement of the worker's long service leave but if any variation in the rate of ordinary pay is made during the period of the long service leave, the employer shall adjust the worker's remuneration to give effect to that variation.

(2) Payment shall be made in one of the following ways:-

(a) in advance for the whole period of long service leave;

or

(b) at the same times as payment would have been made if the worker had remained on duty, in which case payment shall, if the worker in writing so requires, be made by cheque posted to an address specified by him;

or

(c) in any other way agreed between the employer and the worker;

Provided that if during the period of leave any variation in the rate of the ordinary pay of the worker is made, and payment has been in advance the employer shall, upon the worker's return to duty, make any adjustment necessary to give effect to the variation.

(3) Where a worker or his personal representa-

tive is entitled to a payment in lieu of long service leave under this Act such payment shall be calculated at the rate of the ordinary pay of the worker applicable immediately prior to the termination of his service and shall be made either forthwith to the worker or if the worker is deceased, to the worker's personal representative upon his request therefor."

The following definitions in Section 3(1) are material:

" "employer" means a person employing a worker or workers, but does not include the Crown:"

" "ordinary pay" in relation to a worker means remuneration for the worker's normal weekly number of hours of work calculated at his ordinary time rate of pay, and where the worker is provided with free board or lodging by his employer, includes the cash value of that board or lodging as prescribed by the award under which he is paid or, if such value is not prescribed by any award, as provided by the terms of his employment. The term does not include shift premiums, overtime, or other penalty rates;"

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

Section 3 (2) provides as follows:-

" (2) For the purposes of the definition of "ordinary pay" in subsection (1) of this section:-

(a) where no ordinary time rate of pay is fixed for a worker's work under the terms of his service or in the case of a worker employed on piece or bonus work or any other system of payment by results the ordinary time rate of pay shall be deemed to be the average weekly rate earned by him during the period of twelve months immediately preceding the date on which he commences his long service leave or the right to payment in lieu thereof accrues

either to the worker or his personal representative;

and

(b) where no normal weekly number of hours of work is fixed for a worker under the terms of his service, the normal weekly number of hours of work shall be deemed to be the average weekly number of hours worked by him during the period referred to in paragraph (a) of this subsection."

HEARING IN THE INDUSTRIAL COURT

7. The respondent Chaplin applied to the Industrial Court for an order for the payment of a sum of money in lieu of long service leave to which he alleged he was entitled pursuant to the provisions of the said Act. He alleged that he was employed by the appellant pursuant to a single contract of continuous service from 8th May, 1967 to 23rd April, 1975. The appellant denied that he was so employed, or, that he was employed by the appellant at all. The appellant alleged that he was, at all material times, an independent contractor. Further, the appellant denied that the respondent Chaplin was, at any material time, a "worker" within the meaning of that expression in the Act. Judge Allan rejected the submissions of the appellant and held that from 8th May, 1967 to 23rd April, 1975 the said respondent was a worker within the meaning of the said Act and ordered the appellant to pay to him the sum of $3,266.66 in lieu of long service leave. p.1 p.3 p.143

HEARING IN THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

8. On the 29th April, 1977, Hogarth J. granted an order nisi for certiorari upon the application of the appellant against Judge Allan to show cause why an order of certiorari should not be made to remove into the Supreme Court to be quashed the decisions and order of the Industrial Court. p.144

9. The Full Court held that certiorari would lie in the present case if the appellant showed that the respondent Chaplin was not a "worker" within the meaning of the said Act. (See: R. v Australian Stevedoring Industry Board ex parte Melbourne Stevedoring Co. Pty. Ltd. 88 C.L.R. p.152 1.6 p.174 1.26

RECORD

100 per Dixon C.J., Williams, J., Webb J. and Fullagar J. at p. 117, R. v Connell Ex Parte The Hetton Bellbird Collieries Ltd. 69 C.L.R. 407). However, the Court went on to hold that the respondent Chaplin was a "worker" within the meaning of the said Act.

p.160 1.43 10. The view taken by Bray, C.J., with whom Hogarth, J. concurred, and King J. is indicated in the following passages from their judgments:-

Bray C.J.

p.160 1.43 "It seems to me, then, that at the present time there is 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, cf. Sykes & Glasbeek, Labour Law in Australia p. 14. But the power of control over the manner of doing the work is very important, perhaps the most important of such indicia."

p.165 1.37 "In my view the Society had here the legal right to exercise control over the manner in which the representative sold insurance on its behalf and did in fact exercise control over him through the medium of the supervisor, the roster and the obligatory attendance at the sales office and at the sales meetings. These considerations are not, as I have said, decisive, but, in my view, in this case their existence amongst the other indicia, pro and con, weighs down the balance in favour of a contract of service."

King J.

p.180 1.3 "I have been troubled by the fact that the document containing the terms of appointment contemplated the possible employment of sub-agents with the consent of the Society and by the further fact that Mr. Chaplin in fact employed such agents although only to a limited extent. But looking at the whole of the evidence both as to what is contained in the documents and what was done by the parties, it seems to me that the representative had very little freedom of action, a great deal less indeed than is enjoyed by most

employees. An independent contractor must have some significant freedom of choice as to the method by which he will achieve the result which he has contracted to achieve. In every significant respect, this representative was subject to the control and approval of the Society both according to the terms of the documents containing the terms of his appointment and in the actual way that the business was carried on. I may say that in my opinion the representative's relationship (itself obscure) with the subsidiary A.M.P. Fire and General Insurance Co. Ltd., has no bearing on the nature of the representative's contract with A.M.P. Society. In my opinion the learned Industrial Court Judge was right in finding that Mr. Chaplin was employed under a contract of service and was a worker within the meaning of the Long Service Leave Act. "

11. The Court discharged the order nisi. p.181

SUBMISSIONS

12. It is submitted that the decision of the Full Court of South Australia is quite inconsistent with previous decisions of courts of high authority in Australia and the United Kingdom dealing with the nature of the relationship between an insurance company and its representatives. Although the facts in these cases were not identical with those under consideration in this appeal it is submitted that they were similar in substance and that the dicta of the judges in those cases are therefore very persuasive. For instance in Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-operative Assurance Company of Australia Limited (1931) 46 CLR 41 at 47 Dixon J. (as he then was) said:-

"In the written agreement he is called "the agent", and the appellant Company agrees to pay to him on proposals, bearing his signature as introducing agent, commission at specified rates in respect of completed and accepted business. His duties are not defined, but the agreement expressly allows him to perform them either by his clerks and servants or personally. It provides that he may engage in any other business or occupation during the continuance of the agency, except that he may not directly or indirectly act for any

> other life or accident insurance company. It contemplates the receipt by him of moneys on behalf of the appellant, and stipulates for prompt payment over and a statement of the receipts. It expressly prohibits him from using language which may reflect upon the character or conduct of any person or institution, or tend to bring it into disrepute or discredit.
>
> Little evidence was given of the relations which in fact subsisted between him and the appellant in the actual conduct of his agency; and, I think, no sufficient reason appears for supposing that the appellant assumed such a control over the manner in which he executed his work as to constitute him its servant. "

In the same case Evatt J. said on page 69:

> "So far I have dealt with this case upon the basis that Ridley was a servant of the defendant. There is little or no evidence that he was a servant. He seems to have had a very free hand. The contract describes him as an "agent". The more reasonable inference from the contract and all the surrounding circumstances is that Ridley, although authorised by the defendant to procure offers for insurance from members of the public, was engaged in the business of insurance agent on his own account. If so, it was in the course of his own business that he spoke the slanders deemed actionable. "

In Co-operative Insurance Society Ltd. v Richardson Q.B.D. 4th March 1955 (reported in The Times 5th March 1955) at page 9 Sellers J. (as he then was) said:-

> "I do not know what the other 7,000 and more collectors would have said if they had known that it was being alleged in this case that their contract made them servants of the Plaintiffs, but I am inclined to think that the majority would regard themselves, and would wish to be regarded, as agents, in the sense of independent contractors. The matter has, however, to be decided on the effect of the contract and the Defendant in paragraph 3 of the Defence

places reliance on particular clauses. There is no doubt that the collectors' obligations to the Plaintiffs are regulated in much detail and it is not perhaps easy to assess the factors which turn the scales one way or the other.

In my opinion the detailed control was necessitated by the large number of collectors and the nature of the business and the predominant matters which establish the Defendant an independent contractor are the freedom permitted him as to how and when and by what methods he collects premiums and solicits new business; the payment by commission; the power he has over his agency book as agreed by Clause 10 of the Contract, and the use of the description "agent" in the agreement itself. The collector is his own master but is subject to the detailed obligations of his agency.

I do not think the facts that for the purposes of the Workmen's Compensation Acts and the National Insurance Acts the Plaintiff's agents and collectors have been and are treated as being engaged under a contract of service binding and conclusive. The former, in the only case cited, was the result of an admission and not a decision and the latter was apparently the ruling of the Ministry of Health. Also the obligations that the Defendant should belong to a trade union and to the Plaintiffs' Employees Pension and Death Benefit Scheme and the terms of the Scheme are no more than evidence for consideration on the issue of servant or independent contractor. "

(See also Mutual Life and Citizens Assurance Co. Ltd. v Her Majesty's Minister of Justice and Anor Queensland Supreme Court (19th February 1962) not reported and Tuit v Australian Mutual Provident Society (1975) 1 N.S.W.L.R. 158 at 159).

The Full Court disregarded these dicta; Bray C.J. made no mention of them and King J. expressly attached no weight to them. p.178 l.36

13. In deciding the nature of the relationship, it is, of course, necessary to consider and weigh all the relevant circumstances. A matter of the greatest significance, it is submitted, is how the parties themselves have described it. It is

submitted that only in the clearest cases of misdescription should a court fail to give effect to the expressed intention of the parties. In the judgments of the Full Court little weight if any was given to the fact that the parties had expressly negatived the relationship as being one of master and servant and it is submitted that in this respect their Honours were seriously in error. This is a case in which the expressed intention of the parties should prevail.

14. It is further submitted that the nature of the legal relationship between the parties in this case should be determined by the terms and conditions governing that relationship set out in the booklet entitled "Benefits and Conditions of Appointment as an A.M.P. Representative" and set out above. In Neale v Atlas Products (Vic.) Pty. Ltd. (1955) 94 C.L.R. 419 the Full Court of the High Court (Dixon C. J., McTiernan, Webb, Kitto and Taylor J.J.) said at page 428:-

p.196

> "Whilst there are reasons inherent in the document itself for doubting if it was the real measure of the relationship between the parties, it should be borne in mind that there was no reason whatever why they should not have arranged their affairs in this fashion if they were minded so to do and we should not be disposed to ignore it unless it can be said that the evidence establishes quite clearly that the conduct of the parties was inconsistent with it as the basis of their relationship. But this was not, in our opinion, established by the evidence. There was nothing to show that the tilers were not, in fact, free to perform the contractual work themselves or to employ other labour to carry out or assist in the carrying out of that work. Nor was there anything to establish that any form or degree of control appropriate to the relationship of master and servant was ever exercised. The circumstance that one job succeeded another with regularity and that more or less regular payments were made to the tilers did not furnish any safe basis for ignoring what was quite clearly said to have been the basis of their contractual relationships. On the whole we are of the opinion that there is no sufficient

ground for reversing the decision of the magistrate based as it was on the belief that the terms of the document substantially set forth the conditions upon which each tiler was employed upon each job."

(See also Binding v Great Yarmouth Port and Haven Commissioners (1923) 128LT 743, Co-operative Insurance Society Ltd. v Richardson cited above at 7; Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance (1968) 2 Q.B. 497 at 512; Construction Industry Training Board v Labour Force Ltd. (1970) 3 All E.R. 220 at 225; Global Plant Ltd. v Secretary of State for Social Services (1971) 3 All E.R. 385 at 391 and Massey v Crown Life Insurance Company Court of Appeal 4th November 1977.

There is no evidence that the document does other than represent the intention of the parties at the time when the respondent Chaplin was appointed as an agent of the appellant or that it was a sham.

(See Mullens Investments Pty. Ltd. v Commissioner of taxation (1977) 51 A.L.J.R. 82 at 92).

In the absence of evidence that the document was a sham, any other approach would produce the result that the legal nature of the relationship between the parties could not have been established with certainty at the time when the relationship came into existence.

15. It is also submitted that the respondent Chaplin was carrying on business on his own account. This was certainly the intention of the parties. Exhibit A3 ("The Benefits and Conditions of Appointment As An A.M.P. Representative") contains this passage in the Conclusion to Sections I-V;

"In conclusion therefor let us remind ourselves of some of these other aspects - no doubt mentioned during the course of your interviews with the Society's officers:- p.128

> Freedom of action to run your own business, to dictate your own earnings by the results you achieve....."

Furthermore the respondent Chaplin did many things in the course of his agency that are

consistent only with his carrying on the business of the agency on his own account. This indicated that he was carrying on his own business. For instance he engaged sub-agents, employed secretarial assistance, did his own advertising and paid for it, paid for his telephone rentals, calls and telephone answering service, subscribed to publications such as the Government Gazette to obtain business "leads", entertained clients at his own expense, giving them calendars, cards and flowers when the occasion required it and claimed depreciation on his car and on furniture which he used to contact or service clients.

p.161 1.49

16. Bray C.J. was of the opinion that a circumstance pointing to a master and servant relationship in the present case was the absence of any "saleable" goodwill. However, it is submitted that this is something which arises from the nature of the activity itself rather than the relationship of the parties. The need for renewal which exists in the case of other insurances does not occur in the case of life insurance. In the context of the need for renewal, there is a distinct probability that the client will wish to retain the services of the representative when renewal of the insurance becomes necessary, and, in this sense, goodwill is created. In the case of life assurance, no such need for renewal of the cover arises. It is thus difficult to create goodwill in that connection. Certainly, the lack of goodwill in that respect, it is submitted, throws no light on the present question.

17. Further, the relationship between the parties, as documented, included the grant by the appellant to the respondent Chaplin (or his wife) of a general insurance agency on behalf of the A.M.P. Fire and General Insurance Co. Ltd., a wholly owned subsidiary of the appellant. The

p.109 1.30

respondent sold the goodwill of that business for $1,750 on 6th May 1975. The nature of this agency must, it is submitted, colour the general nature of the relationship between the parties and points strongly to the conclusion that, in all material respects, the respondent was carrying on his own business.

18. The conventional test for determing whether the relationship of master and servant exists is

found in the following passage from the judgment of Bramwell B in R. V Walker (1858) 27 L.J.M.C. 207 at 208:

> "It seems to me that the difference between the relations of master and servant and of principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to see how it is to be done. "

In judgments of the High Court of Australia dealing with the relationship, emphasis has been placed on the lawful authority of the master to command the servant so far as there is scope for it. In Zuijs v Wirth Brothers Pty. Ltd. 93 C.L.R. 561 at 571 Dixon C.J., Williams, Webb and Taylor J.J. described the test as follows:-

> "The duties to be performed may depend so much on special skill or knowledge, or they may be so clearly identified, or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."

19. As in that case, the scope for exercising the lawful authority may be slight but nevertheless the relationship of master and servant may exist. On the other hand, the existence of a right to give lawful instructions about the manner in which the work is to be performed does not necessarily point to the existence of a master and servant relationship.

As Dixon J. (as he then was) said in Queensland Stations Pty. Ltd. v Federal Commissioner of Taxation 70 C.L.R. 539 at page 552:-

> ".....a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract..."

20. In the present case, if the respondent Chaplin had in practice been subject to and had accepted the detailed direction and control of the appellant

in the daily performance of his agency the relationship of master and servant might be found to exist (cf. The Queen v Foster and Others: Ex Parte The Commonwealth Life Amalgamated Assurances Ltd. 85 C.L.R. 138 at page 151). This would have indicated an authority to command where there was scope for it.

p.197

21. However, this was far from being the case here. Clause 5 of The General Terms of Appointment provided:-

> "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."

This clause assumed that the business in which the respondent Chaplin was engaged was his business not the appellants. The clause gave the appellant power to stipulate procedures and practices to be followed in conducting the business. This however is, in essence, no different to the right which a supplier of products (e.g. petroleum) often retains to direct the manner in which the purchaser will carry on his business for the purpose of selling those products. The reason behind the provision is to ensure uniformity of practice at retail outlets of the product. Similarly, the purpose of Clause 5 is to ensure uniformity of practice and procedure in relation to the conduct of agencies on behalf of the appellant

22. The clause was not intended to confer on the appellant the right to exercise the detailed direction and control of the respondent Chaplin in the daily performance of his activities as an insurance agent. Not only was this not intended but in fact it did not occur. The respondent was left free to conduct his agency without daily supervision. He was free to work when and (within his district)

where and with what clients he pleased. He could employ staff and work through approved sub-agents (three of whom he appointed) who looked to him for their commission. He could and did engage in other work. He could, if approval was given, carry on the agency in partnership or transfer the agency to a company in which he and members of his family were shareholders. A number of other agents did in fact establish companies to take over their agencies. It is submitted that the respondent Chaplin was not intended to be, nor was he in fact, subjected to the daily direction of the appellant in pursuing those activities (selling policies etc.) which were productive from day to day of his commissions. These activities were undertaken, it is submitted, in the course of and as part of his own business activity. Where the appellant might have been expected to exercise control had it been a master, and the respondent Chaplin, a servant, it exercised no control. That lawful authority to control which is indicative of the relationship of master and servant was absent.

23. It is submitted that the proper approach to the question of control is put by Atiyah, Vicarious Liability In The Law of Torts at pages 41 and 42 as follows:-

> ".....the control which an employer wishes to exercise over the performance of a task he wants done may be exercised either by drawing up an elaborate contract in which the work is described in great detail, or by having a simple contract referring to the work in broad outline, but reserving the right to give the necessary directions as the work is performed. It may well be that the actual degree of control exercised in both cases is the same, but generally speaking it is more usual to exercise the control desired through the medium of the contract itself when one is dealing with an independent contractor, and through day-to-day instructions during the performance of the contract when one is dealing with a servant."

As pointed out earlier, the absence of any day-to-day instructions is a significant feature of the present case.

24. It is respectfully submitted that the South Australian Courts misconceived the essential nature of the "control" test in this area.

25. The appellant respectfully submits that the judgment of the Full Court of South Australia is clearly wrong and ought to be reserved, and this appeal ought to be allowed with costs and the Order Nisi made absolute for the following (amongst other).

REASONS

1. BECAUSE the appellant and the respondent Chaplin intended that their contract be a contract of agency and not a contract of employment.

2. BECAUSE the respondent Chaplin was carrying on business on his own account.

3. BECAUSE the respondent Chaplin enjoyed substantial freedom in carrying out his agency work.

4. BECAUSE the respondent Chaplin had the power to appoint sub-agents and his own employees.

5. BECAUSE the respondent Chaplin did not establish that he was a "worker" within the meaning of the said Act.

R. G. Matheson

No. 36 of 1977

IN HER MAJESTY'S PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF THE
SUPREME COURT OF SOUTH AUSTRALIA

B E T W E E N :

AUSTRALIAN MUTUAL PROVIDENT
SOCIETY Appellant

- and -

PETER THOMAS ALLAN and
LANCELOT JOHN CHAPLIN
Respondent

CASE FOR THE APPELLANT

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