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The 3 R's – Religion, Redundancy, Respect

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Is there such a thing as divine intervention? A decision by the Supreme Court of New South Wales in South Head & District Synagogue (Sydney) (Administrators Appointed) (**South Head**) provides an interesting insight into the approach taken by Courts when faced with the task of interpreting contracts founded on religious law.

The administrators of South Head served Rabbi Milecki (the chief Rabbi of South Head) with a termination notice the day after they were appointed on the grounds of redundancy. The Rabbi argued that his contract with South Head could not be terminated by the Administrators on the basis that the contract was governed by the principles of 'Halacha', a form of Jewish law and jurisprudence, constituting a divine or divinely inspired code of law that regulates every facet of human life, including laws that regulate relations between mankind.

The Rabbi submitted that as his contract with South Head was governed by the principles of 'Halacha', which includes the law of 'Hazakah', he was entitled to remain in his position for the rest of his life and could not have his contract terminated other than by agreement, or by a decision of a 'Din Torah', being people who are qualified to hear and determine such disputes.

Whilst parties to a contract governed by Australian law can elect to incorporate, as terms of the contract, provisions of another system of law, the Administrators submitted that the relevant clauses within the Rabbi's contract (which principles of Jewish law the contract was governed by) provided a lack of certainty as to what was being incorporated as terms of the contract, particularly the principles of 'Halacha' and 'Hazakah'.

In distinguishing South Head from the decision of *Shamil Bank* [2004] 1 WLR 1784 (which the Administrators relied upon), Justice Brereton stated that, *'had the officious bystander observed, when the contract was being made, that it contained no provision about duration, he or she would have been testily supressed with an "of course, the Rabbi has Hazakah, as an aspect of Halacha".* According to Justice Brereton, any other arrangement (no life tenure for example) would have been antithetical to the orthodox Jewish life to which South Head, the Rabbi and the general congregation all subscribed.

The liquidators gave notice that they would appeal the decision of Justice Brereton on 5 July 2017. On 9 October 2017, in separate Federal Court Proceedings, the Court made orders permitting the liquidators to enter into a funding agreement with the secured creditors of the synagogue to fund the appeal. In that proceeding, it was noted that the primary Supreme Court decision was appealed to protect the interests of unsecured creditors. If the Rabbi's employment was not terminated and he had the benefit of life tenure, the liquidators estimate his potential claim to be in excess of $5M if he lived another 20 years, which would leave no return for unsecured creditors.

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Whilst this matter has been appealed, the primary decision in South Head provides an interesting insight into the Courts recognition of the rise of multiculturalism in Australia. Whilst the facts of South Head are unique in that they go to the recognition of religious law in contracts, it is a timely reminder to administrators (and the general public) to ensure that contracts are thoroughly reviewed prior to making a decision to terminate a contract.

If a contract is terminated in breach of its terms (as was the case in South Head), it may amount to a repudiation of the contract, and if that is not accepted and the terminated party elects to affirm the contract, an injunction may be sought restraining the administrators (or any other terminating party) from acting on the purported dismissal and interfering with the terminated party's performance of their duties under the contract, including the earning of remuneration.

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