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# CASE NOTES

EDITED BY RUTH ARLOW
Chancellor of the Dioceses of Norwich and Salisbury

## Elkerton v Malecki

Court of Appeal of the New South Wales Supreme Court: Bathurst CJ, Macfarlan JA and Meagher JA, 27 June 2018
[2018] NSWCA 141
*Contractual interpretation – contract between rabbi and congregation – incorporation of Orthodox Jewish law – intention to create legal relations*

The respondent was the chief rabbi of the South Head and District Synagogue. In 1999 a document was executed by the respondent and the company that owned the synagogue and was controlled by the congregation ('the company') setting out contractual terms of engagement for the respondent. The document included Clause 2, which provided that the relationship between the rabbi and the congregation would be defined in accordance with Halacha (Orthodox Jewish law). The appellants were the administrators of the company. In April 2017, having formed the view that insufficient funds existed to make ongoing payments to the respondent, the appellants purported to terminate the respondent's appointment for redundancy. The respondent refused to accept the termination, arguing that his appointment could not be terminated otherwise than after the determination of a properly constituted Din Torah and in accordance with usages, customs, practices and traditions of Judaism. The appellants brought proceedings for the determination of the dispute. Expert evidence was given that Halacha provides that a rabbi's appointment is for life, and cannot be terminated except by agreement or pursuant to a decision of a Beth Din; and that the only grounds for removal would require a fundamental failure by the rabbi to perform his rabbinical duties. The trial judge determined that the terms of Halacha were incorporated into the contract between the respondent and the company by virtue of Clause 2, on the basis that the reference to 'the congregation' in Clause 2 was to be construed as a reference to the company. As such, the company could not terminate the appointment other than in accordance with a decision of a Beth Din on those limited grounds.

The appellants appealed, arguing that no part of Halacha was expressly or impliedly incorporated into the contract and that the terms were insufficiently certain to be enforceable in Australian law. The Court of Appeal held that the


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construction of the contract did not require the reference to the congregation in Clause 2 to be read as a reference to the company. Rather, the congregation was the community of worshippers and the company the incorporated body controlled by them. The reference to Halacha in the contract was by way of a recital which acknowledged that the Orthodox Jewish law principles which may indirectly apply to the conduct of the company do so because they regulate the natural persons who control it. In that way, Clause 2 simply recorded the position as between the rabbi and his congregation, but not in a way intended to give rise to legal obligations between the respondent and the company. Neither could Halacha be incorporated into the contract by implication. There was no evidence of a religious custom that contracts between rabbis and their congregations or companies controlled by them should include a term of life tenure for the rabbi; neither was it to be implied to give the contract business efficacy. The Court of Appeal further observed that, in any event, the appellants had not provided sufficient expert evidence to establish which part of Halacha were to be incorporated into the contract as enforceable in Australian law such that there was insufficient certainty to allow for that incorporation. The appeal was allowed. [RA]

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**Re All Saints, Branston**
Lincoln Consistory Court: Bishop Ch, 3 July 2018
[2018] ECC Lin 2
*Reredos – removal to different church – previous unlawful re-ordering*

The petitioners sought a faculty authorising the removal of a reredos from Grimsby Minster to All Saints, Branston. A faculty had been granted in 1970 authorising the introduction of the reredos, designed by George Pace, on the east wall of the chancel of Grimsby Minster. It had been taken down in about 1995 and was being stored in the church office. In 1995, proposals for substantial re-ordering of the minster, which included among other things the relocation of the reredos from the east end to the Lady chapel and the introduction of underfloor heating and new flooring, were submitted to the Diocesan Advisory Committee, which recommended the proposals for approval. A petition was submitted and the then chancellor raised various questions about aspects of the proposals for re-ordering. Pending the production of evidence that English Heritage were content with other proposals, the chancellor granted an interim faculty to allow the introduction of underfloor heating and new flooring only.

No faculty was ever issued to permit the other aspects of re-ordering of the minster. It accordingly appeared that the reredos had been removed, and

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