

**DOBSON, MITCHELL & ALLPORT**BARRISTERS, SOLICITORS & NOTARIES  
ESTABLISHED 1834

Partners  
CAMERON LESLIE LLB  
JOHN UPCHER LLB  
ROBERT MACKAY LLB  
JOAN ROBERTS BA LLB  
STEPHEN KNIGHT LLB  
MICHAEL O'PARRILL LLB  
JOHN BENNETT LLB  
TIMOTHY BUGG BA LLB  
MELISSA LYON BA LLB  
ALISON QUINN BA LLB

Consultant  
VALENTINE SMITH LLB BCom FCPA  
Notary Public

Associates  
ANDREW WALKER LLB  
ROBERT WEBSTER BCom LLB  
SARAH DALY BA LLB  
WENDY BEVERIDGE BA LLB  
EWAN STEWART LLB

59 HARRINGTON STREET  
HOBART  
TASMANIA

HOBART  
POSTAL ADDRESS  
G.P.O. BOX 20  
HOBART, TASMANIA 7001

DX: 112 HOBART

TELEPHONE: (03) 6220 6220  
FACSIMILE: (03) 6223 6633

LAUNCESTON  
30 BRISBANE STREET,  
LAUNCESTON, TASMANIA 7250

TELEPHONE: (03) 6334 4638  
FACSIMILE: (03) 6334 4639

E-mail [info@doma.com.au](mailto:info@doma.com.au)

OUR REFERENCE

REDACTED

YOUR REFERENCE:

15 March 2000

**PRIVATE AND CONFIDENTIAL**

Mr W Haas  
Diocesan Registrar  
Anglican Church of Australia  
Diocese of Tasmania  
PO Box 748H  
HOBART TAS 7001

*By facsimile 6223 8968*

Dear Bill

**SKIPPER**

I refer to our telephone conversation 10 March 2000.

In that conversation, I indicated to you that I had found some authority, which is relevant to the issues raised at our meeting with the Dean, Peter Stuart and Kerry Bowerman. One issue which was raised was the question of the status of the Trustees of the Diocese and whether or not they ought to be held liable for the actions of Louis Daniels, as they are alleged in the statement of claim. The second issue is, whether as a Corporation Sole, the Bishop can be held liable for the actions of Daniels. The latter issue raises the question of whether the Bishop is a Corporation Sole.

**Liability of Trustees**

The Trustees are a body corporate. They were previously incorporated by the *Church of England Constitution Act 1899*, which is now repealed. However, by s.10(1) of the *Anglican Church of Australia Constitution Act 1973* ("the Act") that incorporation is continued. By s.10(2) of the Act the

Trustees may use the name "*The Trustees of the Diocese of Tasmania*". By s.11 of the Act, subject to the direction of the synod, the Trustees have power to sell, lease, exchange, mortgage, or otherwise dispose of property, which is vested in them. They may also buy land and give guarantees and indemnities. They have no other function under the Act.

Accordingly, the Corporate Trustees' powers and functions relate solely to property which is vested in them.

In *Archbishop of Perth v AA to JC* (1995) 18 ACSR 333, the Court of Appeal of the Supreme Court of New South Wales was concerned with allegations of tortious conduct by the Christian Brothers. One of the defendants joined was Archbishop Hickey, the Roman Catholic Archbishop of Perth. It was not alleged that he had engaged in any of the tortious conduct himself, but he was joined as the statutory corporation of the Church. The "*Roman Catholic Archbishop of Perth*" was recognised as a Corporation Sole under the *Roman Catholic Church Property Act 1911* (WA).

The Court held that the *Roman Catholic Church Property Act* was directed only to the holding, acquisition, disposition and management of property. The Corporation Sole created under it might sue or be sued, but only in relation to property transactions. There was nothing in the Act creating the Corporation Sole which purported to make it liable for actions in tort arising from the conduct of persons, being Catholic Clergy, unrelated to property. It followed that it could not be said that the statutory Corporation Sole had attached to it any characteristic of successory responsibility for any tortious conduct of the type alleged of any prior persona, being previous holders of the Episcopal office of Roman Catholic Archbishop of Perth.

In my view, this case is analogous to the present action, in which the Trustees have been sued on the basis that they represent the "*corporate persona*" of the Church.

The Trustees have very similar powers to those vested in the Roman Catholic Archbishop of Perth under the *Roman Catholic Church Property Act*. Accordingly, it is possible to argue that the provisions of the Act which allow the Trustees to sue and be sued are limited to actions relating to property vested in the Trustees and do not extend to expose the Trustees to liability in respect of Daniels' tortious conduct.

It should be noted that this point arises prior to any question of whether there is any fiduciary duty owed between any member of the Church and Skipper. Accordingly, it is a threshold point which goes to whether the Trustees can, in law, be exposed to Skipper's action.

A judgment of the New South Wales Court of Appeal is not binding on the Supreme Court of Tasmania. However, having regard to the standing of that Court, it would constitute highly persuasive authority and I consider that the Supreme Court would be reluctant to decline to follow it. Accordingly, as a preliminary point, in my view, this is one which the Trustees should seriously consider taking. If the Trustees win the point, Skipper would be left with a suit against Daniels only, (as Brandenburg is dead) and would then have to decide whether or not to sue any other entity, such as the Bishop, as a Corporation Sole, or Bishop Newell personally. Either course would require Skipper to apply to the Court to join a party "out of time" as his cause of action arose over three years ago.

#### **Voluntary Association**

In *Scandrett v Dowling* (1972) 27 NSWLR 483 the New South Wales Court of Appeal considered the status of the Anglican Church in New South Wales. From my reading of that case and my understanding of the Anglican Church Constitution, the Constitution of the Anglican Church in New South Wales is identical to constitution of the Anglican Church in Tasmania. Both are set out in a schedule to legislation, which is important for present purposes. Section 2 of the *Anglican Church of Australia Constitution Act 1961* (NSW) provides:

*"The several articles and provisions of the Constitution contained in the schedule to this Act... and any canons or rules to be made under or by virtue or in pursuance thereof are and as provided in the Constitution shall be for all purposes connected with or in anyway relating to the property of the Church of England in Australia binding on the Bishops, Clergy and Laity being members of the Church of England in Australia in the several Diocese of the Church of England within the state of New South Wales."*

Section 5 of the *Anglican Church of Australia Constitution Act 1973* (Tas) provides (in part):

"...

- (2) *Subject to subsection (3), the articles and provisions of the Constitution and any canons and rules made under or by virtue or in pursuance thereof are as therein provided binding -*
- (a) *on the Bishops, Clergy and Laity being as members of the church in the Diocese; and*

- (b) *for all purposes connected with or in any way relating to the property of the Church.*
- (3) *A canon or rule that contravenes any law or statute in force for the time being in this State has to the extent of the contravention no force or effect."*

While there are differences between the New South Wales and Tasmanian legislation, they are, in my view, not material.

*Scandrett's case proceeded on the basis that the Anglican Church in Australia is "a voluntary association of its members and the effect of its rules is to be ascertained accordingly" (Mahoney JA at 491) and that the Constitution is a "consensual compact", with no binding legal force.*

It is on that basis that s.5 of the Tasmanian Act is important. Speaking of the New South Wales section Priestley JA said at 561-2:

*"The section makes the Constitution ... binding on the Bishops, Clergy and Laity as members of the Church, but in regard to Church trust property the bindingness was for all purposes. This seems to me to be a recognition within the constitution of the fact that ... [s.5]... of the Act was making the Constitution...binding for general law purposes only in regard to Church trust property and leaving all other provisions of and under the Constitution to be binding on members of the Church in a different way..."*

*Since the Church is not a legal entity but, for Australian legal purposes, the name of the sum of all its members from time to time it is impossible for property to be held directly in the name of the Church. The only way Church property can be held is by Trustees holding property on charitable trust for Church purposes..."*

The judgment of Priestley JA sets out the long legal history of the Church of England in Australia in some detail. It seems to be well settled that the Church is a voluntary association and not a legal entity. The Constitution does not bind members of the Church in any legal way. This has an important bearing on the way that the present case is likely to proceed.

### **The Bishop as a Corporation Sole**

Because the Church is not a legal entity and the Trustees are only Trustees of the Church's property, for the proposition that the Church, or some persona representing the Church is legally liable for the

actions of Daniels, it will be necessary for Skipper to establish the nature of that persona. In the *Roman Catholic Archbishop of Western Australia v AA to JC* (supra) the question of whether the Roman Catholic Archbishop of Perth was a Corporation Sole at common law was considered, but not decided. However, the Court expressed considerable doubt that the Archbishop was a Corporation Sole at common law: (Kirby P at 337 and Cole JA at 355).

### Consequences for the present case

If Skipper is to succeed against the Church, he will need to show that the Church, in some persona, is vicariously liable, either:

1. as Daniels' principal, or employer; or
2. as Skipper's fiduciary.

Even assuming that Skipper could establish that the Bishop was a Corporation Sole, in my view it is extremely unlikely that he could establish that the Bishop was Daniels' employer: *Knowles v Anglican Property Trust, Diocese of Bathurst* (NSW Industrial Relations Commission - 22 April 1999).

The question of whether or not there is a fiduciary relationship between the Bishop and Skipper is somewhat more difficult. It will require a careful review of all of the evidence, once discovery of documents is complete. However, for present purposes, the following matters should be noted:

- Skipper has not pleaded that the Bishop is Skipper's fiduciary, either personally, or as a Corporation Sole;
- in order for Skipper to establish that the office of Bishop is a Corporation Sole, he will need to overcome "significant legal hurdles" (Kirby P in *Roman Catholic Archbishop* case).

### Conclusion

In my view, the most effective method of proceeding at this stage is for the Trustees to make an application to the Court to strike out the statement of claim as against the Trustees, on the basis that they could not, in law, be vicariously liable for Daniels' conduct. Skipper may subsequently apply to join another party, such as Bishop Newell, either personally, or as a Corporation Sole, but for the reasons discussed above, he would have significant difficulties in doing so and this would become apparent to him during the argument concerning the Trustees. Prior to making the application to the

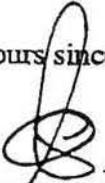
6

court, I suggest that we write to Skipper's solicitors inviting them to consent to orders that their statement of claim against the Trustees is struck out and that Skipper pay the Trustees' costs.

Would you please let me have instructions as soon as possible. For the time being, I will tell Skipper's solicitors that there are certain preliminary points which we wish to test and ask them to defer the matter for a further short period.

I look forward to hearing from you.

Yours sincerely



**MICHAEL O'FARRELL**

Direct line: REDACTED

Email REDACTED