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Who can claim the right of religious freedom? Companies as religious liberty claimants

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Can a company bring a claim alleging that its religious freedom has been violated? Some recent authority suggests 'yes', at least insofar as the company is a one-person company or a closely held corporation. This essay explores the subject, the goal being the exploration of a coherent and principled basis for the granting, if at all, of the right for a business corporation to sue, or claim an exemption, in religious liberty cases.

I Introduction

Can a company claim the right of religious liberty? Initially, the idea might strike one as absurd. How can a business like Vodafone or Marks & Spencer hold religious beliefs (trinitarian or unitarian? agnostic or theistic?) or engage in religious conduct (how could it genuflect, be baptised or make the Hajj?). But once we proceed past the large business behemoths to the small family businesses where Bob, the Baptist builder, Malik, the Muslim mechanic, or Heidi, the Hindu hairdresser, has incorporated his or her pride and joy, then the question is not so bizarre.

Two recent cases on opposite sides of the Atlantic have addressed this topic. Each allowed a corporate claimant to bring its claim. These provide an interesting contrast to the recent determinations of the Victorian Court of Appeal that rejected this notion, as did the Northern Ireland County Court. In this paper I wish to offer some exploratory and preliminary thoughts on the issue. In section II I briefly canvass the notion of a company that pursues both profits and some charitable, altruistic or religious end. In the next four sections I examine a quartet of cases involving the 4 "Cs": Crafts, Cruises, Camps and Cakes. In section VII, I draw some lessons from them and, finally, in section VIII, I offer some tentative thoughts on the way ahead.

II The Faith-Based Company

Can a company have religious beliefs? Many regard the very suggestion as absurd.

In a stimulating article, Jason Iuliano argues they can.¹ In a complex discussion, to which I cannot do justice here, he argues that to ascribe beliefs or intentions to a company is not simply to speak metaphorically. Corporations have distinct “intentionality”² that differs from the intentional states of mind of their constituent members. Iuliano

defend[s] the view that corporations *are* intentional agents and, going even further, that they are persons. They are not flesh-and-blood humans like you and me. Nonetheless, they are persons in a very real sense. Importantly, my argument does not require that corporations be granted the same range of constitutional rights that natural persons enjoy. Instead, its primary purpose is to illustrate that corporations are not mere reflections of their shareholders or employees. As philosophical theories show, they are persons in their own right.³

In terms of theories of corporate personhood, the artificial entity theory holds that corporations are mere creatures of the state: “as lifeless artificial entities, they are incapable of exercising religion, engaging in speech or pursuing other ‘liberty’ interests”⁴. Secondly, the aggregate entity theory conceives of companies as the aggregate of the individuals who comprise them. Corporations can possess rights but only to the extent that these can be clearly attributed to the collection of individuals within them. Lastly, the real entity theory holds that corporations derive their rights neither from the state nor the shareholders, but instead they are real persons. They are “distinct from, but nonetheless tied, to their shareholders.”⁵ The state is powerless to create corporations and all it can do is recognise, or refuse to recognise their existence.

If companies are real persons, possessing beliefs and rights, it does not follow that companies will often be able to successfully assert their religious rights. The usual sincerity requirement is a strict limitation on the availability of any free exercise claim:

Indeed, there is a strong argument that we can better peer into the mind of a corporation [to evaluate sincerity] than into the mind of a natural person. After all, we can view the decision-making procedures employed by a corporation and the interactions of its managers and board of directors. We can see the corporate intentional states emerge. The same is impossible to do with respect natural persons. Whereas the corporate mind is potentially observable, the human mind is sealed off from the judiciary.⁶

Few companies would be able to satisfy the requirement that they genuinely seek an exemption for religious and not (say) financial reasons. In large public companies, the multiplicity of persons holding different worldviews and religious positions would make a coherent, sincere claim formidably difficult, if not impossible, to sustain. In language of the jurisprudence of Article

¹ “Do Corporations have Religious Rights?” (2015) 90 *Indiana LJ* 47.

² *Ibid* at 75ff.

³ *Ibid* at 48 (original italics).

⁴ *Ibid* at 56.

⁵ *Ibid*.

⁶ *Ibid* at 95.

9 of the European Convention on Human Rights, religious rights claimants must possess “views that attain a certain level of cogency, seriousness, cohesion, and importance”⁷, a threshold that seems beyond the reach of public companies.

Turning from these brief philosophical ruminations, Ronald Colombo in a significant recent book⁸ explores the expansion of a different kind of commercial company or “for-profit corporation”, as they are called in the United States. Alongside the traditional business corporation, a plethora of companies have flourished of late whose aims include philanthropic and non-economic aims: environmental, religious and so on. Colombo dubs these “postmodern corporations” in contradistinction for the conventional “modern” profit-maximizing corporation of economics textbooks.⁹ Colombo describes this new breed of corporation thus:

They do not consider themselves beholden to profits alone. Their shareholders bargain around the rules that arguably require them to strictly maximize shareholder profits. They embrace certain principles and values as ends in themselves, willing to sacrifice potential financial gain, and to accept decreased profitability, in pursuit of them.¹⁰

Within the postmodern corporation fold is a large subset containing what Colombo calls “religiously expressive corporations.”¹¹ I will label them “faith-based companies” by way of extension of the now familiar phenomenon of faith-based organizations. Owners of these companies firmly eschew a rigid dualism between the sacred and the secular in favour of a holistic view of life.¹² Work and faith are not in tension, nor are they compartmentalized into two separate realms; rather, faith and work are integrated and one’s faith is expressed through one’s work.¹³

Recognizing the power and ubiquity of the corporate form, certain individuals have combined to build and sustain corporations that adhere to their most deeply held convictions of all: their religious values. Motivating these individuals has not been a desire to proselytize per se, but rather a desire to serve their own needs—and the needs of other people of faith. This should not be surprising, as many people of faith, from a variety of religious backgrounds, feel alienated from if not downright excluded from a marketplace and corporate world driven primarily by the pursuit of profit. . . . Predictably, they have created niche enterprises where individuals of shared religious convictions can pool resources, coming together as directors, and employees, investors and customers. These corporations are commonly committed not

⁷ *Eweida v United Kingdom* [2013] ECHR 37 at [81].

⁸ Ronald J Colombo, *The First Amendment and the Business Corporation* (Oxford University Press, 2015).

⁹ Colombo, *ibid* at 55, emphasizes that he is not adopting the label “postmodern” as that term is used in discourse upon postmodernism in philosophy.

¹⁰ *Ibid* at 58.

¹¹ *Ibid* at 64.

¹² See eg Arthur Holmes, *Contours of a World View* (Grand Rapids, Mich: Eerdmans, 1983) ch 14; Brian J Walsh and J Richard Middleton, *The Transforming Vision: Shaping a Christian World View* (Downers Grove, Ill: InterVarsity Press, 1984) at 67-69.

¹³ See eg John Stott, *New Issues Facing Christians Today*, 3rd rev ed (London: Marshall Pickering, 1999) ch 9.

simply to honorable business practices broadly speaking, but rather to the principles of certain, particular religious traditions.¹⁴

While many, if not most, companies undoubtedly continue to fit the traditional business mould, there are some companies who pursue moral and religious objectives in tandem with profitmaking.

In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; *other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business.¹⁵

Believers whose desire to serve God takes them along a commercial path may form companies, and these enterprises will be informed and guided by the religious precepts of their creators. So “to the extent that the law impedes such religiously guided corporate conduct, we have a potential free exercise claim.”¹⁶

III *Hobby Lobby*

But the *Hobby Lobby* decision, I think, has us all teetering on the brink of corporate anthropomorphism...¹⁷

In *Burwell v Hobby Lobby Stores Inc*¹⁸ the scope of the Patient Protection and Affordable Care Act 2010 (ACA), better know as “Obamacare”, was scrutinized. Various family-run retail chains sought an exemption from part of the compulsory scheme. The health care legislation requires employers with 50 or more employees to provide medical insurance. Failure to do so renders the firm liable to a \$100 per day fine for each affected employee. Preventive care and screening for female workers is part of the Obamacare group-health-insurance coverage. This, in turn, includes 20 methods of FDA-approved contraception. Four of these methods were of concern to the respondent firms. The methods may have the effect of stopping an already fertilized egg from developing any further by preventing its attachment to the uterus. They, the abortifacents, comprised two forms, commonly

¹⁴ Colombo, *First Amendment and Business Corporation*, at xv.

¹⁵ John Paul II, *Centesimus Annus* (Encyclical Letter)(1 May 1991) at § 35:

http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html. See also Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Washington, DC: US Conference of Catholic Bishops Publishing, 2004) at §§ 338-340

¹⁶ Colombo, *First Amendment and Business Corporation*, at 53.

¹⁷ Suzanne McGee, “Corporations, ‘artificial people’ and the unintended risks of Hobby Lobby”, *Guardian*, 6 July 2014.

¹⁸ 134 S Ct 2751 (2014); 573 US ___ (2014).

called the “morning after” pill and two types of intra-uterine device. The Department of Health and Human Services (HHS) does authorize exemptions for “religious employers” (defined as “churches, their integrated auxiliaries and conventions of associations of churches”), as well as “the exclusively religious activities of any religious order.” Certain religious non-profit organizations could also claim an exemption. But what about an everyday business, a “for-profit corporation”?

David and Barbara Green and their adult children—all devout Christians—run two family businesses. The successful arts and craft store, Hobby Lobby, numbers some 500 outlets and employs more than 13,000 workers. David Green, a son, operates 35 Christian bookstores (Mardel) and it employs nearly 400 staff. The third firm, Conestoga Wood Specialties, is a woodworking business and has 950 employees. It is owned and run by Norman and Elizabeth Hahn and their three sons, all of who are devout Mennonites. All three firms are “closely held”¹⁹ for-profit corporations.

The Greens and Hahns believe that their business should run according to Christian teachings. The Greens, for example, close their stores on Sundays despite this costing them a considerable amount in forgone sales. They (and the Hahns) believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.

All three firms sued HHS and other federal officials and agencies under the Religious Freedom Restoration Act 1993 (RFRA) and the Free Exercise Clause of the First Amendment seeking to enjoin the implementation of the ACA’s contraception mandate as it related to the four contraceptives. The respective District Courts in Pennsylvania (the Hahns) and Oklahoma (the Greens) denied the injunctions. The Third Circuit Court of Appeals affirmed, but the Tenth Circuit found in favour of the Greens on the key issues and remanded the case to the District Court to reconsider the injunctive relief.

The issue of prime interest in this paper is whether the companies could sue under the relevant law. HHS contended that they could not sue because they were profitmaking enterprises. (The owners were precluded from suing since the regulations apply only to companies and not to the owners themselves).

¹⁹ A closely held corporation is, surprisingly, not clearly defined in *Hobby Lobby*. The Court refer (at 2764, 2765 and 2774) to such companies being owned and controlled by a single family, which holds all the voting shares and controls the board of directors. According to the IRS (Inland Revenue Service, USA), a closely held corporation is one that “has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year.” <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5>. See Armour and Feintzeig, “Hobby Lobby Ruling Raises Question: What Does ‘Closely Held’ Mean?”, *Wall Street Journal*, 30 June 2014 (around 90 % of companies in the US are closely held).

By a bare majority (5 to 4) the Supreme Court held in favour of the respondents. Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas) for the Court began:

HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.²⁰

The resolution of this issue initially followed a very simple statutory interpretation path. The RFRA applies to a “person’s” exercise of religion. The Dictionary Act states that the word “person” “include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” So, unless there was something about the RFRA context that “indicate[d] otherwise,” the Dictionary Act provided “a quick, clear, and affirmative answer”²¹ to the question at hand. There was nothing indicating otherwise.

The First Amendment and RFRA case law revealed that claims have been brought by nonprofit corporations. HHS conceded that a nonprofit company could be a “person” for the purposes of the RFRA. For the Court there was “no known understanding of the term ‘person’ that includes *some* but not all corporations.”²²

HHS’s next argument concentrated upon “exercise of religion”. How can a company have and exercise a religion? In the Court’s view, neither HHS nor the vigorous dissent of Justice Ginsburg and her colleagues provided “any persuasive explanation for this conclusion.”²³

First, the corporate nature of a claimant cannot be the reason, for the HHS conceded nonprofit companies can avail themselves of the protection of the RFRA.

Second, is the profit-making objective a disqualifying characteristic? The answer, again, was negative since individuals who were pursuing profits could claim the benefit of the First Amendment’s free exercise guarantee. “If, as *Braunfeld* [a 1961 Supreme Court decision] recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can’t Hobby Lobby, Conestoga, and Mardel do the same?”²⁴ But do not for-profit firms exist simply to make money? Incorrect, said the Court, for modern corporate law shows that for-profit

²⁰ *Hobby Lobby* at 2767.

²¹ *Ibid* at 2768.

²² *Ibid* at 2769 (emphasis in original).

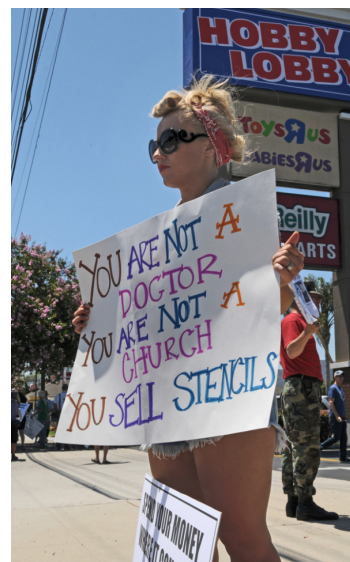
²³ *Ibid*.

²⁴ *Ibid* at 2770. In *Braunfeld v Brown*, 366 US 599 (1961) the Supreme Court entertained an appeal from several individual Orthodox Jewish retail merchants challenging a Sunday closing law in Philadelphia. See also *Gallagher v Crown Kosher Market of Massachusetts Inc*, 366 US 617 (1961)(standing of for-profit corporation to bring suit under the First Amendment left open).

companies may, and do, pursue humanitarian and altruistic goals as well. That being the case, they can equally pursue religious objectives.²⁵ Interestingly, as the Court noted, half of the States recognize “benefit corporations” (“B-Corps”), a dual-purpose company that aims to achieve *both* a profit and a benefit to the public.²⁶

Thirdly, said HHS and the Minority, surely there is a clear distinction between nonprofit and for-profit companies? No: “the actual picture is less clear-cut.”²⁷ Some persons with charitable or religious aims may deliberately decline to organize as nonprofits to take advantage of the benefits that the for-profit form (political lobbying, for example) affords.²⁸ In a significant passage, the Court explains:

The principal dissent . . . [Justice Ginsburg et al] stat[es] that “[f]or-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers.” . . . The first half of this statement is a tautology; for-profit corporations do indeed differ from nonprofits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek “to perpetuate the religious values shared,” in these cases, by their owners. Conestoga’s Vision and Values Statement declares that the company is dedicated to operating “in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business.” . . . Similarly, Hobby Lobby’s statement of purpose proclaims that the company “is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles.”²⁹



Fourthly, how could a court or tribunal ever ascertain the sincere beliefs of a corporation? A large public company such as WalMart, Ford or Verizon would compromise numerous shareholders with diverse religious and philosophical beliefs. Undoubtedly so, accepted the Court, but these sorts of giant companies were unlikely to bring a religious liberty claim and, moreover, this situation was not before the court: “The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.”³⁰

²⁵ *Hobby Lobby* at 2770.

²⁶ *Ibid* at 2771. For further discussion of benefit corporations, see Marc Greendorfer, “Blurring lines between churches and secular corporations: the compelling case of the benefit corporation’s right to the free exercise of religion (with a post-*Hobby Lobby* epilogue)” (2014) 39 *Delaware J Corp L* 819.

²⁷ *Hobby Lobby* at 2771.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ *Ibid* at 2775.

The Court went on to find that the contraception mandate did “substantially burden” the three firms’ exercise of their religion:

If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. . . For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.³¹

Having substantially burdened the three firms’ religious liberty, was the regulation (1) in furtherance of a “compelling governmental interest”, and (2) the “least restrictive means” of furthering that interest?

The Court accepted that the compelling state interest sub-test was met, but not the least-restrictive-means standard. The HHS failed to convince the Court that the Government could not provide contraceptive care directly to female employees affected by the three firms’ exemption. There was already a back-up mechanism in place for employees of nonprofits exempted from the contraception mandate. This could readily be extended to for-profit closely held companies too. Importantly, if the respondent firms’ religious interest were to be accommodated, the female employees affected *would* continue to receive contraceptive coverage and be able to access them “with minimal logistical and administrative obstacles.”³²

Finally, would the proverbial floodgates now open? Would employers be able to opt out of a wide variety of medical procedures or treatments such as vaccinations and blood transfusions? There was no evidence furnished by HHS to substantiate these fears. These must await another day:

our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.³³

The Dissent

The dissent, written by Justice Ginsburg (and joined by Justices Sotomayor, Breyer and Kagan), is almost as long as the Majority opinion and, with more than a grain of hyperbole, criticizes the Court’s opinion as “a decision of startling breadth”, one likely to usher in “havoc”, with the

³¹ Ibid at 2775-76.

³² Ibid at 2783.

³³ Ibid.

Majority justices having “ventured into a minefield”.³⁴

Much of the Minority opinion is, in my view (and with respect), wrongheaded, if not plain incorrect. For example, the dissent charges that the Court’s decision “would override significant interests of the [exempted] corporations’ employees and covered dependents [and] would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure.”³⁵ But recall that the exemption would do no such thing. Employees of Hobby Lobby, Conestoga and Mardel would still be able to access the remaining four methods of contraceptive (remembering the other 16 were available) from the US Government at no cost and negligible inconvenience. The Minority point out: “Impeding women’s receipt of benefits ‘by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit’” was scarcely what Congress contemplated.”³⁶ Perhaps so, but is this really a significant burden upon employees of small religious firms? For the sake of securing the religious freedom of their employers, is it so heinous that the affected workers are put to form filling and some brief incursion upon their time?

Interestingly, in *Burwell v Wheaton College*,³⁷ decided just a week later, the majority of Supreme Court held that filing a form might, in some contexts, be constitutionally objectionable. Wheaton College, a well-known Evangelical Christian liberal arts college, asserted that the simple act of filing the self-certification form for exemption, as a religious non-profit, from the contraception coverage of the ACA, could infringe its religious liberty. The completion and submission of the form would, it argued, make it complicit in the provision of contraceptive coverage, in violation of its religious beliefs. It succeeded in the Supreme Court in securing an emergency injunction pending resolution of the merits of its religious freedom challenge. In her dissent, Justice Sotomayor (joined by Justices Ginsburg and Kagan) disagreed that the high bar for the grant of an injunction had been met. On the religious freedom infringement itself she observed

Let me be absolutely clear: I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs. But *thinking* one’s religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so.³⁸

On the practicalities of the religious accommodation, the Minority stated

³⁴ Ibid at 2787 and 2805.

³⁵ Ibid at 2790.

³⁶ Ibid at 2802.

³⁷ 134 S Ct 2806 (2014).

³⁸ Ibid at 2812 (emphasis in original).

Wheaton objects, however, to *the minimally burdensome paperwork necessary* for the Government to administer this accommodation. If the Government cannot require organizations to attest to their views by way of a simple self-certification form and notify their third-party administrators of their claimed exemption, how can it ever identify the organizations eligible for the accommodation and perform the administrative tasks necessary to make the accommodation work? The self-certification form is the *least* intrusive way for the Government to administer the accommodation.³⁹

Applying similar reasoning here, we might say ask: how does minimally burdensome paperwork necessary for the government to administer the religious accommodation in respect of faith based for-profit corporations, such as Hobby Lobby, substantially burden access to the omitted contraceptive treatment by employees of these firms?

The central attack by Justice Ginsburg was upon the ability of profitmaking businesses to qualify as “victims” of religious discrimination:

Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.”⁴⁰

Admittedly, churches and other *nonprofit* religiously oriented bodies had been long accorded standing to sue under the Constitution’s religious liberty guarantee. But this was an entirely different kettle of fish:

No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.” . . .

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. . . . The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court’s attention.⁴¹

As for the Court’s blurring of the distinction between nonprofit and for-profit companies—based on the fact that some of the latter may pursue and advance charitable or religious ends—the Minority

³⁹ Ibid at 2814 (emphasis supplied).

⁴⁰ Ibid at 2795-96.

⁴¹ Ibid at 2796.

responded:

Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. . . . To reiterate, “for-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers].”⁴²

But, as the Court pointed out, factually speaking this assertion is false. It is not a matter of “either/or” but rather “both/and”.

To the Court’s rhetorical question, why, if “a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can’t . . . do the same?” Justice Ginsburg’s reply was:

But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court’s conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity’s obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.⁴³

This last sentence above is, with respect, at last an interesting point, implying, as it does, some measure of hypocrisy or duplicity on the part of the owners of a corporation. The shield of corporate personality is raised for insolvency and taxation purposes, but is quietly removed when the same company’s owners wish to avail themselves of human rights protection.

On the other hand, there is nothing necessarily untoward in utilizing the benefits of incorporation for some purposes and not for others. The owners are being consistent in their rational pursuit of self-interest.⁴⁴

Finally, and predictably, the floodgates fear was raised:

The Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that [sic] RFRA claims will proliferate, for the Court’s expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.⁴⁵

⁴² Ibid at 2796-70 (quoting Edwards J in *Gilardi v US Department of Health and Human Services*, 733 F 3d 1208 at 1242 (CADDC 2013)).

⁴³ *Hobby Lobby* at 2792.

⁴⁴ See Kirby J (dissenting) in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253 at 273 [81].

⁴⁵ *Hobby Lobby* at 2797.

But the logic of any rule may be extended to other less desirable situations. The Common Law defence of duress or necessity of circumstances may absolve a husband whose pregnant wife is about to give birth to drive at excessive speed to the nearest hospital.⁴⁶ There is no logical reason why that same defence might not be stretched to less extreme circumstances. There is no reason in logic why the awarding of distress damages in the law of contract cannot be extended beyond the confines of agreements whose object is to provide enjoyment or peace of mind to compensate the hurt feelings of ordinary commercial contractors.⁴⁷ All rules have limits or boundaries that may be queried or “stretched”. But that is hardly an argument for not laying down the rule in the first place.

The Minority catalogue a litany of awkward possible claims in the future:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own ... apply[ing] the compelling interest-least restrictive alternative test.” . . . Not much help there for the lower courts bound by today’s decision.⁴⁸



⁴⁶ In New Zealand, see s 24 of the Crimes Act 1961, helpfully discussed in *Police v Kawhiti* [2000] 1 NZLR 117 (defence successful where an intoxicated and disqualified driver drove to Emergency Department of the nearest hospital at 4am after suffering a severe assault from her partner).

⁴⁷ The NZ Court of Appeal in *Mouat v Clark Boyce* [1992] 2 NZLR 233 refused to grant distress damages to the plaintiff in an ordinary commercial contract despite the foreseeability of hurt to feelings in this situation, a stance critiqued by Thomas J (dissenting) in *Bloxham v Robinson* (1996) 7 TCLR 122.

⁴⁸ *Hobby Lobby* at 2805.

Justice Ginsburg saw “an overriding interest in keeping the courts ‘out of the business of evaluating the relative merits of religious claims’”⁴⁹. This is a specious argument, for the courts must evaluate claims from a vast variety of religious individuals and communities. If courts would prefer not to do so then America could abolish the religion clauses of the First Amendment (inconceivable) and related religious freedom legislation (barely less so). Until it does so, the courts must lie in the litigious bed the Framers of the Constitution, Congress and Senate and, indeed, the Supreme Court itself has made for them.

Finally, there is a revealing insight from Justice Ginsburg in one brief passage. She refers to the “special solicitude” generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.⁵⁰

Here, I suggest, is the core of the dissenting justices’ objection. Religion is not something special and not really worthy, in a modern, pluralist and (even in the United States) increasingly secular society, of special treatment.⁵¹ Some American scholars have discerned the rise of a legal or secular egalitarianism.⁵² For those holding this mindset, claims for accommodation or exemption look like special pleading or bare special interest demands. Indeed, for some, the claim for religious accommodation has “become virtually synonymous with or code for discrimination.”⁵³ The Enlightenment *animus* to religion rears its (ugly) head again.

IV *Exmoor Coast Boat Cruises*

*Exmoor Coast Boat Cruises Ltd v Commissioners for Her Majesty’s Revenue & Customs*⁵⁴ is a much more obscure case.⁵⁵ Mr Matthew Oxenham is the sole director and shareholder of Exmoor Coast Boat Cruises Ltd. He operates cruises out of Lynmouth, a pretty little coastal town in Exmoor National Park in northern Devon.

⁴⁹ Ibid (quoting Stevens J in *United States v Lee* (1982) 455 US 252 at 263 n 2).

⁵⁰ Ibid at 2802-03.

⁵¹ For our attempt to answer this point, see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, 2nd ed (Oxford: Oxford UP, 2013) at 82-83 and 113-115.

⁵² On “strong legal egalitarianism”, see Paul Horvitz, “The *Hobby Lobby* Moment” (2014) 128 *Harv L Rev* 154 at 170. On “secular egalitarianism”, see Steven D Smith, “Religious Freedom and Its Enemies, or Why the *Smith* Decision May be a Greater Loss Now Than it Was Then” (2011) 32 *Cardozo L Rev* 2033 at 2046.

⁵³ Horvitz, “Hobby Lobby Moment”, at 172.

⁵⁴ [2014] UKFTT 1103 (TC).

⁵⁵ I am grateful to the excellent Frank Cranmer, *Law and Religion UK* blog for publicising this case: Cranmer, “Can a commercial company have ‘beliefs’? *Exmoor Coast Boat Cruises Ltd v Revenue & Customs*” in *Law & Religion UK*, 22 December 2014, <http://www.lawandreligionuk.com/2014/12/22/can-a-commercial-company-have-beliefs-exmoor-coast-boat-cruises-ltd-v-revenue-customs/>



The case arose from Oxenham’s determination not to send his VAT returns electronically, but by paper instead. As the Tribunal saw it “Mr Oxenham clearly saw himself on something of a crusade against the requirement to file online.”⁵⁶

The Finance Act 2002 requires that all VAT returns must be filed electronically. There is, however, an exemption in the regulations that provides

However a person—

(a) who the Commissioners are satisfied is a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications ... is not required to make a return required by regulation 25 using an electronic return system.

Mr Oxenham claimed to come under this exemption.⁵⁷

Judge Barbara Mosedale, sitting as the Tax Chamber Tribunal, first considered whether Oxenham was a “practising member of a religious society”. The evidence was clear that he was not. As a child he had attended Sunday School at a local Plymouth Brethren Chapel and as an adult he stated he sympathized with the views of the Jimites, a sect of the Plymouth Brethren. Yet, he did not attend any Brethren or Jimite meetings nor could he explain to the judge the reason why the Jimites rejected the use of the internet. The Tribunal accordingly held he was not a practising member of this religion, or any other.⁵⁸

⁵⁶ *Exmoor* at [20]. “He considered the law unfair; he did not see why exemption had to be restricted to members of a religious group; he did not see why exemption had to be restricted to religious beliefs; he considered online filing was made compulsory merely to justify the cost of the online filing system; if he won his case he ... clearly hoped to persuade other persons to pursue exemption. He believed that refusing to file online was taking a stand against human behaviour inducing climate change” (ibid).

⁵⁷ For an earlier case where this same religious-based exemption from the VAT law was successfully claimed by a Seventh-day Adventists couple (who ran a honey making and beekeeping partnership) see *Blackburn v HMRC* [2013] UKFTT 525 (TC). Again, Judge Barbara Mosedale presided.

⁵⁸ The Tribunal heard some contested evidence that his main religion was paganism: *Exmoor* [2014] UKFTT 1103 at [17]-[18].



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Secondly, Oxenham's beliefs were held not be "incompatible" with the use of a computer or the internet. The evidence revealed that he paid someone to create a non-interactive webpage for his company.⁵⁹ (He explained that a website was a matter of economic necessity, lest, without it, his already declining numbers of customers would fall even further precipitating closure.⁶⁰) Oxenham also consented to an agent (an accountant) filing returns online for another company he jointly-owned with his parents (although he had, unsuccessfully, requested a similar religious-based exemption for those returns too).⁶¹ The Tribunal took an unsympathetic view of this, commenting, firstly, that a belief was not "cogent, serious, cohesive and important" (the standard set by European Convention case law⁶²) if the holder was unwilling to "make economic sacrifices for it" and, secondly, that Mr Oxenham ought not to be allowed to "pick and choose" when it suited him to adhere to his religious principles.⁶³

Under s 3 of the Human Rights Act 1998, all legislation, including subordinate legislation, must be read and given effect to in a way that is compatible with the European Convention on Human Rights. Was the regulation mandating compulsory electronic filing of returns compatible with Article 9 of the Convention, which provides that "everyone" has the right to religious freedom?

Logically, noted Judge Mosedale, the first question was whether the appellant, the Exmoor Cruise company, had any human rights. In an earlier case, her Honour had ruled that:

⁵⁹ See http://www.theglenlyngorge.co.uk/boat_trips.htm. The photos and caption in the text of this paper are from this website.

⁶⁰ *Exmoor* [2014] UKFTT 1103 at [29].

⁶¹ *Ibid* at [12]-[13], [31] and [81].

⁶² See *Campbell and Cosans v UK* [1982] 4 EHRR 293 at 304 ([36])(a "conviction", noted the European Court of Human Rights, "denotes views that attain a certain level of cogency, seriousness, cohesion and importance").

⁶³ *Exmoor* at [76], [82]-[83].

the Convention properly interpreted applies to give human rights to companies where those companies are the alter egos of their owners. Companies have a right to a private life where that private life is the private life of the alter ego of the company.⁶⁴

The Revenue argued that to hold that the appellant company had human rights because it was the alter ego of its director/shareholder was to impermissibly lift the corporate veil. A recent UK Supreme Court case, *Prest v Petrodel*, affirmed that:

Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon and Co Ltd* [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. . . . The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law.⁶⁵

But, explained the Tribunal, *Prest* was not a case about whether companies have human rights. *Prest* restated the longstanding position at English Common Law, but the Human Rights Act was a statute and supreme over the Common Law. The relevant question then was what the European Court of Human Rights had ruled on the issue.

In *Pine Valley Developments Ltd*⁶⁶ two companies and the owner/director of those companies, claimed a breach of the Convention. The European Court of Human Rights found that there was a breach of Article 1 of the First Protocol (the right to property and possessions) combined with Article 14 (the right not to be discriminated against) against one of the companies and the owner of the companies. On the corporate veil, it commented:

Pine Valley and Healy Holdings were no more than vehicles through which Mr Healy proposed to implement the development for which outline planning permission had been granted. On this ground alone it would be artificial to draw distinctions between the three appellants as regards their entitlement to claim to be “victims” of a violation.⁶⁷

For Judge Mosedale, this was “a clear statement by the Court that a company could be a victim of a breach of human rights. This means that the Court ruled (albeit without hearing argument) that a company can have human rights.”⁶⁸

So, to return to the issue at hand, “can a company have a right to manifest religion when a company itself is inchoate and unable to have any beliefs at all?”⁶⁹ Judge Mosedale held:

⁶⁴ *L H Bishop* [2013] UKFTT 522 (TC) at [562].

⁶⁵ [2013] UKSC 34 at [8] per Lord Sumption.

⁶⁶ [1991] ECHR 12742/87.

⁶⁷ *Ibid* at [42].

⁶⁸ *Exmoor* at [67].

⁶⁹ *Ibid* at [70].

My conclusion from *Pine Valley* is that a company has human rights *if and to the extent it is the alter ego of a person (or, potentially, a group of people)*. Therefore, it must be seen as being in the shoes of that person and must possess the same human rights because any other decision would deny that person his human rights.⁷⁰

Therefore, while it is *ludicrous* to suggest a company has a religion, or private life or family, nevertheless a company which is the alter ego of a person can be a victim of a breach of [Article 9] (the right to manifest its religion) if, were it not so protected, that person's human rights would be breached.⁷¹

The respondent Revenue disagreed. The taxpayer himself ought to sue in his own name to remedy his breach of human rights. But here (as in *Hobby Lobby*) the owner of the company did not have the right to bring an action against the mandatory e-filing obligation. Nonetheless, Mr Oxenham could, rejoined the Revenue, still make a complaint to the European Court of Human Rights. But, noted Judge Mosedale, he would have no domestic recourse for his alleged breach of his human rights, a distinctly “unappealing”⁷² position. Furthermore, the Revenue's argument, if accepted, would mean the Convention discriminated between a person who traded in their own name and a person who incorporated and traded via a company.

Yet, it is clear from *Pine Valley* that the Court cannot see a good reason to make such a distinction. I do not think the Convention does make such a distinction. Mr Oxenham's rights are the appellant company's rights and can be relied on by the appellant in this Tribunal.⁷³

V *Christian Youth Camps*

In *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd*⁷⁴ the Victorian Court of Appeal held by a majority (2 to 1) that Christian Youth Camps Ltd (CYC) did not qualify for the religious exemption provided for a “person” in the Equal Opportunity Act 1995 (Vic). Cobaw runs the WayOut Project, a “youth and sexual diversity” venture designed to furnish support and suicide prevention services to gay young people. It sought to hire CYC's Phillip Island Adventure Resort for the weekend. The homosexual lifestyle would be portrayed during the camp workshops as normal (“a natural part of the range of human sexualities”⁷⁵). CYC balked at this and refused to accept the booking. There is a great deal to digest from this important case,⁷⁶ but my present focus is simply upon the issue whether CYC as an ordinary *nonreligious* company could claim the benefit of this religious freedom exemption. Section 77 provides that: “Nothing in Part 3 applies to

⁷⁰ Ibid at [71](italics added).

⁷¹ Ibid at [72](italics added).

⁷² Ibid at [74].

⁷³ Ibid.

⁷⁴ [2014] VSCA 75 (16 April 2014).

⁷⁵ Ibid at [28]

⁷⁶ See the detailed analysis of Neil Foster, “Discrimination, Language and Freedom of Religion: Two Important Law and Religion Decisions in Australia” Paper presented at *Varieties of Secularism, Religion and Law*, International Centre for law and Religion Studies, Brigham Young University, Provo, Utah, 5-7 October.

discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person’s genuine religious beliefs or principles.”

I referred to CYS’s right to claim as a *nonreligious* company. The Court (unanimously) held that, despite its ownership by the Open Brethren Church and many (but not all) of its objects being Christian, it functioned as a commercial enterprise and not “a body established for religious purposes” for the purpose of the exemption in s 75(2) of the Equal Opportunity Act.

75 Religious bodies

(2) Nothing in Part 3 applies to anything done by a body established for religious purposes that—

- (a) conforms with the doctrines of the religion; or
- (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

The CYC hired the Phillip Island camp to Christian and secular groups (even Collingwood Football Club⁷⁷), the secular organizations comprising around 80 percent of its hires. Its advertising, webpage and other promotional literature made no reference to its Christian ownership or aims. “CYC’s conduct of its camp’s business was not, in any relevant sense, a ‘religious’ activity. At best, on the argument of the applicants, it was a commercial activity intended to raise money to enable the trustees of the [Christian Brethren] Trust to advance charitable purposes consistent with the doctrines of the religion.”⁷⁸



The Victorian Civil and Administrative Tribunal held⁷⁹ that CYC could be a person for the purposes of s 77, yet this did not ultimately avail the appellants as it failed to meet other criteria necessary to make out the defence. The majority of the Court disagreed with the Tribunal.

In Maxwell P’s view “it [was] clear from the language of s 77, and from the relationship between the exemption provisions in ss 75–77, that Parliament did not intend a corporation to be able to invoke the exemption under s 77.”⁸⁰ I will bypass the detailed points of statutory construction based on the scheme of the Act (important as they are) and concentrate upon the larger

⁷⁷ Ibid at [217]. British readers could substitute Millwall FC here.

⁷⁸ Ibid at [266].

⁷⁹ *Cobaw Community Health Services v Christian Youth Camps Ltd (Anti-Discrimination)* [2010] VCAT 1613 (Judge Hampel).

⁸⁰ [2014] VSCA 75 at [309].

points of policy and principle.

for a body corporate to avail itself of the protection under s 77, it would have to demonstrate that it had ‘genuine religious beliefs or principles’ and that the relevant conduct was ‘necessary ... to comply with’ those beliefs or principles. A corporation, of course, has ‘neither soul nor body’ [*Motel Marine Pty Ltd v IAC (Finance) Pty Ltd* (1963) 110 CLR 9 at 14].⁸¹

It has never been suggested that corporations can meaningfully be said to have religious beliefs, let alone that they should be entitled to enjoy a freedom of religious belief. The Attorney-General drew attention to the statement of Latham CJ, that it was ‘obvious that a company cannot exercise a religion’ [*Adelaide Company of Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116 at 147], but submitted that the ‘generality’ of this statement could no longer be regarded as correct in the light of a series of decisions of the European Commission of Human Rights concerning art 9 of the European Convention.⁸²

But for the President, these decisions from Strasbourg were not relevant here, since they concerned church bodies which had decided to incorporate, not ordinary commercial companies.⁸³ This ignores the cases under the ECHR where the European Court of Human Rights has held that companies may claim for alleged breaches of their human rights, albeit not religious rights. Interestingly, Maxwell P went out of his way to decide this point despite the respondents, Cobaw, not raising it on appeal. “It is not an academic or hypothetical question. On the contrary, it was the subject of a ruling by the Tribunal. It is, moreover, fundamental to the operation of the religious freedom exemptions.”⁸⁴

Next, Neave JA concurred with the President on the corporation’s inability to claim the shelter of s 77:

In my view, s 77 does not apply to corporations. Like other human rights, the right to freedom of religious belief can only be enjoyed by natural persons. Because a corporation is not a natural person and has ‘neither soul nor body’, it cannot have a conscious state of mind amounting to a religious belief or principle. It follows that applying the s 77 exception to a corporation would require the adoption of a legal fiction which attributes the beliefs of a person or persons to the corporation.⁸⁵

The assertion that the right of religious liberty can only be enjoyed by natural persons is plainly wrong. It is trite law that the right extends to collectives and associations in their own

⁸¹ Ibid at [317].

⁸² Ibid at [321].

⁸³ Ibid at [322].

⁸⁴ Ibid at [326].

⁸⁵ Ibid at [413].

right.⁸⁶ For example, a church *qua* church can claim the right of religious freedom and sue (and be sued) under bills of rights and religious discrimination legislation.⁸⁷

Although, continued Neave JA, legislation commonly imposed liability upon companies by virtue of provisions attributing the intention or state of mind of an officer to that of the company, these did not determine this particular matter:

The existence of these provisions does not require the conclusion that a corporation is to be deemed to hold beliefs on matters such as the existence of a deity or deities, the presence of an afterlife, or in the case of Christianity, the centrality of the death and resurrection of Jesus Christ, in the absence of a specific legislative provision which requires such ‘deeming’ to occur.⁸⁸

The practicalities of ascertaining the company’s religious beliefs were an obstacle:

An individual can give evidence on their religious beliefs and a court can make a factual decision as to whether those beliefs are genuinely held. But there would be *practical difficulties* in attributing a particular religious belief or principle to a corporation. The memorandum and articles of a company may show that it was established for religious purposes, but even if such documents contain statements of purposes or ‘principles’ they are unlikely to set out the ‘beliefs’ of the corporation. There are difficulties in attributing the religious beliefs of members of the board to a corporation, because board members may not have the same beliefs, or their beliefs may change over time.⁸⁹

Whilst undoubtedly there are, in general, formidable, if not insuperable, practical difficulties in discovering the religious (or any other beliefs) of a large public company such as Heineken or Philips, this was not relevant to this *particular* case.

Dissenting, Redlich JA held that s 77 could apply to CYC Ltd as a commercial corporation:

Although a corporation is a distinct legal entity with legal rights, obligations, powers and privileges different from those of the natural persons who created it, own it, or whom it employs, there is ample legal basis to impute to it the religious beliefs of its directors and others who the law may regard as its mind or will. The Tribunal observed that subjective intentions may be attributed to corporations, including the necessary mental element for a crime. The corporation may make and express moral, ethical, environmental or other judgments in the discourse of the public square and participate in the defining of social norms. *As this case shows*, it will not necessarily be difficult to identify the corporation’s state of mind. There is *no principled reason* for treating a corporation as capable of forming and acting upon its views in any of these areas but incapable of forming and acting upon religious ones.⁹⁰

The particular legal form of the claimant, flowing from its decision whether to incorporate or not, ought not to determine its right to religious freedom:

⁸⁶ See Ahdar and Leigh, *Religious Freedom in the Liberal State*, at ch 11.

⁸⁷ See eg *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos* (1987) 483 US 727.

⁸⁸ [2014] VSCA 75 at [416].

⁸⁹ *Ibid* at [417](emphasis mine).

⁹⁰ *Ibid* at [476](italics added).

It would be anomalous were s 75(2) alone to apply to corporate bodies. It would follow that wherever a corporation engages in commercial activity but the corporation was not established for religious purposes, s 77 would not enable the exemption to apply to both the corporation and those particular individuals whose acts are to be treated as those of a corporation. That interpretation would produce the unintended result that individuals who operate a business would have *different levels of religious freedom, depending upon whether the business was incorporated or not*. It would force individuals of faith to choose between forfeiting the benefits of incorporation or abandoning the precepts of their religion.⁹¹

VI *Ashers Baking*



In the controversial and much-publicized case, *Lee v Ashers Baking Co Ltd*,⁹² the plaintiff, Gareth Lee, a homosexual, ordered a cake from the defendant bakery, a company having six branches, a staff of around 65 and net assets of over £1m.⁹³ The icing on Mr Lee's cake would have the words "Support Gay Marriage", the logo of QueerSpace (a LGBT lobby organization) and a colour picture of the *Sesame Street* TV show characters, Ernie and Bert. After initially (and reluctantly) accepting the order on the day, the third defendant, Karen McArthur (a director of the family firm) phoned back Lee telling him the bakery could no longer fulfill his order. To do so would violate the owner's, the MacArthur family's, religious beliefs. Mrs McArthur apologized and arranged for a refund. Mr Lee was upset and the culmination of his grievance was a successful complaint to the Equality Commission. The County Court held that the defendant bakery had contravened the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment Order 1998. Ashers Baking's conduct in refusing the cake order constituted unlawful direct discrimination on the basis of the customer's sexual orientation. The defendants' pleas that their religious beliefs provided them with a defence were rejected. They contended that to accept

⁹¹ Ibid at [490](italics added).

⁹² [2015] NICty 2.

⁹³ A sampling of the voluminous commentary includes those that condemned the case, eg, "Icing on the cake" (Editorial), *Daily Telegraph*, 20 May 2015; Melanie McDonagh, "The 'gay cake' case highlights new intolerance developing in Ireland", *Spectator*, 20 May 2014; and those who supported the decision, eg, Joshua Rozenberg, "The 'gay cake' ruling is a victory for equality in Northern Ireland", *Guardian*, 20 May 2015; Mary Hassan, "Finally: A Victory for the LGBT Community in Northern Ireland", *Huffington Post*, 19 May 2015: http://www.huffingtonpost.co.uk/mary-hassan/gay-rights-northern-ireland_b_7313366.html

the order would have forced them to violate their conscience by endorsing a cultural phenomenon (same-sex marriage) that they did not, based on their sincere religious convictions, agree with. In Karen McArthur's words:

I knew that using our skills and creativity to produce a cake supporting gay marriage—which we consider to be contrary to God's word—was something which would be on my conscience. If we provided that cake in these terms, I would feel that I was betraying my faith and failing to live in accordance with what God expects of me... I wish to emphasize that this is in no way related to Mr Lee's sexual orientation. We have many gay customers whom we serve regularly without any difficulty. We also have at least one gay member of staff...⁹⁴

For the Court, the answer was straightforward. The Regulations provided for exemptions for “an organization the purpose of which is to practice [or advance or teach] a religion or belief”, but denied such accommodation for “an organization whose sole or main purpose is commercial”.⁹⁵ Parliament had carefully considered accommodation for religious-orientated businesses, such as the Ashers, but decided not to write such an exemption into the subordinate legislation.⁹⁶

Furthermore, Article 9 of the Convention did not provide protection either. Article 9(2) permits restrictions upon religious liberty in order to, inter alia, protect the rights and freedoms of others. Here, the protection of Lee from sexual orientation discrimination was just such a justified and proportionate limitation.

Of most interest to this paper is the question whether Ashers Baking Co Ltd could avail itself of Article 9. The County Court held it could not. District Judge Isobel Brownlie noted that “it has long been recognized in Convention jurisprudence that a limited liability company cannot invoke Article 9 rights”⁹⁷ and quoted from *Kustannus Oy Vapaa Ajatteliija AB v Finland*:

The Commission has repeatedly held that a church body or an association with religious and philosophical objects is capable of possessing and exercising the right to freedom of religion, since an application by such a body is in reality lodged on behalf of its members...

By contrast, the Commission has held that a limited liability company, given the fact that it concerns a profit-making corporate body, can neither enjoy nor rely on the rights referred to in Article 9 para.1 (Art. 9-1).⁹⁸

Kustannus involved a claim that the church tax violated the applicant company's freedom of religion. The Freethinkers' Association in Finland had formed a company to publish books to

⁹⁴ [2015] NICty at [17].

⁹⁵ Reg 16: quoted *ibid* at [28].

⁹⁶ *Ibid* at [32]: “In respect of ‘Christian businesses’ again the Government accepts that some people hold very forthright views and do not want to provide a service to some people because of their sexual orientation. Having considered this issue the Government is firmly of the view that any person or organization that opens a business to the public for the purpose of providing goods, facilities or services has to be prepared to accept the public as a whole no matter how that public is constituted.”

⁹⁷ *Ibid* at [98].

⁹⁸ Appl No 20471/ 92; (1996) 22 EHRR CD 69. Quoted *ibid* at [98].

advance their cause. The Commission noted that the corporate form chosen by the freethinkers was deliberate. As a limited liability company it was “ in principle required by domestic law to pay tax as any other corporate body, regardless of the underlying purpose of its activities on account of its links with the applicant association.”⁹⁹



Earlier in the judgment her Honour had noted that Ashers Bakery derived its name from a verse in *Genesis* which read: “Bread from Asher shall be rich”.¹⁰⁰ But she also observed that no religious objectives featured in its Memorandum and Articles of Association, nor in its advertising or the terms and conditions provided to customers (both conventional and online).

VII Some Lessons

Crafts, cruises, camps, cakes. What can we take from these rather disparate cases?

First, we have some authority now that a one-person company and a closely held company can both exercise the right of religious freedom. In the former, the decision is of a first instance tax tribunal and the finding on standing is arguably obiter (the claimant already being disqualified on other grounds). In the second instance, the decision represents a bare majority of the Supreme Court.

Second, by contrast, there is not the slightest suggestion that a large public company would have standing to sue, a notion that the UK judge in *Exmoor* rightly described as “ludicrous”. In *Hobby Lobby*, the Court observed that publicly-traded corporations (the Minority mentioned IBM and General Electric as examples) would be “unlikely [to be] the sort of corporate giants”¹⁰¹ bringing religious liberty claims. That seems indubitably correct. As the Court put it:

HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.¹⁰²

⁹⁹ Ibid.

¹⁰⁰ Ibid at [12](*Genesis* 49:20)(NKJV). The *New King James Version* is no doubt preferable, in this health conscious age, to the original *KJV* rendering: “Out of Asher his bread shall be fat”.

¹⁰¹ *Hobby Lobby* at 2774.

¹⁰² Ibid.

Third, objections that the corporate veil is being opportunistically pierced to find individual rights-bearing citizens underneath have not found favour. In *Hobby Lobby* the Minority criticized the very notion a corporation might have or exercise a religion:

the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, no desires.”¹⁰³

Quite so, but the Court was unmoved:

it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. . . . And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.¹⁰⁴

The Third Circuit Court of Appeal in *Hobby Lobby*, in dismissing the Hahns’ appeal, had reasoned: “General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.”¹⁰⁵ The Court’s riposte was terse: “All of this is true—but quite beside the point. Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”¹⁰⁶

Fourth, the conclusion that small companies may claim standing to sue as “victims” of religious freedom violations has arisen in situations where the individual owners of the companies have been precluded from pursuing a religious liberty claim themselves. Faced with no recourse at all, the understandable desire is to permit the action to proceed and at least be evaluated on its merits.

VIII The Way Ahead

¹⁰³ Ibid at 2794, quoting from *Trustees of Dartmouth College v Woodward*, 4 Wheat 518 at 636 (1819)(Marshall CJ) and *Citizens United v Federal Election Commission*, 558 US 310 at 466 (2010) (Stevens J). The same point was made by Maxwell P in *CYC* at [321].

¹⁰⁴ Ibid at 2768 (italics in original).

¹⁰⁵ 724 F 3d 377 at 385 (3rd Cir 2013)(emphasis added).

¹⁰⁶ *Hobby Lobby* at 2768.

The criteria for the recognition of a right of religious freedom exercisable by companies (if this is seen to be a worthwhile thing) would seem to include the following considerations:

• ***size of the enterprise***

Is there a ceiling in terms of the numbers of persons who are shareholders (or owners or directors) beyond which a claim will not be allowed? If so, what is that number?

It would be arbitrary to see any ceiling based on the size of the company. Undoubtedly there are, for example, some closely held companies that are huge. Justice Ginsburg in *Hobby Lobby* noted the Mars company earned some US\$33b in revenue and employed around 72,000 workers.¹⁰⁷ The vast majority of family-owned and run companies do not file this gargantuan profile, nor even Hobby Lobby's scale of operation.

• ***composition of the enterprise***

Must the claimants be related (members of the same family or kinship group)? Must they all be of the same religion?

The answer to the first sub-question would seem to be negative. By contrast, the second issue would arguable require unanimity of religious beliefs and convictions, although satisfying that would seldom be a problem. The faith-based company is a true "community" of persons, drawn together by a shared vision.

• ***the relevant constituency for assessing religious identity***

Must the owners be religiously devout and if not, is it sufficient that the managers, directors, employees (or even customers) are?

Statements in *Hobby Lobby* refer to those who "own, run and are employed"¹⁰⁸ by the company in question. *Hobby Lobby* focused upon the owners and thus the wider constituency did not call for examination, but it might be that the managers, directors or employees are all religiously devout whilst the owners are not.¹⁰⁹ So the relevant persons for assessing the religious liberty claim might extend beyond the owners.

• ***objective of the company***

¹⁰⁷ *Hobby Lobby*, Minority Opinion at n 19.

¹⁰⁸ *Hobby Lobby*, 134 S Ct at 2768. See similarly *ibid*, where Justice Alito observes: "An established body of law specifies the rights and obligations of the people (*including shareholders, officers, and employees*) who are associated with a corporation one way or another. When rights... are extended to corporations, whether constitutional or statutory, the purpose is to protect the rights of these people" (italics added; underlining in original).

¹⁰⁹ Spencer Churchill, "Whose religion matters in corporate RFRA claims after *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 2751 (2014)?" (2015) 38 *Harv JL & Pub Policy* 437 at 443-44.

Must the company be a nonprofit one or can it pursue profit-making *and* charitable or religious goals?

The binary either/or approach is unnecessary and unhelpful. As noted earlier, legislation in many states of the United States recognises benefit corporations with both profit earning and non-economic objectives.

• ***motive for the claim; sincerity of the claimant***

Must the company's reason for claiming the right or exemption be "religious", that is, to further or safeguard "religious" beliefs or practices? Must the religious reason be sincere or genuine?

There is arguably nothing new here for the same inquiry is made of flesh-and-blood individual claimants: there must be a sincere religious motivation on the part of the company.¹¹⁰

Whichever factors one chooses as relevant, some quite fundamental (and difficult) questions cannot be avoided,¹¹¹ questions such as: What are we trying to achieve? Why is it important to delimit standing to sue? And who "deserves" to be able to bring a religious freedom suit? Given the *fact* of a serious violation of a person or group of persons' religious freedom, does it matter the legal *form* in which they present themselves to court?

It is my contention that the status of the claimant is generally not relevant to the claim.¹¹² The relevant and key questions are the usual ones: Is there a significant infringement upon the claimant's religious freedom? Does the claimant have a sincere religious conviction regarding the conduct at issue? And so on

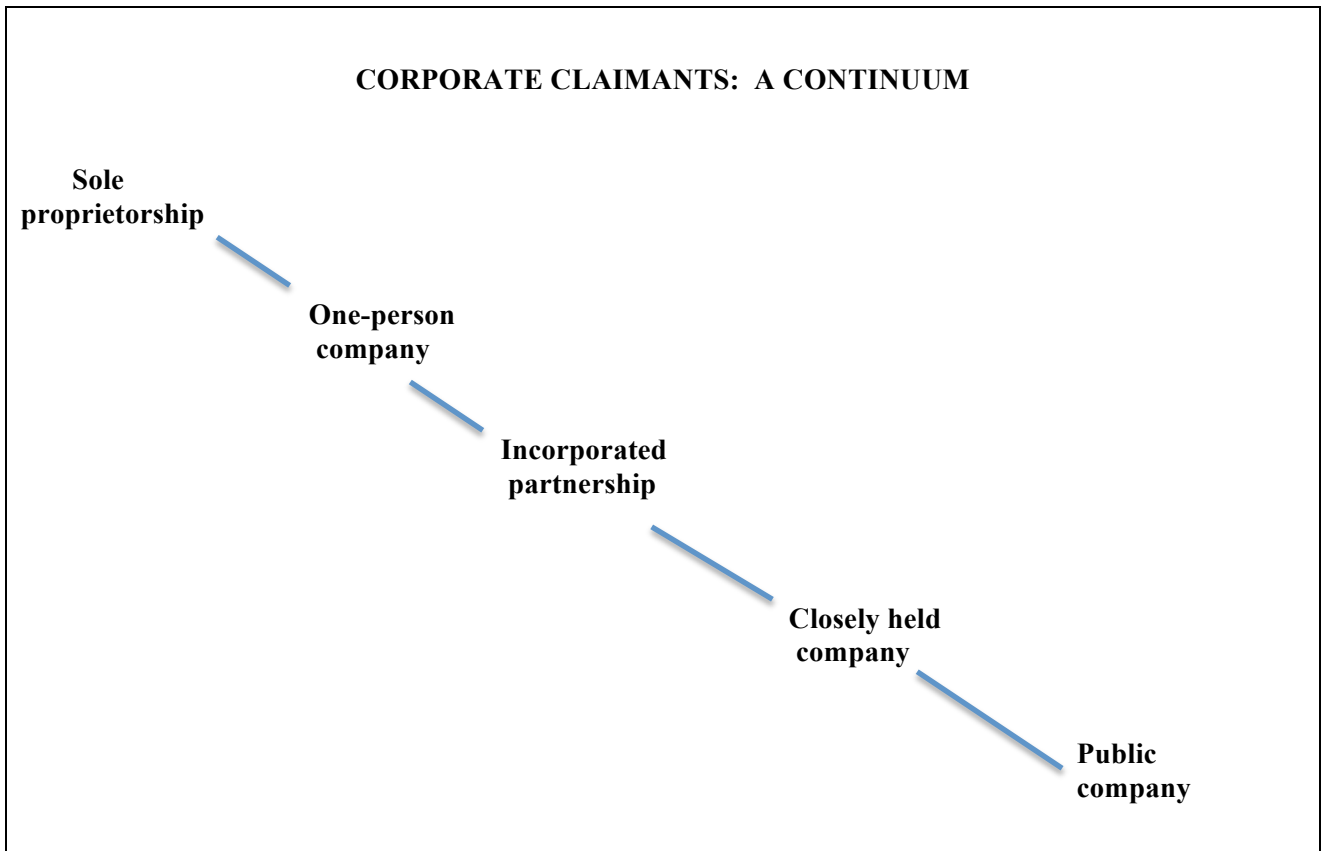
Next, do we proceed from "the ground up", from "first principles"? Do we proceed by way of analogy to those who are unquestionably valid claimants? If extension by analogy is the route, then the benchmarks are sizeable ones, entities with potentially large numbers of individuals: not just individuals, but churches, denominations, sects and entire religious communities have been held to have the right of religious freedom.

¹¹⁰ See Ahdar and Leigh, *Religious Freedom*, at 193-197, for our three-state approach to stating a religious liberty claim.

¹¹¹ "[There] is a general point about conceptual analysis. The study of concepts like *law*, and *freedom*, and *power*, and *democracy* cannot be undertaken in a normative vacuum. Unless, for example, we have some idea of why it might *matter*, why it might be thought a matter of *concern* whether something is a law or not, we cannot sensibly choose among rival conceptions of this concept . . . Justificatory argument in political theory and jurisprudence must precede conceptual analysis, not the other way round." Jeremy Waldron, "Legislation and Moral Neutrality" in his *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) ch 7 at 153 (emphasis in original); Ahdar and Leigh, *Religious Freedom*, ch 2 at 23.

¹¹² See also Redlich JA in *CYC* at [490](quote at fn 91 above); Colombo, *First Amendment and Business Corporation*, at 140.

The potential company claimants to religious freedom would seem to lie along a continuum beginning, at one end, with one-person companies and ranging to large public companies, at the other end.



No one could seriously suggest that a publicly-traded company such as CocaCola, BSKyB or Royal Dutch Shell should be able to bring proceedings for violation of its religious liberty. At the other end of the spectrum, the small family-owned, single-shareholder and sole-director company is surely a plausible candidate for the recognition of the right of religious freedom. Perhaps the incorporated partnership merits the right to sue too?

So, for now, perhaps we ought to commence modestly by recognizing one-person companies as being able to bring a religious liberty claim. There would need to be the obvious riders that an individual natural person would also need to satisfy: there must be a sincere religious belief or practice that is being infringed (in more than a trivial or *de minimis* fashion) by the law in question. It would make sense too for there to be no allowable claim where the individual (or perhaps a small related group of persons?) could bring a claim in his or her own name.

In the Common Law tradition (and in the absence of legislation) we might just dare to hope that cautious and incremental judicial reasoning will lead to a just and sensible solution.