



HIGH COURT OF AUSTRALIA

Public Information Officer

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MACEDONIAN ORTHODOX COMMUNITY CHURCH ST PETKA INCORPORATED v HIS
EMINENCE PETAR, THE DIOCESAN BISHOP OF THE MACEDONIAN ORTHODOX
DIOCESE OF AUSTRALIA AND NEW ZEALAND AND THE VERY REVEREND FATHER
MITKO MITREV

A church association holding property allegedly on trust for the church could use some of that property to defend itself in court proceedings, the High Court of Australia held today.

His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand, and Father Mitko Mitrev, a former priest of the St Petka Parish in Rockdale in Sydney, instituted proceedings in the New South Wales Supreme Court in 1997 against the Macedonian Orthodox Community Church St Petka Incorporated (the Association), members of its executive committee, and the priest who replaced Father Mitrev. The Association was incorporated in 1992 and church land was transferred to it which the plaintiffs alleged was then held upon trust for the Macedonian Orthodox Church. As well as the Church and Church Hall, the Association owned five home units in Rockdale, a child-care centre at Arncliffe, funds held on deposit and objects of veneration. The Bishop and Father Mitrev (the plaintiffs) alleged the Association wrongly dismissed Father Mitrev, replaced him with an allegedly disqualified priest banned from performing clerical duties, used another allegedly disqualified priest to conduct services in breach of church law, dealt with church property without the Bishop's authority, ceased to remit five per cent of Parish income to the Bishop, and used the property to fund legal proceedings. They alleged the Association had repudiated the trust. The trial, originally set down for 2004, is due to start in November of this year.

The Association instituted separate proceedings to obtain judicial advice under section 63 of the NSW *Trustee Act* as to how it should conduct the main proceedings. Section 63 provided that a trustee may apply to the Supreme Court for direction on any question about administration of the trust property or about interpretation of the trust instrument. Following this direction protected the trustee from liability for breach of trust. Since 2004, Justice George Palmer has handed down four judgments in the judicial advice proceedings. In 2007 he ordered that the Association could access property acquired before 1992 to pay its costs of defending the main proceedings of \$78,666 between 2004 and 2007 and up to \$216,295 for future costs. He found that the trust would benefit from the terms of the trust being resolved once and for all and disputes over administration of trust property being ended.

The Court of Appeal allowed the plaintiffs' appeal and dismissed the Association's summons seeking judicial advice. It held that Justice Palmer erred in exercising his discretion to give judicial advice by failing to take account of material considerations and by an error of law. The material considerations were failure to consider the adversarial character of the proceedings, which generally made the giving of judicial advice inappropriate, and failure to take into account a possible reduction of the trust fund in covering the plaintiffs' costs as well as the Association's costs. The error of law was an order that other orders could later be revoked which would operate

retrospectively. The Association appealed to the High Court. The Court of Appeal also refused the plaintiffs' applications for leave to appeal against judicial advice given by Justice Palmer in 2004 and 2005. The plaintiffs sought special leave to cross-appeal against that refusal.

The High Court unanimously allowed the appeal, restored Justice Palmer's orders and refused the plaintiffs' special leave application. It held that nothing in section 63 precluded the Supreme Court from giving the advice sought by the Association. Provided there was a question about the administration of trust property or the interpretation of a trust instrument – and both kinds of question were present here – nothing in section 63 limited the application to “non-adversarial” proceedings. The Court held that classification of proceedings as “adversarial proceedings” was not useful in deciding whether advice should be given under section 63. Obtaining judicial advice resolved doubt about whether it was proper for a trustee to incur the costs of litigation, which meant that the trust's interests would be protected.

The High Court held that the necessary consequence of section 63 was that a trustee who was sued should take no step in defence of the suit without first obtaining judicial advice about whether to defend the proceedings. It held that Justice Palmer did not seek to settle any disputes, as he only advised the Association that it would be justified in defending the main proceedings and that it could have recourse to certain property to pay the costs of that defence. If individual defendants were found to have participated in grave breaches of the trust they could be exposed to personal liability for the costs of proceedings to remedy the breaches, including the plaintiffs' costs. Justice Palmer was not shown to have erred by failing to have regard to the effect on the trust property of advising the Association that it could properly defend the main proceedings and that it could resort to trust property to do so, provided fraud, wilful concealment or misrepresentation were absent. The Court held that Justice Palmer's order allowing for revocation of his orders only did so with respect to future operation.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*