THE MODERN ANIMUS CONTRAHENDI: FOCUSING ON INTENTION THROUGH A 'CONTEMPORARY LENS'

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I INTRODUCTION

When intention to create legal relations[1] emerged from the courts as a discrete contractual element about a century ago, the doctrinal debate that ensued focused on the *need* for it.[2] That controversy appears to have been resolved, providing little more than historical context today. This article will argue that, insofar as intention is at all controversial or even noteworthy a century later, it is because the focus now is on its proper *use*. The question now facing superior courts is how intention is best utilised by a competent judiciary, in view of its considerable normative potential for setting public policy parameters for the enforceability of agreements. Courts may increasingly be challenged by the need to re-examine the kinds of agreements that will be recognised as legally enforceable contracts. Although such a challenge is unlikely in the case of clearly business transactions, it promises to appear as a live issue in disputes over arrangements, relationships and contexts that are less obviously commercial. This contention will be illustrated by demonstrating the ways in which intention has been used in superior court decisions

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1 Intention to create legal relations is referred to hereafter as *intention*. The term *animus contrahendi* in the title and elsewhere in this article is Latin for the 'will or intention to contract'. It is used here interchangeably with 'intention' and is "simply another name for the agreed intention to be legally bound by contract …": H K Lucke, 'The Intention to Create Legal Relations' (1967-1970) 3 *Adelaide Law Review* 419, 419.

2 See *The Emergence of Intention* below.

concerning faith work.[3] The private law and employment status of faith workers offers a very apposite factual matrix. Although considered historically as an incident of ecclesiastical office and generally beyond the jurisdiction of civil courts,[4] faith work has in recent decades been held in some court decisions to be rooted in contract.[5] Intention has provided the key to those decisions. In turn, the decisions have influenced the contemporary nature of intention and signalled its future direction.

The first part of this article will revisit the doctrinal controversy over the historical emergence of intention and the entrenchment of its core legal presumptions. The second part will trace the ways in which intention has been used in key faith worker cases to both invalidate and validate the contractual basis of spiritual work. The third section will focus on three recent and pivotal court decisions[6] from New Zealand, Australia and Britain that have been instrumental in shaping the current law on the employment status of faith workers. It will conclude by asserting that the faith worker

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3 The term 'faith work' is here understood as work performed by 'the professional or ordained personnel [that] religious institutions commission to propagate religious faith and belief to adherents of religions': Simon Fisher, 'Clergy confidentiality and privileges' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion: God, the State and the Common Law* (2005). This corresponds to the liberal and inclusive interpretation of 'clergy' adopted by the Federal Court of Australia in *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 195. The term 'faith workers' is generally coterminous with the more common expressions 'clergy', 'ministers of religion' and 'clerics'.

4 See *In re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563; *Re Employment of Ministers of the United Methodist Church* (1912) 107 LT 143; *Scottish Insurance Commissioners v Paul* [1914] SC 16; *Rogers v Booth* [1937] 2 All ER 751; *President of the Methodist Conference v Parfitt* [1984] QB 368; *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309.

5 See *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95; *Eisenmenger v Lutheran Church of Australia, Queensland District* [2005] QIRComm 32; *The New Testament Church of God v Stewart* [2005] UKHL 73; *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28.

6 *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513; *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95; *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28.

cases have set the groundwork for the contemporary nature of *animus contrahendi* – one in which a holistic and objective test has assumed precedence over the operation of the traditional presumptions, thereby increasing the normative potential of intention in the hands of a responsive judiciary.

II THE EMERGENCE OF INTENTION

The position of intention in contract law has seemed for most of the preceding half century to be relatively uncontroversial. Together with agreement and consideration, it is considered invariably as one of the necessary formative elements of every enforceable contract and is regarded, by most academic writers at least, 'as an immovable aspect of modern [contract] doctrine.'[7] Traditionally, and until recently, intention was to be established by the virtually undisputed application of legal presumptions:

> The third element of contract formation is that the parties must manifest an intention to create legal relations. … [This requirement] has often been approached on the basis that certain types of agreements are presumed to be intended to be binding, while others are presumed not to be made with such an intention.[8]

However, this apparent equanimity towards the place of intention in contract law belies the fact that its legitimacy was originally disputed and that its modern genesis has been accompanied by a subtext of academic controversy. Even as late as the mid-twentieth century, some legal commentators, such as Tuck,[9] rejected it as a

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7 Sally Wheeler and Jo Shaw, *Contract Law: Cases, Materials and Commentary* (1994) 148.

8 Peter Heffey, Jeannie Paterson and Andrew Robertson, *Contract: Cases and Materials* (9th ed 2003) 113.

9 'In the leading English textbooks on contract, and, unfortunately, in some obiter dicta of the judges as well, we find the proposition that, for a contract to come into existence, the offer must be intended to create legal relations: Anson states "In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences". Now this may be true of continental systems of law based on the civil law of Rome, but it is submitted that such a rule has no place in the common law of England.': Raphael Tuck, 'Intent to Contract and Mutuality of Assent' (1943) 21 *Canadian Bar Review* 123, 123.

foreign intrusion. Williston[10] famously rejected the notion of intention, denouncing it as alien and unnecessary, since consideration sufficed as the test for enforceability of contract. In the same vein, Unger described it as an irrelevant fiction or complication, which 'should be exposed and removed in order to protect the law of contract from being overlaid by a multiplicity of unnecessary and possibly contradictory requirements.'[11] These views were largely premised on the 'exchange model' of contract that was indigenous to the English common law in which consideration was given primacy. An enforceable contract was seen as an exchange of promises supported by consideration, which 'had a precise definition: a legal detriment to the promisee, bargained for or given in exchange for [a] promise.'[12] The presence of consideration obviated the need for any further test of volition because, from at least the mid-sixteenth century, courts required plaintiffs to identify the motives or reasons for the making of their promises.[13] The English had already experienced a failed challenge[14] to consideration in the late eighteenth century, inspired by ideas from civil law jurisdictions, and intention to create legal relations was viewed by its critics as a product of renewed and similar doctrinal influences from the continent. This came in the context of a requestioning of the sources of contractual liability that accompanied the huge social and economic changes of the industrial revolution. The notion of

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10 Samuel Williston, *Williston on Contracts* (3rd ed) (1957) s 21.

11 J Unger, 'Intent to Create Legal Relations, Mutuality and Consideration' (1956) 19(1) *The Modern Law Review*, 96, 100.

12 Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 100 *Columbia Law Review* 94, 100.

13 In *Marler v Wilmer* (1539) KB 27/IIII, m64 the King's Bench required evidence of a 'quid pro quo' or connection between a "recited bargain and the undertaking to perform it." Consideration was also sought in the assumpsit cases *Newman v Gylbert* (1549) Kiralfy 176 and *Joscelin v Shelton* (1557) 74 ER 503. By the close of the sixteenth century the term 'consideration' became standard because of the use of 'in consideration' clauses in pleadings in actions to recover the price of goods.

14 Lord Mansfield, Lord Chief Justice of the King's Bench (1756-1788), and his fellow judge Wilmot J in *Pillans v van Mierop* (1765) 3 Burr 1663, 97 ER 1035, are generally represented as arguing for an abandonment of consideration, at least in the case of written contracts. This and a further alleged attempt by Lord Mansfield to relegate the role of consideration were finally overcome in the case of *Rann v Hughes* (1778) 4 Bro PC 27; 101 ER 1013.

intention had in effect been known since early times as *animus contrahendi*,[15] the expression of voluntariness and free will in the assumption of legal obligations. Significant natural law thinkers on the continent such as Pufendorf[16] in the seventeenth century reminded lawyers that it allowed courts to distinguish a genuine promise from a joke. Ibbetson[17] notes that it was not unknown in the early common law and that English writers such as Fox and Leake had referred to it in their treatises.[18] Legal historian A W B Simpson has also highlighted the work of English treatise writers of the nineteenth century who gave prominence to 'the principle that expressions not intended to be binding do not constitute a promise'.[19] But its renewal in modern times was seen by its detractors principally as a consequence of nineteenth century will theory.

Will theory gained prominence by emphasising that 'all the rules of law that compose the law of contracts [could] be developed from the single proposition that the law of contract protects the wills of the contracting parties.'[20] It epitomised nineteenth century ideas of individualism and freedom and, in the legal sphere, was built on philosophical foundations provided by civil law jurists such as Pothier[21] and Savigny.[22] The former reflected the French view that the wills of two or more parties to create a mutual obligation led to an enforceable contract. Similarly, in Germany, Savigny argued that, 'in enforcing contracts ... the law produced a certain result because that result had been willed.'[23] Pothier in particular, with a new amalgam of natural law theories and ideas of social contract, provided a potent influence on English treatise writers such as

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15 Lucke, above n 1.
16 Samuel Pufendorf, *On the Law of Nature and Nations* (1672).
17 David Ibbetson, *A Historical Introduction to the Law of Obligations* (2001) 233.
18 William Fox, *Treatise on Simple Contracts* (1842) 62-3; S M Leake, *Contract* (1867) 9-10.
19 A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review*, 247, 264.
20 Kennedy, above n 12, 115.
21 Robert Joseph Pothier, *Traite des obligations* (1791).
22 Friedrich Carl von Savigny, *System des heutigen romischen Rechts* (1840).
23 James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1992) 162.

Joseph Chitty and, later, Frederick Pollock. The emphasis on the will of the parties provided the rationale for major developments in the law of contract.[24] Offer and acceptance analysis has been traced to Pothier's insistence that a promise on its own could no longer suffice for liability in contract. The eventual distinction between terms that went to the root or essence of a contract and those that did not was seen as a reflection of the search for the true will of the parties. The laws relating to mistake and assessment of damages have been seen as products of the will theorists.[25] All of these developments were to a large extent made possible by the demise of jury trials in civil litigation:

> The possibility of trying facts by judge alone was introduced by the Common Law Procedure Act 1854 ... All the experience suggested that judges were more likely to understand the factual issues than laymen, and were as competent to assess evidence ... The 1854 Act said that the 'verdict' of the judge was to have the same effect as the verdict of a jury.[26]

By the time of the *Common Law Procedure Act* 1854, the principal concern of the courts was to avoid the discouragement of bargains. In order to facilitate commercial activity and liberalise the laws of exchange, the elements of contractual liability were refined. Judges were increasingly required to dispense with commercial matters efficiently and provide consistent and viable doctrinal rationales for their verdicts. Spurred on by legal writers and thinkers, they couched their judgments in terms of the freely expressed human will of the parties. It has been noted that:

> …[t]he generalisations evolved by text-writers and judges undoubtedly buttressed freedom of dealing and sanctity of bargain, the economic superiority of market-place pricing over government regulation, the moral righteousness of self-sufficiency and self-improvement. In this spirit … an enforceable contract arose out of a meeting of minds – consensus ad idem.[27]

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[24] Ibbetson, above n 17, 220-232.
[25] Ibid.
[26] J H Baker, *An Introduction to English Legal History* (3rd ed 1990) 109.
[27] W R Cornish and G de N Clark, *Law and Society in England 1750-1950* (1989) 201.

It was in this context that *animus contrahendi* experienced a kind of revival, with the will theory giving renewed doctrinal prominence to the free will and intention of contracting parties. Savigny, Pothier and others working in the civil law tradition had already been highly influential in their reasoning that certain types of promises could not be binding. They recognised:

> … the possibility of promises being made 'without any intention of giving the person to whom they are made a right of demanding their performance', this being apparent either because it is expressly said, or because the circumstances imply it, or because of the relative position of promisor and promisee (for example a family matter).[28]

It was, in fact, the marital relationship between promisor and promisee in *Balfour v Balfour*[29] that later provided the crucial opportunity for Atkin LJ to identify intention as a separate formative element of contract.

It is argued here that two key factors consolidated intention upon its renewed emergence from will theory. These factors helped to distinguish it from older notions of *animus contrahendi* and entrench it as a durable judicial tool. The first is the imbuement of intention with the veil of objectivity. This relates to the very nature of intention as a juridical concept. Intention in the general sense has played a role in both civil and criminal law and has tended to connote the presence of desire, knowledge and foresight.[30] In contract law it implies that parties to an agreement freely anticipate its legal enforceability and are prepared on the basis of their words and actions to be bound by the attendant rights and liabilities attaching to that agreement. Of course, it is trite to say that a court cannot know exactly what the parties *actually* intended in the

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[28] Simpson, above n 19, 264.

[29] [1919] 2 KB 571.

[30] Brian Coote, 'Reflections on Intention in the Law of Contract' [2006] *New Zealand Law Review* 183, 183-4.

subjective sense. It is difficult also to reliably know what to look for when determining the presence of subjective intention.[31] This was why St Germain, in the early days of the humanist reaction to clericalism, was sceptical of the old canonist principle that promissory liability could be established only where a subjective *animus contrahendi* was evident, namely where a person genuinely intended to be bound by a promise:

> For it is secret in his own conscience whether he intended to be bound or nay. And of the intent inward of the heart man's law cannot judge.[32]

It is perhaps not surprising that the overworked English courts saw the potential for adopting an objective standard for intention. The treatise writer Chitty has been credited[33] with highlighting the problematical and unreliable nature of subjective intention, favouring instead a theory of objective agreement borrowed from William Paley:

> Where the terms of the promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended, at the time that the promisee received it.[34]

With the judiciary facing pressure to resolve claims in the wake of the demise of jury trials, the objective approach to intention had

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[31] See Alan R White, 'Intention, Purpose, Foresight and Desire' (1976) 92 *Law Quarterly Review*, 569, 569-570, where four possible classes of inquiry into subjectively held intention are identified: (i) Intending to do something, whether or not one does it, and whether expressed or not; (ii) Doing something intending to do it or with the intention to do it; (iii) Doing something with the intention of doing something else, whether or not one does the second thing. The second thing could be either an accompaniment of the first, without it being the reason for doing the first or the consequence of it. It could alternatively be the intended result of the first thing or the reason for doing the first thing, either as a means to the second or as a way of doing or attempting to do the second; (iv) Doing something intending to do something else, with only the intention of doing the second thing, and never intending the first.

[32] Christopher St Germain, *Doctor and Student*, (1530) Dialogue 2, Ch 24.

[33] Ibbetson, above n 17, 221.

[34] William Paley, *The Principles of Moral and Political Philosophy* (1785) 145.

major advantages for courts, notwithstanding its incompatibility with Pothier's emphasis on *consensus ad idem* of the parties. Whereas Savigny had argued that the will of the parties was an 'invisible event', the outward expression of which resulted in a 'juristic act' that had to be declared outwardly,[35] the English courts were prepared to declare it themselves on behalf of the parties initially by employing the rules of estoppel:

> [T]he difficulty was explained away by treating it as a rule of evidence rather than a rule of substance, parties being estopped from denying that their words meant what they appeared to mean.[36]

It is useful also to recall Pollock's well-known pronouncement about intention, which disguises an essentially objective standard for deciding what parties must apparently mean when they make certain types of agreements:

> If people make arrangements to go out for a walk or to read a book together, that is no agreement in a legal sense. Why not? Because their intention is not directed to legal consequences, but merely to extra legal ones; no rights or duties are to be created.[37]

The second key factor that embedded intention is the pressure exerted upon will theory by critics who were conscious of the rapidly changing social and economic landscape of Anglophone polities at the dawn of the twentieth century. As time went on, it was no longer feasible to pay homage to the sacrosanct will of bargaining parties without accounting for the frequent inequality of their power to bargain. The role of the state grew in the regulation of transactions and,

> [m]ore than ever before, law came to be used as an instrument of positive discrimination. As the organisation uniquely powerful in a society of proliferating groups, the state would use legislation and bureaucracy to benefit those – largely from the working class – who

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35 Freidrich Carl von Savigny, *System des heutigen Romischen Rechts* (1840), iii, §134, 258. See Gordley, above n 23, 163.

36 Ibbetson, above n 17, 222.

37 Sir Frederick Pollock, *The Principles of Contract* (1882) 2.

> were unable to support or help themselves against the vicissitudes of old age, sickness, unemployment and bad housing.[38]

Courts inevitably reflected the increased awareness that will theory could not of itself provide the conceptual framework for enforcing and recognising contracts. The mass production and distribution of goods required a rethinking of the foundations of contractual liability, with greater attention paid to norms of fairness, justice and protection from exploitation. A demand for greater recognition of public policy and public interest, what Duncan Kennedy has described as 'the rise of "the social"',[39] began to take effect around the turn of the century. Critics such as Jhering[40] in Germany, Gounot[41] and Demogue[42] in France and Roscoe Pound[43] in the United States emphasised that will theory's 'fundamental idea of party autonomy clashed with widely held principles of social justice.'[44] This trend offered judges greater scope to achieve public policy outcomes in the disputes before them, and intention provided the opportunity. What became known as intention to create legal relations was hinted at in some early cases without using the term directly.[45] One example is the 1893 Court of Appeal decision in *Carlill v Carbolic Smoke Ball Company*,[46] which may be seen as a judicial attempt to rationalise the public policy need for an exception to the rule that acceptance must be communicated to the offeror in order to be effective. Since Mrs Carlill famously bought and used the smoke ball as stipulated by the company, it was held that execution by her of those acts amounted to acceptance of the company's offer. In order to arrive at this conclusion, the court sought an answer to Lindley J's question whether the advertisement

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38 Cornish and Clark, above n 27, 78.
39 Kennedy, above n 12, 117.
40 Rudolf Jhering, *Der Zweck im Recht* (1877).
41 Emmanuel Gounot, *Le Principe d l'autonomie de la volonte en droit prive* (1912).
42 Rene Demogue, *Les notions fondamentales du droit prive: essai critique* (1911).
43 Roscoe Pound, 'Liberty of Contract' (1909) 18 *Yale Law Journal* 454.
44 Ibbetson, above n 17, 245.
45 Ibid 233-4, citing *Jones v Bright* (1829) 5 Bing 533, 541; *Dimmock v Hallett* (1867) 2 Ch App 21; *Carlill v Carbolic Smoke Ball Company* [1893] 1QB 256; *Heilbut, Symons & Co v Buckleton* [1913] AC 30.
46 [1893] 1QB 256.

'was intended to be a promise at all, or whether it was a mere puff which meant nothing'.[47] In Smith LJ's judgment:

> … the advertisement was an offer *intended* to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise [emphasis added].[48]

The company's intention, proved by the earnest placement of moneys in trust, made the offer binding. Holding the company to its intention in these circumstances bore the implication that members of the public were, on public policy grounds, to be protected from the chicanery of product promoters.

However, the case that is commonly credited with entrenching the modern iteration of *animus contrahendi* is the husband and wife dispute in *Balfour v Balfour*.[49] This significant Court of Appeal decision involved the promise by a husband to provide a monthly allowance to his wife for a period of time during which he worked overseas. When the wife brought an action in contract for the husband's broken promise, a single judge ruled that, because the wife had consented to the payment of a fixed monthly sum, she had given sufficient consideration for the husband's promise. However, the Court of Appeal unanimously held that his promise was not enforceable. Duke LJ held that no consideration had been provided by the wife, and Warrington LJ found she had failed to prove any express or implied terms. But Atkin LJ's judgment has attracted the most attention for his view of consideration, and for finding that it had been provided by the wife. His Honour started with the unequivocal assertion that certain types of agreements, such as those between husbands and wives concerning allowances for household expenses, were not enforced by courts:

> [T]hey do not result in contracts even though there may be what as between other parties would constitute consideration for the

47 *Carlill v Carbolic Smoke Ball Company* [1893] 1QB 256, 261.
48 Ibid 267.
49 [1919] 2 KB 571.

> agreement. The consideration, as we know, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. … [S]uch arrangements made between husband and wife are arrangements in which there *are* mutual promises, or in which there *is* consideration [emphases added] … Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences.[50]

Critics of intention have focused on Atkin LJ's definition of consideration above as flawed and inadequate, thereby making possible an inflated reliance on intention to fill the gap. Unger charges that His Honour:

> … failed to add that such benefit or loss must be received or suffered *as the price for a promise* [emphasis added] … [An] agreement between husband and wife may be lacking consideration not only when it consists of no more than a single promise by the husband, but also when, for instance, the husband's promise to pay housekeeping money is made in connection with a promise by the wife to perform household duties. … In the normal course of family life, the husband's promise of support is not offered in payment for the services of his wife.[51]

This criticism asserts that the real reason the wife lost her claim was because there was no consideration on her part, and that intention was an artificial construct that allowed Atkin LJ to advance the policy position of keeping courts out of domestic disputes and stopping the proliferation of litigation. But this view fails to address two points. The first is that the claim that a 'husband's promise of support is not offered in payment for the services of his wife' may *itself* be seen as reflective of a normative policy position, and premised on a view of what is 'normal'. The second point is that on a reasonable reading of nineteenth century rules of consideration, Atkin LJ was justified in recognising that it was highly likely there was sufficient consideration in the executory bilateral contract between the Balfours, inviting the possibility of litigation, because

[50] *Balfour v Balfour* [1919] 2 KB 571, 578-579.
[51] Unger, above n 11, 98.

consideration was located in the *mutual assumption of obligations*. As Atkin LJ said:

> It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s or £2 a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part.[52]

In other words, when the husband promised the money, he did so on the necessary assumption that the wife took on the obligation of using the funds for the maintenance of the children and the upkeep of the household. The wife's agreement to the terms was on the basis that she would continue with her role so long as her husband honoured his commitment to pay. In the event of breach by the husband, the wife was at liberty to treat the marriage as over and rely on her matrimonial rights, whether at common law or under statute. It is argued here that Atkin LJ was in effect conscious of the 'secret paradox' of consideration,[53] which had been identified by Pollock[54] only a few years prior to *Balfour*, but which had also been alluded to by Anson[55] in his 1878 treatise on Contract, and then addressed by Williston,[56] Corbin[57] and others.[58]

The 'secret paradox' raised by the treatise writers went to the unresolved question of what exactly constituted the consideration for an executory bilateral contract.[59] The common law had long

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[52] [1919] 2 KB 571, 579.

[53] See Richard Bronaugh, 'A Secret Paradox of the Common Law' (1983) 2 *Law and Philosophy* 193.

[54] Sir Frederick Pollock, review of Pease and Latter, *The Students' Summary of the Law of Contract* (1913) in (1914) 30 *Law Quarterly Review* 128, 129.

[55] William Anson, *Principles of the English Law of Contract* (1878) 80.

[56] Samuel Williston, 'Successive Promises of the Same Performance' (1894) 8 *Harvard Law Review* 35.

[57] Arthur Corbin, 'Does a Pre-existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27 *Yale Law Journal* 365

[58] Brian Coote, *Contract as Assumption: Essays on a Theme* (2010) 24.

[59] Ibid 24-26.

recognised the requirement of consideration in the sense of a justifiable reason or motive for a promise. It had subsequently accepted the notion that an exchange of promises could be binding, giving birth to the 'executory' contract. But the nature and positioning of consideration in the executory contract presented a quandary. Coote[60] refers to the various suggestions made by the treatise writers for the precise location of the consideration: the exchanged promises; the created obligations; the moral obligation inherent in the promise; the promisee's aroused expectations and the words of the promise. It was even argued that executory contracts be recognised only on a de facto basis to avoid the theoretical problem. All of these views were controversial and troubled by logical and conceptual flaws. But arguably the most plausible explanation was outlined as follows:

> The attachment of a legal contractual obligation and its assumption are not separate, consecutive events but rather two aspects of a single act, the one being inherent in the other. It is the reciprocal exchange of the assumptions of legal contractual obligation, occurring simultaneously at the point of formation, which brings an executory bilateral contract into being. What each party is seen to have bargained for is the assumption, by the other, of reciprocal legal obligation … What is required is no more than classical contract law already requires, namely, an exchange of promises made with the intention to contract.[61]

On this view of consideration, Mrs Balfour's claim was actionable. The only factor that could thwart such a claim was the absence of an intention to be legally bound. Atkin LJ's rationale for finding an absence of intention was policy and the public interest:

> All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether.[62]

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60 Coote, above n 58.
61 Ibid 39.
62 [1919] 2 KB 571, 579.

The modern doctrine of intention, in the hands of courts seeking to further what they saw as the legitimate interests of the public, can be seen partly as restoring to consideration a degree of 'equity' that had been lost in the nineteenth century triumph of the will. It is argued here that the necessity to resolve the 'secret paradox' contributed to the importance that the judiciary attributed to the requirement of intention, which was predicated on the presence of mutual assumptions of obligation at formation. These assumptions derived from the words, actions and circumstances of formation itself. In other words, these factual matters, determined objectively in evidence, were used by courts to justify certain inferences. The inferences, in turn, led eventually to the establishment of working presumptions. In *Balfour*, for instance, the couple was legally married. Since the common law, as a matter of custom, treated arrangements between married couples as non-justiciable and 'outside the realm of contracts', notwithstanding the possible technical presence of consideration, the very fact of marriage led to an inference that the parties did not assume legal obligations. The traditional understanding of marriage by the courts and the church supported such a view, not because such agreements were not possible, but because courts would not enforce them as a matter of public policy. *Balfour* confirmed the custom, reaffirmed in many subsequent cases, that domestic agreements do not give rise to enforceable obligations. This became a presumption for the sake of convenience. However, it was a presumption that could reasonably be rebutted by the plaintiff, since the onus of proof belonged to the party alleging that the agreement was intended to be enforceable at law. This was recognised by Atkin LJ from the beginning, when he found 'the onus was upon [the wife], and [the wife] has not established any contract.'[63] What followed was the emergence of two fundamental presumptions, one in favour of intention to contract in business transactions, and the other against intention in domestic and social cases. Both, and especially the latter, have been the subject of considerable judicial elaboration.

[63] *Balfour v Balfour* [1919] 2 KB 571, 580.

The normative potential of intention becomes apparent not only with Atkin LJ's forceful defence of the public interest in limiting the spread of litigation. It can be seen also in a wide array of later cases in which courts adopted a presumption against an intention to create legal relations in order to deny contractual liability: domestic agreements;[64] government policy or administration;[65] provisional agreements;[66] collective industrial agreements[67] and agreements within clubs, churches and voluntary associations.[68] Equally, there have been many cases where the presumption against intention has been rebutted on the facts.[69] Courts have even accepted a rebuttal of the commercial presumption,[70] with inferences of fact, operative presumptions, rebuttal and onus of proof acting as judicial aids for locating intention objectively. Just as courts apply a priori principles to facts in order to ascertain agreement and consideration, they adopt a similar approach in order to locate intention.

The objective search by courts for the parties' hidden subjective intentions masks, in effect, a discretion to affirm or override the enforceability of the arrangement on public policy grounds, notwithstanding the presence of agreement and consideration. The ambit of the discretion indicates the normative parameters of intention. Hedley has identified this process in a multitude of cases where the parties have not put their minds to their legal obligations at all, or there is no evidence either way as to what they may have anticipated:

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64 *Cohen v Cohen* (1929) 42 CLR 91; *Jones v Padavatton* [1969] 2 All ER 616.

65 *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424; *Administration of the Territory of Papua New Guinea v Leahy* (1961) 105 CLR 6.

66 *Masters v Cameron* (1954) 91 CLR 353.

67 *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 1 WLR 339.

68 *Cameron v Hogan* (1934) 51 CLR 358; *Scandrett v Dowling* (1992) 27 NSWLR 483.

69 *Todd v Nicol* [1957] SASR 72; *Wakeling v Ripley* (1951) 51 SR (NSW) 183; *Riches v Hogben* [1986] 1 Qd R 315.

70 *Rose and Frank Co v Crompton & Bros Ltd* [1923] 2 KB 261; *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626.

> When the court purports to find an intention as to legal relations, it can only be because the court thinks that legal liability should be present, and imposes it on the parties. Moreover, when there are indications whether the parties intended liability, it is all too easy for the courts to ignore them. Two main techniques are used: … Firstly, the court can arbitrarily narrow the issue, to make the indications appear irrelevant. … [Secondly, by] the 'principle of objectivity', which states that if the parties have 'to all outward appearances' contracted, then neither can escape by proving a subjective lack of intention.[71]

Hedley's analysis shows how the nineteenth century treatise writers were instrumental in shaping a single law of contract, 'the subject-matter [of which] was overwhelmingly business and consumer transactions; the general principles [of which] were thus largely designed for commercial work.'[72] However, as time went on the classical paradigm was argued for many different types of context, including domestic cases, and judges:

> …found the perfect device for achieving this in the solution that Atkin LJ [in Balfour] had adopted, of postulating a doctrine of 'intent to create legal relations'. If liability were thought appropriate on certain facts, it could plausibly be made out as 'intended'; if not, it would be easy to deny the existence of the requisite intention.[73]

Similarly, Hepple sees the advantage for courts in retaining 'the device of constructive "intention" [which] is superficially attractive because it enables the courts to cloak policy decisions in the mantle of private contractual autonomy.'[74] Sceptical commentators may indeed have seen intention as an unnecessary addition, since '[i]n most situations the test of bargain provides a satisfactory answer to

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[71] Stephen Hedley, 'Keeping Contract in its Place – *Balfour v Balfour* and the Enforceability of Informal Agreements' (1985) 5 *Oxford Journal of Legal Studies*, 391, 395.

[72] Ibid 402.

[73] Ibid 403.

[74] B A Hepple, 'Intention to Create Legal Relations' (1970) 28 *Cambridge Law Journal* 122, 134.

the policy question,'[75] but they have nevertheless often acknowledged some of the benefits of intention and its use by the judiciary. Courts have generally tended to come to the 'right' decisions, even though reliance on consideration or bargain alone would have led to similar conclusions. In Hedley's work, cases in which there was no evidence that the parties put their minds to legal relations at all are categorised according to whether the parties were 'at arm's length' or not.[76] It is concluded that courts have tended to find intention present in domestic cases only when there was evidence, such as in *Merritt v Merritt*,[77] that the plaintiff had performed his or her side of the bargain.[78] This is now seen as a 'rule' of intention. It was also noted that purely executory agreements were generally not enforced;[79] that courts have frequently cured vague agreements with the use of implied terms[80] or severance;[81] that evidence has usually been required of recompense for consideration supplied;[82] and that courts have generally failed to locate intention where the claimant has sought more than the detrimental reliance to which they were entitled.[83]

In other words, there has unsurprisingly been little evidence that courts have tended in the domestic and social cases to do anything other than exercise their objective assessment of the facts meticulously and arrive at decisions that have been accepted as reasonable, regardless of the views of observers as to the necessity of intention. The real question, as Selznick points out,[84] is not whether courts will make decisions based on policy considerations,

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75 Hepple, above n 74.
76 Hedley, above n 71, 405-412.
77 [1970] 1 WLR 1211.
78 Hedley, above n 71, 406.
79 *White v Blackmore* [1972] 2 QB 651.
80 *Tanner v Tanner* [1975] 3 All ER 776.
81 *Simpkin v Pays* [1955] 1 WLR 975.
82 *Horrocks v Forray* [1976] 1 All ER 737.
83 *Jones v Padavatton* [1969] 1 WLR 328.
84 Philip Selznick (with P Nonet), *Law and Society in Transition: Toward Responsive Law* (1978). See Malcolm Feeley and Edward Rubin, 'Responsive Law and the Judicial Process: Implications for the Judicial Function', in Robert Kagan, Martin Krygier, Kenneth Winston (eds) *Legality and Community: On the Intellectual Legacy of Philip Selznick* (2002) 249.

but how courts can more *competently* respond to the policy requirements of agreements arising from complex social relationships and structures.

What is important for the context at hand is to review the ways in which intention has been used by courts in the faith worker cases in order to prove or disprove the formation of contract as a matter of fact. It is telling that claims by faith workers against their religious organisations have stood or fallen principally on the sword of intention. It is also telling that Hedley in 1985 categorised the clergy cases as involving 'arm's length' relationships, vaguely implying that the courts used the wrong tests to conclude faith workers were not employees.[85] A closer analysis of the history of faith work, and its treatment at common law, would indicate they may have more in common with voluntary and domestic situations where assumptions of obligation are derived from the intrinsic and extra-legal nature of the relationship rather than from the indices of contract. However, faith workers have not infrequently turned to the law seeking that the civil courts recognise and enforce their allegedly *contractual* rights against the churches and religious organisations within which they worked. The pivotal role played by intention in these cases will now be examined.

[85] Hedley, above n 71, 414-415.

III INTENTION IN THE FAITH WORKER CASES

At the outset, it is necessary by way of background to outline three fundamental historical factors that underpin an understanding of the issue at hand. The first is that the position of faith workers in common law jurisdictions was understood for centuries to be contingent upon their holding a special status before the law known as *ecclesiastical office*. This concept was rooted in canon law and reflected an orthodox natural law view of obligations and rights.[86] The second relevant factor is that the civil courts exercised for centuries a reluctance to intervene in the internal affairs of the church. Establishment of the English church secured its autonomy, although inevitably at the expense of its political power. This historical compromise between church and state led to the gradual diminution of a separate jurisdiction for ecclesiastical courts and the formal subservience of church laws to those of the state. In practice, what emerged was reluctance on the part of royal courts to interfere with internal church matters, including disputes involving clerics and their personal status within the church hierarchy, other than cases involving loss of proprietary rights as a result of breaches of church rules.[87] The third salient fact is the rediscovery of *consensual compact*, a concept based on the civil law version of the Roman

[86] By assuming the duties and obligations attaching to their office, clerics were clearly defined in contradistinction to other persons subject to law enforced by the Crown. Ecclesiastical office brought with it certain rights, such as the protection of the church from the laity and the institutions of state. The legal effect of this status was that ordained personnel recognised by the church enjoyed a qualified immunity from prosecution, a recognised clergy-parishioner privilege, a legal right to occupation of residential premises owned by the church, income from a variety of sources during their term of office and other indices of autonomy from the affairs of ordinary lay citizens. The semi-autonomous status of the church as a juridical entity, reflective of its position as 'one of the great estates of the realm', was manifested in a variety of ways in law and equity, including early forms of corporate personality for the holding of property, the entrenchment of the charitable trust and the special status of gifts for the support of clergy.

[87] Mark Hill, 'Church Autonomy in the United Kingdom' (Paper presented to the Second European/American Conference on Religious Freedom, Church Autonomy and Religious Liberty, University of Trier, Germany, 27-30 May 1999) 5.

pactum or covenant between two or more people. This was how courts rationalised the legal status of the non-established churches.[88] The property that these groups held was vested in trustees who were responsible to their congregations through solemnly executed deeds of trust, which commonly contained 'detailed provisions regulating rights and powers of trustees, ministers, church officers and the congregation, and their relationship to the national church organisation, if any.'[89] These 'rules' of the church were regarded virtually as contractual terms subject to judicial construction.[90]

Against this background it is not surprising that by the early twentieth century faith workers were prepared to argue breach of contract where they had been disciplined or dismissed by their congregations or ecclesiastical superiors. However, it is also not surprising that church bodies relied on the institutional pull of ecclesiastical office to refute a contractual basis for spiritual work. This was very evident in early litigation which tested the extension of certain statutory rights to persons who could establish an employment relationship. The courts in these cases did not ground their decisions in the language of intention as such, but the judgments were effectively premised on a presumption that spiritual work could not be understood in contractual terms. Cases such as *In Re Employment of Church of England Curates*,[91] *Re Employment of Ministers of the United Methodist Church*[92] and *Scottish Insurance*

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88 The non-established churches were, in historical English context, the Catholic Church with its hierarchical apex in Rome and the great variety of dissenting, independent and separatist Protestant groups that rejected both the papacy and the established English church. But they included also the Church of England itself in places such as Scotland where it was not established and did not enjoy the unique closeness with state institutions.

89 Hon Justice B H McPherson, 'The Church as Consensual Compact, Trust and Corporation' (2000) 74 *Australian Law Journal*, 159, 162.

90 In the Scottish case of *Dunbar v Skinner* (1849) 11 D 945, the Court of Sessions referred to the Episcopal Church (the principal non-established Anglican congregation in Scotland, where establishment status was enjoyed by the Presbyterian Church) in terms of a 'voluntary union pactionally constituted' and a 'voluntary agreement'. The dispute and its resolution were couched in terms of 'breach of agreement' and 'agreement'.

91 [1912] 2 Ch 563.

92 (1912) 107 LT 143.

Commissioners v Paul, [93] demonstrate that, up to that point in time, courts were prepared to consider the relationship between a religious body and its ordained personnel as contractual in just two situations: firstly, where it was necessary to intervene in a voluntary association dispute to vindicate a claim involving loss of proprietary or other civil rights due to breach of association rules or denial of natural justice; and secondly, where qualification for statutory protection such as workers' compensation or other insurance cover required preliminary evidence of an employment contract. Invariably, no contract was found in the second group of cases. Intention to create legal relations was yet to emerge as a crucial tool of argumentation and reasoning in these cases.

The earliest British clergy case in which the element of contractual intention seems to have featured was *Rogers v Booth*,[94] in which a woman lieutenant in the Salvation Army claimed under workers' compensation legislation following a work injury.[95] In that case, the absence of intention was used to rationalise and affirm the prevailing view that faith work could not be grounded in contract. For the unanimous Court of Appeal,[96] the explicit refutation of a 'salary'[97] by the Salvation Army proved that the relationship between the parties was spiritual notwithstanding the organisation's strict command structure. Significantly, it was held that the parties did not in fact have any intention to be legally bound 'when [their] arrangement was entered into'.[98] The test for intention was not expressed in terms of presumptions and their rebuttal, but by way of an implied premise that 'spiritual' work, regardless of the minutiae of the tasks to be conducted, could not be contractual:

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93 [1914] SC 16.

94 [1937] 2 All ER 751.

95 *Workmen's Compensation Act 1925* (UK).

96 Sir Wilfrid Greene MR, Romer and Scott LJJ.

97 The *Orders and Regulations for Officers of the Salvation Army* provided that '[t]he Army does not recognise the payment of salary in the ordinary sense; that is, the Army neither aims at paying nor professes to pay its officers an amount equal to the value of their work; but rather to supply them with sufficient for their actual needs, in view of the fact that, having devoted themselves to full-time Salvation service, they are thereby prevented from otherwise earning a livelihood.'

98 [1937] 2 All ER 751, 754.

> It would be a very curious thing if the General of the Salvation Army … could bring actions for damages against [people under him] if they failed to obey some directions that he gave as to the way in which they should perform their spiritual task. I venture to think that nothing of the sort was the intention of either party when that arrangement was entered into.[99]

Where faith worker and church were 'united together for the performance of spiritual work',[100] the court held that the parties simply did not intend to create legal relations. However, by focusing on the army's *Orders and Regulations*, and the lieutenant's signed acknowledgment that her work was voluntary and without guaranteed remuneration, as objective evidence of lack of intention, the Court of Appeal implicitly left open the possibility that a different result could have eventuated had the organisation's documents and the arrangements between faith worker and church expressed an alternative understanding. The judgment is arguably significant since it indicated that evidence of ecclesiastical office in effect set up a presumption against intention, but one that was potentially capable of rebuttal.

Few faith worker cases presented themselves for adjudication in the superior courts in the four decades following *Rogers v Booth*. However, the common law world experienced in the final three decades of the twentieth century a proliferation of statute-based rights in the area of employment law, including 'unfair dismissal' rights mandating appropriate procedures for job terminations.[101] Claimants of course had to establish their locus standi as employees.

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[99] *Rogers v Booth* [1937] 2 All ER 751, 754.

[100] Ibid.

[101] In the United Kingdom, the first inroads were made through the *Industrial Relations Act* 1971, followed by comprehensive legislation consolidating several enactments over the preceding decade in the form of the *Employment Protection (Consolidation) Act* 1978. In Australia, unfair dismissal claims were available firstly at the level of various State Acts, and then as award provisions implied into employment contracts. This was followed at the federal level by the *Industrial Relations Act* (1988) as amended by the *Industrial Relations Reform Act* (1993), which proscribed dismissal on prohibited grounds for a 'valid' reason, including on 'harsh, unjust and unreasonable' grounds.

Two highly significant cases in this period were instrumental in highlighting the issue of intention vis-a-vis the employment status of faith workers: *President of the Methodist Conference v Parfitt*[102] and *Coker v Diocese of Southwark*.[103]

Parfitt was the first case in which a statutory tribunal held that a suspended minister of religion had been unfairly dismissed as a church employee. Intention was instrumental in securing victory before two employment tribunals, where majorities had found that Parfitt was providing his work and skill in exchange for a stipend, manse and other benefits, and that he 'intended to become a servant of the church' by acceding to its authority and discipline.[104] However, the Court of Appeal upheld the views of the dissenting minorities upon proper consideration of crucial segments of the *Constitutional Practice and Discipline of the Methodist Church* and a church document titled *The Methodist Ministry*. These documents supported the existing presumption against intention in clergy cases in two important respects. Firstly, ministers were not recruited like non-spiritual workers but were 'called of God' and had the requisite attributes to be 'authorised [by the church] to minister in holy things'. Secondly, ministers were not paid for their services, but received a traditional stipend (even though tax regulators may have conveniently treated it as a wage) because 'the church undertakes the burden of their support and provides for each man according to his requirements.'[105] However, notwithstanding that intention was used in *Parfitt* to rebut the possibility of contract between faith worker and church, Dillon LJ explicitly recognised two significant alternative possibilities: firstly, that spiritual work *could* be the subject of an agreement enforceable in the civil courts between a faith worker and parties *other than* the church in which they had been ordained; and secondly, that it was even conceivable for a carefully drafted document to expressly bind a faith worker and their church in contract in some cases.

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[102] [1984] QB 368.
[103] [1998] ICR 140.
[104] [1984] QB 368, 372.
[105] Ibid 375.

> [T]he spiritual nature of the work to be done by a person and the spiritual discipline to which that person is subject may not necessarily, in an appropriate context, exclude a contractual relationship under which work which is of a spiritual nature is to be done for others by a person who is subject to spiritual discipline. … A contract of service between a newly ordained minister and the church could perhaps be drafted … but the arrangements under such a contract would not be the same as the arrangements for ministers under the … doctrinal standards of the Methodist Church.[106]

In a separate judgment, May LJ gave specific attention to the contractual element of intention; a matter not directly alluded to by Dillon LJ. The issue was necessitated by the 'first question' for deliberation: 'whether Mr Parfitt ever had any relevant contract with the Methodist Church at all'.[107] His Honour was prepared to concede that there was evidence of agreement between the parties in respect of the performance of a minister's duties, and even of 'good consideration to support such an agreement'.[108] This important concession brings to mind Atkin LJ's judgment in *Balfour*[109] to the effect that the only element that had to be added to the agreement and consideration between husband and wife was the necessary one of intention. But May LJ outlined how the lower tribunals had in effect avoided addressing the issue of intention, simply taking the 'very high degree of control that a minister must submit to in most aspects of his everyday life and work' as evidence that a contract of service necessarily existed. This logical leap exposed the flawed reasoning in the tribunals below and 'begged the question' concerning the formation of contract, an outcome that his Honour rejected on the facts of the case. For him it was clear the element of intention remained unsatisfied:

> I am unable to accept that either party to the present proceedings intended to create a contractual relationship … The submission by the Methodist Church that a minister is, in effect, a person licensed by the Methodist Conference to perform the work of a minister in accordance with the doctrine of the church and subject to its

[106] *Parfitt* [1984] QB 368, 376.
[107] Ibid 378.
[108] Ibid.
[109] [1919] 2 KB 571, 580.

> discipline is, in my judgment, the most persuasive description of his status and role.[110]

What is evident in these words is that the court looked for intention in the primary church documents to which both parties subscribed and used it to validate the ecclesiastical autonomy of the Methodist Church and its interpretation of the special, non-contractual nature of the relationship. By implication, therefore, alternative interpretations of the relationship were admissible as evidence to the contrary. Agreeing that the appeal should be allowed, May LJ was not prepared to concede, even if a contract did exist, that it was a contract of service. So despite the presence of agreement and consideration, it was intention that was missing as a separate element, since an objective appraisal of how the church viewed its relationship with ministers could not reasonably have led to the conclusion that a contract enforceable by the civil courts had been created. Again, a judicial concern for the institutional autonomy of the Methodist Church negated a finding of intention. But in this case there was clearly an important concession from the bench that spiritual work could reflect a binding intention indicative of contract, although arguably not between a faith worker and the church in which they were ordained.

The Court of Appeal[111] decision of *Coker* concerned the termination of appointment of an assistant curate of the Church of England. An employment tribunal had initially held that Coker's position demonstrated the following indicia of employment: his non-delegable duties, financial dependence and control by the vicar on behalf of the diocese. Mummery LJ asserted that the correct law was contained in a rebuttable presumption that there was no contractual relationship between a minister of religion and their church without clear evidence of an intention to the contrary. For him, evidence of intention had to be 'objectively ascertained' in the circumstances:

> In some cases … there is no contract, unless it is positively established by the person contending for a contract that there was

[110] [1984] QB 368, 380.
[111] Staughton, Ward and Mummery LJJ.

> an intention to create a binding contractual relationship. This is such a case.[112]

In a separate concurring judgment, Staughton LJ made significant concessions that broadened the parameters within which intention to create legal relations could be located. His honour was prepared to accept Coker's assertion that the cases 'demonstrated … there is still room for argument',[113] and that a curate's stipend could in some cases be regarded as a wage or salary. Similarly, he acknowledged that some 'subsidiary' aspects of the relationship between a minister of religion and their church could be contractual, such as those dealing with the payment of a pension or the occupation of a residence.[114] Despite accepting the Court of Appeal decision in *Parfitt* as authoritative, his Honour nevertheless rejected the notion that there was an 'absolute rule' that an office holder could not simultaneously be regarded as an employee.

IV FAITH WORK 'THROUGH A CONTEMPORARY LENS'

In 1998 the Court of Appeal[115] in New Zealand had cause to revisit the authorities on the employment status of faith workers in *Mabon v Conference of the Methodist Church of New Zealand*,[116] an appeal by a dismissed minister. There was evidence that the Conference of the church had rejected legal advice to the effect that its arrangements with ministers would be construed as contractual, despite taking nominal steps to amend its primary documents following the English Court of Appeal's decision in *Parfitt*. The Court of Appeal's unanimous decision, delivered by Richardson P, neither vindicates fully the Conference view that non-employment status was agreed between the parties, nor rejects outright legal advice that a ruling against the church was likely to eventuate.

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[112] [1998] ICR 140, 147.
[113] Ibid 149.
[114] Ibid 150.
[115] Richardson P, Gault, Henry, Keith and Tipping JJ.
[116] [1998] 3 NZLR 513.

The appeal court's judgment was constructed around the 'crucial question of whether there was an intention to create a legal contract between the Reverend Mabon and the conference in [his] stationing … in the Woodville parish'.[117] His honour noted that Mabon 'believed he was called by God to be a minister of the Methodist Church', which was 'inconsistent with an intention on [his] part … to seek to be legally bound in his relationship with the conference as part of his ordination or stationing.'[118] Similarly, the church's 'entire history demonstrated that it did not consider itself an employer of its presbyters'.[119] However, it was perfectly feasible for the Conference of the church to have decided otherwise.

> [H]ad the conference accepted the opinion of its board and resolved that it was bound by secular law to conclude that it was in an employment relationship with its ministers and had it amended its rules accordingly, then the arrangements [with Mabon] … might well have been able to have been characterised as having been made with an express intention to be legally bound.[120]

Richardson P insisted that '[w]hether … intention to create legal relations existed is a matter for objective determination'.[121] For the court, it was important to consider the objective context within which the intentions of the parties were expressed. Importantly, it was acknowledged that 'the overhang of history and culture may affect perceptions of what it takes to create or negative intentions to enter into legal relations in a particular context.'[122]

Referring to an earlier case before the court,[123] his Honour noted that the words used by the parties to describe the legality of their

[117] *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513, 521.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid 522-3.
[122] Ibid 528.
[123] *R v Lord Chancellor's Department, ex parte Nangle* [1991] ICR 743.

relationship, whether expressed through a minister's genuine belief at ordination or a church assembly's formal vote, 'were merely descriptive of *what was believed to be the position*'.[124] To establish intention, what was essential for a court was objective evidence to determine what *must have been the intention*, as expressed by the parties and as determined by history, culture and the material circumstances of the case. Significantly, his Honour heralded the view that the presumptions of intention had possibly outlived their utility, quoting directly from a 1994 New Zealand Court of Appeal decision involving an agreement between de facto spouses:[125]

> [T]he range of circumstances in cases such as these is likely to be so varied that in any particular case a presumption, albeit of fact, is likely to be of limited assistance. Each case will turn on its own facts and there is no substitute for a careful examination of those facts.[126]

Richardson P drew two important conclusions from the Court of Appeal's 1994 decision. Firstly, the emphasis of the British courts on presumptions in the context of intention was not as useful as a focus on the plaintiff's 'onus of satisfying the Court on the balance of probabilities that it is proper to draw the necessary inference'.[127] Secondly, it was necessary to analyse the particular arrangement between church and minister 'through a contemporary lens'[128] in order to determine their intention. Both of these conclusions about intention later featured in the seminal 2002 Australian decision of *Ermogenous v Greek Orthodox Community of South Australia*.[129]

[124] [1998] 3 NZLR 513, 524.
[125] *Fleming v Beevers* [1994] 1 NZLR 385.
[126] Ibid 389-90 (Tipping J).
[127] [1998] 3 NZLR 513, 524.
[128] Ibid.
[129] (2002) 209 CLR 95.

Importantly, the judgment in *Mabon* was also influenced by obiter in three English faith worker decisions: *Parfitt*, *Coker* and *Davies*.[130] It was not inconceivable that some aspects of the otherwise non-contractual relationship between a church and its faith workers could exhibit the requisite intention to ground enforceable contractual components. A possible instance was a 'subsidiary contract as to a pension or the occupation of a house.'[131] Furthermore, it was held that:

> … there are no reasons of legal principle or public policy why the parties should not provide for certain distinct matters to be the subject of a legally enforceable contract and at the same time *intend* and so allow other matters to be resolved in other ways [emphasis added].[132]

The absence of intention on the facts was finally determined by the evidentiary weight given to the clearly expressed wording of the church's laws and regulations, the refusal of the 1994 Conference to acknowledge an employment relationship, the nature of the stipend, the church's 'notional employer' stance, as well as Mabon's work on that basis over considerable time. But the Court of Appeal acknowledged that it could easily have been otherwise.

Finally, two relatively recent decisions[133] concerning faith workers will be highlighted from a small but significant body of

[130] *President of the Methodist Conference v Parfitt* [1984] QB 368; *Diocese of Southwark v Coker* [1998] ICR 140 (CA); *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705. In the *Davies* case, although the House of Lords did not refer to intention specifically, their Lordships did not disapprove of the concession made by Dillon LJ in *Parfitt* and unanimously acknowledged that exclusively spiritual duties could be performed under a contract of employment or independent contract for services. Lord Templeman specifically agreed that 'it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual': [1986] 1 All ER 705, 709.

[131] [1998] 3 NZLR 513, 525.

[132] Ibid 524.

[133] *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95; *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28.

adjudicated disputes.[134] These two notable cases have in effect consolidated the approach in *Mabon*. They also demonstrate the post-*Mabon* development of intention as an element of contract creation and the potential of intention to generate normative outcomes in the hands of a competent and responsive judiciary.

Ermogenous involved a claim by an ordained clergyman who had been appointed by a lay association of Greek immigrants to act as archbishop of a collection of disparate congregations centred in Adelaide. Ermogenous served for twenty three years and, upon retirement, claimed long service leave and accrued annual leave. He succeeded before an industrial magistrate in South Australia,[135] whose order was upheld on appeal by both a single judge[136] and a Full Bench[137] of the state Industrial Relations Court. The Full Court of the Supreme Court of South Australia overturned these decisions on the basis that the nature of spiritual work militated against a finding of contract, even though there may at the same time have been 'a collateral and enforceable agreement as to peripheral

[134] See *Price v Representative Body of the Church in Wales* [1938] Ch 434; *Parker v Orr* (1966) 1 ITR 488; *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309; *Guru Nanak Sikh Temple v Sharry* (1991) IDS Brief 450; *Birmingham Mosque Trust Ltd v Alavi* [1992] ICR 435; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; ex parte Wachmann* [1993] 2 All ER 249; *Subhan v Enfield Mosque Society* [1995] UKEAT 1061/93; *Allison v Anglican Diocese of Melbourne* [1998] IRCommA 1091; *Knowles v Anglican Property Trust, Diocese of Bathurst* [1999] NSWIRComm 157; *R v Bishop of Stafford, ex parte Owen* (2000) 6 Ecc LJ 83; *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation Mediation and Arbitration and Others* [2001] ZALC 141; *Cohen-Hallaleh v Cyril Rosenbaum Synagogue* [2003] NSWSC 395; *Eisenmenger v Lutheran Church of Australia, Queensland District* [2005] QIRComm 32; *The New Testament Church of God v Stewart* [2005] UKHL 73; *Engel v The Adelaide Hebrew Congregation Inc* (2007) 98 SASR 402.

[135] *Ermogenous v Greek Orthodox Community of South Australia* (1997) 64 SAIR 622.

[136] *Greek Orthodox Community of South Australia v Ermogenous* (1998) 65 SAIR 514 (McCusker J).

[137] *Greek Orthodox Community of South Australia v Ermogenous* [1999] 89 IR 188 (Jennings SJ, Cawthorne and Parsons JJ).

matters'.[138] If intention was positively proved, only then would the question have arisen of 'whether the contract [was to be] properly characterised as a contract of employment'.[139]

The joint judgment of Gaudron, McHugh, Hayne and Callinan JJ[140] in the High Court pointed out that it would be *wrong to formulate rules* to 'prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist'.[141] Because the task of locating intention '[was] not a search for the uncommunicated subjective motives or intentions of the parties',[142] what had to take place was an 'objective assessment' of the circumstances, including the nature of the agreement, the status of the parties and the substance of their relationship. Importantly, the joint judgment explicitly decried the benefit of the legal 'presumptions' by way of which intention was customarily located:

> For our part, we doubt the utility of using the language of presumptions in this context. At best, the use of that language does no more than invite attention to identifying the party who bears the onus of proof. [143]

In this case, it was clearly the responsibility of the archbishop to establish contract. Undue attention to the issue of presumptions harboured the danger of falling into the logical trap of regarding one notion, that intention *ought not* be presumed, as analogous to another, namely that an arrangement about a faith worker's pay and conditions *does not* amount to a contract. The High Court feared that such a presumption could 'rapidly ossify into a rule of law',[144] and deflect from the task at hand, which was to identify intention as a matter of fact. Furthermore, it was held that no assumptions ought to be made about what may 'usually' be the norm when it comes to

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[138] *Greek Orthodox Community of South Australia v Ermogenous* (2000) 77 SASR 523, 576.
[139] Ibid.
[140] Kirby J delivered a separate concurring judgment.
[141] (2002) 209 CLR 95, 105.
[142] Ibid 106.
[143] Ibid.
[144] Ibid.

church governance and to relations between religious organisations and their spiritual workers, warning against the 'unthinking application of the practices of one tradition to another'.[145]

The High Court majority also took the view that the reasoning of the Full Court of the Supreme Court of South Australia, in support of the proposition that an intention to contract cannot be presumed in cases involving clergy remuneration, was based on authorities that had arrived at that conclusion by different routes. In those cases where it was held that ministers of religion held office,[146] the organisations within which the offices existed, as well as the relevant appointing entities, were readily discernible. In other cases, like *Ermogenous*, where an employment contract with an unincorporated body was argued,[147] there were major obstacles to identifying the employer. Just as significant were those decisions[148] that rested on the supposition that the relationship between church and religious worker was not contractual but spiritual. They showed that existence of one kind of relationship did not necessarily exclude the other. Even though the Full Court had recognised that it was not impossible for the spiritual connection to be governed by contract, but merely that it should not be presumed to be so, it concluded that the *only* relationship Ermogenous enjoyed was 'with a church, not [a lay association], and was a spiritual, not a contractual, relationship'.[149] The *Davies* case[150] recognised that even where a connection was entirely spiritual, certain aspects of the relationship, such as occupation of the manse and payment of a stipend, could give rise to legally enforceable rights and duties.

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[145] *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95, 99.

[146] *Re Employment of Church of England Curates* [1912] 2 Ch 563; *Scottish Insurance Commissioners v Paul* [1914] SC 16.

[147] *President of the Methodist Conference v Parfitt* [1984] QB 368; *Davies v Presbyterian Church of Wales* [1986] ICR 280; *Diocese of Southwark v Coker* [1998] ICR 140.

[148] Such as *Rogers v Booth* [1937] 2 All ER 751.

[149] (2002) 209 CLR 95, 110.

[150] *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705.

It was also acknowledged by the High Court,[151] as in the *Coker* case, that a minister of religion could be performing spiritual duties for an entity that was not exclusively religious in nature, such as 'a school, or a duke, or an airport authority'.[152] The same principle applied to an incorporated body such as the Greek Orthodox Community of South Australia, without detracting from the spiritual character of the connection. The High Court explained it this way:

> To say that a minister of religion serves God and those to whom he or she ministers may be right, but that is a description of the minister's spiritual duties. It leaves open the possibility that the minister has been engaged to do this under a contract of employment.[153]

For the High Court, the Full Court had erred in holding that the magistrate had failed to take intention into account, by either misinterpreting his findings or by drawing an inference about intention that was not open on the facts. It had also arrived at general propositions about the lack of intention in clergy employment arrangements that were not supported by the relevant authorities.[154] Accordingly, the High Court allowed Ermogenous' appeal and remitted the final point to the Full Court for further consideration.

In a separate concurring judgment, Kirby J agreed with the proposed orders by way of a more circuitous route. The first question that required resolution was whether the magistrate had addressed intention. To Kirby J, although the magistrate had not appeared to use the conventional legal terminology, he had *by implication* 'certainly dealt with the substance of the argument in resolving the challenge to the existence of a legally enforceable contract between the parties.'[155] This was through his rejection of the notion that an archbishop's relationship with those who provided his

[151] (2002) 209 CLR 95, 110.
[152] *Diocese of Southwark v Coker* [1998] ICR 140, 150 (Staughton LJ).
[153] (2002) 209 CLR 95, 110.
[154] Ibid 112.
[155] Ibid 115.

necessities of life must by its nature be incompatible with a contract of employment.

For Kirby J, it was increasingly clear that courts in Anglophone jurisdictions were approaching the problem with 'a contemporary lens,'[156] a clear reference to *Mabon*, and were willing to 'reject the notion that religious organisations, as such, are somehow above secular law and exempt from its rules'.[157] In Australia, a secular polity, there is clearly 'no presumption that contracts between religious or associated bodies and ministers of religion, of their nature, are not intended to be legally enforceable'[158] and the 'spiritual nature' of the relationship will not preclude courts from identifying an intention to create contractual relations. Even if there were such a presumption, it would not apply to an arrangement entered into by a faith worker with a secular entity for the necessities of life.

In summary, *Ermogenous* was important in that it warned there was no one solution to the clergy cases. It approved of looking at the entire relationship objectively and, significantly for the issue of intention, found that the presumptions in such cases were of limited value and indicated only which party bore the onus of proof.[159] It followed that there was no longer a presumption that faith work was non-contractual for lack of intention, and there was no inherent obstacle to a minister of religion being held to be an employee in certain situations. If intention could objectively be established, then the proper test for deciding whether the contract was one of employment required an assessment of the total relationship between the parties, including factors of control and organisation, as

[156] *Ermogenous v Greek Orthodox Community of South Australia* (2002) 209 CLR 95, 122.
[157] Ibid 121.
[158] Ibid.
[159] Obiter to that effect had already been expressed in 2001 by the Full Court of the Supreme Court of Western Australia in *Pirt Biotechnologies Pty Ltd v Pirtferm Ltd* [2001] WASCA 96, [21] (Murray J).

expressed in the High Court decision of *Stevens v Brodribb Sawmilling Co Pty Ltd*.[160]

The House of Lords' decision in *Percy v Church of Scotland Board of National Mission*[161] involved a highly publicised allegation of unfair dismissal and unlawful sex discrimination by a single woman, an ordained minister of the established Church of Scotland. She was dismissed from her post by the church following her admission of an affair with a married church elder. She argued that male ministers in similar circumstances had been treated differently, and that she had lost her stipend and use of manse under the five-year appointment. An employment tribunal, and its appellate body, dismissed her claim on two grounds: that it dealt with 'matters spiritual', which were within the exclusive jurisdiction of the church under the *Church of Scotland Act 1921*, and that her spiritual work was not a 'contract personally to execute any work or labour' as required for a claim under section 82(1) of the then extant *Sex Discrimination Act 1975*.[162] A further appeal court added that, on the facts, there were no grounds to depart from the rebuttable presumption that an ordained minister's position did not 'give rise to obligations enforceable in the civil law'.[163]

In the House of Lords, Lord Nicholls, with whom three of the remaining Law Lords concurred, distinguished the established cases on the basis that they involved more narrow statutory constructions of 'contracts of service', involving tests of the degree of an employer's control, whereas Ms Percy contended that she was engaged in a 'contract for services' falling within the ambit of the sex discrimination definition.[164] It was clear to his Lordship that the intrusion of statutory employment and discrimination laws had altered the legal playing field. The freedom to dismiss under the old laws of master and servant meant aggrieved employees could seek a

[160] (1985-86) 160 CLR 16.
[161] [2006] 2 AC 28.
[162] *Sex Discrimination Act 1975* (UK), now repealed and replaced by the *Equality Act 2010* (UK).
[163] [2006] 2 AC 28, 35.
[164] Ibid 34.

remedy on the basis of breach of contract, as a matter of private law, or argue they held 'office' in order to attract judicial review of their termination as a matter of public law. This dichotomy between employees and office holders lost significant impact with the granting of statutory rights of review for employees generally, and with increasing judicial and legislative acceptance of their co-existence. There was authority for the view that a holder of office could be employed at the same time.[165] The question for the House of Lords was not whether the woman faith worker held office, but whether she could be held to have entered into a contract to provide services *notwithstanding* that she may have held office.

Further matters for consideration were the purported absence of intention in the spiritual relationship and the notoriously difficult task of identifying the employer in cases involving religious organisations. Lord Nicholls saw both issues as surmountable. Firstly, it was now clear on the authorities that a person could be employed to provide exclusively spiritual duties and that the absence of intention 'cannot be carried into arrangements which *on their face are expected* to give rise to legally binding obligations'.[166] Secondly, the absence of a corporate or single entity and the 'internal fragmentation' of churches 'ought not stand in the way of otherwise well-founded claims'. A review of the correspondence between the parties led to the reasonable conclusion that one of the church organs, the Board of National Mission, had entered into a contract for Ms Percy to provide services to the church on agreed terms and conditions. The fact that her status could be described as an 'ecclesiastical office' did not derogate from the reality that the agreed terms of service between the parties were definitive of their true relationship at law.[167] The further fact that the Church of Scotland held exclusive jurisdiction over 'matters spiritual', an undefined term, did not interfere with Ms Percy's claim.[168] Any

[165] *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28, 39-40. His Lordship referred to two unfair dismissal cases, one involving a stipendiary lay reader (*Barthope v Exeter Diocesan Board of Finance* [1979] ICR 900) and the other concerning a statutory rent officer (*Johnson v Ryan* [2000] ICR 236).
[166] [2006] 2 AC 28, 40.
[167] Ibid 42.
[168] Ibid 43.

contract of employment entered into by the church created statutory rights that were not properly to be seen as 'matters spiritual'. Even the exercise of church discipline over the employee would not be sufficient to extinguish the right to bring a claim for sex discrimination, which is based on the enforceable agreement between the parties.

> The rights and obligations created by such a contract are, of their nature, not spiritual matters. They are matters of a civil nature… [i]n respect of [which] the jurisdiction of the civil courts remains untouched.[169]

The contract between the parties was therefore one of employment, notwithstanding the spiritual nature of the work, and the initial employment tribunal possessed the requisite jurisdiction despite the provisions of the 1921 Church of Scotland legislation. The remaining majority of Law Lords[170] agreed with Lord Nicholls on substantially similar grounds.

The dissenting speech of Lord Hoffmann is of some note. It began with a reiteration of the traditional distinction between office holders, such as ministers of the church, and employees. To his Lordship the law on this matter had been 'stated so often and for so long that [he] would not have thought it open to question'.[171] Confusion had been caused in recent times, according to Lord Hoffmann, by unhelpful judicial statements to the effect that ministers of religion were 'servants of God', a 'superfluous metaphor for a lawyer', or that their appointments were not accompanied by an intention to create legal relations. In view of the advertisement for the position, the correspondence between the parties, the offer and acceptance, the terms of appointment and the totality of the 'prosaic documents' in the case:

> …how can it be said that there was no intention to create legal relations? That submission seems to me unanswerable. There was

[169] *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28, 43.
[170] Lord Hope of Craighead, Lord Scott of Foscote and Baroness Hale of Richmond.
[171] [2006] 2 AC 28, 47.

> plainly an intention to create legal relations. But those legal relations were not a contract of employment. They were an appointment to a well-recognised office, imposing legal duties and conferring legal rights.[172]

For Lord Hoffmann, it was clear that legal relations were created, just as they are whenever a judge or registrar of births is appointed, and that the attendant rights and obligations were enforceable at civil law. But a contract of service, or for services as argued in this case, could not have existed because a minister of the Church of Scotland was clearly the holder of an office recognised by law. Even the relevant provision[173] that defined employment in the *Sex Discrimination Act* 1975 was clarified by further provisions dealing with constables and holders of public office,[174] bringing them within the ambit of the definition. This made it clear that Parliament, aware of the distinction, intended to make 'no such provision for clergymen'.[175]

Percy was significant because it finally put to rest two long-standing inferences that courts historically presumed to follow upon proof of ecclesiastical office. The first was that a faith worker and their church do not intend to be legally bound, and the second held that an office holder of an established church could not be employed. The *Percy* decision stands for the proposition that, where the conditions of service are spelled out on appointment, intention is more likely to be inferred, but where the conditions are within pre-existing church rules, there is less likely to be an objective finding of intention. It confirmed that faith work could be undertaken by way of contract and relegated the importance of identifying the church entity that was to act as 'employer'. It also anticipated the crucial role that responsive regulation could play in the area of faith work. However, it leaves open the possibility that churches and their ordained workers could agree and express an intention not to be

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[172] *Percy v Church of Scotland Board of National Mission* [2006] 2 AC 28, 48.

[173] 'Employment' was defined in section 82(1) as 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour'.

[174] Sections 17 and 85(2) respectively.

[175] [2006] 2 AC 28, 49.

legally bound to each other. It should be noted that two subsequent faith worker decisions have specifically adopted the *Percy* rejection of the previous presumption in *Parfitt* and other cases that faith workers and churches have no intention to be legally bound: *The New Testament Church of God v Stewart*[176] and *Moore v President of the Methodist Conference*.[177]

V CONCLUSION

The superior court decisions analysed in this article, and in particular the recent cases of *Mabon*, *Ermogenous* and *Percy*, set the groundwork for the contemporary test for a modern *animus contrahendi*. Freed from the restrictive legacy of the traditional presumptions, such an element requires a court, as a matter of evidentiary proof and by way of an objective analysis of the factual matrix including any extra-legal character their relationship may have manifested, to identify, and if necessary to imply, the objectively determined intention of the parties to form an arrangement such that their mutually assumed obligations, would, to a reasonable observer apprised of the facts as the parties must be taken to have understood them, generate benefits and sanctions that would, either wholly or in part, be enforceable by a court of law. They illustrate how intention has moved from a set of presumptions used by courts to affirm or negate contractual relations to a holistic objective analysis of the relationship between the parties, the onus of proof being on the party asserting contract, that requires a court to apply a standard of proof capable of taking into account a myriad of different and at times competing demands. As the High Court noted in *Ermogenous*:

> In this case, where issue was joined about the existence of a legally binding contract between the parties, there could be no doubt that it was for the appellant to demonstrate that there was such a contract. Reference to presumptions may serve only to distract attention from that more basic and important proposition.[178]

[176] [2008] IRLR 134; [2008] ICR 282.
[177] [2010] UKEAT 0219/10/DM.
[178] (2002) 209 CLR 95, 106.

That is not to say that the presumptions have been relegated to legal history. Although some Australian cases[179] post-*Ermogenous* have adopted the High Court's reasoning and required the legal onus of establishing intention to reside in the party asserting the contract, other courts[180] have found application of the presumptions of continuing utility. Yet others have opted for a hybrid approach.[181] For arrangements that are not typically commercial or driven by bargain, especially those in a relational context such as the faith worker cases, the challenges are evident.

Notwithstanding the judicial ambivalence to date, courts can expect to be faced by the competing demands of modern pluralist societies, which could reasonably expect faith workers to be provided with the fundamental employment entitlements enjoyed by ordinary workers, yet would arguably not expect courts to intervene in church affairs, undermine religious freedom or adjudicate on the reasonableness of church assemblies and hierarchies acting in accordance with their beliefs. The cases highlighted in this article demonstrate how the modern interpretation of intention could increasingly enable courts to place the relationship between the parties in a wider social and cultural context to ascertain whether the arrangement *ought* to be seen as contractual by a reasonable and responsive legal order. This important normative dimension of the modern *animus contrahendi*, in addition to promising more responsive justice in the validation of contractual claims, will increasingly require a competent and flexible judiciary to set legitimate parameters for its application without compromising the authority of the courts or undermining the nature of contract.

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[179] See *Jakobkiewicz v Dickson Catering Pty Ltd* [2002] ACTSC 107; *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851; *Ashton v Australian Cruising Yacht Co Pty Ltd* [2005] WASC 192; *Seiwa Australia Pty Ltd v Beard* [2009] NSWCA 240; *Tipperary Developments Pty Ltd v Western Australia* (2009) 258 ALR 124.

[180] See *Shortall v White* [2007] NSWCA 372; *Shahid v Australasian College of Dermatologists* (2008) 168 FCR 44.

[181] *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235.