
The Bathurst Diocese Decision in Australia and its Implications for the Civil Liability of Churches

NEIL FOSTER¹

Associate Professor in Law, Newcastle Law School, University of Newcastle, New South Wales, Australia

In the New South Wales Supreme Court decision of Anglican Development Fund Diocese of Bathurst v Palmer in December 2015, a single judge of the court held that a large amount of money which had been lent to institutions in the Anglican Diocese of Bathurst, and guaranteed by a letter of comfort issued by the then bishop of the diocese, had to be repaid by the bishop-in-council, including (should it be necessary) levying the necessary funds from the parishes. The lengthy judgment contains a number of interesting comments on the legal personality of church entities and may have long-term implications (and not merely in Australia) for unincorporated, mainstream denominations and their contractual and tortious liability to meet orders for payment of damages. The article discusses the decision and some of those implications.

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One of many interesting questions in the field of law and religion concerns the legal personality of the larger denominational churches. It becomes a pressing question when there is a need to hold such denominations accountable either for contractual obligations or in the law of tort. The tragic phenomenon of child sexual abuse perpetrated by clergy has made this all the more vital an issue to resolve.

The decision of a single judge of the New South Wales Supreme Court, Hammerschlag J, in *Anglican Development Fund Diocese of Bathurst v Palmer* (hereafter ‘the Bathurst Diocese case’)² canvasses many of the relevant issues in a contractual context (the question of repayment of a loan made to the diocese on security of a ‘letter of comfort’ from the then bishop). But the comments made will also have implications for actions in tort, and may be of some interest to courts, lawyers and academic commentators in other jurisdictions.³

1 This is a revised version of a paper given at the Cardiff Festival of Canon Law, hosted by the Centre of Law and Religion at Cardiff University and the Law and Religion Scholars Network, 5–6 May 2016.

2 [2015] NSWSC 1856 (10 Dec 2015).

3 There has been a subsequent decision, reported as *Anglican Development Fund Diocese of Bathurst in its own capacity and in its capacity as trustee of the Anglican Development Fund Diocese of Bathurst (receivers and managers appointed) v The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst [No 2]* [2016] NSWSC 226 (10 March 2016) (hereafter ‘Bathurst Diocese No 2’). This was in effect a judicial

Before examining this particular decision, however, it seems worthwhile to set it in the context of some of the previous law on the issues.

THE LIABILITY OF DENOMINATIONS

Many members of the general public are understandably surprised to find that a number of the larger Christian denominations have no unified legal or juridic personality.⁴ The problem is often not present with smaller, more recently established or independent congregations. In Australia, at least, many of those churches have gone through a process of incorporation, often utilising the provisions of specific legislation designed to provide this structure for not-for-profit organisations.⁵

For various reasons, however, it is often the case that the larger denominational churches, such as the Anglican Church or the Roman Catholic Church, have not in the past been set up with overall legal personality. Perhaps relevant factors were that these churches were so deeply involved in the local community, had a reasonably strong resource base and were regarded as a 'good risk' to pay their contractual debts, that there was no external pressure to create a formal legal entity. It has to be said that another factor may have been that, in the past, these institutions enjoyed a high degree of trust from all sectors of society, and so it was assumed that they would not misuse their power or need to be sued. Sadly this trust has been eroded, especially by evidence of matters such as child sexual abuse by clergy, and increasing confirmation that this was concealed by senior leaders of some churches.⁶

Of course, in relation to property holdings there was always a need to provide a formal 'ownership' structure, and this was often done through the law of charitable trusts. Legislation, at least in Australia, was often used to establish corporate entities, which would act as trustees for property. But it was always going to

pronouncement of orders that the parties had agreed following the first decision. It offers no new legal insights, but is useful as an example of the implications of the findings in the first decision.

- 4 A case in point is the United Kingdom decision of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, in which the House of Lords famously declared that, 'the Church of England is not itself a legal entity' (per Lord Hobhouse of Woodborough at para 84).
- 5 In New South Wales, for example, the current such legislation is the Associations Incorporation Act 2009 (NSW). Similar provisions are available in other states and territories in Australia.
- 6 In Australia, these matters are the subject of a major ongoing Royal Commission into Institutional Responses to Child Sexual Abuse; for the latest developments and interim reports, see <<http://child-abuseroyalcommission.gov.au>>, accessed 10 October 2016. The Royal Commission is not confined to investigating major denominational churches, as it also covers government institutions, para-church organisations and smaller churches, among others, but issues related to the major churches have occupied a major part of its time. The Royal Commission has already issued a *Redress and Civil Litigation Report* (September 2015), chapter 16 of which ('Identifying a proper defendant') helpfully reviews a number of matters discussed in this article; <see <https://www.childabuseroyalcommission.gov.au/getattachment/65eccf58-ec82-45b6-934d-023f80b946c9/Redress-and-civil-litigation-report>>, accessed 10 October 2016.

be an interesting legal question as to whether an entity established to hold property could be regarded as legally liable for contracts entered into by clergy or others on behalf of the church, or for wrongs that might cause harm to others. Issues raised include both external relationships (entry into contracts, holding property as against outsiders, being bound by legal obligations such as duties under tort law and the criminal law) and internal relationships (questions of how churches manage their own affairs; who appoints leaders and how; who makes decisions as to what is done; who controls property; and how decisions are made in relation to the churches' members and workers).

There seem to be only a limited range of options for a 'group' to have an identity and role in the legal system. It may simply be an undifferentiated mass of people who choose to act together – an unincorporated association. At the other end of the spectrum, it may be formally established (in the narrow sense of 'set up') by legislation, often an Act of Parliament. Or it may operate as a formally incorporated body, either as a not-for-profit organisation or under a 'corporate' model, being incorporated as a company.

In Australia, decisions needed to be made to allow property to be held by churches when the country was settled. There is some debate about the status of the Church of England, for example, as an 'established' church prior to Federation.⁷ Arguably, since Federation, section 116 of the Commonwealth Constitution would preclude recognition of the Anglican Church as 'established'. However, there are a number of statutes on the books recognising the formal existence of churches and making certain provisions for their property arrangements and (possibly) for other purposes. In New South Wales, for instance, there is the Anglican Church in Australia Constitution Act 1961 (NSW), and there are many others for non-Anglican bodies, such as the Churches of Christ in New South Wales Incorporation Act 1947 (NSW).

In the well-known decision of *Trustees of the Roman Catholic Church v Ellis* (hereafter '*Ellis*'),⁸ the New South Wales Court of Appeal held that the statutory entity created to hold property for the Roman Catholic Church under the Roman Catholic Church Trust Property Act 1936 (NSW) could not be sued as responsible for sexual assault committed by a priest, as that entity had no control over the actions of the priests. Since that time there has been a great deal of doubt as to how denominations may be held liable for the actions of their clergy, especially where those actions took place some time ago, the relevant clergyman is dead or not otherwise worth suing, and the bishop who appointed or supervised him is no longer in post and may also not be worth personally suing.

7 See Dixon J in *Wylde v Attorney-General* (1948) 78 CLR 224 at 284: 'the better opinion appears to be that the Church of England came to New South Wales as the established Church and that it possessed that status in the colony for some decades'. However, as the judge noted at 286, by about the middle of the nineteenth century this status had gone.

8 [2007] NSWCA 117, (2007) 70 NSWLR 565.

What, then, is a denomination if it is not given legal personality by Act of Parliament or other action? As noted, it is in effect an unincorporated association. One characteristic of such an association is that it has no separate legal identity, which means that sometimes *all* the members of the body might be arguably held liable in contracts or in tort, while at other times liability might rest with the leaders of the body at the relevant time (but not later). Mason P commented in *Ellis*:

A corporation has perpetual succession and is liable to sue and be sued. An unincorporated association that is not a partnership is a group of individuals associated together for some lawful purpose other than profit that may or may not have a rigid constitution or a fixed and finite membership. Procedurally, it cannot (at common law) sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity.⁹

In *Victorian WorkCover Authority v Roman Catholic Trust Corporation for the Diocese of Melbourne*, for example, Parrish J in the County Court of Victoria accepted the evidence in that case that ‘the Archdiocese of Melbourne is an unincorporated association’.¹⁰ The case involved injury to a teacher employed at a local Catholic primary school. It was accepted that the employer of the teacher was the local parish priest. The property trust holding legal ownership of the school land was held not to be liable for the injury, as they did not exercise any real control over what happened on the premises, and hence were not ‘occupiers’ for purposes of owing a duty of care.¹¹ The damages owed by the priest (as employer) were apparently covered by an insurance policy taken out by the priest.¹² WorkCover were trying to recover amounts that had been paid out by way of compensation from the diocese, but the court held that there was no incorporated body to be sued at the larger, diocesan, level.

Another case holding that the Roman Catholic church as such is a voluntary body, and that ‘property trusts’ cannot be sued in tort for wrongs committed by clergy is *Archbishop of Perth v AA* (a case of sexual abuse by clergy).¹³ In *Trustees for the Roman Catholic Church for the Archdiocese of Sydney v TGP Architects and Planners Pty Ltd*, Campbell J commented:

The [civil law] does not recognise a parish as having any separate legal personality. Indeed, it does not recognise a church, or parish, as having any

⁹ Ibid at para 47.

¹⁰ [2013] VCC 71 at para 24(b).

¹¹ Ibid at para 132.

¹² Ibid at para 17.

¹³ (1995) 18 ACSR 333.

separate legal personality. Rather, churches and parishes are voluntary unincorporated associations in the eyes of the civil law.¹⁴

In general, the courts have said that at common law there is something of a presumption of 'non-interference' with the rules of voluntary associations.¹⁵ Nevertheless, the courts may sometimes be involved in the affairs of such organisations where there is a question of property rights, or the right to earn a living.

The decision in *Sturt v the Right Reverend Dr Brian Farran Bishop of Newcastle* (hereafter '*Sturt*') raises some of these issues.¹⁶ Two members of the clergy, Father Sturt and Father Lawrence, were accused by a member of the public of having been involved in sexual activity with him when he was a minor, and in particular of being involved in an incident at a motel in connection with a clergy conference in Narrandera, Diocese of Riverina. A disciplinary panel was set up under internal church rules, which met and concluded that the allegations were true and warranted the two priests being disciplined and deposed from holy orders. The priests sought an injunction to prevent the Bishop from proceeding. Sackar J noted:

In the present case the defendants assert the plaintiffs have relevantly no civil right to articulate and hence there is nothing for a court to entertain. In particular they say there is not nor could there be for example a contract of employment or contract of service and point to the fact that a clergyman holds office and has not been traditionally regarded as an employee. Further the defendants submit that absent a property right (of which there is none) the plaintiffs have no standing. In addition 'reputational' interests they submit do not provide an adequate basis or standing for the relief claimed . . .

It should be acknowledged at the outset that the *church is a voluntary association*; that in and of itself has significant consequences in terms of the plaintiffs ability to articulate their rights.

It should also be acknowledged that courts have routinely not interfered in the internal workings of voluntary associations, especially religious organisations: *Attorney-General (NSW) v Grant* [1976] HCA 38; (1976) 135 CLR 587 at 613 per Murphy J.

With a voluntary association there is therefore a need to identify with some precision whether some civil or proprietary right has been infringed, which as a matter of law requires enforcement, before intervening in such an organisations affairs.¹⁷

14 [2005] NSWSC 381 at para 22.

15 See *Cameron v Hogan* (1934) 51 CLR 358.

16 [2012] NSWSC 400.

17 *Ibid* at paras 44–47, emphasis added.

The judge concluded that the priests had not been shown to be ‘employees’ of the church.¹⁸

This did not mean that the court had no jurisdiction to consider the process by which the priests had been disciplined. Following *Wylde v Attorney-General*¹⁹ and *Scandrett v Dowling*,²⁰ it was held that the constitution of the Anglican Church did not *on its own* create legal rights (that is, in relation to internal doctrinal issues).²¹ However, in a number of decisions involving religious officers being removed from office under disciplinary procedures, the courts have been willing to hold that a failure to follow appropriate procedures may be justiciable.²² Hence Sackar J in *Sturt* ruled that the question of whether appropriate procedures had been followed was one that he was prepared to consider:

There is little doubt in my mind that the [Professional Standards] Ordinance is drafted in language that manifests an intention to affect legal rights and obligations. Given the nature of the conduct which is sought to be examined and what is potentially at stake it seems to me that it cannot be gainsaid that that is the intention of the PS Ordinance. It has been put by the Primate, and I agree, that the plaintiffs each have an *accrued right to hold and to hold themselves out as entitled to hold, Holy Orders in the Anglican Church of Australia* which right is clearly at risk as a result of steps undertaken or purportedly taken under the PS Ordinance. There is also equally little doubt that a *priest enjoys certain rights, privileges or advantages attached to the office (so described)*. These would include the actuality or prospect of receiving emoluments of the office of a priest. One example which was given was to solemnise a marriage under and for the purposes of the Marriage Act 1961 (Cth). Of course in doing so the priest is entitled to make a charge for the delivery of services. There is also the prospect envisaged by s 77(d) that if deposed from Holy Orders the person may not be able to hold an office which would otherwise be held by a lay person without the prior

18 See *ibid*, discussion concluding at para 86. A full discussion of the employment status of ministers of religion is beyond the scope of this article. For an overview of the issues, see N Foster, ‘Employment status of clergy’, *Law and Religion Australia*, 3 May 2015, <<https://lawandreligionaustralia.wordpress.com/2015/05/03/employment-status-of-clergy/>>, accessed 10 October 2016. In the UK, see Frank Cranmer, ‘Employment status of clergy: goodbye to the “servant of God”’, *Law & Religion UK*, 9 May 2016, <<http://www.lawandreligionuk.com/2016/05/09/employment-status-of-clergy-goodbye-to-the-servant-of-god/>>, accessed 10 October 2016.

19 (1948) 78 CLR 224.

20 (1992) 27 NSWLR 483.

21 *Sturt* at para 102.

22 See, eg, *MacQueen v Frackelton* (1909) 8 CLR 673; *Baker v Gough* [1963] NSWLR 1345.

consent of the bishop. Examples of this would be a church warden or a member of a parish council.

Treating the PS Ordinance in this way is, it seems to me, entirely consistent with the decisions of *Macqueen v Frackelton*, *Baker v Gough* and *Raguz v Sullivan*.

On matters of discipline and if the PS Ordinance is invoked in the Diocese of Newcastle, *I consider its language should properly be construed as giving those threatened or whose careers are placed in jeopardy contractual rights to ensure the integrity of the process*. Those rights, as here, can be enforced against the members relevantly of the PSC [Professional Standards Committee] or PSB [Professional Standards Board] and if need be the bishop (the first defendant).

The process of investigation of allegations and in turn the public ventilation of such allegations are it seems to me to be contractually governed by the promised procedure with its promised safeguards.

This contractual regime would in and of itself permit either plaintiff in my opinion to complain about a failure on the part of the church as it were (but relevantly members of the PSC and/or PSB) to observe the appropriate and/or promised procedures and if not to seek relief in the courts. In my view the plaintiffs' claims are justiciable.²³

Thus it seems to be established that someone who is being disciplined by a religious body, and in danger of losing 'entitlements', may be able to complain about standard administrative law concerns such as lack of natural justice or proper procedures being followed. Interestingly, Sackar J also accepted the argument that, reputation being to some extent also a valuable right, a claim could have been made on the basis that a person's reputation would have been badly impaired by the result of a finding of an internal tribunal.²⁴

Having gone on to examine the course of the procedures, the judge in *Sturt* concluded that natural justice *had* been observed, that the priests had been given an opportunity to respond to the allegations made and that there was no ground to interfere with the final decision. The case is an important example of the fact that a court may act to supervise the actions of an unincorporated association where those actions may have a detrimental financial impact on a member of the association.

It is against the background of those general principles that we turn to the *Bathurst Diocese* case.

23 *Sturt* at paras 142–146, emphasis added.

24 *Ibid* at para 163.

THE FACTS OF THE *BATHURST DIOCESE* CASE²⁵

The Anglican Diocese of Bathurst is a part of the Anglican Church of Australia. It is one of 23 dioceses in Australia, and is a part of the Province of New South Wales (corresponding to the state of the same name). It is formally presided over by a synod, which between annual meetings delegates decision-making to a body called the bishop-in-council (BIC). The other key player in these proceedings was a corporate body known at the relevant time as the Anglican Development Fund Diocese of Bathurst (ADF), established under authority of unusual legislation allowing synods of Anglican dioceses to create such bodies, the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW).²⁶ The ADF had been established, as Hammerschlag J noted, as

the Anglican Diocese of Bathurst Stewardship for Ministry Fund, to receive deposits from persons or organisations (not being diocesan organisations, corporations or parishes) and to invest such monies for the purposes of returning a surplus to be used to provide financial support for ministry objectives for the Diocese. (para 12)

It is worth setting out the scheme that had been devised to use the ADF to raise money for diocesan ministry purposes, as described in the case:

In 2007, it was decided that the Diocese would go, after a fashion, into the business of banking. ADF was chosen to be the Diocesan ‘banker’. The idea was that instead of parishes and other Diocesan bodies individually borrowing money from commercial banks in dribs and drabs, as to that time had been the case, Church borrowing and lending would be centralised. All necessary funds would be borrowed by ADF from a bank and ADF would on-lend it to Diocesan organisations. It was intended that ADF would profit by lending at interest rates higher than the ones at which it borrowed. The ADF Ordinance was amended to give its Board the power to lend and advance money or give credit to any parish, school or any organisation subject to the control of Synod, whether on security or not, and to take security (if any) for money lent or advanced or credit given by it. The ADF Ordinance included a provision requiring its Board to adopt a Prudential Code of Practice. (para 13)

²⁵ All references to the *Bathurst Diocese* case are given in the main text and not otherwise identified.
²⁶ Unusual because, in general, a ‘body corporate’ may only be created under specific legislation which is administered by public servants. Here the power to create artificial legal entities of this sort is given to a religious body.

To cut a long story as short as possible, the ADF borrowed a large amount of money, to the tune of some AU\$40 million, from the Commonwealth Bank. It lent that money to the management of some newly established church schools. Those schools proved not to be self-sustaining, and more money was lent (in some cases, contrary to advice that the board of the ADF had received from external advisors). In the end, the money was all lost, and the diocese was not able to repay the bank.

The bank had in place special lending arrangements, which applied to large religious denominations. Contrary to its normal practice in giving other loans, it would not require a mortgage over land or assets as security. Instead, it agreed to accept a 'letter of comfort' provided by the then bishop, the Right Reverend Richard Hurford. The letter purported to commit the assets of the Anglican Property Trust Diocese of Bathurst (APT) to underwrite the loan to the ADF. The APT was a corporate entity which was 'constituted as a body politic and corporate under the provisions of the Church of England Trust Property Incorporation Act 1881 (44 Victoria) (NSW)' (para 18). As the title of the legislation indicates, the APT was set up to hold property in trust for the purposes of the church.

Late in 2013 the ADF defaulted on its loan. Receivers were appointed to the ADF, and the two church schools concerned were sold to the Sydney Anglican Schools Corporation (based in the Diocese of Sydney), although still owing money.

Clause 32 of the ordinance establishing the ADF provided that, in case of a deficiency in funds, 'Bishop-in-Council shall promote an ordinance to levy the necessary funds from the parishes'. The receivers wrote to the ADF and to the current BIC demanding that this step be taken to repay the money owing, which after the sale of the schools and some other adjustments was still about AU\$25 million.

Three separate actions were initially begun. The first was the 'Board case', whereby the ADF (controlled now by the receivers, of course) in effect sued its own board members for breach of duties they owed not to commit the body to expenditure when they knew it could not meet its obligations (see para 38). The second was the 'Bank case', whereby the Commonwealth Bank was suing the BIC as managers of the diocese, to require them to liquidate diocesan assets to make up the money owing to the bank from the ADF (see para 40). (The order sought here was that assets be sold and the money paid to the ADF.) The final action was the 'ADF case', whereby the ADF also sued the BIC as diocesan managers, in this case on its own account requiring liquidation of diocesan assets to enable the ADF to pay the money it owed to the bank (see para 41).

In circumstances that have not been fully disclosed, the Board case was apparently settled and some AU\$11.3 million found by way of settlement payment

from board members to the ADF (para 39). However, there was a remaining amount of some AU\$14 million, which was still the subject of the Bank and ADF actions, which are the matters dealt with by the judgment under discussion.

THE RULINGS AND FINDINGS IN THE *BATHURST DIOCESE* CASE

Without going into fine detail on the pleadings, there were broadly five main issues involved in the litigation, issues that may arise in other cases involving ecclesiastical bodies (although some involve specific legislation in New South Wales). Four of these concerned the Commonwealth Bank action and were laid out in paragraphs 156–164:

- i. Had there been an intention to enter into legal relations when the then bishop issued the ‘letter of comfort’, so that the bank had a contractual right to require BIC to cause the loan to be repaid from diocesan funds?
- ii. If so, with whom was the bank entering into a contract for the money to be repaid? Which ‘BIC’ was liable – the members of the body at the time when the initial arrangement was made, or the current members of the body?
- iii. Regardless of whether there was a binding contract, did the BIC have a ‘duty’ to cause the bank loan to be repaid out of diocesan funds, so as to give the bank a remedy under section 65 of the Supreme Court Act 1970 (NSW)?
- iv. For the purposes of carrying out its obligations to repay, could the BIC get access to church trust funds, the purposes of which might not explicitly authorise them being used to repay diocesan debts?

A final issue related to the ADF action: did the ADF, as a part of the diocesan ‘structure’, have the right to require an ordinance to be passed to levy diocesan funds to repay the money (paras 165–176)?

The BIC mounted a strenuous defence of all these claims. Hammerschlag J summed up counsel for the BIC’s argument as follows:

A general synopsis of BIC’s position from an alternative perspective to that in its written Opening Outline might be the following. It denies the existence of the Diocese as an institution capable of incurring obligations which it formally and solemnly undertook. It denies the authority of its former Bishop and titular and spiritual head to have incurred obligations on its behalf which he formally and solemnly undertook. It denies that obligations formally and solemnly undertaken are legally binding. It denies the existence of formal documents of obligation where there is clear and

cogent evidence of their existence. It denies that ordinances passed to give protection to lenders including Diocesan lenders in the event of borrowers' default are effective to give any such protection. It denies that enabling legislation passed to give it control over church trust property gives it such control. It denies that its present Bishop would exercise powers and authority vested in him to discharge obligations formally and solemnly undertaken by his predecessor, even if he could do so. It denies the existence of any church trust property available to be used to discharge obligations it may be found to owe. (para 182)

The tone of the judge's comments reveals the views he had formed of the arguments. In short, the BIC lost on virtually every point that it took, and the current BIC was ordered to cause the money to be repaid by liquidating as many diocesan assets as were required.

It is impossible to do full justice here to the detailed reasons provided in a careful review of the law. However, the following summarises the main points and responds to the five issues outlined above.

Intent to create legal relations

On this issue there was no real doubt. The relationships between the parties here did not fall into any of the commonly accepted categories where this question has proved difficult in the past (such as the relationship between close family members, or the relationship between a clergyman and his congregation, or between a clergyman and his 'episcopal superior'). The question involved 'an objective assessment of the state of affairs between them, that is, an assessment of what was conveyed objectively by what was said or done' (para 189), and here there was a document and a transaction all the features of which signalled that it was a commercial arrangement as to which either party could resort to legal procedures for enforcement, if needed:

Do the terms of the Letter of Comfort, seen against the events that surround its inception, reflect an intention to create legally binding relations? In my opinion, the answer is in the affirmative. Its purpose, formality, terminology and substantive content all evince that intention:

1. it was brought into existence as a component, insisted on by the Bank, of a significant commercial lending transaction;
2. it was required, given and taken as 'security' (whatever it was worth) for that transaction. The Bank's proposal letter of 12 November 2007 stated that the multi-option facility limit was to be 'secured by a letter of acknowledgement from the Church'; the Bank's 22 November 2007 Letter of Offer required 'A Letter of Acknowledgement by the Bishop of Bathurst, Anglican Church of Australia Diocese of

- Bathurst located at 3 Church St Bathurst NSW 2795'; the Letter of Offer contained an express acknowledgement that any 'Security' listed in the letter would extend to cover the borrower's obligations under the facility; and the covering letter enclosing the specimen Letter of Acknowledgement stated that the Bank would be relying upon it as its sole security. The giving of security implies bindingness;
3. it is a formal instrument under the hand and seal of the Bishop of the Diocese;
 4. it records, under the signature of the Registrar, that it had (as was the fact) been registered in the Register of the Acts of the Bishop, which was available for inspection by the public;
 5. it contains a Certificate pursuant to cl 2 of the Finance Ordinance under which the Diocese accepts responsibility for an advance by the Bank;
 6. it describes its predecessor as the Letter of Guarantee dated 9 January 2008, and it withdraws it; and
 7. its terminology is that of binding obligation, commitment and promise. It records and confirms APT's approval for the Bank to lend to ADF. It confirms ADF's power to borrow. It confirms the commitment of the Diocese to ensure that ADF meets its financial commitment to the Bank. It confirms the commitment of the Diocese to use its best endeavours and powers, conferred by legislative or other means, to resolve issues that may arise with the loan facilities. (para 195)

Identity of the other contracting part(ies)

What was slightly more difficult was to identify with whom the bank was contracting, given that it had intended to enter a binding contract with someone. The material noted previously about the nature of the Bathurst Anglican diocese was affirmed early in the judgment: 'At no level does the Church itself, as an institution, have corporate existence. It is a series of unincorporated voluntary associations at different levels: national, provincial, diocesan and perhaps even parish' (para 6). Hammerschlag J accepted the view, noted earlier, that 'A voluntary association does not, in law, have any existence apart from its members, and in itself can acquire no rights and incur no obligations: *Carlton Cricket & Football Social Club v Joseph* [1970] VR 487 at 488' (para 199).

Insofar as Bathurst Diocese had purported to enter into the contract, through the agency of the bishop, the question was whether the contract was with every person associated with the diocese or with some smaller group. Hammerschlag J adopted the view taken in previous decisions that a contract entered into with an unincorporated association will usually be deemed to be entered into with the

members of the management group.²⁷ Here this was the bishop-in-council committee. But was the contract with the BIC at the time of the entry into the arrangement, or the current BIC?

After some discussion of apparently conflicting approaches, the judge concluded that, in a situation of ongoing obligations (as opposed to something like a one-off transaction), the law would usually be that the obligation attaches to each successive management committee as they in turn take office. He quoted (at para 221) the following passage from the Full Court of the Supreme Court of South Australia in *Harrington v Cooté*:

I acknowledge the difficulties in identifying the persons who are the contracting parties of an unincorporated association. In my view, those difficulties are not as great in the case of a closely structured and continuing organisation like the Anglican Church which has clearly identifiable committees and tribunals with a readily ascertainable membership. *The members of those bodies, and the ecclesiastical and other officers of the Anglican Church, on taking office, may be taken by that very act, to adopt and become bound by the legal relationships of their predecessors in office.* I would hold that the bishop of the diocese and, from time to time, the parish priest are legally bound by the terms and conditions on which the licence was first granted. So too are the incumbents of any office or tribunal which has a power to affect the rights and interests granted by the licence. Furthermore, a breach of the constitutional instruments and canons and other rules of the Anglican Church by those office holders need not be treated as a breach committed by all members of the Anglican Church including the holder of the licence. In any event, an aggrieved parish priest sues on the contractual terms of the licence and not as a mere member.²⁸

Taking into account these principles, Hammerschlag J concluded that, when the bishop entered into obligations under the letter of comfort, he did so on behalf of the BIC, and with the intention that those obligations would be binding on future members of that body:

It cannot be, and would not have been contemplated to be, the fluctuating membership of Bishops, clergy and laity as a whole, amounting to hundreds, even thousands of people, who have no relevant function, authority

27 See paras 204–206, referring to *Bradley Egg Farm Ltd v Clifford* [1948] 2 All ER 378.

28 *Harrington v Cooté* (2013) 119 SASR 152, per Kourakis CJ at 162–163, para 25, emphasis added.

or power, or all Diocesan corporations, whatever their business. Consistently with the view taken by Hutley JA in *Peckham v Moore*,²⁹ it is clear from the Letter of Comfort itself that the whole membership was not intended by the Bank or those who negotiated with it to be the contracting parties.

The sensible, commercial and rational conclusion is that the Bank contracted with those members of the overarching association who can, and who would reasonably be expected to, do or procure such things that are necessary to give the Bank the benefit of the Letter of Comfort, that is, those persons who exercise and who are expected to exercise practical power and control over church trust property . . .

The persons who can, and would, be expected to do those things that are necessary to give the Bank the benefit of the Letter of Comfort are, in my opinion, BIC *for the time being*. (paras 281–282, 288, emphasis in original)

Despite the fact that, on the occasion of the giving of the letter of comfort there was no formal resolution approving the arrangement, it was held that the bishop had implied authority to do so, and at any rate his action in doing so was later ratified by the BIC's accepting the arrangements (para 298).

Later, the judge again affirmed that the later members of the BIC were to be taken to have assumed the obligations entered into by the earlier group:

Acceptance alone of appointment to a standing committee designated and regulated by comprehensive ordinances plainly intended, amongst others, to ensure continuity and the proper discharge of obligations, is sufficient outward expression of agreement to be bound by contractual obligations undertaken by that standing committee, and which are still on foot. (para 325)

This finding was challenged by counsel for the BIC (noted at para 321), on the basis that it was inconsistent with the NSW Court of Appeal decision in *Ellis* (see above). In that case it had been held that the present Archbishop of Sydney could not be held liable for the actions of a former archbishop. However, Hammerschlag J held that the two cases were different; that the principle in *Harrington* followed from 'conventional rules of contract and agency'; and that no question of holding someone liable simply because of 'status' arose (para 323).³⁰

29 *Peckham v Moore* [1975] 1 NSWLR 353, discussed in *Bathurst Diocese* at paras 210–212.

30 Formally, of course, *Ellis* was a tort, not a contract, decision, and the distinction seems correct. But it has to be said that the two decisions sit oddly together.

Duty to repay actionable under statute

An independent claim made by the Commonwealth Bank, in addition to its contract claim, was that it had a remedy under a specific statutory provision, section 65 of the Supreme Court Act 1970 (NSW). That section provides as follows:

65 Order to fulfil duty

- (1) The Court may order any person to fulfil any duty in the fulfilment of which the person seeking the order is personally interested.
- (2) The Court may, on terms, make an interlocutory order under subsection (1) in any case where it appears to the Court just or convenient so to do.
- (3) The powers of the Court under this section are in addition to any other powers of the Court.

This slightly unusual, and little-used, provision was held by Hammerschlag J to be available as a separate ground of relief for the bank. He commented that, while not the subject of much judicial consideration, the provision ‘enables the Court to issue orders in the nature of mandamus but stripped of the technicalities which historically restricted the efficacy of such orders’ (para 402). A prior form had restricted duty to that of a public nature, but the current version seems to require only a duty imposed by some other law. The main relevant duty identified by the bank was the obligation imposed by section 2 (regarding the constitution, canons and rules to be binding for Church property purposes) of the Anglican Church of Australia Constitution Act 1961 (NSW):

The several articles and provisions of the Constitution contained in the Schedule to this Act (hereinafter called the Constitution) and any *canons and 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 any way 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 Dioceses of the Church of England within the State of New South Wales.*³¹

The question whether this provision created legal obligations binding upon members of the Church of England (the Anglican Church as it now is) had been discussed in the important decision of *Scandrett*, noted earlier. That decision had involved the question whether the Bishop of Canberra-Goulburn could proceed to ordain a woman as a priest, contrary to a resolution of the General

31 Emphasis added.

Synod, without being restrained by an order of the court. The Court of Appeal held that no order would be issued but, as Hammerschlag J discussed in the *Bathurst Diocese* case, the reasons offered by the members of the court differed slightly. Priestley JA (as noted by Hammerschlag J at para 226) seemed to take the view that the constitution of the Church could create no legal rights or obligations unless in relation to a question of ‘property’, which the ordination issue was not said to touch on. Mahoney JA took a slightly wider view, conceding that the rules of a voluntary association in general may create rights and obligations between the members, even if those matters do not touch on property issues (see the discussion in *Bathurst Diocese* at para 230). But Hammerschlag J took the view that the rules relating to ordination were among those not intended to be legally enforceable.

However, while *Scandrett* arguably did not involve property issues, Hammerschlag J held that the *Bathurst Diocese* matter clearly did. As argued by counsel for the BIC, the letter of comfort did not explicitly relate to a defined piece of real property. Nevertheless, the relevant ordinances provided that the APT could underwrite borrowing. The only reason for putting this provision in place was because the APT held the church’s *property*. As the judge put it:

Given that all property, real and personal, held for the Church is church trust property, everything that is used to discharge debts connected with the activities of the Church in the Diocese must be church trust property. It is clearly connected with or related to the property of the Church in the Diocese, and is clearly capable of being used for purposes in connection with it. This reality is in no way diminished by the fact that the Finance Ordinance does not speak to any particular piece of property. Were this to be a requirement, it would not operate with respect to property which became church trust property after the date of the Ordinance. (para 244)

There were, then, legal duties created by the 1961 Act between members of the Church to observe ordinances made under the authority of the rules of the Church. Among those duties were the duty of the BIC to pay debts entered into on its behalf:

Clause 2 of the Finance Ordinance imposes on the Bishop, his successors, and all members of the Church holding office (in this case as members of BIC), a duty to discharge the responsibility accepted by the Diocese pursuant to the Certificate given. The nature and extent of that responsibility is illuminated by cl 4 and 5, and it includes the duty to pay the amount which the Diocese has been called on to pay by the Bank by reason of ADF’s default, and to take such action, by ordinance or otherwise, as is necessary to achieve this.

Clause 32 of the ADF Ordinance imposes on BIC the duty to levy the necessary funds from parishes to cure the deficiency in ADF's funds, and to promote such ordinances as may be required to do so.

In my opinion, the Bank is plainly personally interested in the fulfilment of these duties. (paras 407–409)

The only remaining question under section 65 was whether it was appropriate to make an order requiring fulfilment of these duties. Before that question could be answered, Hammerschlag J had to address the next substantive issue, that of the impact of the trusts on which property was held.

Use of church trust funds other than as explicitly authorised

It was accepted that all the property held by the diocese was held on charitable trusts (most, presumably, for the advancement of religion – see, for example, para 436). But the order sought by the bank and the ADF was that property be realised, if needed, and the proceeds used to pay off a debt. Was that use of the property authorised by the trusts on which the property was held?

Hammerschlag J was presented with long lists of individual properties owned by the diocese under various forms of trust. The judge examined and discussed a representative sample at paragraphs 438–491. To summarise, for most of the properties he found that there was either a trust for the general purposes of the Anglican Church or the diocese (and hence there would be no breach of trust to use that money to discharge a diocesan debt) or a trust for the purposes of a particular parish (see, for example, para 467), in which case it would be for the general benefit of the parish that the diocese of which it was a part was able to pay its debts.

In addition, however, even assuming that there might have been some trusts as to which the specific purposes would not extend to paying the debt, the judge ruled that section 26 of the Anglican Church Trust Property Act 1917 (NSW) (the Trust Property Act) gave a wide-reaching power to the trustees to use property without regard to the specific trusts on which it was held:

(1) It shall be lawful for the synod of the diocese for which any church trust property is for the time being held if it shall *appear to such synod expedient* by reason of circumstances subsequent to the creation of the trusts of such property by ordinance to direct that such property be *sold, exchanged, mortgaged, or let* on mining, building, occupation, or other leases, or otherwise dealt with in manner provided by such ordinance . . .³²

32 Emphasis added.

Hammerschlag J concluded that the literal meaning of the provision allowed the synod to pay no heed to the provisions of trust instruments in disposing of or dealing with property. Hence he declared:

It follows that even if church trust property is held under express terms, s 26(1) of the *Trust Property Act* allows BIC, in the circumstances that have arisen here, by ordinance, to direct that it be sold or otherwise dealt with to honour the Letter of Comfort or make up ADF's deficiency without breaching any trust, or for that matter any ordinance or identified law. (para 520)

This is, perhaps, one point where the judge may be wrong. I think that there was more to be said here for the argument put by counsel for the BIC. Counsel argued that section 26 was intended to allow sale, exchange or mortgage of trust property but was not intended to allow the trust obligations to be ignored (see para 502). I would add that the 'principle of legality', which is commonly cited as an important interpretive principle today, would point in the same direction.³³ The principle is that fundamental common law rights will not be lightly taken away from individuals, unless Parliament has made its view 'irresistibly clear'. The same principle would arguably be applicable to equitable rights.

Here, to remove the protection given to charitable trusts by language that is ambiguous on the point seems wrong. This is especially the case when the Trust Property Act itself contains another provision, which does clearly affect the terms of a trust. This is section 32, noted in passing by Hammerschlag J, where he remarks that the provision:

provides for the power of Synod to vary trusts. The exercise of the power is conditioned upon formation of an opinion of impossibility or inexpedience and is akin to a statutory *cy-pres* jurisdiction, enabling Synod to create new trusts: see *Attorney-General and Others v Church of England Property Trust Diocese of Sydney* (1933) 34 SR (NSW) 36. This is a different type of power. (para 515)

Where there is an express power allowing a trust to be varied, requiring a high barrier of 'impossibility or inexpedience' to be exercised, does it really seem plausible that Parliament would have intended another power conditioned simply on 'expedience' to allow a similar radical alteration of a trust arrangement?

33 For an overview of the rule, see Dan Meagher, 'The principle of legality as clear statement rule: significance and problems', (2014) 36:3 *Sydney Law Review* 413–443.

If the view were accepted that section 26 does not empower the setting aside of trust obligations, that would not undermine the bulk of Hammerschlag J's reasoning. As he correctly points out, most of the 'generalised' trusts for church purposes would comfortably support the payment of diocesan debts. It would, however, presumably allow an individual parish or person affected by a proposed sale of diocesan property, if they could show an unusual trust that would be breached by a sale, to do so on a case-by-case basis.

Ordering an ordinance to levy diocesan property

In the end, therefore, the court was able to order that the BIC comply with the obligation that it had under clause 32 of the ADF Ordinance: 'The Fund shall be guaranteed by the Anglican Diocese of Bathurst to the extent that should there [be] any deficiency in funds, Bishop-in-Council shall promote an ordinance to levy the necessary funds from the parishes.' The court did not specify which sources of funding should be resorted to, in order to obtain the necessary funds: Hammerschlag J said that was a matter for the diocese to decide (para 524). (One of the few orders sought by the bank and the ADF which was denied was an order imposing 'joint and several' liability on all diocesan entities, which Hammerschlag J said was not necessary.) In any event, Bishop Palmer had conceded, in cross-examination, that he would have been willing to pass such an ordinance already except for the fact that he had been advised he could not do so (see para 527).

A final objection made by the BIC – that the proceedings were 'charitable trust proceedings' and ought only to have been brought with permission of the attorney-general – was rejected. The court ruled that they did not involve any issues of the validity or scope of a charitable trust, and hence that the attorney-general's involvement was not necessary. In any event, since leave to commence such proceedings without the involvement of the attorney-general was possible, leave would have been granted if needed (see para 541).

In conclusion, the judge affirmed that the obligations created by the letter of comfort and other related documents were legally binding on the BIC, and that declarations would be issued that they were obliged to levy the funds of the diocese and individual parishes if needed to make up the shortfall. The subsequent orders, as seen in *Bathurst Diocese No 2*, reflect these findings.

The latest news on the outcome of the litigation appears to be as follows:

The Synod of the Diocese of Bathurst in the Anglican Church of Australia has authorized its bishop, the Rt. Rev. Ian Palmer, to sell ten church properties, including All Saints College in Bathurst to satisfy a multi-million debt owed to a commercial bank. On 9 April 2016 the synod authorized

the bishop to liquidate church assets to settle the debt and to ‘take any other action in order to fulfil the obligations agreed in this settlement’.³⁴

EVALUATION AND IMPLICATIONS

It is probably too early to see all the implications of the decision in this case. It is not known yet whether there will be an appeal. But some brief comments may be helpful. While the decision here is not one on tort liability, it may in the end be influential in that sphere. As noted above, the South Australian decision in *Harrington*, while not formally contrary to the decision of the NSW Court of Appeal in *Ellis*, sits somewhat oddly with it. In *Ellis*, it will be recalled, the Archbishop of Sydney at the time of tort proceedings was held not to be liable for the actions of his predecessor at the time of commission of the tort. In *Harrington*, however, subsequent members of the management board of an unincorporated association were taken to have assumed the obligations of a previous board.

It is not clear whether the *Ellis* principle will be tested in the High Court of Australia. It may be, however, that this will not be needed, if the recommendations of the current Royal Commission are adopted.³⁵ The Royal Commission has suggested a formal model of ‘redress’ payments that does not require proceedings in tort, in relation to past abuse by clergy. It has also supported a model for the future, which includes the following recommendation:

State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:

- a. the property trust is a proper defendant to the litigation
- b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.³⁶

Such a model has much to commend it. Indeed, it seems that in practice in recent years large denominational churches have not in fact been relying on

34 G Conger, ‘Insolvent Anglican diocese to sell church schools and properties’, *Anglican Ink*, 25 April 2016, available at <<http://www.anglican.ink/article/insolvent-australian-diocese-sell-church-schools-properties>>, accessed 10 October 2016.

35 See above, n 6.

36 Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, p 511.

the so-called *Ellis* defence. It is also interesting that, in the UK at least, the courts seem to have fairly readily assumed that property trusts associated with churches are available in child sexual abuse cases.³⁷

As to other consequences of the *Bathurst Diocese* litigation, I have indicated above my concerns about the final stage of the findings, where the suggestion is that fairly generally worded legislation can be used to avoid obligations imposed by trusts. I suggest that this is one area that may need to be revisited.

As for the other findings, I think that on the whole they produce a sensible result. While it may be true in strict legal theory that there is no such thing as the Anglican Church or the Roman Catholic Church, their solid buildings and other regular public pronouncements lead most ordinary members of the community to suspect that rumours of their non-existence are much exaggerated. Most would accept the common-sense view that where a senior member of the clergy accepts the loan of a large amount of money, and promises to do all that he can as leader of his organisation to pay back the loan on agreed terms, that this is what he actually intended, and he should be held to the agreement (and his successor should also be so held). The judgment of Hammerschlag J here is to be commended, on the whole, for providing plausible legal justifications for those apparently obvious propositions. The case as a whole, of course, ought to provide even more incentive than was there previously for churches to ensure that proper financial oversight is provided when large and expensive undertakings are entered into with money provided by church members.

37 In relation to the unincorporated De La Salle Brothers, for example, Lord Phillips in *Catholic Child Welfare Society v Various Claimants & The Institute of the Brothers of the Christian* [2012] UKSC 56, [2013] 2 AC 1 at para 33 dealt with the issue very briefly: 'Because of the manner in which the Institute carried on its affairs it is appropriate to approach this case as if the Institute were a corporate body existing to perform the function of providing a Christian education to boys, able to own property and, in fact, possessing substantial assets.'