AGENTS OR EMPLOYEES? SOME PROBLEMS OF A.M.P. SOCIETY v. CHAPLIN

The "terminological disorder which has been the source of various quite sterile controversies as to how an 'agent' should be distinguished or defined"[1] seems to have afflicted the recent decision of the Privy Council in *Australian Mutual Provident Society* v. *Chaplin & Allan*,[2] on appeal from the Supreme Court of South Australia.[3] The case concerned the question whether a representative of the A.M.P. was a "worker" under the Long Service Leave Act, 1967 (S.A.), so as to be entitled to long service leave. Section 3(1) of the Act defines a worker as:

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

This definition is clearly meant to cover the situation in which a person employed does not receive a salary but a commission, the servant in an independent contractor's clothing.

In tendering the advice of the Judicial Committee, Lord Fraser of Tullybelton employed the terms "agent", "independent contractor", and "servant" in a quite indiscriminate fashion as if they were baubles, bangles and beads. The question whether the life insurance company's representatives were "workers" as defined in the Act was treated as if it involved deciding "whether the contract was one of service or one of agency",[4] implying that these terms were mutually exclusive and thereby giving further impetus to the controversy as to their meaning. To add to the confusion their Lordships later referred to "the question of whether the contract is one of service or for services"[5] as if "agency" and "a contract for services" were entirely interchangeable notions.

Although the Judicial Committee was at pains to point out that "the appeal does not raise any question of law",[6] the decision, perhaps unwittingly, trespasses into the disputed area of the legal nature of the various relationships mentioned, which could have been avoided in the context of the case. Whilst it may be true that an attempt to fit the notions of an agent, independent contractor, and servant into watertight compartments is an exercise in futility,[7] in the context of this case the interests of clarity might have been best served by the Judicial Committee eschewing all reference to the notion of agency.

In the South Australian Supreme Court Bray C.J. consistently referred to the question as being " . . . one to distinguish between a contract of service and a contract for services".[8] This effectively overcomes the need to rely on terminology which has been the subject of so much jurisprudential

1. Stoljar, *The Law of Agency* (1961), 10.
2. (1978) 18 A.L.R. 385.
3. *The Queen* v. *Allan; Ex Parte Australian Mutual Provident Society* (1978) 16 S.A.S.R. 237.
4. (1978) 18 A.L.R. 385, 386, 389.
5. *Id.*, 391.
6. *Id.*, 387.
7. See also the comments in *Bowstead on Agency* (11th ed., 1976), 13: "Though there are interconnections, both historical and practical, it is unlikely that the ideas involved and the terminology can be reduced to a satisfactory scheme."
8. (1978) 16 S.A.S.R. 237, 247, 249. In Roman law the same distinction was drawn between *locatio conductio operis* and *locatio conductio operarum*.

controversy, and which requires careful definition and consistent usage to avoid confusion. In one passage in his judgment the learned Chief Justice did loosen his tight rein on employment of terms when employing the vivid metaphor:

> " . . . the velvet glove of independent agency has been pulled over the iron hand of magisterial control."[9]

But even here the Chief Justice was careful to qualify his use of the concept of agency by reference to it being "independent" in nature.

In his concurring judgment, King J. juxtaposed the notion of an independent contractor to a worker or employee in an entirely logical and consistent fashion. He observed:

> "But looking at the whole of the evidence both as to what is contained in the documents and what has been done by the parties, it seems to me that the representative had very little freedom of action, a great deal less indeed than 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 the business was carried on."[10]

It is submitted that this is the correct approach. By distinguishing an independent contractor from an employee, King J. emphasised the degree of control as the critical factor in determining whether the contract was one of service or for services. The Judicial Committee may have been using the notion of an agent and independent contractor interchangeably without expressly saying so. At the beginning of the Board's advice Lord Fraser stated:

> "The Society denies that he [the respondent] was an employee of theirs and maintains that the respondent was an independent contractor."[11]

The Judicial Committee then proceeded to consider the relationship between the Society and its representatives as either one of *agency* or employment. If this change of terminology was deliberate it ought to have been clearly explained. It may well be that the use of agency terminology was prompted by the wording of the agreement setting out the terms of appointment of the respondents, clause 3 of which stated that:

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

The Supreme Court placed little weight on this clause of the agreement.[12] The Privy Council, however, took a different view:

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9. *Id.*, 250.
10. *Id.*, 261-2.
11. (1978) 18 A.L.R. 385, 386.
12. King J. stated: "The learned Industrial Court Judge thought that that provision, in the circumstances which were proved, was of little importance . . . I agree with the view which the learned Industrial Court Judge took of this provision" ((1978) 16 S.A.S.R. 237, 261.). *Cf.* the decision of the Court of Appeal in ***Ferguson*** v.

> "Clearly clause 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 clause 3 . . . 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 clause 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 clause 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 clause 5 is coloured by clause 3 and ought to be read as applying only to such practices as could be laid down by a principal for his agent."[13]

Possibly it is the adoption of agency terminology which led the Privy Council to give an exaggerated relevance to clause 3. By insisting that the notion of worker as defined in the Act is distinct from and exclusive of that of agent the Privy Council was able to neutralize the effect of the substantial degree of control invested in the Society over the respondents in clause 5. Had it employed the notion of independent contractor instead of agent, the substantial control of the Society could well have been a decisive factor in determining which persons fell within or outside the ambit of the definition of worker in the Act.

The inescapable logic of their Lordships' approach leads to the untenable conclusion that once the relationship is held to be one of agency, it is excluded from being a contract of service. Stoljar, without attempting to define an agent, describes him as follows:[14]

> ". . . an agent is not someone acting or working for another, he is someone who acts in a specific manner, namely, to establish contractual relations between a principal and a third party . . . Between 'agency' and 'service' there is, in addition, a functional connection, since a person can be both an agent and servant. An ordinary shopgirl, for example, satisfies every accepted test of service: she is under her employer's complete control as regards what to do and how to do it; yet as a *vendeuse* she acts as an agent between the customer and the shop-owner. A bus conductor is a servant in his duty to help people in and out of buses and so on, but he is an agent when he issues the ticket which is the contract between the passenger and the transport company."[15]

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12. *Cont.*
John Dawson & Partners (Contractors) Ltd. [1976] 3 All E.R. 817 in which it was held that a contractual declaration by the parties that a workman was an independent contractor ought to be wholly disregarded if the remainder of the contractual terms governing the realities of the relationship show it to be a contract of service.
13. (1978) 18 A.L.R. 385, 389.
14. Stoljar, *op. cit.* (*supra,* n.1), 2-3.
15. *Cf.* also Fridman, *The Law of Agency* (4th ed., 1976), 21-22; *Bowstead on Agency* (14th ed., 1976), 12.

The High Court in the case of *International Harvester Co. of Australia Pty. Ltd.* v. *Carrigan's Hazeldene Pastoral Co.* [16] endorsed the view that an agent is a person who has the power and capacity to create legal relations between his principal and third parties. The test for an agent is not the degree of control exerted upon him by the person on whose behalf he acts, as is the case with an independent contractor, but his capacity to enter into contractual relations on his principal's behalf. In respect of one and the same act, a person may be both an employee and an agent. The fact that the insurance representatives are agents does not entail that they are not also workers or employees. The central issue is whether this was a contract of service or for services; that is, whether the representatives were servants or independent contractors. The Privy Council's view of the agency relationship appears to equate it with a contract for services and the agent with an independent contractor. If an agent can be either an independent contractor or a servant,[17] the approach of the Privy Council is with respect not entirely logical, even if it can be argued on the facts that this was the right decision.

An insurance agent in the sense of a representative of the company empowered to negotiate contracts of insurance on its behalf may be employed by an insurance company as an employee on a contract of service, and the fact that he is employed to establish contractual and commercial relations between his principal and members of the public does not preclude him from being a servant.

In the colloquial sense of the term, an "agent" may not necessarily be a person with capacity to bind his principal contractually with third parties. In *Colonial Mutual Life Assurance Society Ltd.* v. *The Producers and Citizens Co-operative Assurance Co. of Australia Ltd.*[18] Dixon J. observed:

> "Some of the difficulties of the subject arise from the many senses in which the word 'agent' is employed. 'No word is more commonly and constantly abused than the word "agent". A person may be spoken of as an "agent" and no doubt in the popular sense of the word may properly be said to be an "agent", although when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency that use of the word is misleading.' "[19]

The term "estate agent" is similarly misleading. The House of Lords held recently in *Sorrell* v. *Finch*[20] that an estate agent, so called, was not authorised to receive a deposit from the prospective purchaser on the vendor's behalf, nor did he have the power to bind the vendor contractually. It was suggested by Lord Wilberforce, dissenting, in *Branwhite* v. *Worcester Works Finance Ltd.*[21] that:

> "It may be that some wider conception of vicarious responsibility other than that of agency, as normally understood, may have to be

16. (1958) 100 C.L.R. 644, 652. See also *Peterson* v. *Moloney* (1951) 84 C.L.R. 91, 94-95.
17. Stoljar, *op. cit.* (*supra*, n.1), 4 states: "Now, of course, an agent can be either a servant or an independent contractor . . .". See also Borrie & Greig, *Commercial Law* (2nd ed., 1978), 3 (Para. 104).
18. (1931) 46 C.L.R. 41.
19. *Id.*, 50, citing Lord Herschell in *Kennedy* v. *De Trafford* [1897] A.C. 180, 188.
20. [1977] A.C. 728.
21. [1969] 1 A.C. 552.

> recognised in order to accommodate some of the more elaborate cases which now arise when there are two persons who become mutually involved or associated in one side of a transaction."[22]

He was referring to the relationship between a motor car dealer and finance company in a hire-purchase transaction; but his remarks are equally applicable to insurance agents and estate agents.[23]

It appears from the advice of the Privy Council that the respondents in the case were not empowered to bind the appellant company contractually with third parties and, therefore, could not be considered to be agents in a strict technical sense. It may be that the Privy Council was using the term "agent" in a non-technical manner to mean someone who acts as another's representative with some degree of autonomy. In relying on the notion of an agent, especially in a colloquial sense, it may have been easier for the Privy Council to justify reversing the unanimous decisions of the Supreme Court and the Industrial Court than it would have been had it adopted the more specific and confined notion of an independent contractor. It appears to have assisted the Privy Council in explaining away the seemingly high degree of control vested in the Society over the respondents by the terms of their appointment. However, their Lordships did not expressly indicate that they were adopting a different approach from the Full Court.

In the *Colonial Mutual Life* case[24] the High Court held an insurance company vicariously liable for damages resulting from defamatory statements made by its representative about another insurance company while acting in his representative capacity. The basis of the majority judgment was that the insurance "agent" had a limited range of activities which he performed as a representative of the insurance company and the defamatory statement was made in carrying out those functions which were essentially to canvass insurance proposals for the company. In this context the insurance "agent" appears to be in a strict legal sense neither a servant nor an agent. This decision may be contrasted with a South African Appellate Division case decided in the same year and involving the same insurance company.[25] The Court held unanimously that the insurance company was not liable for damages arising out of the negligent driving of its representative while taking a medical practitioner to examine a proponent for a life insurance policy. The decision was based on the finding that the insurance "agent" was acting as an independent contractor and not a servant at the time of the collision. The approach of the courts to the question whether an insurance company is liable to a third party by virtue of the acts of its "agent" is to examine on an *ad hoc* basis the particular act concerned to establish whether in that limited area the insurance "agent" could be said to have acted as the representative of the company. It is not, therefore, involved in establishing whether the entire relationship between the insurance agent and company is embodied in a contract for services or a contract of service. However, this is the precise issue which arose in the *A.M.P.* case.

In the area of vicarious liability the courts have consistently applied common principles of law to the relationship of agency and employment.

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22. *Id.*, 587.
23. For a recent discussion see Reynolds, "Agency: Theory and Practice", (1978) 94 *L.Q.R.* 224.
24. (1931) 46 C.L.R. 41.
25. *Colonial Mutual Life Assurance Society Ltd.* v. *Macdonald* [1931] S.Af.L.R. 412.

Originally the doctrine of vicarious liability was considered only in the context of agency, and liability depended upon whether the agent was regarded as a servant or independent contractor. Hence, the vicarious liability of an agent and servant was in certain circumstances considered to be co-extensive. In the seminal case of *Lloyd* v. *Grace, Smith & Co.*[26] a managing clerk of a firm of solicitors was referred to as an agent, but in that context was clearly a servant. Lord MacNaghten stated:

> "The expressions 'acting within his authority', 'acting in the course of his employment' and the expression 'acting within the scope of his agency' as applied to an agent, speaking broadly, mean one and the same thing."[27]

An attempt was made to drive a wedge between the two concepts of "scope of authority" and "course of employment" by Lord Denning in *Ormrod* v. *Crosville Motor Services Ltd.,*[28] a position which he maintained in *Heatons Transport Ltd.* v. *T.G.W.U.*[29] However, his approach was not adopted by the House of Lords when the *Heatons Transport* case came before it.[30] In the words of Lord Wilberforce:

> "In each case the test to be applied is the same: was the servant or agent acting on behalf of, and within the scope of the authority conferred by the master or principal."[31]

It was, therefore, incorrect for the Privy Council in the *A.M.P.* case to suggest by inference that once a person is considered to be an agent he is precluded from being a servant or worker.

Similar terminological confusion appears in the judgment of Asprey J.A. in the New South Wales Court of Appeal in *Presser* v. *Caldwell Estates Pty. Ltd.*[32] In considering the vicarious liability of a vendor for the representations of his estate agent to the purchaser he stated:

> "The vicarious liability of a principal for the tort of his agent is to be distinguished from the liability of an employer for the tort committed by his servant in the course of his employment. The liability of the principal varies according to whether the work which the principal has retained the agent to perform, although done at the request and for the benefit of the principal, is an independent function of the agent or is carried out by the agent while standing in the place and right of the principal so as to represent the principal in dealing with third parties in the principal's affairs . . ."[33]

He then proceeded to consider the nature and scope of the estate agent's implied authority. It is not clear at all why he made any reference to the tortious liability of a servant, when in fact he determined the question on the basis of whether the "agent" was acting as an independent contractor or as the vendor's authorised representative in respect of the representations. Perhaps, by referring to a servant in this manner his Honour was doing

26. [1912] A.C. 716.
27. *Id.*, 736.
28. [1953] 2 All E.R. 753, 756.
29. [1972] 2 All E.R. 1216, 1246.
30. [1973] A.C. 15.
31. *Id.*, 99.
32. [1971] 2 N.S.W.L.R. 471.
33. *Id.*, 485.

nothing more than indicating that the estate agent was not to be considered in this context as a servant. Nevertheless, the result is a rather indiscriminate association of that confusing trinity; the independent contractor, servant and agent. On the facts the case is quite reconcilable with *Lloyd's* case, as the managing clerk of the firm of solicitors can be considered to be a servant in that case, whereas the estate agent in *Presser's* case is more akin to an independent contractor. Hence, the firm of solicitors was held liable for the acts of its managing clerk, but not the vendor in respect of his estate agent's representations.

Confronted with the problem of establishing the legal nature of the relationship between parties to an alleged contract of service and their vicarious liability in tort, the courts are well advised to avoid uncritically importing the notion of agency, or at least if agency terminology is used, to define the nature of the agency and employ this meaning consistently. But for the time being insurance agents are not considered to be "workers", and insurance companies owe a debt of gratitude to the Privy Council.

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