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AA - JC Inclusive v Hickey & Anor S158/1995 [1996] HCATrans 89 (4 March 1996)

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry

Sydney No S158 of 1995

B e t w e e n -

"AA" - "JC" INCLUSIVE

Applicants

and

BARRY JAMES HICKEY, ARCHBISHOP FOR THE TIME BEING OF THE ARCHDIOCESE
OF PERTH

First Respondent

ROMAN CATHOLIC ARCHBISHOP OF PERTH

Second Respondent

Application for special leave to appeal

BRENNAN CJ

TOOHEY J

McHUGH J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON MONDAY, 4 MARCH 1996, AT 9.55 AM

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MR P.C.B. SEMMLER, QC: May it please the Court, I appear with **MR P.T. TAYLOR** for the applicants. (instructed by Slater & Gordon)

MR F.X. COSTIGAN, QC: If the Court please, I appear with my learned friend, **MR G.L. MEEHAN**, for the respondents. (instructed by Dunhill Madden Butler)

BRENNAN CJ: Yes, Mr Semmler.

MR SEMMLER: Your Honours, could I deal, first of all, with the error that we say the Court of Appeal made in setting aside the leave to amend to substitute the second respondent as defendant, which leave was given by Justice Levine. This deals with the liability of the second respondent, the statutory corporation sole, known as the Roman Catholic Archbishop of Perth. Now, your Honours, the Court of Appeal disallowed the amendment granted by Justice Levine, because it said that any claim against that statutory corporation must inevitably fail; that it was futile, because there was nothing in the Acts relied upon purporting to make the corporation sole responsible or liable for the torts and breach of duty alleged.

Now, your Honours, because there are no pleadings in this case at this stage, which have been filed, notwithstanding numerous attempts by the applicants to file statements of claim in these proceedings, could I just very briefly indicate what the torts and breach of duty alleged were, and there was evidence to this effect before the Court of Appeal on affidavit. It is that in the 1940s and 1950s, when Archbishop Prendeville was the holder of the office of Archbishop of Perth, he was, it will be alleged and there will be evidence to this effect, the head of a Catholic association which was the custodian of the orphans in these orphanages in Western Australia, including these plaintiffs, and was responsible for their welfare and received money from the Western Australian Government to look after them, and, in brief, the torts and breaches of duty alleged are that there was a failure by the corporate Archbishop - - -

BRENNAN CJ: Now, just a moment; you have immediately switched - - -

MR SEMMLER: Well, your Honour, there was a failure by the Archbishop, which we say the corporate Archbishop - - -

BRENNAN CJ: And by that you mean Archbishop Prendeville?

MR SEMMLER: Yes. There was a failure by Archbishop Prendeville, for which we say the corporate Archbishop now is liable, in failing - - -

TOOHEY J: Could I just - sorry to interrupt you, but you also used the expression "head of association" - - -

MR SEMMLER: Yes.

TOOHEY J: Was that used synonymously with the statutory office holder, or was it intended to imply something else?

MR SEMMLER: This was the Catholic Episcopal Migration and Welfare Association. It entered into an agreement with the Western Australian Government and he was the head. There will be, obviously, questions of fact, as to his role in that organisation and whether that gave rise to liability in him and, in turn, whether the corporation is liable for his acts. But that, in brief, your Honours, because there are no pleadings, these are the allegations which the plaintiffs will seek to make.

BRENNAN CJ: What we need to understand, for the purposes of this application, is the way in which you seek to establish either that Archbishop Hickey personally is liable in tort, or, how the corporation is liable in tort.

MR SEMMLER: Your Honour, there is no suggestion that Archbishop Hickey is personally liable

for what occurred.

BRENNAN CJ: Let us see if we can dispose of Archbishop Hickey first of all. Archbishop Hickey is not personally liable; how is his liability said to arise, if at all?

MR SEMMLER: He is liable as the corporation sole at common law. A corporation which - that deals with the liability of the first respondent, your Honour. If your Honour wishes me to deal with that, I shall.

BRENNAN CJ: Yes, deal with that first and then we can understand. It seems to me that the problem which you are trying address, namely the exercise of the discretion, if it be a discretion, to allow the amendment, must turn upon the bases upon which you are seeking to sheet home liability to the two parties who are the respondents in these proceedings.

MR SEMMLER: Well, your Honour, as I say there are no pleadings, but the allegation is as I have put it.

BRENNAN CJ: Archbishop Hickey is not being sued as Archbishop Hickey personally. You say he is being sued as a corporation sole at common law.

MR SEMMLER: At common law, yes. And the question of whether a corporation sole at common law exists is one which even the Court of Appeal recognised as not being determined, let alone what is the name of this corporation sole at common law. Your Honours, what happened was that, notwithstanding that the heavy onus on an application to strike out proceedings against a defendant, the proceedings against the person intended to be sued as the corporation sole at common law, that is Archbishop Hickey, the Roman Catholic Archbishop of Perth for the time being, those proceedings were struck out, when the Court acknowledged that his very existence is not something that has been determined by a court after argument in a recent decision, and when the Court itself presumably does not know what is his correct name. The Court of Appeal seemed to assume, in their judgment, that the name of the common law corporation sole was the same name as the statutory corporation, that is, the Roman Catholic Archbishop of Perth, but that was never made clear. What was clear was that the applicants, when they sued Dr Hickey, were intending to sue the common law corporation sole.

McHUGH J: I must say that is a proposition that I could never bring myself to accept. You would have to argue long and hard to convince me that you intended to sue the corporation sole at common law. The writ is directed to "Barry James Hickey, Archbishop for the time being of the Archdiocese of Perth".

MR SEMMLER: Your Honour, the problem that your Honour has in understanding how he could have been sued as the common law corporation sole is that, your Honour, no one knows whether he exists, because it has not been conclusively determined, nor what is his name.

McHUGH J: But if the Archbishop was a corporation sole at common law, you would sue the Archbishop, would you not?

BRENNAN CJ: Yes.

McHUGH J: You would not sue Barry James Hickey.

MR SEMMLER: Well, he was named as "Archbishop for the time being".

McHUGH J: He may be, but Barry James Hickey is a separate legal personality to the Archbishop of the Archdiocese of Perth if that Archbishop is a common law corporation sole.

TOOHEY J: The problem seems to stem, Mr Semmler, from the fact that the cause of action, as far as it can be ascertained from the papers before us, lies in negligence and breach of fiduciary duty, alleged as a personal allegation against a person holding the position of Archbishop at the time. Now, somehow, that is sought to be transposed into an obligation that accrues upon the present holder of the same office as the person against whom the allegations were made.

MR SEMMLER: Yes.

TOOHEY J: Well, that is a fairly big step, is it not?

MR SEMMLER: Yes, but, your Honours, it depends upon what was the intention of the plaintiffs when they sued, and that intention was uncontested. The affidavit evidence is set out at page 66; the plaintiff's solicitor said:

I always intended to sue the holder of the office of the Catholic Archbishop of Perth.

McHUGH J: That denies the very proposition.

BRENNAN CJ: Exactly.

McHUGH J: That denies your whole case. You do not sue the holder, you sue the office, because it is the corporation sole.

MR SEMMLER: Earlier on in his affidavit the solicitor had said that his understanding was that the Archbishop may be a corporation sole, which might be liable for the torts of his predecessors, and our contention is that it is apparent from that uncontested evidence, that he did not intend to sue the individual, he intended to sue the office holder for the time being, who, if there is a corporation sole at common law would be liable for the torts of the corporation back 30 or 40 years before, and - - -

TOOHEY J: You can get a glimmer, perhaps, of how a cause of action might be mounted in those circumstances, perhaps based on some sort of vicarious responsibility, but that is not the case that is sought to be made out.

MR SEMMLER: No, our contention is that the corporation itself was - - -

TOOHEY J: Yes, I understand that, and that is what seems to me to give rise to all these problems.

MR SEMMLER: Your Honours, could I come back to the first respondent, and ask your Honours to look at the possible liability of the second respondent, the statutory corporation - - -

BRENNAN CJ: Before you leave it, can I just take you a little further into the proposition that Justice McHugh was discussing with you. At page 66, as you say, the affidavit is there:

I therefore caused the present Catholic Archbishop of Perth, Barry James Hickey, to be named as a defendant -

Now, in what way do you seek to avoid the plain meaning of those words?

MR SEMMLER: Your Honour, we would concede that the name used may be wrong, but the intention - according to *Bridge Shipping* and what your Honour - - -

BRENNAN CJ: It is not a question of the name, it is a question of the person. Now, who was the person that was intended to be sued?

MR SEMMLER: The office holder of the office of the Archbishop of Perth, your Honour.

BRENNAN CJ: Well, that is Barry James Hickey, is it not?

MR SEMMLER: Yes, and we would say, he is not only the human being Barry James Hickey, he is also the legal fiction, the Archbishop of Perth as a common law corporation sole, and, indeed, we would say, your Honours, the statutory corporation sole. They are all the same thing. But the point that I seek to make, your Honours, is that at this stage of proceedings, where we do not even have pleadings, where there has been no determination of whether and with what name the corporation sole at common law exists, it is entirely inappropriate and, we would respectfully submit, unfair, that the possibility of proceedings being brought against the common law corporation sole should be disposed of in this summary way.

Your Honours, I well appreciate that the name given, including the name Barry James Hickey, Archbishop for the time being, may have been the incorrect name, but the test under Part 20 rule 4 (3), as expounded in *Bridge Shipping*, is not to do with the name. Everyone who makes an application under that section makes a mistake as to the name. Or they say they make a mistake as to the name. So, the question of the name used cannot be determinative of whether or not one is entitled to the relief provided. Rather, it is a question of what was the intention of the party, and, as Justice Kirby said, in the Court of Appeal, looking at the history of this litigation and what was done; the refinement of the pleadings, the fact we, as yet, still have not been able to file pleadings in these proceedings, it is clear that we did seek to sue the Archbishop as a corporation sole at common law. Intention is the test, not the name that was used.

Your Honours, if I could deal with the second respondent. The Court of Appeal decided that a claim against the statutory Archbishop must inevitably fail. But, your Honours, in doing so, the Court of Appeal disallowed the amendment because, we would say, they erred in determining the question of whether the statutory corporation could possibly be liable by reference to the general statutory function of the corporation, rather than by considering the acts alleged. And, of course, the difficulty that the Court of Appeal had, and that this Court has, is that the acts alleged are not even in pleadings which have been filed at this stage. And that made it all the more difficult for the Court to determine that there was no arguable case against the statutory Archbishop.

We say that the Court of Appeal, in focusing on the statutory powers, overlooked the fact that tort liability can arise from things which are done simply by reason of the legal existence of a person or body, and that those acts or omissions which can be negligent do not need statutory power in order to make the body liable for them. Not all acts performed by a body corporate, to be actionable, need to be authorised by statute, and your Honours, we rely upon the decision of this Court in *Australian National Airlines Commission v Newman* [1987] HCA 9; 162 CLR 466. That was a case, of course, dealing with a commission established by Act of Parliament. Its powers and functions were set out in the Act; there was a limitation provision on the commencement of actions against that body for, or arising out of, anything done or purporting to have been done under the Act. This Court said that in determining whether the action was caught by section 63, it is not necessary to look at the general statutory function of the body, but rather to the negligent act or omission alleged.

Now, in this case, without the benefit of pleadings, without knowing, in effect, what the acts or omissions are, except in a very general sense, the Court of Appeal said, "This body that Justice Levine has allowed you to substitute could not possibly, or arguably, be liable for those acts or omissions, which are only known in a general sense."

McHUGH J: I want to try and understand this point about the corporation sole and who you intended to sue. Is my recollection correct, that if one was suing the corporation sole that it would be some such title as, "The Roman Catholic Bishop of Perth - - -"

MR SEMMLER: The statutory corporation, your Honour.

McHUGH J: Well, statutory or at common law - if you wanted to sue a corporation sole, that is what you would be suing. You would not be suing an individual, would you?

MR SEMMLER: Certainly the statutory corporation has that name, "The Roman Catholic Archbishop of Perth". No one knows what is the name of the common law corporation, if it exists.

McHUGH J: But if you were suing the Archbishop of Canterbury, you would not sue Dr Fisher, or whoever happened to hold the office, would you? You would not say, "I will sue Dr Fisher, being the Archbishop of Canterbury", you would sue the Archbishop of Canterbury.

MR SEMMLER: There is authority, your Honour, in the Scientology cases referred to. There is a suggestion, taken from Salmond on Jurisprudence, that the corporation sole bears the same name as the natural person who is its sole member. Your Honours have trouble with the idea that Dr Hickey can be named, or was named, as the common law corporation sole, but Salmond on Jurisprudence, and one must concede this is a very nebulous area, says that the corporation sole bears the same name as the natural person who is its sole member. Now, if that is correct, then in our contention it is arguable that that same name, Barry James Hickey, Archbishop for the time being of the Archdiocese of Perth, was the correct name for the common law corporation sole. But, whatever may be the case, in our submission, it is simply inappropriate to strike out proceedings when that issue has not been ventilated.

Not only has the issue of what is the correct name, which troubles your Honours, been ventilated, but the issue of whether he exists at all has not even been decided.

BRENNAN CJ: No. The question which troubles me, speaking for myself, is understanding that there is anything on the face of the writ, or otherwise, which indicates anything different from the fact that you are suing a person, to wit Barry James Hickey.

MR SEMMLER: Added to the words "Barry James Hickey", your Honour, were "Archbishop for the time being".

BRENNAN CJ: I appreciate that.

MR SEMMLER: If he had been sued in his personal capacity, as a human being, there would have been no need and there would have been no addition to the name, Barry James Hickey, of the additional words. Your Honour, if what Salmond says is correct, then giving the name of the natural person as the name of the corporation sole was correct.

TOOHEY J: You have got this situation, have you not, Mr Semmler, that three members of the Court of Appeal held that the second respondent could not be liable for personal torts of somebody holding the position of Archbishop at the time of the event in question. You have got two members of the Court of Appeal who are against you on the notion that a corporation sole can somehow impose some success reliability upon a person who may hold that position at the present time. You have got the then President of the Court of Appeal saying that that is a matter that could be left for further argument.

MR SEMMLER: Yes.

TOOHEY J: I also understood you to say that claim was not pursued against Barry James Hickey in that name.

MR SEMMLER: The claim was not pursued against him personally as opposed to him as the

Archbishop in his official capacity - - -

TOOHEY J: And that could only arise in that respect on the basis of a corporation sole at common law responsible for the personal torts of a previous person answering that description?

MR SEMMLER: Yes, putting it another way, your Honour, they are one and the same person. At law, because of the fiction known as the common law corporation sole, what was done in the 1940s and 1950s is regarded as having been done by the present office holder. Could I take your Honours to the section dealing with the statutory Archbishop. Can I take your Honours to section 3 of the 1916 Act.

Your Honours, the Court of Appeal decided that any claim against the statutory Archbishop was futile because he did not have the power to do what we allege he did. Section 3 of the 1916 Act says this:

The title "Roman Catholic Bishop of the Diocese of Perth" shall mean and include "The Archbishop of the Archdiocese of Perth," and all acts, matters, and things that might or could be done and performed by the roman Catholic Bishop of the Diocese of Perth may from time to time be done and performed by the Archbishop.....as a corporation sole by the name of "The Roman Catholic Archbishop of Perth".

Now, your Honours, Justice Cole in the Court of Appeal, with whom the other two judges agreed in his judgment, took the view that that section is limited to property related powers. Now, if your Honours read the words in the section, they demonstrate a legislative intention to bestow upon the corporate Archbishop the unfettered official capacity of the Bishop. Those words mean that everything the Bishop can do as Bishop, can be done by the corporate Archbishop. The powers vested in the corporate Archbishop by section 3 are not restricted to dealings in land, or in property in the wider sense.

The Court of Appeal, in our respectful submission, has confused the specific purposes which may be referred to in other sections of the 1916 Act and the 1911 Act on the one hand, with the unrestricted capacity conferred upon the corporation by the words of section 3. That capacity is far wider than may be necessary for the purposes for which it may have been said that the 1911 Act was originally enacted, but the fact that the original purposes may have been limited does not restrict the capacity of the corporation as set out in section 3.

BRENNAN CJ: Mr Semmler, just pause for a moment to think. Your allegation, with or without any pleadings, does not matter, because we know generally what the nature of your allegation is; it is a failure to exercise proper control, is that not so?

MR SEMMLER: That is correct, yes.

BRENNAN CJ: The question is whether or not the statute of Western Australia conferred on the Archbishop of Perth, under the corporate title, some power of control over the Christian Brothers; is that right.

MR SEMMLER: Over the boys in the orphanages.

McHUGH J: No, over the Brothers.

MR SEMMLER: Well, over the Brothers - - -

BRENNAN CJ: Yes.

MR SEMMLER: - - - and over what was going on.

BRENNAN CJ: Over what was happening there?

MR SEMMLER: Yes.

BRENNAN CJ: Well now, the proposition that the statutory authority, the corporation, as distinct from the ecclesiastical holder of the office for the time being, Archbishop Prendergast, had that power seems to me to be quite untenable.

MR SEMMLER: The statutory Archbishop received money from the Western Australia Government to be - - -

BRENNAN CJ: Why do you say the statutory Archbishop received money?

MR SEMMLER: Well, all property, by the 1911 Act, of the Diocese of Perth, including real and personal property, was to be vested in the statutory Archbishop. So, any money received by the Roman Catholic Church in Western Australia, pursuant to any agreement 30 or 40 years later with the Western Australia Government to look after these migrant orphans, was money which would be invested in the statutory Archbishop.

BRENNAN CJ: Now, how could that lead, as a matter of statutory authority, or put it how you will, to any situation where some power of control could be sheeted home to a statutory corporation?

MR SEMMLER: The liability is sheeted home by the words of section 3, because by section 3 of the 1916 Act this statutory body was given all the powers of the Archbishop.

McHUGH J: Your argument is that it is a mistake to see section 3 as confined to property transactions?

MR SEMMLER: Yes, because there is no limitation on that section.

McHUGH J: All the authorities of the Catholic Archbishop of Perth have been transformed into a statutory power.

MR SEMMLER: Yes, and, your Honour, that accords not only with what we say is the language of the section, but with fairness, and with the American authorities, to the effect that church corporations cannot avoid liability in tort on the basis that they were only created for specific purposes. Your Honour, there is a whole line of authorities referred to by Justice Levine in his judgment which, from the start of this century onwards in the United States, show that this very problem, which is confronted by the applicants in this case, is one which the courts in the United States have considered is answered by saying that, particularly if you have a statute like this which confers these wide powers, the respondents ought not to be allowed to argue that although they hold all of the money - - -

BRENNAN CJ: I think your time has expired, Mr Semmler.

MR SEMMLER: Thank you, your Honour.

BRENNAN CJ: Mr Costigan.

MR COSTIGAN: We say that we rely on our written submissions, but we say that one of the problems that has arisen here is a failure to distinguish between the various roles of an Archbishop, many of which are personal, many of which, not surprisingly, are sacramental, and that there are

things than an Archbishop can do which do not fall within any of the concepts of corporation sole either at common law or under the statute, and obvious examples are the Archbishop saying mass, or hearing confession or ordaining priests.

McHUGH J: Well, that sounds like common sense to me but, having regard to the terms of section 3 of the *Roman Catholic Church Property Acts*, it is at least arguable, is it not, that everything that the Archbishop does is done as a corporation sole?

MR COSTIGAN: It is a startling conclusion, your Honour - - -

McHUGH J: Well, it may be - - -

TOOHEY J: But you would not have to go that far, would you? All you would have to say is that everything relevantly done - - -

MR COSTIGAN: Yes.

BRENNAN CJ: You could say that the Catholic Church is the established church in Western Australia.

MR COSTIGAN: I am not sure, even though I am acting for Archbishop Hickey, that I should adopt that suggestion, your Honour. But one cannot look at section 3 in isolation from the 1911 Act, which is the Act that creates the corporation sole for the purpose of holding property, and what the 1911 Act does is to, by section 3, vest in the Bishop of the Roman Catholic Bishop of the Diocese of Perth, property as defined in the Act, and what happened in the 1916 Act, by section 3, was to indicate that the corporation sole, set up under the 1911 Act, under the title "Roman Catholic Bishop of the Diocese of Perth", shall include the Archbishop, because the Bishop is now an Archbishop, and there is nothing we would say to your Honour Justice McHugh which would enable an interpretation of section 3 in the 1916 Act, which was really dealing with the change of name of the Bishop to Archbishop, to create the situation where everything he did was under his role as corporation sole.

McHUGH J: But the change of language does seem significant, Mr Costigan, whereas under section 4 of the 1911 Act the Bishop, as a corporation sole, seems to have been limited to property transactions, section 3 is so framed that the whole matter seems to be at large - at least, it is arguable that it is.

MR COSTIGAN: Except this, your Honour, that it is in the context of a *Roman Catholic Church Property Act*, and it is an amendment of the previous Act. Section 1 says:

This Act may be cited as the *Roman Catholic Church Property Acts Amendment Act 1916*.

And it is clearly intended to refer back to the 1911 Act, which was an Act which was setting up the corporation sole.

TOOHEY J: I must say, it would be a curious result in some respects if a provision of that sort which were dealing with nomenclature suddenly shifted a whole area of authority or responsibility within the framework of an amending statute that was amending a property vesting Act.

BRENNAN CJ: I am puzzled by this. My copy of the 1916 Act is not that which appears in the appeal book, and the notation is that it was amended by No 67 of 1972. The section that is in the appeal book appears, from my copy, to be a 1912 Act.

TOOHEY J: There is a 1912 Act, but it does not seem to be particularly relevant.

BRENNAN CJ: It is 1912 that carries the words upon which Mr Semmler relies.

MR COSTIGAN: I am not able to answer that. I do know that there were various reprints of the Acts.

TOOHEY J: The 1912 Act is a power to appoint attorneys and a power to appoint an administrator. It seems to be confined to those two situations.

MR COSTIGAN: The Act, your Honour the Chief Justice, that I have in front of me is Act No 4 of 1916, and it is section 3 of that Act which my friend Mr Semmler, I think, took the Court to.

BRENNAN CJ: I see, yes. Yes, I am sorry, I think I mislead you.

MR COSTIGAN: That is an Act assented to on 17 November 1916, and the preamble to the Act says:

Whereas the Diocese of Perth has been created into an Archdiocese; And whereas the Archbishop of the said Archdiocese is now carrying out the powers and duties formerly carried -

It is that Act, your Honour.

McHUGH J: When you look at this 1916 Act, you find section 3, the powers are at large, and then you look at section 4 in the context of a church property Act, and you see that under section 4(2):

The Archbishop of the Archdiocese of Perth in his corporate name may -

among other things, "enter.....into any partnership", this is paragraph (e):

syndicate, joint venture or other transaction whether for the purpose of profit or otherwise;

And then in paragraph (g):

compound, release or settle claims by or against him in his corporate name, whether in contract or tort.

MR COSTIGAN: I am troubled, your Honour, that the Act I have in front of me does not have those paragraphs. The Act I have in front of me is No 4 of 1916.

TOOHEY J: We are working from reprints and they do not have the numbers, nor the date of assent. At least, the copies I have lack that sort of information.

MR COSTIGAN: My learned junior has handed to me a document which is headed, "*Roman Catholic Church Property Acts* 1916 reprinted as at 13 July 1988".

BRENNAN CJ: Yes.

MR COSTIGAN: It is that copy that includes various parts of section 4 that your Honour - - -

BRENNAN CJ: (g) is at the top of page 3 of my print.

MR COSTIGAN: The Act I had been looking at was section 3, and that is the section that my friend Mr Semmler also took the Court to. But both copies include the preamble which makes it clear that the intention of the Act was to deal with the factual situation that the Diocese of Perth was now an Archdiocese.

TOOHEY J: Your argument presumably has to be that section 3 is really a change in nomenclature and nothing more, and that section 4(2)(g), in so far as it refers to claims in contract or tort, relates to such claims arising out of property vested by reason of the primary statutes -is another matter, but that has to be the argument, I suppose.

MR COSTIGAN: That is so, your Honour. That is the argument. Of course, the subsections of section 4(2) were not inserted by the 1916 Act but by some later Act, between 1916 and 1988. But, even those subsections state:

Without limiting the generality of subsection (1) The Archbishop of the Archdiocese of Perth in his corporate name -

So, it is still dealing with the corporation sole created by statute for the purpose of the legislation.

TOOHEY J: Are you saying, Mr Costigan, that section 4 that we have is the section substituted in 1972 - substituted in its entirety, apparently?

MR COSTIGAN: My junior has handed to me a copy of the 1972 Act which says, "Section 4 of the principal Act is repealed and re-enacted as follows", and - - -

TOOHEY J: Do we have a copy of section 4 as it was introduced in the 1916 statute?

MR COSTIGAN: I have it. That was the copy I was reading from, your Honour, No 4 of 1916. I do not know whether the Court has it in that form - it was in our table of - Your Honour, I do not understand that my argument on this construction point gains by repetition.

BRENNAN CJ: No.

MR COSTIGAN: So I do not propose to repeat. So far as the other matters are concerned, we rely on our written submissions.

TOOHEY J: But what do you say about the argument that there is a corporation sole at common law reflected now in the name of the first respondent, not sued in a personal capacity, but as answering the description of corporation sole at common law, responsible for the personal torts of the occupant of the person answering that description at the time of the events in question?

MR COSTIGAN: We would say a number of things to that, your Honour. The first is that, as the Court of Appeal decided, the allegation against the first respondent was made against him in his personal capacity and, indeed, what is called the first statement of claim, but which, in fact, is the fourth statement of claim, there is no claim against the corporation sole at common law.

TOOHEY J: But when it is said that the claim was made against the Archbishop at the time personally, that can perhaps mean one of two things, as opposed to vicarious responsibility, if there is a personal responsibility, or it can mean personal in the sense of something that did not derive from the office which he held. In what sense do you understand the term to be used?

MR COSTIGAN: It is not clear. His Honour Mr Justice Cole, as I read his judgment, took it to mean a claim against the Archbishop personally as - - -

TOOHEY J: It certainly means personally in the sense of not vicariously. I think that is common ground.

MR COSTIGAN: An attempt was made to regard that as a successory liability. I am sorry I am a bit uncertain in the way in which I answer your Honour, but that is a reflection of the uncertainty - - -

TOOHEY J: It is a bit difficult in the absence of pleadings.

MR COSTIGAN: That is so. We say about the corporation sole at common law that it is not a matter that has been debated in full or decided by any court as yet.

TOOHEY J: Was it argued before the Court of Appeal?

MR COSTIGAN: It was not argued before the Court of Appeal.

TOOHEY J: Although it is referred to by the then President in his judgment.

MR COSTIGAN: It is referred to by the President but it was not argued. The argument before his Honour Mr Justice Levine was essentially in written submissions, not from the Bar table, that being because in the latest edition of the statement of claim there was no claim against the Archbishop as a corporation sole at common law. We would say, as his Honour Mr Justice Cole said, that it is premature to deal with that question until it has been properly argued and it is not appropriate to ask this Court to give an advisory opinion on that question when it - - -

TOOHEY J: But would the question arise in view of the Court of Appeal's judgment?

MR COSTIGAN: We would say it does not arise. At the moment the proceedings are that there are two respondents - application made by the applicants to substitute the statutory corporation for the first respondent. There is no application made to substitute a corporation at common law for the first respondent. So that at the moment all we have is Archbishop Hickey sued as the "Archbishop for the time being with the Archdiocese of Perth" as the first respondent and the statutory corporation was the second respondent.

TOOHEY J: Is that right, the statutory corporation is the second respondent? The statutory corporation has gone.

MR COSTIGAN: They have both gone if the Court of Appeal is right, your Honour.

TOOHEY J: That is what I am asking you because you were suggesting that these matters somehow were still available to be canvassed. If the order of the Court of Appeal stands - - -

MR COSTIGAN: Statutory corporation is gone.

TOOHEY J: Statutory corporation is gone. What about the first respondent?

MR COSTIGAN: If the applicant wished to make a new application to substitute for the first respondent a common law corporation sole, that he could do only if the first respondent remains in the proceedings. But if the Court of Appeal's judgment stands, both respondents have gone and all that is left is the **trustees of the Christian Brothers**.

TOOHEY J: That is really what prompted the question because I did not understand your comment that somehow or other matters of this sort were still live to be canvassed at trial or before trial.

MR COSTIGAN: They could only be canvassed really if the applicant sought leave to join an additional defendant, namely the corporation sole at common law.

TOOHEY J: Yes, I understand that.

BRENNAN CJ: Taking the steps one by one, assuming that Mr Semmler's argument based on section 3 had some merit - leave aside what merit, but some merit - the steps then are that we have, if

we construe the writ and the affidavit at least in a way in which I thought they should be construed, namely that it is suing Barry Hickey personally, the question then is whether it was right to substitute the corporation which arguably might be liable for Barry Hickey. What do you say about that?

MR COSTIGAN: That is the statutory corporation?

BRENNAN CJ: The statutory corporation.

MR COSTIGAN: We rely on the unanimous decision of the Court of Appeal that it was futile to join or substitute the - - -

BRENNAN CJ: Let us assume that the futility argument is not a very strong one.

MR COSTIGAN: Then we say that that is not the kind of question that ought to attract the attention of the High Court. This is a Western Australian statute. There are statutes of this kind but nonetheless different detail in every State of Australia and there is no matter of general interest in the law to determine the meaning of section 3 of the 1916 Act which would affect other statutes or other States.

BRENNAN CJ: It is a question of whether or not *Bridge's Case* has any application, is it not, then?

MR COSTIGAN: Not on that point, we would say, your Honour. If in fact the question of the possible liability of the statutory corporation is the matter which my friends wish this Court to determine, we would say it is not an appropriate case for special leave because it is not going to lay down any principle which covers the whole of Australia but is limited to the interpretation of section 3 of the Western Australian Act. That is on the question of whether there is liability. The question of whether *Bridge's Case* applies is another question. That is a question of the meaning of mistake and to what extent the mistake is as to the name of the person intended to be sued or as to the identity of the person to be sued. On that we rely on the decision of the Court of Appeal and we say it was correct and it is not a matter where the law will be enhanced by this Court looking at it again.

TOOHEY J: Could I just ask you this additional question, Mr Costigan. You appear to be saying that if the Court of Appeal's order stands, it would still be open to the applicants to seek to add as a defendant Barry James Hickey as a corporation sole at common law.

MR COSTIGAN: It would be open to them; it would be resisted.

TOOHEY J: I appreciate that it would be resisted, but there does not seem to be any question of res judicata or anything of that sort that would preclude such an application being made.

MR COSTIGAN: We do not see that. There would be other serious defences.

TOOHEY J: I appreciate there would be other arguments against it.

MR COSTIGAN: We say that because there has been to date no application by the applicants to join the corporation sole at common law under its correct name as a defendant to these proceedings.

TOOHEY J: Thank you.

BRENNAN CJ: Thank you, Mr Costigan. Mr Semmler.

MR SEMMLER: If your Honours do not grant special leave in this case, the decision of the Court of Appeal will stand and effectively the applicants will have no opportunity to argue a claim for redress against the Roman Catholic Church hierarchy in Western Australia.

McHUGH J: Why do you say that?

MR SEMMLER: Because in relation to the matter that Justice Toohey just raised, it will be futile for the applicants at some later stage to seek to bring in another party. The reason for that is that these proceedings were commenced in August 1993. In December 1993 the *Choice of Law Act* took effect and the effect of that Act is that in respect of any proceedings commenced after that time, any proceedings against a new party would be out of time; it would be absolutely futile.

TOOHEY J: You mean because the Western Australian *Limitation Act* would apply with no provision, or no relevant provision, for extension?

MR SEMMLER: That is correct. As Justice Kirby noted in his dissenting judgment on this issue of the common law corporation sole, these 201 applicants secured a legitimate forensic advantage in commencing proceedings at a time when the limitation law to be applied was that of New South Wales rather than Western Australia. That advantage will be lost absolutely if special leave is not granted in this case.

McHUGH J: Speaking for myself, I think you may have an arguable point on section 3, but the difficulty I have is the *Bridge* point having regard to the terms of the writ and the statement in paragraph 5 of the affidavit of your solicitor which is set out at page 66 where he said that he thought "the present Archbishop might be liable for the torts of his predecessors". That reflects language of vicarious liability. He would not be talking about the present Archbishop being liable for the torts of his predecessors. He would be saying that the corporation sole was liable, full stop.

MR SEMMLER: Your Honour, this - - -

McHUGH J: It is plain from the last sentence of paragraph 6 that he was not even aware that the Act created a corporation sole; he says so in terms. So he did not intend to sue the statutory corporation sole.

MR SEMMLER: Your Honour, this point was not taken before Justice Levine. The question of mistake within Part 20 rule 4(3) was not contested by the defendant. The defendant's contest was that it was futile. The technicalities of *Bridge Shipping* and Part 20 rule 4(3) were not in contest.

BRENNAN CJ: They were in the Court of Appeal, were they not?

MR SEMMLER: In our respectful submission, that itself was an error. But they were not in contest before Justice Levine and, even if they were, the relevant mistake, to deal with your Honour Justice McHugh's point, must be - the whole of that paragraph of the applicants' solicitor must be looked at in context. He swears that he is informed that the Archbishop of Perth "might be liable for the torts of his predecessors". Assuming for the moment that he gets the name wrong, the relevant characteristic peculiar to this defendant that he is seeking to sue and to no other person is that he is the Archbishop in his official capacity rather than the person, a corporation sole liable for the torts of his predecessors.

The relevant characteristics within the *Bridge Shipping* test are the corporate capacity and the official capacity. That is what he sought to sue but it appears that the Court of Appeal took the view he got the wrong name.

BRENNAN CJ: But in your attempted pleading you have neither sued Barry Hickey nor the corporation sole.

MR SEMMLER: At common law.

BRENNAN CJ: At common law.

MR SEMMLER: Your Honour, but we have not yet been allowed to file any pleadings.

BRENNAN CJ: That is hardly to be attempted in the light of the fact that you have exhibited a number of pleadings to your affidavit.

MR SEMMLER: Your Honour, the question of the liability of the corporation sole at common law was never abandoned. There was a notice of contention filed in the Court of Appeal.

BRENNAN CJ: It is not a question of never abandoned - never raised.

MR SEMMLER: It was raised, your Honour. It is in Justice Levine's judgment at many stages. He has to deal with this issue which was put forward. It was never abandoned. A notice of contention was filed and submissions were put in relation to it. Your Honours, could I just finally say in relation to section 3, the statutory Archbishop, if the legislature had not intended what we say they intended, they would have used in section 3 the name of the corporation sole when they said:

and all acts, matters, and things that might or could be done and performed by the Roman Catholic Bishop of the Diocese of Perth -

That is his ecclesiastical name. That is not the corporate name that the statute gave him in 1911. That is his ecclesiastical name. And if they contended that this was simply - as your Honour Justice Toohey said, it was simply a matter of changing the name - - -

BRENNAN CJ: Mr Semmler, your time has expired.

MR SEMMLER: Yes, if your Honour pleases.

BRENNAN CJ: The Court will consider what decision it will give in this matter and hopes it is in a position to give a decision after lunch today.

AT 10.50 AM THE MATTER WAS ADJOURNED

UNTIL LATER THE SAME DAY

UPON RESUMING AT 2.23 PM:

BRENNAN CJ: To ascertain the persons whom the plaintiffs sued in these proceedings, one looks to the summons in the first place. The relevant defendant was there described as "Barry James Hickey, Archbishop for the time being of the Archdiocese of Perth".

The person whom the plaintiffs' solicitors then intended to be the defendant is identified in an affidavit sworn by a Mr Stephens who said:

In late August 1993, I was informed by Mr Paul Mulvaney, a partner of the firm Slater and Gordon ... that the Archbishop of Perth may be a corporation sole and that the present Archbishop might be liable for the torts of his predecessors. As a result, I believed the present Archbishop was a successor in law and in title to his predecessor. I therefore caused the present Catholic Archbishop of Perth, Barry James Hickey, to be named as a defendant in these proceedings.

I always intended to sue the holder of the office of the Catholic Archbishop of Perth. At the time of commencing proceedings on behalf of these men, I was not aware of the existence of an Act called the Roman Catholic Church Property Act 1911 (WA) and I was not aware that the said Act created a

corporation sole.

We are unable to come to any conclusion on this material other than that the individual, Barry James Hickey, was the person whom the plaintiffs sued and intended to sue. It is conceded that the plaintiffs have no cause of action against him.

The question whether there is any corporation sole at common law and, if so, the title by which it might have been sued does not arise.

The Court of Appeal held that the corporation of the Roman Catholic Archbishop of Perth created by the *Roman Catholic Church Property Act 1911* (WA) as amended by the *Roman Catholic Church Property Act Amendment Act 1912* and as further amended by the *Roman Catholic Church Property Acts Amendment Act 1916* could not be substituted as a defendant for Barry James Hickey. The Court reached that decision by applying the decision of this Court in *Bridge Shipping Pty Ltd v Grand Shipping SA* [1991] HCA 45; (1991) 173 CLR 231. The application of that case by the Court of Appeal reveals no error of principle. Moreover, although the scope of section 3 of the 1916 Act is open to argument, we do not think that the appellants, even if they were granted special leave on other points, would enjoy sufficient prospects of success on this point to justify the grant of special leave. Accordingly, special leave will be refused.

MR COSTIGAN: I would ask for costs, your Honour.

BRENNAN CJ: Do you have anything to say, Mr Semmler?

MR SEMMLER: I have nothing to say, your Honour.

BRENNAN CJ: It will be refused with costs.

AT 2.26 PM THE MATTER WAS CONCLUDED