HIGH COURT OF AUSTRALIA

GUMMOW ACJ
KIRBY, HAYNE, HEYDON AND KIEFEL JJ

MACEDONIAN ORTHODOX COMMUNITY
CHURCH ST PETKA INCORPORATED APPELLANT

AND

HIS EMINENCE PETAR THE DIOCESAN BISHOP
OF THE MACEDONIAN ORTHODOX DIOCESE OF
AUSTRALIA AND NEW ZEALAND & ANOR RESPONDENTS

Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand
[2008] HCA 42
Date of Order: 7 August 2008
Date of Publication of Reasons: 4 September 2008
S107/2008

ORDER

1. *Appeal allowed.*

2. *Respondents to pay the appellant's costs of the appeal.*

3. *Set aside order 1 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 22 June 2007 and, in its place, order that the application for leave to appeal to that Court be dismissed with costs.*

4. *Application for special leave to cross-appeal dismissed with costs.*

5. *Set aside orders 1, 2, 3 and 5 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 23 October 2007 and, in their place, order that the appellant be entitled to be reimbursed out of the Schedule A Property for the balance of its costs, charges and expenses incurred in conducting the proceedings in the Court of Appeal to the extent to which they are not paid by the respondents.*

6. *Order that the appellant be entitled to be reimbursed out of the Schedule A Property for the balance of its costs, charges and expenses incurred in conducting the proceedings in this Court to the extent to which they are not paid by the respondents.*

On appeal from the Supreme Court of New South Wales

Representation

G C Lindsay SC with G O Blake SC for the appellant (instructed by McConnell Jaffray)

T G R Parker SC with R E Steele for the respondents (instructed by Sachs Gerace Lawyers)

R P L Lancaster with M A Izzo intervening on behalf of the Attorney General for the State of New South Wales as amicus curiae (instructed by Crown Solicitor (NSW))

CATCHWORDS

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand

Trusts – Trustees – Judicial advice – Charitable trust – Entitlement of trustee to advice that it would be entitled to defend itself against allegations of breach of trust – Entitlement of trustee to advice that it could fund its defence from trust property.

Trusts – Trustees – Judicial advice – Power of Supreme Court – *Trustee Act* 1925 (NSW), s 63(1) – Limitations on power to give advice – Nature of advice – Power to revoke order providing advice – Effect of revocation.

Trusts – Trustees – Judicial advice – Factors relevant to discretion of Supreme Court to give advice under s 63 of *Trustee Act* 1925 (NSW) – Whether advice in best interests of trust – Whether trustee's financial position irrelevant – Whether Court required expressly to undertake exercise balancing advantages to trust in giving advice against disadvantages – Relevance of adversarial character of proceedings.

Charities – Trustees – Judicial advice – Relevance of public benefit in giving advice.

Practice and Procedure – Appeal from discretionary decision – Necessity of intermediate appellate court identifying particular *House v The King* (1936) 55 CLR 499 error – Whether error shown where trial judge said not to "expressly" consider particular matters not put at trial.

Words and phrases –"all expenses incurred", "question respecting the management or administration of the trust property".

Rules of Supreme Court 1883 (UK), O 55 r 3.
Trustee Act 1925 (NSW), ss 59(4), 63, 85, 93(3).

1 GUMMOW ACJ, KIRBY, HAYNE AND HEYDON JJ. These reasons for judgment are organised under the following headings.

Introduction

2 There are on foot before the Equity Division of the Supreme Court of New South Wales certain proceedings entitled "*His Eminence Petar, The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand v Mitreski*". The parties to this appeal conveniently refer to those proceedings as "the Main Proceedings". They do so to distinguish them from separately instituted proceedings in the Equity Division entitled "*The Application of Macedonian Orthodox Community Church St Petka Inc*". Those proceedings were instituted in order to obtain judicial advice as to how one of the defendants to the Main Proceedings should conduct those proceedings. This appeal arises out of the judicial advice proceedings.

3 In the Main Proceedings there are two plaintiffs. The first plaintiff is His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand. The second plaintiff is the Very Reverend Father Mitko Mitrev, a former priest of the St Petka Parish in Rockdale, Sydney. They are respondents in this Court, but for the most part it is convenient to call them "the plaintiffs".

4 The statement of claim which was extant at the time of the orders which led to this appeal is "Statement of Claim (Version 8)". It alleges that the first five defendants (Lambe Mitreski, Pero Damcevski, Boris Minovski, Eftim Eftimov and Mile Marcevski) were members of the executive committee of the sixth defendant, the Macedonian Orthodox Community Church St Petka Incorporated. The sixth defendant is the appellant in this Court, but for the most part it is convenient to call it "the Association". The Association is the registered proprietor of land previously held upon trust by trustees appointed under a Deed of Trust pursuant to a constitution adopted by the parishioners of the St Petka Parish in 1977. Upon incorporation of the Association in 1992, that land was transferred to it. The Association is alleged to hold that property, and property acquired since 1992, upon trust for the purposes of the Macedonian Orthodox Church. The eighth defendant (Naum Despotoski) is alleged to be acting unlawfully as parish priest of the St Petka Parish in place of the second plaintiff, who, it is alleged, has been wrongly dismissed by the Association. The Attorney-General for the State of New South Wales is the ninth defendant[1]. It is alleged that the Association has contravened the doctrine and law of the Macedonian Orthodox Church in dismissing the second plaintiff, appointing other persons in his place, making changes to the building used as the parish church and in other ways. It is alleged that the Association has broken its trust in various respects, and ought to be removed as trustee[2].

5 This appeal arises out of orders made by Palmer J, sitting in the Equity Division of the Supreme Court of New South Wales, in response to a summons filed by the Association applying for judicial advice under s 63 of the *Trustee Act* 1925 (NSW) ("the Act"). Those orders were made for reasons stated in what will be called Judgment No 3[3] and Judgment No 4[4]. The principal orders are as follows:

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1 There is no seventh defendant.

2 Some of the allegations are set out in more detail below: [145]-[146].

3 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247.

4 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254.

"1. The Association would be justified in defending the Main Proceedings on the issue of the terms of the trust declared by Hamilton J on 7 February 2007 and without limiting its generality:

(a) the allegations in paragraphs 7A and 22 of Statement of Claim (version 8);

(b) the allegations that are raised by the plaintiff by way of defence to the allegations in paragraphs 7A and 22 of Statement of Claim (version 8);

...

2. The Association be entitled to have recourse to the property in Schedule A in the judgment *Metropolitan Petar v Mitreski* [2003] NSWSC 262, other than the Church Land, for the purpose of paying its reasonable costs of defending the Main Proceedings as to the Schedule A Property Issue as follows:

(a) $78,666.01 for the period from 9 July 2004 to 9 February 2007;

(b) up to $216,295.00 for future costs."

It is convenient to refer to the issues identified in order 1 by the expression Palmer J employed – "the Schedule A Property Issue". The meaning of "the Schedule A Property" will be clarified below[5].

6 The Court of Appeal of the Supreme Court of New South Wales (Giles, Hodgson and Ipp JJA) upheld an appeal by the plaintiffs against those and related orders, set them aside, and dismissed the Association's summons seeking judicial advice[6]. The Association appealed against those orders. On 7 August 2008 this Court announced that the appeal was allowed, and the orders of Palmer J restored.

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5 See [11]-[13] below.

6 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150.

7 The Court of Appeal also refused the plaintiffs' application for leave to appeal against directions made as part of two earlier pieces of judicial advice given by Palmer J on 7 May 2004 ("Judgment No 1")[7] and 10 June 2005 ("Judgment No 2")[8]. The plaintiffs made an application for special leave to cross-appeal against that refusal. On 7 August 2008 this Court dismissed that application with costs.

8 It is necessary to explain the reasons for these outcomes in some detail.

Background

9 The background to the litigation as a whole is complex. It is desirable to resist any infection from the parties' fascinated obsession with the minutiae of their innumerable litigious battles since 1997, and the prospect of more to come[9]. The aspects of the background which are relevant to the determination of the present appeal can be summarised as follows.

10 *The origins of the Main Proceedings.* On 14 July 1997 the Association purported to dismiss the second plaintiff as parish priest of the St Petka Parish. The plaintiffs contended that this was wrongful and commenced the Main Proceedings. Hamilton J later granted leave for the plaintiffs to bring the proceedings pursuant to s 6(1)(b) of the *Charitable Trusts Act* 1993 (NSW)[10]. The trial is fixed to commence on 17 November 2008[11].

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7 *Application of Macedonian Orthodox Community Church St Petka Inc* [2004] NSWSC 388.

8 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441.

9 Palmer J compared the litigation to the Sargasso Sea: *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [39]. He saw it as characterised by "the constant shifts and manoeuvrings of the parties": *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254 at [5]. At [7] he spoke of "each twist and turn in the path on the way to a final hearing". At [9] he indicated a fear of "yet another protracted and expensive piece of litigation as a spin-off to the Main Proceedings."

10 *Metropolitan Petar v Mitreski* [2005] NSWSC 330. Section 6(1), (2) and (2A) of the *Charitable Trusts Act* provide:

> "(1) Charitable trust proceedings are not to be commenced in the Court unless:

(Footnote continues on next page)

11 *The Association's property.* Among other things, the Main Proceedings relate to certain items of property owned by the Association. What the parties call "the Schedule A Property" was acquired before the incorporation of the Association in 1992 and comprises land on which stand the building consecrated and used as the Parish Church of the St Petka Parish, and the Church Hall ("the Church Land"); premises at Arncliffe used as a child care centre; and two home units at Rockdale held as investments. What the parties call "the Non-Schedule A Property", acquired since 1992, comprises three other home units at Rockdale also held as investments; funds held on deposit; and objects of veneration within St Petka Church.

12 *The orders of Hamilton J.* After a trial on separate questions pursuant to Pt 31 of the then Rules of the Supreme Court of New South Wales, Hamilton J on 4 April 2003 decided (and on 7 February 2007 declared) that the Schedule A Property was held by the Association on a charitable trust "to permit [it] to be used by the [Association] as a site for a church of the Macedonian Orthodox Religion and for other buildings and activities concerned with or ancillary to the encouragement, practice and promotion of the Macedonian Orthodox Religion."[12]

(a) the Attorney General has authorised the bringing of the proceedings, or

(b) leave to bring the proceedings is obtained from the Court.

(2) The Court is not to give such leave unless satisfied that the Attorney General has been given an opportunity to consider whether to authorise the proceedings or that the referral of the matter to the Attorney General is not appropriate because of the urgency of the matter or other good cause.

(2A) Any such authority or leave may also be given after charitable trust proceedings have been brought so as to enable the continuation of those proceedings."

11 *Metropolitan Petar v Mitreski* [2008] NSWSC 293 at [54]. Lest silence be taken as approval of the delay since the Main Proceedings began, it must be said that it is most unsatisfactory. It was not suggested that any criticism for this delay is to be directed at the courts.

12 *Metropolitan Petar v Mitreski* [2003] NSWSC 262 at [102].

13 This left for future resolution the particular terms of the trust on which the Schedule A Property is held – the Schedule A Property Issue. It also left for future resolution the status of the Non-Schedule A Property. And it left for future resolution the balance of the issues in the proceedings. On 10 March 2004, Hamilton J fixed the trial of all those issues for 9 August 2004.

The judicial advice given by Palmer J

14 *Palmer J's Judgment No 1.* On 16 April 2004 the Association applied to the court under s 63 of the Act for judicial advice. On 7 May 2004, Palmer J delivered Judgment No 1. He held that, in the absence of an opinion from counsel that the Association had sufficient prospects of success in the Main Proceedings to justify it in defending them and to justify it in expending trust funds in defence of them, it would not be right to give the Association advice in unqualified terms that it was so justified. However, he directed that the Association was justified in taking such steps as were necessary to comply with the Court's directions and preparing its case for trial, up to and including 9 July 2004 ("Direction 1"). He also directed that the Association was justified in having recourse to the Schedule A Property (other than the Church Land) for the purpose of paying its reasonable legal costs incurred in two respects: complying with the existing directions of the court and in preparation of its case up to 9 July 2004, when it was expected that the interlocutory applications on foot would have been completed; and procuring an opinion of counsel as to its prospects of success in the Main Proceedings ("Direction 2")[13]. The significance of Direction 1 and Direction 2 in this Court is that the plaintiffs have filed an application for special leave to cross-appeal against the Court of Appeal's refusal to uphold an application, made well out of time, for leave to appeal against those directions[14].

15 *Palmer J's Judgment No 2.* Palmer J's Judgment No 1 appears to have rested on an expectation that all interlocutory applications would be resolved by 9 July 2004 in readiness for the trial fixed by Hamilton J to commence on 9 August 2004. That expectation was not fulfilled, and further interlocutory

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13 *Application of Macedonian Orthodox Community Church St Petka Inc* [2004] NSWSC 388 at [22], [24] and [27].

14 The plaintiffs had, within time, filed a notice of appeal; but after a debate which took place when the Court of Appeal drew attention at the hearing on 8 December 2004 to the question of whether the appeal was competent without leave being granted, the plaintiffs ceased to press the appeal, invited the Court of Appeal to dismiss it as incompetent, and did not apply for leave.

applications were made. In response to a further application by the Association for judicial advice, on 10 June 2005 Palmer J directed in Judgment No 2 that for the purpose of paying its further reasonable legal costs and expenses, up to an amount of $60,000, in procuring a preliminary opinion of counsel as to its prospects of success in the Main Proceedings, the Association was justified in having recourse to the Schedule A Property (other than the Church Land)[15] ("Direction 3"). The significance of Direction 3 in this Court is that the plaintiffs have filed an application for special leave to cross-appeal from the Court of Appeal's refusal to uphold their application, made years out of time, for leave to appeal against it.

16 *Palmer J's Judgment No 3 and Judgment No 4.* In 2006 the Association applied for further judicial advice in relation to the Schedule A Property. On 23 November 2006, Palmer J published Judgment No 3, indicating advice favourable to the Association[16], and made orders to that effect on 22 March 2007 in Judgment No 4[17].

17 In understanding the background against which Palmer J had to consider the application, it must be noted that the Association was restrained by an injunction, granted by the Court of Appeal on 6 October 2006[18], from paying any of the costs of the first–sixth and eighth defendants incurred in certain proceedings, out of its property except for (inter alia) those authorised pursuant to judicial advice. These proceedings include the Main Proceedings, the first judicial advice proceedings before Palmer J, and the purported appeal from his orders. It must also be noted that in early 2007 the Schedule A Property (excluding the Church Land) was worth on one view $1.75 million and on another, which Palmer J adopted, about $1.3 million; the Non-Schedule A Property was worth about $550,000; the Association owed the National Australia

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15 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441 at 448 [84].

16 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247.

17 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254. See above at [5]. A slip in the orders was corrected on 4 May 2007.

18 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2006] NSWCA 277.

Bank about $580,000; and other liabilities included actual or possible liabilities to its lawyers for over $1 million. Further, on the Schedule A Property Issue, the Association's liability for past costs was $78,666 and its estimate of the costs to be spent to finalise that issue was approximately $216,295.

18 One other background circumstance is that, in Judgment No 1, Palmer J found "that the Association has endeavoured to raise money for the further conduct of its defence of the Main Proceedings from its supporters in the Parish of St [Petka], and that it has not achieved any significant success." He also found "that without recourse to the trust property the Association will be without the means of conducting its defence in the Main Proceedings."[19] In Judgment No 2, he found "that the Association is unable to carry the Main Proceedings much further except by recourse to the [Schedule A Property]."[20] That factual assumption, which was at least on some occasions not controverted by the plaintiffs, pervaded Judgment No 3 and was twice explicitly repeated in it[21].

19 Palmer J saw the application before him as raising three questions.

20 The first was whether it was in the interests of the trust over the Schedule A Property that the defence, so far as it concerned the Schedule A Property Issue, be funded out of that property. Palmer J answered that question affirmatively. He found a benefit to the trust in that "the terms of that trust will be resolved once and for all and the disputes as to the administration of the trust property will be ended."[22] Underlying this conclusion is the analysis Palmer J adopted in Judgment No 2[23]:

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19 *Application of Macedonian Orthodox Community Church St Petka Inc* [2004] NSWSC 388 at [19].

20 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* [2005] NSWSC 558 at [54].

21 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [53] and [65].

22 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [50].

23 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* [2005] NSWSC 558 at [56].

> "If the terms of the trust are as the [plaintiffs] contend, a necessary precondition will exist for the Court to find that the Association has misappropriated the trust funds and that it ought to be removed as trustee. On the other hand, if the Court finds that the terms of the trust are as the Association contends, it will probably follow that applying the trust funds in the way in which the [plaintiffs] seek would be a misappropriation and that the Association, in defending the Main Proceedings, has been acting properly to preserve the trust fund from such misappropriation."

The Schedule A Property Issue was thus pivotal to the determination of numerous disputes between the parties. Palmer J pointed out that the purpose of the trust was not the preservation of wealth for the financial advantage of a class of beneficiaries, but rather a charitable purpose – the promotion of religious worship[24]. He continued[25]:

> "[T]he final settlement of disputes as to how the objects of a charitable trust are to be achieved by use of the trust property is an important benefit of the administration of the trust and the value of that benefit is not measured only according to who pays the costs of the proceedings and whether the assets of the trust are increased by the proceedings".

He concluded: "It is in the public interest and for the benefit of the trust estate that there be an end to the disputes as to the terms of the trust under which the Church may be used."[26] Neither the Court of Appeal[27] nor the plaintiffs, at least in this Court, challenged this reasoning.

21 The second question which Palmer J saw the application as raising was whether the opinions of counsel demonstrated that there were sufficient prospects of success to warrant the Association funding its defence on that issue. Palmer J

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24 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [50].

25 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [51].

26 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [52].

27 *His Eminence Metropolitan Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [94] and [116].

indicated that he could not engage, in his reasons for judgment, in analysis of the opinions of counsel, for they were the subject of client legal privilege, as the *Evidence Act* 1995 (NSW), Pt 3.10, Div 1, calls it. Nor, he said, could he state what the strength of the Association's case was in relation to the facts which had been assumed in the opinions but which had not yet been established.

22 After describing the substantive opinion of counsel in general terms and considering various factors[28], Palmer J concluded by answering the second question affirmatively. It is to be noted that the Court of Appeal did not dispute this aspect of Palmer J's reasoning either.

23 The third question which Palmer J saw the application as raising was whether sufficient money could be realised from recourse to the Schedule A Property to meet all costs necessary to carry the Association's defence on the Schedule A Property Issue to conclusion. In Judgment No 4, Palmer J answered the third question affirmatively for reasons[29] which need not now be examined, since neither the Court of Appeal nor the plaintiffs now contest that aspect of Palmer J's reasoning.

24 Judgment No 3 was given on an "overriding proviso" reflected in order 3 in the following words:

> "[T]he expenditure by recourse to the Schedule A Property is justified only if the Association is reasonably of the opinion at the time of making of the expenditure that, if the expenditure is made the Association will have sufficient funds remaining from which it can properly pay the costs of defending the Schedule A Property Issue to finality."

Palmer J's concern was to ensure that "expenditure from trust resources will not be futile"[30] or "fruitless", which it would be if all available funds were "exhausted before the Schedule A Property Issue is decided with finality."[31]

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28 The passages are quoted at [162]-[163] below.

29 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254 at [9]-[10].

30 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [40].

31 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254 at [6].

The Court of Appeal

25 Palmer J's reasons in Judgment No 3 and Judgment No 4 relate to a very difficult problem. The reasons are careful, cautious and detailed. How, then, did the appeal come to be allowed? Despite some apparent indications to the contrary, at least a majority of the Court of Appeal declined to decide that the giving of judicial advice was beyond the power of Palmer J[32]; indeed the proposition that it was beyond power was not advanced by the plaintiffs either in the Court of Appeal or in this Court. Instead the Court of Appeal held that Palmer J erred in his exercise of the discretion. The Court of Appeal approached the appeal apparently keeping in mind the orthodox analysis of appellate intervention in discretionary decisions explained by this Court in *House v The King*[33]. The Court of Appeal found that Palmer J erred in exercising the

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32 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [77] per Ipp JA (Hodgson JA agreeing at [5]). The contrary indications are at [63] and [112]: see below at [28] and [75]. Giles JA said (at [3]) that the Association's application was "foreign to the non-adversarial nature of s 63 proceedings" and this made giving advice "inappropriate". Whether he disagreed with the majority depends on the meaning of "foreign" and "inappropriate".

33 (1936) 55 CLR 499 at 504-505; [1936] HCA 40. There Dixon, Evatt and McTiernan JJ said:

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; [1949] HCA 26.

discretion in three respects: the first two lay in a failure to take into account material considerations, while the third was an error of law affecting one of Palmer J's orders.

26 *Failure "expressly" to consider adversarial character of proceedings.* First, the Court of Appeal held that Palmer J erred in failing "expressly" to address the following facts: that the Association was not disinterestedly seeking advice as to whether it should follow one course of conduct or another, but asked the Court to support its views as to religious doctrine and organisation over those of the plaintiffs; that while it was concerned to discover the true terms of the trust, its principal motivation for this concern was to prove it had not breached the terms of the trust and should not be removed as trustee; and that it was generally inappropriate to give judicial advice in adversarial proceedings[34].

27 *Failure "expressly" to conduct a "balancing exercise".* Secondly, the Court of Appeal criticised Palmer J for failing "expressly" to conduct a "balancing exercise" in which the potential benefits to the trust of authorising the Association to defend the Main Proceedings using trust property and of affording it protection under s 63 "should have been weighed" against "the potential disadvantages that, should the Association be unsuccessful, costs would be lost and [the plaintiffs] would seek to recover their costs from the trust."[35] Despite the language of "weighing" and "balancing", in substance Palmer J was criticised for failing to take into account a possible reduction of the trust fund to cover not only the Association's costs, but also the plaintiffs' costs if they were successful in the Main Proceedings.

28 *Retroactivity of order 6.* The third error found by the Court of Appeal related to Palmer J's order 6[36]. The Court of Appeal treated it as an order rendering the other orders revocable ab initio, and said that Palmer J "erred in

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34 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [82]-[96].

35 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [97].

36 Quoted below at [89].

holding that he was empowered to make revocable orders in respect of the judicial advice he gave"[37].

29 *Re-exercise of discretion.* Because of these three suggested errors, the Court of Appeal set aside Palmer J's decision. It proceeded to re-exercise the discretion. It did so adversely to the Association. The principal reason for doing so was the "essentially adversarial nature of the dispute"[38].

The position of the plaintiffs in this Court

30 Apart from defending the Court of Appeal's reasoning, the plaintiffs submitted that there were three additional grounds, identified in their notice of contention, on which the Court of Appeal could have set aside Palmer J's orders, even though it did not deal with these three grounds. It is convenient to deal with the relevant six points – the three grounds on which the plaintiffs won in the Court of Appeal and the three grounds on which they contend that the Court of Appeal's orders can be supported – in the order in which the plaintiffs dealt with them in this Court. They are:

(a) Was the Association's financial position irrelevant?

(b) Was it wrong, by making order 6, to render the other orders revocable ab initio?

(c) Did Palmer J err in failing to take into account the adversarial character of the proceedings?

(d) Did Palmer J conduct the correct "balancing exercise"?

(e) Did Palmer J deny procedural fairness in relation to privileged material?

(f) Did Palmer J deny procedural fairness in dealing with the Association's application before it had filed its defence?

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37 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [112].

38 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [117].

31 Points (b)-(d) are points on which the Court of Appeal's reasoning turned. Points (a) and (e)-(f) are notice of contention points.

32 Before examining the submissions of the parties in relation to the six issues which the plaintiffs have raised, it is desirable to make some preliminary points about the Association's application under s 63 and about s 63 itself.

The legislation

33 The following legislative provisions are relevant to this appeal.

34 *Section 63.* Section 63 of the Act provides[39]:

> "(1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.
>
> (2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.
>
> (3) Rules of court may provide for the use, on an application under this section, of a written statement signed by the trustee or the trustee's counsel or solicitor, or for the use of other material, instead of evidence.
>
> (4) Unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.
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39 For the purpose of this appeal the question how far there is jurisdiction to give judicial advice by reason of the inherent jurisdiction of a court of equity, or by reason of the *Supreme Court Act* 1970 (NSW), s 22 or s 23, need not be considered.

(8) Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion advice or direction shall, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.

(9) The notice shall state shortly the opinion advice or direction, and the intention of the trustee to convey or distribute in accordance therewith.

(10) Any person who claims that the person's rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Court, apply to the Court for such order or directions as the circumstances may require, and during such time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.

(11) Subject to subsection (10), and subject to any appeal, any person on whom notice of any application under this section is served, or to whom notice is given in accordance with subsection (8), shall be bound by any opinion advice direction or order given or made under this section as if the opinion advice direction or order had been given or made in proceedings to which the person was a party."[40]

35 *Section 85.* Section 63 is significant in relation to s 85(1) and (2) of the Act. They provide:

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40 Sub-sections (5)-(7) were repealed in 1972. They created restrictions on the powers of Judges and Masters, and powers in relation to costs, which are immaterial to the construction of the remaining parts of s 63. There are provisions similar to s 63 in Queensland (*Trusts Act* 1973, ss 96 and 97), South Australia (*Trustee Act* 1936, s 91 and the *Administration and Probate Act* 1919, s 69), Western Australia (*Trustees Act* 1962, ss 92 and 95) and the Australian Capital Territory (*Trustee Act* 1925, s 63). In Victoria the powers given by r 54.02 and r 54.03 of the Supreme Court (General Civil Procedure) Rules 2005 are not derived directly from the United Kingdom source of s 63, but from the Rules of the Supreme Court 1883 (UK) ("RSC"), O 55 r 3, discussed below at [41]-[49].

> "(1) Where a trustee is or may be personally liable for any breach of trust, the Court may relieve the trustee either wholly or partly from personal liability for the breach.
>
> (2) The relief may not be given unless it appears to the Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which the trustee committed the breach."

The United Kingdom precursor to s 63 entered the law in 1859 at the instigation of Lord St Leonards. Although in 1857 Lord St Leonards had intended to introduce a provision similar to s 85 contemporaneously with the precursor to s 63[41], it was not in fact introduced until 1896[42].

36 The legislative scheme, then, is that it is desirable that trustees in doubt as to a course of action should not proceed with it and seek relief under s 85 afterwards, but rather seek s 63 advice first. That is because one of the things which a trustee invoking s 85 requires to be excused from is failure to seek s 63 advice.

37 *The origins of s 63.* Leaving aside the role of the inherent or implied jurisdiction of the Supreme Court, the origins of the first limb of s 63(1), relating to questions respecting the management or administration of the trust property, lie in s 30 of the *Law of Property Amendment Act* 1859 (UK) ("*Lord St Leonards' Act*") and s 9 of the *Law of Property Amendment Act* 1860 (UK)[43]. Section 30 provided:

> "Any Trustee, Executor, or Administrator shall be at liberty, *without the institution of a Suit*, to apply by petition to any Judge of the High Court of Chancery, or by summons upon a written Statement to any such Judge at

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41 United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), series 3, vol 145, 11 June 1857, col 1552; vol 147, 28 July 1857, col 550 and 18 August 1857, col 1774.

42 The origin of s 85 lies in the *Judicial Trustees Act* 1896 (UK), s 3, enacted in New South Wales in the *Trustee Act Amendment Act* 1902, s 9. See *Maguire v Makaronis* (1997) 188 CLR 449 at 473-474; [1997] HCA 23; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 498 [33]; [2003] HCA 15.

43 See *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674 at 677-679.

> Chambers, for the Opinion, Advice, or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property or the Assets of any Testator or Intestate, such Application to be served upon or the Hearing thereof to be attended by all Persons interested in such Application, or such of them as the said Judge shall think expedient; and the Trustee, Executor, or Administrator acting upon the Opinion, Advice, or Direction given by the said Judge shall be deemed, so far as regards his own Responsibility, to have discharged his Duty as such Trustee, Executor, or Administrator in the Subject Matter of the said Application; provided nevertheless, that this Act shall not extend to indemnify any Trustee, Executor, or Administrator in respect of any Act done in accordance with such Opinion, Advice or Direction as aforesaid, if such Trustee, Executor, or Administrator shall have been guilty of any Fraud or wilful Concealment or Misrepresentation in obtaining such Opinion, Advice, or Direction; and the Costs of such Application as aforesaid shall be in the discretion of the Judge to whom the said Application shall be made." (emphasis added)

The emphasised words are significant: they highlighted the summary character of the new procedure[44].

38 Section 9 provided:

> "Where any Trustee, Executor, or Administrator shall apply for the Opinion, Advice, or Direction of a Judge of the Court of Chancery under [s 30 of *Lord St Leonards' Act*] the Petition or Statement shall be signed by Counsel, and the Judge by whom it is to be answered may require the Petitioner or Applicant to attend him by Counsel either in Chambers or in Court where he deems it necessary to have the Assistance of Counsel."

These provisions were enacted in New South Wales as s 30 of the *Trust Property Act* of 1862, which was replaced by s 20 of the *Trustee Act* 1898 (NSW). That in turn was replaced in 1925 by s 63, which remains in force.

39 But in 1925 s 63 went beyond merely re-enacting s 20 of the 1898 Act. In addition three major innovations were made.

40 The first was that advice on questions about "the interpretation of the trust instrument" could be given. Secondly, s 63(4) made it plain that it was possible

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44 See below at [61]-[63].

for evidence to be adduced by affidavit or otherwise. Thirdly, s 63(11) recognised that an express right of appeal might be created[45].

41 *An alternative to s 63.* In England another means by which judicial advice could be given to trustees without an administration order was developed. The RSC 1883, O 55 r 3(e)-(g), provided:

> "The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as cestui que trust under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require, (that is to say,) the determination, without an administration of the estate or trust, of any of the following questions or matters:–
>
> ...
>
> (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees;
>
> (f) the approval of any sale, purchase, compromise, or other transaction;
>
> (g) the determination of any question arising in the administration of the estate or trust."

This was replaced by RSC 1965, O 85 r 2, which was itself replaced by the Civil Procedure Rules 1998, Pt 64.2.

42 An equivalent to these English rules was enacted in New South Wales in the *Supreme Court Procedure Act* 1900, ss 10-12 and Sched r 2. That was

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45 Harvey J had doubted whether one existed: *In re J S Mitchell, dec'd* (1913) 30 WN (NSW) 137 at 138. Sir William Page Wood V-C had denied that one did: *In re Mockett's Trusts* (1860) 6(1) Jur (NS) 142 at 143: see also Daniell, *Chancery Practice*, 5th ed (1871) vol 2 at 1944.

replaced by the *Equity Act* 1901 (NSW), s 11 and Fourth Schedule r 1. That in turn was replaced by the Rules of the Supreme Court 1970 (NSW), Pt 68, rr 1, 2 and 8, which now appear in the Uniform Civil Procedure Rules 2005 (NSW), Pt 54.

43 *The similarity of the alternatives.* The legislative courses taken in England and New South Wales, although superficially they diverged, in substance became very similar. It is this fact that makes it relevant and useful for this Court to consider them for the purpose of understanding and applying in these proceedings the local legislation. The divergence arose when s 30 of *Lord St Leonards' Act* was repealed by the *Trustee Act* 1893 (UK). No corresponding step was taken in New South Wales. The substantial similarity derives from the fact that from 1925, when s 63 was introduced, the judicial advice facility and the originating summons facility were treated as serving the same function. Thus in 1926 H S Nicholas and H E Harrington in *Trustee Acts of New South Wales* treated the two procedures as governed by the same rules when they said in relation to s 63[46]:

> "Presumably the Court in dealing with questions of interpretation will follow the same rule as on Originating Summons and will not answer a question which may never arise ... Orders made on applications under this section are as binding on the persons to whom notice has been given as if they had been made on Originating Summons, provided that the requirements of this section have been fulfilled and subject to the right of appeal ..."

Another contemporary Australian text cited a case from England on originating summons procedure and a case from New South Wales on s 63 indifferently as authorities on the need for trustees to obtain protection before embarking on litigation[47]. That these opinions and assumptions should be held was not surprising. The effect of the 1925 changes in New South Wales was to incorporate into the "judicial advice" facility some features of the "originating summons" facility. And the summary character of proceedings by way of

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46 Page 100. H S Nicholas served as a judge of the Supreme Court of New South Wales from 1935 to 1946 (in the last 7 years as Chief Judge in Equity) and he was editor of *Underhill's Trusts and Trustees: Special Australasian Edition*, 7th ed (1913).

47 Stuckey and Irwin (eds), *Parker's Practice in Equity*, 2nd ed (1949) at 757, n 61. See also the first edition of Parker, *The Practice in Equity*, (1930) at 651.

originating summons is one respect in which that procedure is closely similar to s 63.

44 No doubt, as this Court has so often emphasised[48], close attention must be paid to the provisions which found the jurisdiction which is invoked[49]. But divergences between the two legislative schemes must not be permitted to obscure some important and fundamental similarities between the two. In particular, examination of principles governing proceedings instituted under rules of court derived from O 55 r 3, applied in cases such as *In re Beddoe; Downes v Cottam*[50], *In re Dallaway, dec'd*[51] and *In re Evans, dec'd*[52] may provide useful guidance in considering how the powers given by s 63 of the Act should be exercised in a particular case.

45 That there should be such similarities in the effect achieved by the different provisions is hardly surprising when it is recognised that each is directed to the same end. Each provides for a procedure which, if adopted, will not only protect a trustee from later complaint that he or she should have acted otherwise, but also protect the trustee from personal liability for costs incurred. And where the question for the Court is whether the trustee would act properly in instituting or defending litigation, the answer given will necessarily affect the parties to that other litigation. In particular, the judicial advice proceedings may yield an order which will give one party to the litigation (the trustee) power to resort to a fund in order to meet the costs incurred in pursuit or defence of the litigation.

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48 See, for example, *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.

49 cf *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [59].

50 [1893] 1 Ch 547.

51 [1982] 1 WLR 756; [1982] 3 All ER 118.

52 [1986] 1 WLR 101; [1985] 3 All ER 289.

46 *The Court of Appeal's misapprehension about the similarity.* The Court of Appeal was under a misapprehension about the two legislative schemes. It said it wanted to emphasise[53]:

> "that the provision of judicial advice to a trustee in New South Wales is governed by [the Act]. For this reason, decisions in other jurisdictions, in which different, or even no, legislation applies, are of limited assistance. During the course of argument, there was much reference, for example, to *In re Beddoe; Downes v Cottam*[54]..., which is the origin of much English learning on the question of judicial advice to a trustee, and a long line of cases that have followed it. While some of what is said in these cases may be of some relevance, the key to the issues raised in this case is to be found in the New South Wales statute. No legislation was relevant to the *Beddoe* decision."

47 In fact a legislative enactment was material to the relevant part of *In re Beddoe*. In that case a tenant for life who desired to exercise her rights under the *Settled Land Act* 1882 (UK) to sell land held in trust brought a successful action in the Queen's Bench Division in detinue to obtain the title deeds from the trustee. The Commissioner who heard that action ordered the trustee to pay the costs. The trustee then obtained an order from the Chancery Division that the costs which he had been ordered in the common law action to pay and had paid, together with his own solicitor-client costs in that action, be paid out of the trust property. The Court of Appeal set aside that order. It ordered that the trustee ought only to have the costs he would have incurred had he applied for leave to defend at the expense of the trust estate. By that the Court of Appeal meant an application by originating summons under O 55 r 3. This is plain from the following passage in Lindley LJ's reasons for judgment[55]:

> "[A] trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his *cestui que trust* unless under very exceptional

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53 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [59].

54 [1893] 1 Ch 547 (footnote added).

55 [1893] 1 Ch 547 at 557. See also Bowen LJ at 562 and 564.

> circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate."

48 That warning that trustees who become involved, or wish to become involved, in litigation should seek the court's sanction is the significant, and in later years influential, aspect of *In re Beddoe*. Thus, as the Association pointed out, and the plaintiff did not deny, O 55 r 3 was a piece of legislation – delegated legislation in England – which was central to that aspect, and was later viewed in New South Wales by Nicholas and Harrington as being functionally equivalent to s 63[56].

49 Further, the Court of Appeal said that Palmer J's reliance on *In re Dallaway*[57] was misplaced because[58]:

> "[the Act] applies in New South Wales and no legislation of any kind applied to the situation in *Re Dallaway* and the orders that Megarry VC made in that case. The legal matrix against which *Re Dallaway* was decided does not exist in New South Wales."

Yet *In re Dallaway* was an application by originating summons (ie under RSC 1965 O 85 r 2, the successor to RSC 1883 O 55 r 3, referred to in *In re Beddoe*). Sir Robert Megarry V-C called the application "a *Beddoe* summons in which are sought directions whether [the executor] should continue to defend [an] action, and to counterclaim in it."[59] Hence the legal matrix against which *In re Dallaway* was decided does exist in New South Wales for it was an application made under delegated legislation which was seen in New South Wales as being functionally equivalent to s 63.

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56 See [43] above.

57 [1982] 1 WLR 756; [1982] 3 All ER 118.

58 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [107].

59 [1982] 1 WLR 756 at 758; [1982] 3 All ER 118 at 120.

50 *In re Dallaway and In re Evans.* There was a dispute between the parties about *In re Dallaway* and a later decision of the English Court of Appeal on a *Beddoe* application in which *In re Dallaway* was distinguished, namely *In re Evans*[60]. The plaintiffs contended that the approach taken in the former, on which Palmer J relied, was wrong, and that the latter, which Palmer J distinguished, supported them[61]. The Association contended that the former was right, and had been followed in New South Wales[62], and that the latter was distinguishable.

51 The primary point made by the plaintiffs was that the application in *In re Dallaway* was, in truth, an application for a pre-emptive costs order which should have been made to the court hearing the proceedings and not under the guise of an application for judicial advice from the court supervising the administration of the trust, because it deprived the plaintiffs of the protection which the adversarial proceedings of the former type of application would bring.

52 This is not a dispute of any significance in light of the plaintiffs' concession that Palmer J had jurisdiction and the Court of Appeal majority's acceptance of it – in each case correctly, for reasons given below[63]. That being so, it is the circumstances of a particular application that matter; how other courts were struck by other applications is not decisive. As Nourse LJ said in *In re Evans*[64]: "[E]very application of this kind depends on its own facts and is essentially a matter for the discretion of the ... judge who hears it." So far as the plaintiffs are complaining of an inability to take advantage of adversarial procedures, the complaint will be dealt with elsewhere[65].

53 All of this said, the ultimate duty of the judges below was to be derived from the applicable legislation of the Parliament of New South Wales. To the

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60 [1986] 1 WLR 101; [1985] 3 All ER 289.

61 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [55]-[76].

62 *Metropolitan Local Aboriginal Land Council v Metropolitan Aboriginal Assoc* [2003] NSWSC 104.

63 At [56]-[58].

64 [1986] 1 WLR 101 at 106; [1985] 3 All ER 289 at 292.

65 See [167]-[177].

extent that the judges in the Court of Appeal insisted upon that point, they were correct for reasons of basic principle repeatedly stated in this Court[66]. Nevertheless, where, as here, the legislation reflected and even copied laws enacted, or made, for identical or analogous circumstances in England, it was permissible and helpful to construe the New South Wales legislation with the benefit of the experience expressed in judicial observations on the English analogues.

General points about s 63

54 It is proposed to make eight general points about s 63.

55 *Implications not to be read in.* First, the following much cited statement of this Court in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[67] is relevant to s 63:

> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words".

56 *No implied limitations on power to give advice.* Secondly, although at least Ipp JA and Hodgson JA were not prepared to hold that in the circumstances of this case s 63 gave no power to give judicial advice[68] and although the plaintiffs did not argue to the contrary, it is desirable to confirm, with respect, that their Honours were correct. There are no express words in s 63, and no implications from the express words which are used in s 63, that automatically preclude the court from giving the advice which the Association sought. There is nothing in s 63 which limits its application to "non-adversarial" proceedings, or proceedings other than those in which the trustee is being sued for breach of

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66 See eg *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11], 545 [63]; [2001] HCA 53; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15], 111-112 [249]; [2001] HCA 56; *Western Australia v Ward* (2002) 213 CLR 1 at 60 [2], 65-66 [16], 69 [25], 249-250 [588]; [2002] HCA 28; *Weiss v The Queen* (2005) 224 CLR 300 at 312-313 [31].

67 (1994) 181 CLR 404 at 421; [1994] HCA 54: see the cases referred to in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at 488-489 [47] n 28, cf at 500 [84] n 67; [2004] HCA 59.

68 See above at [25].

trust, or proceedings other than those in which one remedy sought is the removal of a trustee from office.

57 This conclusion follows the principle referred to in the previous paragraph: from the unqualified words of s 63(1), particularly the words "respecting the interpretation of the trust instrument"; from the contemplation of s 63(4) that affidavit or other evidence may be used and that notice may be given; from the contemplation of s 63(8)-(10) that advice may be given not only where there are controversies among beneficiaries, but where beneficiaries are in dispute with trustees about those controversies; and from the contemplation of s 63(11) that there may be an appeal from the opinion, advice or direction[69].

58 Only one jurisdictional bar to s 63 relief exists: the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument. The Court of Appeal did not deny that both kinds of question existed in the present case. Hence, as the Court of Appeal recognised and as the plaintiffs accept, the dispute in this appeal relates only to the question whether Palmer J erred in the exercise of his discretion.

59 *No implied limitations on discretionary factors.* Thirdly, there are no express words in s 63, and no implications from the express words which are used in s 63, making some discretionary factors always more significant or controlling than others. In particular, s 63 does not provide that the adversarial nature of the proceedings about which the advice is sought, the tendency of the advice to foreclose an issue in those proceedings, or the fact that the trustees seeking the advice are being sued for breach of trust are of special significance. Hence the discretion is confined only by the subject-matter, scope and purpose of the legislation[70]. While it was accepted by the Court of Appeal that the court has power under s 63 to give advice even if the proceedings are "adversarial" in character, their approach was to give that consideration very great significance as pointing to an exercise of the discretion against granting advice.

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69 So far as there is authority suggesting that it is beyond the power of the court to give advice to be used for "adversarial purposes" or to decide a matter in issue between parties (eg *Re Mary Hooper* (1861) 29 Beav 656 [54 ER 782]), it dates from a time before the additional words were inserted into what is now s 63(1) and before s 63(8)-(10) were inserted – in the case of New South Wales, in 1925.

70 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; [1963] HCA 54; *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 661; [1996] HCA 5.

60 The Attorney-General submitted that the fact that a court may rely on a written statement of the trustee or use other material "instead of evidence" by reason of s 63(3) undoubtedly gives rise to discretionary considerations of substantial weight where the question for advice is in form or substance an application which will determine or affect questions that could also be resolved in ordinary adversarial litigation. He also submitted that it may be the case that the court would properly decline judicial advice if, for example, a contested construction suit, constituted by the disputing parties and resolved by a judge acting on evidence, appeared to be more apt to the resolution of a question concerning the interpretation of the trust instrument. He further submitted, however, that the discretion of the court to consider applications brought under s 63 should not be yoked to a general first principle that, where there is a contest or where there are adversaries, it is not appropriate to give advice. Those submissions are correct, and early authorities must be read in their light[71].

61 *Summary character of s 63 procedure.* A fourth noteworthy aspect of s 63 procedure is what Lord St Leonards described as its "summary" character. Before *Lord St Leonards' Act*, as Palmer J said in Judgment No 2[72]:

> "[I]f a trustee wished to obtain the direction or opinion of the court on a matter of administration or management or as to a question of construction of the trust instrument, the trustee had to commence an administration suit. The trustee would raise on the pleadings in the suit the particular point upon which the court's advice was sought. Having obtained the court's direction or advice on that point, the trustee would then obtain a stay of all further proceedings in the administration suit. To commence a general administration suit was, however, often a cumbersome and expensive exercise as all persons interested in the estate had to be brought before the court, accounts had to be taken and enquiries had to be ordered, none of which was necessary if all that was in question was a point of construction of the trust instrument or what should be done in the management or administration of the trust assets in a particular situation."

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71 See below, n 108.

72 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441 at 445 [20].

62 On 11 June 1857, in delivering his First Reading Speech on the Trustees Relief Bill, the Bill which when enacted became *Lord St Leonards' Act*, Lord St Leonards said that he proposed[73]:

> "to give trustees a summary right by petition, without rendering it necessary to file bills, to obtain the opinion of the Court of Chancery upon any point which might arise in the administration of the trust estate. This would be a great benefit to trustees, and, by substituting a cheap and simple process of determining questions, prevent the necessity of expensive suits."

63 An element of that objective survives in s 63(3)-(4). Precursors to the summary procedure advocated by Lord St Leonards can be seen in relation to charities in the *Charities Procedure Act* 1812 (*Sir Samuel Romilly's Act*) (UK) and the *Charitable Trusts Act* 1853 (UK), s 16. Various of the plaintiffs' arguments, so far as they assimilated their position before Palmer J to those of litigants in conventional litigation, tended to undercut the summary character of s 63 proceedings. The background described by Palmer J and alluded to by Lord St Leonards also points towards a wider rather than a narrower use of s 63, so as to assist the court's administration of trusts by orders less extreme than a general administration order.

64 *Private and personal advice.* A fifth matter, closely related to the fourth, is that s 63 operates as "an exception to the Court's ordinary function of deciding disputes between competing litigants"; it affords a facility for giving "private advice"[74]. It is private advice because its function is to give personal protection to the trustee.

65 Section 63(2) precludes any trustee, who acts in accordance with the private advice, from being held liable for breach of trust in the event that in conventional proceedings it is later held that the legal position does not correspond with the advice given, so long as the proviso to s 63(2) is satisfied.

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73 United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), series 3, vol 145, 11 June 1857, col 1557.

74 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441 at 445 [23] per Palmer J, approved in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 122 [40] per Beazley and Giles JJA.

The possibility that the rights of beneficiaries under private trusts could be affected by judicial advice led the New South Wales Parliament in 1925 to introduce the protections given by s 63(8)-(11) and in that sense to strike a compromise. However, those protections did not alter the primary function of s 63 as creating a procedure for private advice to trustees. Even if notice of the application for private advice is given to other persons (by reason of rules of court, or a court direction under s 63(4), or by reason of s 63(8)), those persons are not strictly speaking "parties" to "proceedings" by reason of the closing words of s 63(11), although they are able to participate in the proceedings to some extent. Section 63 reflects a compromise between a procedure for affording private advice to trustees and the need for affected persons to be given a hearing in some cases.

66 It was an error on the part of the Court of Appeal to treat the plaintiffs as being in a position of parity with the Association in the judicial advice proceedings. It was an error which may have led the Court of Appeal to treat the plaintiffs as being adversaries of the Association in those proceedings (as distinct from the Main Proceedings) and hence to conclude that in proceedings of the present kind judicial advice should generally not be given. There is no disharmony or lack of realism in treating the plaintiffs and the Association in the Main Proceedings as adversaries but recognising the Association, in the judicial advice proceedings, as trustee (for that it was) seeking judicial advice to which later it would be obliged to adhere.

67 *Role of context in applying s 63.* Sixthly, the application of s 63 will tend to vary with the type of trust involved. Where there is a non-charitable private trust involving a conflict between beneficiaries, or between beneficiaries alleging a breach of trust out of which a trustee has profited and that trustee, and where the defendants in those proceedings have a personal capacity to fund the defence, it might not be correct to give the trustee an opinion, advice or direction. The position is not necessarily the same where the trust is for a charitable purpose, where the public interest is involved since ex hypothesi the trust is beneficial to the public, where none of the contestants in the litigation about the trust is suing or defending in order to augment, defend or seek the restoration of personal assets, and where a crucial question is the precise terms of the purpose for which the trust exists.

68 Nor is the position necessarily the same where the charitable trust is for religious purposes: since religious controversies do not commonly come before

the courts unless they involve disputes about property rights[75] they will often take the form of an allegation of breach of trust and a claim that the trustee be removed. That circumstance may have less weight against the grant of the opinion, advice or direction than it would in disputes about a private trust.

69 *Relationship of s 63 to rights of indemnity*. Seventhly, *Lord St Leonards' Act* was enacted in England at a time when the legal and practical burdens on trustees were increasing, and against a background conception which continues to possess vitality. That conception is that the office of trustee is a gratuitous one unless a special arrangement to the contrary is made. Provision was made for procedures of the kind embodied in the two legislative schemes because "[i]t is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict"[76]. But as Danckwerts J said[77]:

> "persons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred ... The general rule is quite plain; they are entitled to be paid back all that they have had to pay out."

While trustees acting gratuitously are entitled both under the general law and s 59(4) of the Act[78] to an indemnity out of the trust assets for expenses incurred in administering the trust, it was understandable that the legislature should enact provisions enabling them to take advice before embarking on any course which might carry a risk of incurring costs that might be outside the indemnity.

70 In particular, trustees who are sued, particularly for breach of trust, may sometimes experience uncertainty about whether they will be able to obtain indemnity as to the costs of their defence under s 59(4) in any event. Perhaps

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75 *Cameron v Hogan* (1934) 51 CLR 358 at 370-371 and 377-378; [1934] HCA 24; *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95 at 108 [32], 118-119 [65]; [2002] HCA 8.

76 *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell.

77 *In re Grimthorpe* [1958] Ch 615 at 623.

78 See below, n 155.

they will if their breach is excused under s 85(2); but they cannot be sure, in advance, that the court's discretionary power to excuse the breach will be exercised in their favour, and one of the matters to be excused is their failure to obtain the court's direction under s 63 or otherwise. This points strongly to the conclusion that an application under s 63 by a trustee sued for breach of trust (including a breach of trust alleged to arise in the very defence of the proceedings) is not to be seen as one which should rarely if ever succeed. Instead it should be seen as a standard instance to which s 63 can in appropriate circumstances apply.

71 In short, provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses *properly* incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.

72 It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust.

73 The fact that one of the purposes of proceedings for judicial advice is to protect the interests of the trust has particular importance where, as in this case, the trust concerned is a charitable purpose trust. In litigation brought by private persons having a particular view about the terms of a trust, the trustee will ordinarily be joined as a necessary and proper party to the proceedings. Unless some other party will act as contradictor, the burden of defending the suit will fall upon the trustee. If, as will often be the case with a charitable purpose trust, there is no other party that will act as contradictor, the claims made about the terms of the trust will go unanswered unless the trustee can properly resort to the trust funds to meet the costs of defending the litigation. And even if there is another party that will act as contradictor, it is almost always desirable, even necessary, for the trustee to take an active part in the proceedings so that issues are properly ventilated and argued.

74 A necessary consequence of the provisions of s 63 of the Act is that a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings. In deciding that question a judge must determine whether, on the material then

available, it would be proper for the trustee to defend the proceedings. But deciding whether it would be proper for a trustee to defend proceedings instituted about the trust is radically different from deciding the issues that are to be agitated in the principal proceeding. The two steps are not to be elided. In particular, the judicial advice proceedings are not to be treated as a trial of the issues that are to be agitated in the principal proceedings.

75 *The Court of Appeal's general principles.* Finally, the Court of Appeal stated certain general principles about s 63[79]. Not all the propositions so stated represent sound guides in relation to applications under s 63. The propositions use expressions like the "proper province" of s 63, what s 63 is "intended to empower" or "does not empower" and what "should not" be done. Since the majority declined to decide that the mere giving of advice by Palmer J was not beyond power, these propositions must be read as going to discretion, not power. And even if the propositions are read, as they must be, as going to the court's discretion only, some of them are expressed more widely than is appropriate, particularly so far as they suggest that it would be rare and difficult for a trustee alleged to have committed a breach of trust to obtain assistance under s 63 in relation to the defence of the proceedings. As the appeal against the Court of Appeal's orders is to be allowed and the orders of Palmer J restored, the propositions in question should not be regarded as expressing the governing law in Australian courts.

76 These eight points suggest that the merits of any particular decision made under s 63 must depend on the particular circumstances of the case in which the decision was made. It is necessary now to examine the six issues posed by the plaintiffs in the light of the circumstances of this case.

(a) Was the Association's financial position irrelevant?

77 In Judgment No 3, Palmer J assumed the correctness of, and repeated, what he had found in Judgment No 1 and Judgment No 2: that if the Association were not permitted to fund its defence on the issue isolated by Palmer J out of trust assets, it would not be able to defend the proceedings[80]. The plaintiffs attacked this aspect of the trial judge's reasoning in three ways.

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79 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [63].

80 See [18] above.

78 *Lack of factual basis?* The first criticism of Palmer J's reasoning was that it "rested on factual assertions (as to the [Association's] means and its ability to retain the services of its lawyers) that were themselves in dispute. For this reason alone, it was unsuitable to be taken into account in a judicial advice application where the relevant facts could not be properly explored or tested."

79 It is very common in judicial advice applications for the court to be invited to give advice on the basis of facts, whether proved by affidavit as contemplated by s 63(4) or alleged in a "written statement" or "other material" as contemplated by s 63(3), which are contested and controversial. As Palmer J said, a "judicial advice application ... is founded upon facts stated to the Court by the trustee, untested by adversarial procedure, and assumed by the Court to be true" – although "only for the purpose of the application."[81]

80 Palmer J understood that if the challenge made by the plaintiffs were to be fully ventilated, "it would doubtless engender yet another protracted and expensive piece of litigation as a spin-off to the Main Proceedings."[82] Palmer J was right not to permit that to happen. Section 63(2) affords a safeguard against the mischief complained of by the plaintiffs: the trustee loses the protection which the "opinion advice or direction" would otherwise have given if, in obtaining it, the trustee has been "guilty of any fraud or wilful concealment or misrepresentation".

81 The plaintiffs cited no authority for this aspect of their submission. It finds no support in the language of the Act and is erroneous in principle.

82 *Irrelevance?* The plaintiffs submitted:

> "For the purposes of s 63, the court is concerned only with the interests of the trust estate; it is not concerned with the determination of issues between the parties. If the court concludes that it is in the interests of the trust estate for the proceedings to be defended, then it will authorise the defence. If it does not, it will not. In either situation, the availability or

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81 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [69].

82 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254 at [9].

otherwise to the trustee of other funds to conduct the defence is irrelevant."

83 There might be force in this submission if all that the Association had applied for, and all that Palmer J had given, was advice that it would be justified in defending the Main Proceedings. But the Association applied for, and obtained, an additional direction that it was entitled to have recourse to the trust property to pay its reasonable costs. The question of its financial capacity was relevant to that matter.

84 Palmer J saw the financial capacity of the parties in trust estate litigation as being central to what is practical and fair. He said[83]:

"Where a trustee seeks an order that it is justified in defending a claim against the trust estate by recourse to the trust assets for the costs of the litigation, the question will be whether it is more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out amongst themselves, at their own risk as to costs and leaving the trustee as a necessary but inactive party in the proceedings, or whether it is more practical, and fairer, that the trustee be the active litigant with recourse to the trust fund for the costs of the litigation. What is 'practical and fair' will depend on the particular circumstances of each case and will include:

– whether the beneficiaries of the trust estate have a substantial financial interest in defending the claim;

– what are the financial means of the beneficiaries to fund the defence;

– the merits and strengths of the claim against the trust estate;

– the extent to which recourse to the trust estate for defence costs would deprive the successful claimant of the fruits of the litigation;

– if the trust is a charitable trust rather than a private trust, what, if any, are the considerations of public interest."

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83 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [62]. This analysis was cited with approval in Mowbray et al, *Lewin on Trusts,* 18th ed (2008) at 749-750 [21-115].

85 Further, when Palmer J spoke of "fairness" he was not speaking only of fairness to the Association, but also of fairness "to individuals, who are not beneficiaries of the trust and have no financial interest in the trust property" and who, if the trust assets could not be employed, would have to fund the litigation if there were to be litigation[84]. He also had in mind questions of justice in the public interest. The difficulty with the plaintiffs' submission is that once Palmer J concluded that it was in the best interests of the trust for the proceedings to be defended – a matter on which the Court of Appeal agreed[85] and the plaintiffs did not disagree – it would be vacuous to leave the matter there without considering how, in the then circumstances, the proceedings were to be defended as a matter of practicality.

86 *Advance costs order?* The plaintiffs drew a distinction between an "advance costs order" and an order made as part of judicial advice; submitted that in substance order 2 was an advance costs order, like those made in *In re Dallaway*[86]; and contended that it was wrong to have made it without the full range of "usual adversarial procedures" being available.

87 It is not necessary to deal with the plaintiffs' arguments on this matter further, because it was not shown how the "usual adversarial procedures" would have put the plaintiffs in a better position to oppose the advice Palmer J gave. Furthermore, even if the plaintiffs were right in submitting that an advance costs order is only made "in most unusual circumstances", that condition was satisfied in this case.

88 *Conclusion.* Accordingly the plaintiffs' attack on Palmer J's reasoning in this respect fails. The Court of Appeal's orders cannot be supported by suggesting that there was any error in that reasoning.

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84 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [65].

85 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [116].

86 [1982] 1 WLR 756; [1982] 3 All ER 118.

(b) Was it wrong, by making order 6, to render the other orders revocable ab initio?

89 Order 6 of Palmer J's orders was: "The foregoing orders are subject to, and may be revoked by, an order of the trial judge in the Main Proceedings, or by a subsequent order in these proceedings." A similar order was made in Judgment No 1 and Judgment No 2. The plaintiffs construed order 6 to mean that, if at a later stage the orders were revoked, the revocation would not operate merely for the future, but would have effect from the time the orders were made, so that any money spent pursuant to order 2 would have to be refunded. Below, that construction will be referred to as "the plaintiffs' construction of order 6". The correctness of the plaintiffs' construction of order 6 was common ground in the Court of Appeal and, not surprisingly, the Court of Appeal therefore assumed its correctness. On that basis, it held that s 63(2) did "not empower" the order[87] and that it "was not permitted by s 63"[88]. That was a conclusion supported not only by the plaintiffs but also by the Attorney-General.

90 There are conflicting indications about what was intended by order 6, as distinct from what it says. On the one hand, while it is not easy to find in the written submissions of the parties either to Palmer J or to the Court of Appeal an explicit indication of what the true construction of order 6 or its predecessors was thought to be, it is clear that, at the oral hearing before the Court of Appeal on 8 December 2004, counsel for the Association contended that the plaintiffs' construction of the equivalent to order 6 made in Judgment No 1 was correct. Until that time the plaintiffs had maintained their position that the opposite construction was correct: that revocation was only possible for the future.

91 In this Court, counsel for the Association initially said that no party contended that the plaintiffs' construction of order 6 was incorrect. After some debate with members of the Court, counsel for the Association indicated preparedness to accept a construction of order 6 as operating only in futuro.

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87 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [108].

88 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [111].

92 On the other hand, there are factors suggesting that Palmer J meant order 6 only to permit revocation of the orders so far as their operation in the period after revocation was concerned.

93 First, the primary authority on which Palmer J relied for making similar orders in relation to both Judgment No 1 and Judgment No 2 was *In re Dallaway*. The order made in that case by Sir Robert Megarry V-C was one permitting only prospective revocation, for he said[89]:

> "although as matters stand the [executor] ... is fully justified in defending ..., it is possible that material may emerge subsequently which will make it unreasonable for the [executor] to *continue to defend* ...; and if, despite that, the [executor] *continued* with the litigation, no order that I make now ought to protect them in relation to *subsequent* costs." (emphasis added)

94 Secondly, Palmer J said that the plaintiffs could make an application "for the revocation of the orders which have been made on an interim basis" if they succeeded in the trial of the Main Proceedings on the Schedule A Property Issue and believed "that the facts, as they have emerged, could not reasonably have supported [the opinions of counsel] as to prospects"[90]. This must be read in context, however. So read, the passage contemplates more than a lack of reasonable support, for the next paragraph sees the key issue as being whether the Association and its lawyers had "been guilty of concealment or misrepresentation in obtaining" the opinions of counsel[91]. That is the language of s 63(2), which does permit retrospective revocation, and the paragraphs preceding the passage under discussion quote and discuss that subsection. The passage is not discussing order 6.

95 Nevertheless the crucial question is not what the parties believed or Palmer J intended, but what order 6 means. If the plaintiffs' construction of order 6 were correct, orders 1 and 2 would give the Association very little protection because of the insecurity of its position. On the plaintiffs' construction a trustee, after carrying out actions in accordance with those orders, might find those actions later impugned for some reason falling short of the circumstances

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89 [1982] 1 WLR 756 at 761-762; [1982] 3 All ER 118 at 123.

90 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [74].

91 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [75].

described in s 63(2). That outcome is so remarkable that very specific language would be needed before that construction of the Act could be arrived at.

96 The premise from which the Court of Appeal concluded that order 6 "was not permitted by s 63"[92] was the plaintiffs' construction of order 6. Since that construction is not correct, the premise goes. Accordingly, it is not necessary to decide whether the Court of Appeal's conclusion as to what s 63 permits was correct or not. On the assumption that order 6 only allowed revocation in futuro, the plaintiffs did not argue that it was not permissible, and the Attorney-General correctly argued that it was permissible.

(c) Did Palmer J err in failing to take into account the adversarial character of the proceedings?

97 *The Court of Appeal's distinction.* Although in this Court counsel for the plaintiffs said the tag "adversarial" was "perhaps an unfortunate tag" and "not a tag we particularly embrace because of the imprecision associated with it", the majority of the Court of Appeal (Ipp JA, Giles JA concurring) characterised the advice sought as "essentially adversarial"[93]. The majority of the Court of Appeal drew a distinction between the use of a s 63 application for adversarial purposes and its use for non-adversarial purposes[94]. According to the Court of Appeal, the existence of an adversarial purpose was an extremely powerful discretionary factor against giving the advice[95].

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92 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [111].

93 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [82].

94 In an earlier decision the Court of Appeal had drawn the same distinction: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112.

95 The plaintiffs contended to the Court of Appeal that, in dealing with a judicial advice application, the court should not be drawn into resolving a disputed issue, and in such circumstances may and "should usually" refuse the application.

98 *The authorities.* It may be noted in passing that the authorities relied on do not directly support the proposition just stated, nor do they invalidate Palmer J's reasoning.

99 *The New South Wales authorities.* The Court of Appeal relied on a statement by Beazley and Giles JJA in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* that judicial advice is not "an appropriate vehicle by which to settle disputes between parties to a trust"[96]. They also cited *Hartigan Nominees Pty Ltd v Rydge*[97], where Sheller JA said less absolutely that this was "generally inappropriate". And they cited *Harrison v Mills*[98] where Needham J said that it was extremely doubtful whether disputes "between trustees" (other than bona fide differences about the construction of a document) "would be entertained by a court under s 63", and also said[99] that it is "quite undesirable that the rights of the parties should depend to any degree upon facts which have not been established in the normal manner."

100 One difficulty in applying these statements to the present case is that, strictly speaking, the plaintiffs are not "parties to a trust", nor could they be described as having any "rights". A similar difficulty arises from the statement of Ipp JA (Giles JA concurring) that he agreed with Hodgson JA that Palmer J's advice "would affect the *rights* of the trustee and the *rights* of Bishop Petar and Father Mitrev to a very substantial extent"[100] (emphasis added). The plaintiffs were not "parties to a trust" – they were not settlors or trustees or beneficiaries. They had no "rights": indeed they had no standing to commence litigation as of

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96 (2006) 66 NSWLR 112 at 123 [42].

97 (1992) 29 NSWLR 405 at 440. Cf at 417-418 (point 5).

98 [1976] 1 NSWLR 42 at 45.

99 [1976] 1 NSWLR 42 at 46.

100 *His Eminence Metropolitan Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [84]. The reference to Hodgson JA is a reference to *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 128 [67], where Hodgson JA (dissenting) said: "the judicial advice would affect the rights of the trustee and the rights of the plaintiffs to a very substantial degree."

right, but were obliged to seek the leave of the court under s 6(1)(b) of the *Charitable Trusts Act* 1993 (NSW)[101].

101 The most that can be said is that the first plaintiff holds a particular office, and the second plaintiff has held another office: if the Association's contentions about the terms and purposes of the trust affecting the Schedule A Property are erroneous there may be particular outcomes for them in relation to those offices. But even if the plaintiffs were treated as "parties to a trust" in a looser sense, as persons with duties or personal concerns in relation to the broad operation of the trust, it cannot be said that Palmer J endeavoured to settle any disputes. All Palmer J did was advise the Association that it would be justified in defending the main proceedings on the Schedule A Property Issue, and that it could have recourse to certain property to pay the costs of that defence. He left the settlement of the disputes in the Main Proceedings to the trial judge who will hear those proceedings. Palmer J was not primarily concerned to decide any issue on facts not established in the normal manner; rather he was offering a means by which an issue could be established in the normal manner, and if that means continues to be nullified by the dismissal of this appeal, the issue may never be decided in the normal manner.

102 The plaintiffs submitted that order 2[102] necessarily pre-empted further debate about the $78,666.01 in costs for the period 9 July 2004 to 9 February 2007 and about the future costs referred to in order 2(b). Subject to the proviso to s 63(2), that is true. If the Association loses the Main Proceedings, order 2 will have affected the "rights" of the Association by legitimating what the plaintiffs allege to be a breach of trust – an application of trust property in support of one aspect of its position in the Main Proceedings – in a manner which will cause recovery of that money to be impossible unless the Association is guilty of fraud, wilful concealment or misrepresentation. However, that is a different thing from settling any major dispute. Order 2 settled only a single relatively small part of the dispute, and the settlement had a satellite or instrumental character: the part "settled" was a necessary step towards the proper resolution of a major element in the dispute.

103 If it were wrong of Palmer J to have made order 2 because it pre-empted any future debate about whether the costs identified were claimable trust property, as the plaintiffs submitted, it would follow that in many circumstances

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101 See n 10 above.

102 Set out at [5] above.

trustees could never get protection under s 63 in relation to the costs of defending proceedings. That is inconsistent with the statutory language. It is a construction that would undermine the purpose of Parliament, as expressed in the language of the Act.

104 *The Privy Council.* The Court of Appeal also referred to *Marley v Mutual Security Merchant Bank and Trust Co Ltd*[103]. The Court of Appeal attributed to the Privy Council in that case the proposition that "in exercising its jurisdiction to give directions on a trustee's application, the court is not engaged 'in determining the rights of adversarial parties'."[104] What the Privy Council actually said, and this had been quoted by Palmer J[105], was:

> "[I]n exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties."

105 While accepting that it was not beyond power to give judicial advice that determined substantive rights in contested proceedings, the Court of Appeal appeared to think that it was so powerful a discretionary factor that generally this should not be done, and that this was decisive in the present case. The Attorney-General argued[106] that the Privy Council in *Marley's* case was not establishing a dichotomy, as the Court of Appeal appears to have thought, between ascertaining the best interests of the trust on the one hand and not determining adversarial rights on the other, the former function being permissible and the latter not. Rather the Privy Council was concerned to make the point that the court's sole purpose in giving judicial advice is to determine what ought to be done in the best interests of the trust estate, and that while it was not the court's purpose to determine the rights of adversaries, that could be done as a necessary incident of determining what course ought to be followed in the best interests of the trust estate.

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103 [1991] 3 All ER 198 at 201.

104 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [90].

105 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [41].

106 Citing *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 35 ACSR 440 at 445 [17].

106 In the present context, that conclusion would appear to be supported by s 63(3)-(4) of the Act, which contemplate the use of evidence in some cases, by the notice procedures in s 63(4) and (8)-(10), and by the possibility of appeal contemplated by s 63(11) – all steps which could be material if there were a risk that the judicial advice given might affect the rights of adversaries. That is, while the time and cost involved in giving judicial advice at an early stage of litigation, when the issues involved in disputes about rights may not be fully sharpened and it may not be possible for the factual position to be as efficiently exposed as in a trial, may be factors relevant to a decision not to grant judicial advice but to let the matter be examined in conventional litigation, they are not factors which either automatically bar judicial advice or are so weighty as generally to compel the court not to grant the advice. If they were, the consequence would be that advice would either never, or only very exceptionally, be given on the issue whether trustees should defend proceedings instituted against them for breach of trust. Nothing in the language of s 63 suggests this outcome.

107 Further, some forms of advice about adversarial cases may be in the best interests of the trust estate. An approach that treats an adversarial character as being always, or at least very often, fatal to the success of a judicial advice application, contradicts what the Privy Council saw as the sole function of the court. That consequence would be the more acute because a plaintiff desiring to prevent a trustee whom that plaintiff is suing from having access to the trust property to fund the defence could effectuate that desire by pleading that to use the trust property for that purpose would be a breach of trust.

108 *Other authorities.* The Court of Appeal then said: "It is, indeed, well-established that judicial advice is generally an inappropriate mechanism for determining substantive rights in contested proceedings."[107] For this proposition six cases were cited. Four do not support it as a proposition about s 63 in its present form[108]. One case, *Neagle v Rimmington*[109] offers some support for the

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107 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [91].

108 It is true that in the first case, *Re the Trusts of the Will of Gilchrist* (1867) 6 SCR (NSW) Eq 74 at 78, Hargrave J cited *Re Mary Hooper* (1861) 29 Beav 656 [54 ER 782] as authority for the proposition that the *Trust Property Act* of 1862 (NSW), s 30, should not be used to construe trust instruments, but since 1925 the second limb of s 63(1) permits this course. The other cases (*Re J S Mitchell, dec'd* (1913)

(Footnote continues on next page)

proposition asserted, but it relies on and does not add to what is said in *Harrison v Mills*[110] and *Marley v Mutual Security Merchant Bank and Trust Co Ltd*[111], discussed above[112].

109 The sixth authority cited by the Court of Appeal is a passage from *Re Australian Pipeline Ltd*[113]. Barrett J there said that s 63:

> "assumes that the matter on which judicial advice is sought will be one that involves some aspect of 'the trustee's duty as trustee' as it relates to future conduct of the trustee. A trustee who is alleged by a beneficiary to have committed a breach of trust or statutory wrong and who defends legal proceedings in which that allegation is advanced does not thereby perform any 'duty as trustee'. A decision by a trustee accused of breach of trust whether to contest the allegation is unrelated to any aspect of 'the trustee's duty as trustee'."

110 In understanding that passage, it must be remembered that Barrett J had earlier said in his reasons[114] that a trustee could properly seek judicial advice relating to defending legal proceedings "if the legal proceedings are themselves concerned with the management or administration of the trust property or the interpretation of the trust instrument" (as the Main Proceedings are). It is also necessary to remember that Barrett J found support for that last statement in an

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30 WN (NSW) 137, *Alcock v The Public Trustee* (1936) 53 WN (NSW) 192 and *Re Sinnamon* [1940] QWN 41) do not support the proposition.

109 [2002] 3 NZLR 826 at 833-835.

110 [1976] 1 NSWLR 42 at 44-45.

111 [1991] 3 All ER 198 at 201.

112 See [104]-[107].

113 (2006) 60 ACSR 625 at 632 [25].

114 (2006) 60 ACSR 625 at 631 [23].

observation by Palmer J in Judgment No 2[115], which, in turn, had in part been approved by Beazley and Giles JJA[116].

111 The Court of Appeal referred to earlier decisions of that Court[117] as establishing that judicial advice proceedings should not be used to settle disputes between parties to a trust. Stated in that way, the proposition is not controversial. It recognises the distinction to which reference is made earlier in these reasons[118] between deciding whether it would be proper for a trustee to sue or defend and deciding the issues tendered in the proceedings that it is proposed to institute or defend.

112 But nothing that was said in those earlier cases, and nothing in the relevant provisions of the Act, warrants limiting the powers given to the court by s 63 by reference to a classification of some proceedings as "adversarial proceedings", and others as not.

113 No criterion was identified by the Court of Appeal as marking what are "adversarial proceedings". When it is recalled that the question which a trustee seeking judicial advice under the Act tenders for decision by the court is whether it would be proper for the trustee to defend proceedings that have been instituted against it, thus making those proceedings contested proceedings, it is evident that the word "adversarial" is intended to convey more than joinder of issue between parties. But its content and meaning were not elucidated in the Court of Appeal or in argument in this Court.

114 Much emphasis was given in the Court of Appeal to the fact that, in the Main Proceedings, the plaintiffs claim that the Association had acted in breach of trust and that it should be removed as trustee. But as the primary judge pointed

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115 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441 at 445-446 [23].

116 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 122 [40].

117 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 122 [40]; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 440. See also *Harrison v Mills* [1976] 1 NSWLR 42.

118 See [74].

out, the principal issue between the parties in the Main Proceedings centres upon the terms of the trust on which the property is held, and the primary judge concluded that it was in the interests of the trust that the uncertainty about those terms should be resolved. Where, as here, the trust is a charitable purpose trust, identifying the dispute between the parties as centring upon allegations of breach of trust and claims for removal of a trustee is an incomplete description of the issues that are tendered in the litigation. It is an incomplete description because describing the dispute in this way suggests that the trustee has no more than a personal pecuniary interest in the outcome of the litigation. That may be the case where a trustee of a private trust is sued for breach of trust in managing the trust fund and beneficiaries claim compensation for losses allegedly sustained as a consequence. But in this litigation the interests at stake are larger and more complex than whether a defaulting trustee should make good the financial consequences allegedly flowing from mismanagement of a trust fund. There is a public aspect to those interests because they concern the administration of a charitable purpose trust.

115 If the expression "adversarial proceedings" was intended to refer to the fact that allegations of breach of trust are made in the Main Proceedings and a claim is made for removal of the Association as trustee, it is an expression which provides no assistance in resolving the question tendered by the Association in the judicial advice proceedings.

116 Classification of the proceedings in respect of which a trustee asks advice about the propriety of instituting or defending, as "adversarial proceedings", is not useful in deciding whether advice should be given under s 63 that instituting or defending the proceedings is proper.

117 *The Court of Appeal's criticisms.* It is not necessary further to discuss the "adversarial" issue at a general level. That is because the Court of Appeal's criticism of Palmer J was narrow. The Court of Appeal did not criticise Palmer J for failing to understand or failing properly to apply the Court of Appeal's distinction. Rather it fastened on two specific aspects of the "adversarial" element in the proceedings. One was that the dispute in the Main Proceedings about the true terms of the charitable trust was intense. The second was that the Main Proceedings involved allegations of breach of trust against the Association (one of the allegations being that the Association was in breach of trust for spending trust funds in defence of a claim that it was in breach of trust in other

respects), and sought the removal of the Association as trustee for that reason[119]. The Court of Appeal said that Palmer J's error was merely that he "did not *expressly* address these matters which ... were crucial to the discretion his Honour was required to exercise."[120] (emphasis added)

118 *Was the point not considered by Palmer J put to him?* Before examining the terms of Palmer J's reasons for judgment, it is desirable to note one observation made by Ipp JA (Hodgson JA concurring) in his reasons in relation to the costs of the Court of Appeal proceedings. His Honour said[121]:

> "[T]he three grounds on which this Court found that his Honour had erred in exercising his discretion were only articulated with clarity during the course of the hearing on appeal and after intervention from the Bench. It does not seem to me that the case was put before the trial judge in the way it eventually was put on appeal."

119 The correctness of that observation is supported by a comparison between the plaintiffs' written submissions to the Court of Appeal and the transcript of oral argument. It is also supported by the form of Palmer J's reasons for judgment, namely to set out a series of submissions by the plaintiffs and to deal with each one by one. This suggests that any failure by Palmer J to deal with a point is an indication that the point was not put.

120 In these circumstances a measure of benevolence should be employed in reading Palmer J's reasons for judgment, both in relation to this first error detected by the Court of Appeal in relation to the adversarial character of the proceedings, and the second error it detected in relation to the "balancing exercise"[122]. Counsel for the plaintiffs did not demur from the proposition that

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119 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [79]-[96].

120 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [96].

121 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc (No 2)* [2007] NSWCA 287 at [38].

122 See [137]-[166] below.

when a court is invited to make a discretionary decision, to which many factors may be relevant, it is incumbent on parties who contend on appeal that attention was not given to particular matters to demonstrate that the primary judge's attention was drawn to those matters, at least unless they are fundamental and obvious.

121 The alternative approach would permit a party to run one case before the primary judge and different cases on however many levels of appeal were open. Where it is said on appeal that a primary judge was in error in not taking into account a particular consideration "expressly", even though it was not explicitly submitted to the primary judge that it should be, a benevolent construction of the primary judge's reasons will often reveal, by a process of inference and implication, that the relevant consideration was borne in mind, even though it was not stated in as clear-cut a way as an appellate court, dealing with a hostile submission by one party not put nearly as distinctly, or at all, to the primary judge, might prefer.

122 Turning to the particular error under consideration, before Palmer J the plaintiffs submitted that he "should adopt the general principles laid down for judicial advice applications by the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*"[123]. The principles referred to included the passage quoted above[124], and the plaintiffs' written submissions to Palmer J quoted it. However, the precise way in which the Court of Appeal formulated its criticism of Palmer J's supposed error in relation to the adversarial character of the proceedings is not reflected in the plaintiffs' written submissions to Palmer J. Nor are the authorities on which the Court of Appeal relied[125].

123 It is not possible now to know what was put to Palmer J orally. But, in view of Palmer J's silence about those authorities, and in view of the very brief treatment of the adversarial question in the plaintiff's written submissions to the Court of Appeal, it seems unlikely that the deficiency was remedied in oral

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123 [1991] 3 All ER 198: the plaintiffs drew particular attention to 201d-h.

124 See [104].

125 Those discussed above at [99] and [108]-[110], particularly *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 123 [42] and 127-128 [65]-[68] (a decision admittedly handed down only nine days before the first of the plaintiff's written submissions to Palmer J).

argument before Palmer J. A reading of the transcript of oral argument before the Court of Appeal suggests, as do the words of Ipp JA quoted above[126], that the stress laid in the Court of Appeal on the adversarial question was something which arose in argument at the instigation of the Court of Appeal and for that reason played a crucial role in its decision and orders. Counsel for the plaintiffs contended that the point was an issue before the Court of Appeal and before Palmer J. It depends by what is meant by "an issue". If the point was taken as faintly before Palmer J as it was in the written submissions to the Court of Appeal, it would not be culpable for Palmer J to have overlooked it, because in the course of oral argument in the Court of Appeal Hodgson JA said that he had not appreciated the point about the adversarial issue "as being made with any great force" in the written submissions.

124 *What Palmer J did in Judgment No 3.* Whether or not this point on which the Association lost in the Court of Appeal was clearly taken before Palmer J, he did address the relevant matters in substance.

125 His Honour quoted the words of the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*[127] that, in a judicial advice application, "the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining *the rights of adversarial parties*" (emphasis added). Palmer J only determined the rights of adversarial parties to the limited extent necessary to ensure the protection of the best interests of the trust estate. Palmer J found that it was in the best interests of the trust on which the Schedule A Property is held, and indeed in the public interest, to secure the "important benefit" of having the precise terms of the trust resolved. Palmer J stressed the fact that the orders he was asked to make related only to that question – not to any of the other issues in the Main Proceedings[128]. He said that the value of that important benefit "is not measured only according to who pays the costs of the proceedings and whether the assets of the trust are increased by the proceedings"[129]. That was so, in his opinion, because the

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126 See [118].

127 [1991] 3 All ER 198 at 201.

128 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [27] and [44].

129 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [51].

purpose of the trust was charitable, rather than being "the preservation or accumulation of wealth for the financial advantage of a class of beneficiaries"[130].

126 Palmer J took into account one risk of making order 2 – namely that under the guise of defending the Main Proceedings on the Schedule A Property Issue, the Association might use Schedule A Property for its defence on other issues. The risk had been identified in submissions advanced to Palmer J by the plaintiffs, and summarised by him, thus[131]:

> "it could be difficult in practice to draw the line between costs expended on the Schedule A Property Issue and some other issue. Because of this difficulty ... the advice sought should be refused because otherwise there is a risk that the Schedule A property will be expended on defending an issue in the Main Proceedings not relevant to the administration of the Schedule A property trust."

127 Palmer J formulated that aspect of the problem thus[132]:

> "The choice is between, on the one hand, giving advice which would permit the Association to have recourse to Schedule A property to defend the Schedule A Property Issue, with an attendant risk of unauthorised expenditure, and, on the other hand, avoiding that risk by refusing any advice and thereby denying the Association the means of defending the Schedule A Property Issue at all."

His Honour resolved the issue, so explained, as follows[133]:

> "In my opinion, the choice should be resolved by permitting the Association to defend the Schedule A Property Issue by recourse to the Schedule A property and leaving the risk of unauthorised expenditure on

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130 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [50].

131 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [44].

132 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [45].

133 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [46].

> the shoulders of the Association and its legal representatives. If the [first plaintiff] succeeds in the Main Proceedings in his contentions as to what are the precise terms of the trust upon which Schedule A property is held, and if it becomes apparent, on an assessment of costs or the taking of accounts, that the Association and its lawyers have expended Schedule A property on issues clearly not authorised by the Court's judicial advice, then the Association, its responsible officers and its legal representatives will leave themselves open to personal liability to restore the assets of the trust by reason of procuring or participating in *a breach of trust* or receiving trust property with knowledge of the facts which make the payments *a breach of trust*. I have little doubt that the Association, its responsible officers and its lawyers will be well aware of their exposure to such personal liability and will act accordingly in the way in which Schedule A property realisations are expended on costs in the Main Proceedings." (emphasis added)

128 This aspect of Palmer J's reasoning shows the close attention his Honour paid to the intensely adversarial character of the dispute between the plaintiffs and the Association, and to the fact that it involved allegations of breach of trust. That characteristic is also revealed in a further passage in which he rejected the plaintiffs' submission that it was in the best interests of the trust that the Association should not defend the Schedule A Property Issue at all, for if it did not, it would be found liable for breach of trust and the trust fund would be considerably augmented. Palmer J said[134]:

> "[T]he submission means that if a claim is made against a trustee for *breach of trust* and for restoration of the trust fund, it is always the duty of the trustee, even though entirely innocent of any wrongdoing, to surrender to the claim without a fight because surrender and a consequent payment to the trust fund will result in an increase in the trust fund. An increase in the trust fund is in the interest of the trust and a trustee who does not act in the interest of the trust is in *breach of trust*. It follows that an innocent trustee who defends a claim to restore the fund, by that very act becomes a guilty trustee and a claim for *breach of trust* which should fail if it were not defended will succeed only because it is defended. It is a pretty paradox – but it is not the law". (italic emphasis added)

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134 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [49].

129 Contrary to the conclusion of the Court of Appeal, the reasoning of Palmer J – to some extent expressly, and to some extent by implication – addresses the difficulties arising from the fact that the Association was seeking judicial advice as to the defence of proceedings in which its conduct was under challenge. The Court of Appeal criticised Palmer J for failing "to take into account the fact that the principal issue on which advice was sought essentially related to an important contested question in the Main Proceedings"[135]. The "fact" stated was that advice was sought on whether the Association should defend the proceedings on a particular question, and on whether the Schedule A Property could be used to fund that defence. That "fact" was a factor of which the trial judge was well aware.

130 *Hodgson JA's criticisms of Palmer J.* Hodgson JA agreed with the views of Ipp JA (Giles JA agreeing), but expressed his opinion on the error alleged in his own words. It is desirable to deal with his Honour's analysis separately. He saw the proceedings as being "non-adversarial" but as having "a substantially adversarial character". He said[136]:

> "As shown by Ipp JA, the contest in the proceedings before [Palmer J] did have a substantially adversarial character, in the following respects:
>
> (a) The trustee was seeking to use trust property to defend itself against allegations of breaches of trust.
>
> (b) The trustee was not disinterestedly asking the Court's guidance on what course to take and/or what were the true terms of the trust, but seeking to advance a particular version for the trust that would protect it from findings of breach of trust.
>
> (c) The effect of the advice sought by the trustee would be that a very substantial portion of trust assets would be used up, with little if any prospect of recovery if the decision went against the trustee, thereby to a significant extent pre-empting the decision in the substantive litigation."

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135 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [79].

136 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [7].

131 His Honour then said[137]:

> "I agree with Ipp JA that these considerations were not taken into account by the primary judge; and that, having regard to them, the Court should decline to give judicial advice in non-adversarial proceedings."

132 Considerations (a) and (b) were matters which Ipp JA viewed as part of the first error found against Palmer J, that which is the subject of the present discussion. Consideration (c) on the other hand, was a matter which Ipp JA dealt with as part of the "balancing exercise" error[138].

133 *Hodgson JA's consideration (a).* Palmer J was aware of, and took into account, consideration (a). He certainly knew, because he alluded several times to the fact that the plaintiffs were alleging in the Main Proceedings that the Association had been acting in breach of trust[139]. Further, submissions by counsel for the plaintiffs stressed that if the Association failed on the Schedule A Property Issue, the Court would have found that the Association had committed breaches of trust. The consideration which Palmer J is said not to have taken into account is implicit in those circumstances: if the Association succeeded on that issue, it would have defended itself successfully against allegations of breaches of trust. Palmer J dealt in detail with these submissions[140]. And it must be concluded that he took into account the consideration just referred to.

134 Further, it is not right to read Judgment No 3 as self-contained. In dealing with the arguments leading to Judgment No 3, Palmer J was all too familiar with the background from the hearings leading to Judgment No 1 and Judgment No 2. At the start of Judgment No 3 he stated that he would "assume that the reader of this judgment is generally familiar with the history of the matter"[141]. It is plain

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137 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [8].

138 Discussed below at [137]-[166].

139 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [4], [6], [17], [22]-[23], [26], [28], [31]-[34], [40] and [65].

140 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [48]-[49]: see above at [128].

141 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [2].

from Judgment No 1 and Judgment No 2[142] that Palmer J was fully aware of Hodgson JA's consideration (a), and there is no reason to suppose that he did not take it into account in arriving at orders 1 and 2.

135 *Hodgson JA's consideration (b).* Palmer J was also aware of, and took into account, Hodgson JA's consideration (b). He did so, for example, when he summarised the Association's position thus[143]:

> "The Association denies that its property is held upon trust at all. Alternatively, it says that if the property is held upon trust, the terms of the trust are subject to the terms of the Association's constitution so that the Association may use that property as it has done, without breach of trust."

136 That passage in Palmer J's Judgment No 3 reveals awareness that the Association was not disinterested, but advanced a particular version of the terms of the trust which, if made out, could protect it from allegations of breach of trust. Palmer J had revealed a similar awareness in his earlier two judgments[144].

(d) Did Palmer J conduct the correct "balancing exercise"?

137 *"Balancing exercise"?* The orthodox approach to appellate intervention in relation to discretionary decisions[145] requires the expression "balancing exercise" to be employed only with care[146].

138 The question is what the particular statute or rule of law conferring the discretion contemplates as relevant or irrelevant factors. If it mandates that

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142 *Application of Macedonian Orthodox Community Church St Petka Inc* [2004] NSWSC 388 at [2]-[3], [9], [15] and [20]; *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441 at 443 [7], 447 [33]-[34] (and [2005] NSWSC 558 at [48], [52], [55] and [56]).

143 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [6].

144 For example, *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* [2005] NSWSC 558 at [55]-[56].

145 *House v The King* (1936) 55 CLR 499 at 504-505: quoted above at n 33.

146 See *Dwyer v Calco Timbers Pty Ltd* (2008) 82 ALJR 669 at 676-677 [37]-[40]; 244 ALR 257 at 266-267; [2008] HCA 13.

particular weight be given to one factor, that mandate must be obeyed. But, in the absence of any such mandate, the question of what weight the relevant factors should be given or what balance should be struck among them is for the person on whom the discretion is conferred, provided no error of law is made, no error of fact is made, all material considerations are taken into account and no irrelevant considerations are taken into account, subject to the possibility of appellate intervention if there is a plain injustice suggesting the existence of one of the four errors just described even though its nature may not be discoverable, or if there is present what has come to be known as "*Wednesbury* unreasonableness"[147].

139 *The Court of Appeal's reasoning.* The Court of Appeal said Palmer J should have "balanced", on the one hand, the potential benefits of authorising the Association to defend the Main Proceedings on the Schedule A Property Issue, and, on the other, the disadvantages that would follow if the Association were unsuccessful. Those disadvantages were two in number. One was that "costs would be lost" – ie, the Association's costs of defending the proceedings. The other was that the plaintiffs "would seek to recover their costs from the trust". The majority of the Court of Appeal (Ipp JA, Giles JA concurring) said that Palmer JA did not refer to the fact that, if the plaintiffs succeeded in the Main Proceedings, order 2 would cause at least one-third of the value of the Schedule A Property (other than the Church Land) to be lost to the trust[148].

140 *The Court of Appeal's criticisms: the Association's own costs.* The Court of Appeal's criticism in relation to the failure to take into the balance the Association's own costs is not correct. Palmer J assumed the value of the Non-Schedule A Property (other than the Church Land) to be about $1.3 million. He also set out in order 2 the amount of costs which the Association was entitled to expend in defence of the proceedings relating to the Schedule A Property Issue as the sum of $78,666.01 for past costs and up to $216,295 for future costs – a total of $294,961.01. The Association's costs were referred to several times in

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147 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

148 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [98]. Hodgson JA applied to the loss the expression "a very substantial proportion": at [7](c) (quoted at [130] above).

Judgment No 3[149] and Judgment No 4[150]. Finally, Palmer J had made it abundantly plain in Judgment No 1, Judgment No 2 and Judgment No 3 that he was fully aware that without recourse to the Schedule A Property the Association could not defend the Main Proceedings[151]. Thus Palmer J expressed full awareness of the impact of order 2 in reducing the value of the trust property so far as the Association's costs were concerned.

141 *The Court of Appeal's criticisms: the Association's liability for the plaintiffs' costs.* What of the plaintiffs' costs? The majority's figure of "at least about one-third" of the Schedule A Property (other than the Church Land) appears to rest on the assumption that if the plaintiffs succeed, "it is likely that recourse would be had to the Schedule A [P]roperty in an amount of not less than about $400,000"[152].

142 The majority of the Court of Appeal arrived at that fraction, and adopted that assumption, because it took the value of the Schedule A Property other than the Church Land (less a mortgage to the National Australia Bank Ltd) to be $1,175,000; it said there was evidence that the Association's future costs were likely to be $200,000; it inferred that the plaintiffs' costs would be the same[153]; and it assumed that the plaintiffs would seek those costs out of the trust assets. The Court of Appeal considered that Palmer J erred in failing to take account of the Association's liability for the plaintiffs' costs if it lost, and in failing to appreciate that the plaintiffs' costs would come out of the trust assets.

143 *The plaintiffs' argument to the Court of Appeal: s 59(4).* The Court of Appeal's approach diverged, however, from that adopted in the plaintiffs'

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149 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [34], [37], [40], [88] and [91].

150 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254 at [9]-[10], [13] and [15].

151 See [18] above.

152 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [98].

153 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [48]-[53] and [56].

submissions to the Court of Appeal[154]. The submissions to that Court contended that the trustee's right of indemnity under s 59(4) of the Act[155] applied "not only to the costs which the trustee incurs to his or her own lawyers in conducting the proceedings but also to any costs which may be awarded against the trustee in the proceedings".

144 The plaintiffs' argument made a number of controversial assumptions and begged a number of questions. In particular, it paid no regard to the question of what expenses fall within the statutory phrase "all expenses incurred"[156]. Does the expression include expenses arising from breaches of trust of the kind alleged?

145 The Statement of Claim (Version 8) alleges that the Association has, inter alia, breached the trust on which the Schedule A and Non-Schedule A Property is held by applying parts of that property for purposes other than those of the trust in the following ways: preventing the first and second plaintiffs from conducting religious services at the St Petka Church; administering parts of the property to the exclusion of the second plaintiff as parish priest by purportedly dismissing him and ceasing to pay him; employing in his place and paying an allegedly disqualified priest banned from performing clerical duties; requiring or permitting another allegedly disqualified priest to conduct purported religious services in breach of church law; dealing with parts of the property without the first plaintiff's authority; permitting another person allegedly banned from performing clerical duties to use the church hall for purported services without the first plaintiff's authority; refusing to accept applications for membership; and using the property to defend the Main Proceedings, conduct the proceedings for

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154 Unlike the written submissions, the plaintiffs' notice of appeal to the Court of Appeal did not contain any material specifically directed to a failure to conduct a balancing exercise.

155 It provides:

> "A trustee may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers."

156 Similar questions have recently caused difficulty, and a measure of disagreement, in relation to s 59(4) and in relation to rights of indemnity of trustees under the general law, which is similar to that under s 59(4), in *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (In Liq)* [2002] ATPR 41-864 and *Nolan v Collie* (2003) 7 VR 287.

judicial advice, and conduct the appellate judicial advice proceedings and ceasing to remit 5 percent of the income of the St Petka Parish to the first plaintiff.

146 It is also alleged that the Association "has repudiated" the trust, and has continued to do so despite Hamilton J's decision[157]. It is further alleged that the Association has not complied with its statutory obligations to lodge its accounts, and that it is in a position of conflict between its duty as a trustee and its interest in avoiding liability for the alleged breaches. Depending on what findings of fact are eventually made by the trial judge, it is possible that the Association has committed very serious misconduct. If so, it is highly doubtful that it could employ s 59(4) to protect itself from the consequences of an order that it pay the costs of the plaintiffs.

147 However, the argument based on s 59(4) need not be considered further: for although s 59(4) was referred to in the plaintiffs' argument to this Court, the Court of Appeal did not rely on it. The argument based on s 59(4) is thus irrelevant to any rebuttal of the Association's argument in support of the notice of appeal that the Court of Appeal erred in detecting an error in Palmer J's reasoning based on a failure to conduct a proper "balancing exercise". The argument based on s 59(4) is also irrelevant to the points raised by way of notice of contention, which does not mention s 59(4).

148 *The Court of Appeal's approach: s 93(3).* Instead of accepting the plaintiffs' s 59(4) argument, the Court of Appeal relied on s 93(3) of the Act[158]. It cited *Perkins v Williams*[159] and *Titterton v Oates*[160] for the proposition that: "A

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157 *Metropolitan Petar v Mitreski* [2003] NSWSC 262.

158 It provides:

> "In any proceedings with respect to the management or administration of any property subject to a trust or forming part of the estate of a testator or intestate, or with respect to the interpretation of the trust instrument, the Court may, if it thinks fit, order any costs to be paid out of such part of the property as in the opinion of the Court is the real subject matter of the proceedings."

159 (1905) 22 WN (NSW) 107.

160 (1998) 143 FLR 467 at 483-484.

person interested in the trust fund who successfully institutes proceedings for removal will, ordinarily, be awarded costs from the fund."[161]

149 At the outset it must be noted that the cases cited do not support that proposition. In *Perkins v Williams*, A H Simpson CJ in Eq ordered the two defendant trustees to be removed for breach of trust, ordered them personally to pay the plaintiff's costs, and reserved the question whether any of the plaintiff's costs not recovered from those defendants be paid out of the trust fund. He later answered that question affirmatively and made a corresponding costs order, while reserving the question of which beneficial interests should bear the burden of that order. This outcome raises a factual question which the plaintiffs did not invite the Court of Appeal to consider, and which it did not consider: to what extent could the plaintiffs' costs of the Main Proceedings, if ordered to be paid by the defendants, be met by the defendants (ie not just the Association) before any question of resort to the trust assets had to arise?

150 As for *Titterton v Oates*, in that case the Supreme Court of the Australian Capital Territory (Crispin J) ordered that the first defendant be removed as trustee and that the costs of the plaintiff and the second defendant (two of the beneficiaries) be paid out of the trust assets, rather than by the first defendant. However, his Honour did so because, although there was some wilfulness and bitterness in the trustee's conduct, the extent of her responsibility for some breaches of trust was mitigated by an episode of a longstanding depressive illness, and the basis for removal was not that there had been breaches of trust but "that the maintenance of the present arrangement would be inimical to the interests of all concerned."[162] This asserts no rule as to what "ordinarily" will happen; and it is factually very remote from the present case.

151 Certainly under the general law trustees in breach of trust can be ordered to pay the costs of proceedings to remove them[163]. Nothing in s 93(3) of the Act prevents such an order being made in a case in which it would be proper to make it. The question is whether a s 93(3) order might also be made in this case in

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161 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [54].

162 (1998) 143 FLR 467 at 484.

163 *Attorney-General v Murdoch* (1856) 2 K & J 571 [69 ER 910]; *Palairet v Carew* (1863) 32 Beav 564 [55 ER 222].

favour of the plaintiffs if the Association were to lose the Main Proceedings. Whether the "costs" referred to in s 93(3) would include the costs of the plaintiffs in this case would depend on the following matters, among others: whether the trial judge makes a costs order against the Association; what the allowable quantum of the Association's costs are (bearing in mind the constant complaints by the plaintiffs that the figures given for the Association's costs are far too high); and whether the trial judge directs that the Association is at liberty to satisfy that costs order out of the trust assets – either at all, or only on the Schedule A Property Issue (that being arguably necessitated by doubts as to the terms of the trust for which none of the parties were responsible).

152 On the last matter, it would be bizarre that a trustee responsible for (and other defendants participating with the trustee in) grave breaches of trust of the kind alleged in the Statement of Claim (Version 8) should not be exposed to personal liability for the costs of proceedings to remedy the breaches, including the costs of the plaintiffs. The plaintiffs instituted the Main Proceedings for various purposes, including to vindicate the authority of the first plaintiff and the position of the second plaintiff. However, amongst the purposes is a desire to preserve the property of the trust alleged. It is difficult to imagine that, if the Main Proceedings succeed and a new trustee is appointed, either the plaintiffs or the new trustee would calmly acquiesce in the Association's relying on s 93(3) of the Act to absolve it of its liability under an order that it pay the plaintiffs' costs, and thereby further destroy the property of the trust which the proceedings were instituted to preserve. Nor is it likely that the Court would exercise its discretion under s 93(3) favourably to the Association if the allegations in the Statement of Claim were fully made out. In particular, it is difficult to imagine that the Court would order that the plaintiffs' costs be paid out of the trust property at least until the plaintiffs had exhausted their rights under costs orders against the defendants.

153 In this respect, the plaintiffs displayed a certain inconsistency in their arguments. Although they often criticised the amount which the Association had spent or wanted to spend on its lawyers, their defence of the Court of Appeal's reasoning about the "balancing exercise" assumes that for them to spend the same amount on the whole case as the Association did on the Schedule A Property Issue would be reasonable. Yet if the plaintiffs' criticism is sound, that assumption might be wrong, and it was otherwise unsupported.

154 Another inconsistency was that, for some purposes, the plaintiffs contended that there was no need for the Association to have access to the trust property to fund the proceedings, since the funds could be raised from other persons, presumably including the other defendants; yet for other purposes the plaintiffs contended that, if the plaintiffs succeeded, the defendants could not pay their costs. These inconsistencies, and the lack of analysis they received from

bar and bench in the courts below, raise a further question over the Court of Appeal's criticism of Palmer J in relation to the "balancing exercise".

155 The Court of Appeal's judgment contains no assessment of the factors just outlined. Doubtless that is because the submissions of the parties to the Court of Appeal, and those of the plaintiffs in particular, contain no assessment of them. If Palmer J failed to assess them, that is because in the six sets of written submissions supplied by the plaintiffs to him the material devoted to the relevance of the risk that the plaintiffs' costs could come out of the trust assets was limited to the following passage:

> "Judicial advice which authorises the bringing or the defence of proceedings must contemplate the possibility that the trustee will be unsuccessful, and that the trustee's costs, *and the other party's costs*, will thereby fall upon the trust estate." (emphasis added)

156 The submissions did not refer, in terms, either to s 59(4) or to s 93(3). Thus Palmer J was not favoured with a specific argument corresponding with the Court of Appeal's reasoning. He did not deal with any such point in specific terms, although he did make general references among a list of the relevant factors to "the amounts involved, including likely costs", "the likely costs to be incurred by the trustee" and "the cost of the litigation [being] very great"[164].

157 If Palmer J overlooked the very brief submission made, he could be excused for having done so. And if he did not overlook it, but regarded its generality as being so unsatisfactory that it did not call for specific treatment, he could be excused for that too. Appellate interference with discretionary judgments on the ground that a consideration was left out of account depends on establishing that the judge did "not take into account some *material* consideration"[165] (emphasis added). The error perceived by the Court of Appeal was an error relating to an unspecified and unspecifiable sum of money up to $200,000 in a case in which Palmer J was acutely conscious of the propensity of the parties to fight over issues in a manner wholly disproportionate to what was at stake, and in which he had seen the loss of almost $300,000 to the trust estate as not being disproportionate to the benefits to be gained by the litigation.

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164 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [80]-[81].

165 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.

158 The figure of $200,000 also depended on numerous contingencies which Palmer J had not been asked to analyse. Considerations of a controversial kind in relation to applying s 93(3) to the facts were also material, but not developed before Palmer J. Assuming in favour of the plaintiffs that his Honour in fact failed to take the point into account, in those circumstances the terms in which the point was put to Palmer J, so far as it was put at all, amongst a mass of other submissions of the utmost complexity and detail, preclude it being regarded as a material matter which he ought to have taken into account. For if the plaintiffs did not see it as sufficiently material to merit proper exposition and development, why should he?

159 *Further error in the "balancing exercise"?* The only flaw identified by the Court of Appeal in the failure of the primary judge to conduct a "balancing exercise" related to the liability of the trust assets for the Association's costs and the plaintiffs' costs. However, in this Court the plaintiffs contended in addition that Palmer J had committed a further error in relation to the balancing exercise by failing to form some view of the strength of the Association's defence, which he could not do until the Schedule A Property Issue had been defined by the filing of the defence to the Statement of Claim (Version 8). The plaintiff submitted that it was not enough for Palmer J to conclude that there were "sufficient prospects of success to warrant the Association defending the Schedule A Property Issue"[166], but that he should have formed a view of its "strength", so that that could be weighed in the balance. This submission is hypercritical.

160 In contemporary circumstances where there is an increasing tendency on trial (as on appeal) to commit argument to very detailed and lengthy written submissions, it is undesirable that appellate courts should adopt a hypercritical stance. Doing so tends to encourage further litigation and to cause sight of the substantive merits (including the legal merits) of the case to be lost. This is particularly so where what is at stake is a discretionary decision which can rarely, or never, be explained exhaustively and entirely in the reasons provided by judges for their determinations.

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166 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [82].

161 Palmer J had great difficulties in dealing with an opinion of counsel which the Court of Appeal had earlier held[167] was privileged. That opinion necessarily relied on assumptions of fact which could only be tested at the trial. Even assuming that Palmer J did not state a concluded view about strength, that did not exclude the possibility that he had formed a particular but necessarily tentative view about strength, given the assumptions of fact made in the opinion, because it was not open to him to reveal the contents of the opinion.

162 Although the plaintiffs' submissions take Palmer J to be using the term "sufficient prospects of success" in apposition to an opinion about strength, that is not the way Palmer J used the term. His Honour said[168]:

> "In a judicial advice application in which the trustee asks whether it is justified in prosecuting or defending litigation, all the Court does is to reach a view as to whether the Opinion of Counsel satisfies it that there are *sufficient prospects of success* to warrant the trustee in proceeding with the litigation. Counsel's Opinion must address the facts necessary to support the legal conclusions reached and must demonstrate that the propositions of law relied upon for those conclusions are *properly arguable*. Whether, in the light of Counsel's Opinion, there are '*sufficient*' *prospects of success* calls for another judgment, founded upon such considerations as:
>
> – the nature of the case and the issues raised;
>
> – the amounts involved, including likely costs
>
> – whether the likely costs to be incurred by the trustee are proportionate to the issues and [the] significance of the case;
>
> – the consequences of the litigation to the parties concerned;
>
> – in the case of a charitable trust, any relevant public interest factors". (emphasis added)

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167 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112.

168 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [80].

163 Thus Palmer J distinguished the question of whether propositions were properly arguable from the question whether there were "sufficient" prospects. Palmer J then said[169]:

> "[Counsel's opinion] specifically addresses the facts relating to the Schedule A Property Issue, amongst other issues. The propositions of law relied upon are properly arguable. I have considered the factors referred to above. While the cost of the litigation is very great, so also is the importance of the litigation to a section of the community. As I have said, the final settlement of the dispute as to the use of the Church, which has already divided the community so bitterly for such a long time, is in the public interest."

164 Nothing in the foregoing reasoning indicates that Palmer J distinguished between mere "sufficiency" and "strength"; indeed he had earlier stated as a relevant factor "the merits and strengths of the claim against the trust estate"[170]. Nor does the plaintiffs' submission demonstrate that Palmer J was disabled from reaching the stated assessment by the absence of a defence to the Statement of Claim (Version 8). The contents of counsel's opinion doubtless indicated in general terms what the contents of the defence would in due course be[171].

165 *Conclusion respecting "balancing exercise".* The primary judge was not shown to have erred by failing to have regard to the effect on the trust property of advising the Association that, subject to the limitations fixed by the primary judge, the Association would act properly if it defended the Main Proceedings. What orders for costs should be made at the conclusion of the Main Proceedings will be a matter for the trial judge that is to be decided having regard to the way in which the various issues joined in those proceedings are decided. In the circumstances, it was not necessary for the primary judge to predict what costs orders might be made at the end of the trial of the Main Proceedings. It is, therefore, not now necessary to explore further the various costs orders that might possibly be made beyond noticing that one form of order that may be made in proceedings in which there are allegations of breach of trust and a claim for

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169 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [81].

170 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [62]: see above at [84].

171 A different complaint about the absence of a defence by the plaintiffs is considered below: [174]-[177].

removal of a trustee is an order that the defaulting trustee pay the costs of opposite parties without resort to the trust property.

166 Whether, at the conclusion of the Main Proceedings, it would be appropriate to order that the Association should itself pay the costs of the other parties to the proceedings (without resort to the trust property) is a point about which it is not profitable to speculate further. The primary judge's conclusion that it is proper for the Association to defend those proceedings (subject to the various limitations indicated in those orders) should stand. Unless it is later contended that there was "any fraud or wilful concealment or misrepresentation in obtaining the ... advice"[172], it follows that, subject to those limitations, the Association may resort to the Schedule A Property to meet its costs and expenses of defending the proceedings. It also follows that, absent a contention of fraud, wilful concealment or misrepresentation, the Association could not later be ordered, in the Main Proceedings, to restore to the trust property the costs that it had thus paid or retained. That inevitable consequence of an order in the nature of order 2 may constitute a powerful reason, if all that were at stake in proceedings were the liability of a trustee personally to make good the consequences of what is alleged to be the trustee's breach of trust, to make no order permitting such a trustee to defend the suit at the expense of the trust fund. But as explained earlier[173] that is not this case.

(e) Did Palmer J deny procedural fairness in relation to privileged material?

167 *The plaintiffs' argument.* In support of their notice of contention, the plaintiffs submitted that, once they had been served with the Association's application for judicial advice, it was possible that their "rights" could be affected, because the advice could bind them under s 63(11). The plaintiffs submitted that it followed that, as a matter of procedural fairness, they should have been given the opportunity to participate in as meaningful a way as possible in the proceedings.

168 A key difficulty for the plaintiffs was the existence of the earlier decision in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand*[174]. In that case a majority of the Court of Appeal held that the opinions

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172 *Trustee Act* 1925 (NSW), s 63(2).

173 See [67]-[68] and [73].

174 (2006) 66 NSWLR 112.

of counsel were the subject of client legal privilege under Pt 3.10, Div 1 of the *Evidence Act* 1995 (NSW), and that the privilege was not waived by their use in judicial advice proceedings. The plaintiffs accepted that, so long as that earlier decision stood, Palmer J was bound to apply it, as he did[175]. The plaintiffs formally submitted to Palmer J, and to the Court of Appeal in the appeal from Palmer J, that that earlier decision should not have been followed because it was wrong.

169 *The correctness of the earlier decision cannot be raised by way of notice of contention.* Contrary to the plaintiffs' submissions, the question of whether the earlier decision was correct was not a question which the Court of Appeal "erroneously decided, or ... failed to decide" within the meaning of r 42.08.5 of the High Court Rules 2004 (Cth). The Court of Appeal was bound to apply its own earlier decision unless the plaintiffs made an application to have the earlier decision overruled. This they did not do.

170 It follows that the Court of Appeal, like Palmer J, was right to follow the earlier decision, and that the formal submission that it was wrong, made only to preserve the plaintiffs' position in this Court, was not a submission which the Court of Appeal was obliged, or permitted, to deal with. Hence the question whether the earlier decision was correct is not something that the plaintiffs can raise in this Court as of right under their notice of contention. It is rather a question which arises only in relation to the application for special leave to cross-appeal against the earlier decision. That question will be discussed below[176].

171 *Discretion to permit access?* The plaintiffs submitted, however, that Palmer J had a discretion to provide them with the relevant parts of counsel's opinions in relation to the strength of the Association's case on the Schedule A Property Issue. The plaintiffs relied on *Official Solicitor to the Supreme Court v K*[177]. In that case the court was said to have a discretion to permit a mother to be shown a medical report about her child even though it was confidential. However, that case did not concern a privileged document, simply a confidential one. And once it is accepted that the opinions were the subject of client legal privilege under Pt 3.10, Div 1 of the *Evidence Act* 1995 (NSW),

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175 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [21].

176 See [178]-[184].

177 [1965] AC 201 at 219, 234 and 238.

access to them could only be had by invoking some provision of that Part or some other provision of the *Evidence Act* permitting access. The plaintiffs did not point to any such provision.

172 *Election between waiving privilege and abandoning the application.* Finally, the plaintiffs suggested that Palmer J ought to have put the Association to an election between waiving privilege in the opinions and abandoning the s 63 application. The plaintiffs did not develop this idea. Nor did they point to any passage in the record in which Palmer J was urged to take this course or in which the Court of Appeal was urged to allow the appeal because of his failure to take it. In these circumstances Palmer J cannot be criticised for failing to take it.

173 It follows that Palmer J did not make any error in refusing the plaintiffs access to the opinions of counsel. The Court of Appeal's orders cannot be supported by contending that there was.

(f) Did Palmer J deny procedural fairness in dealing with the Association's application before it had filed its defence?

174 *The plaintiffs' argument.* The plaintiffs contended in their notice of contention that Palmer J ought to have delayed giving his advice until the Association's defence had been filed. The questions of what the differences between the parties were on the Schedule A Property Issue, how long it would take to resolve them, and what the costs would be necessarily depended on all the parties and Palmer J understanding what the differences were. While Palmer J had some idea of the nature of the defence by reason of his access to the opinions of counsel, the plaintiffs did not.

175 *The clarity of the issues.* It was for the plaintiffs to make out their case on the Schedule A Property Issue. They put their case in pars 7A and 22 of their Statement of Claim (Version 8). It is possible that parts of these allegations have been admitted in the defence which was not before Palmer J but has since been filed. However, the conduct of these proceedings over more than a decade does not suggest that that is a possibility which will do much to shorten controversy.

176 In the Fourth Amended Statement of Claim there was no par 7A, but par 22 corresponded substantially with its counterpart in the Statement of Claim (Version 8), although the latter contains numerous additional particulars. The defence filed in answer to the Fourth Amended Statement of Claim consisted largely of denials and non-admissions. In the circumstances, Palmer J's identification of the Schedule A Property Issue by reference to pars 7A and 22 was adequate, and sufficient to enable the plaintiffs to debate the merits of granting judicial advice without any breach of procedural fairness.

177 It follows that the absence of a defence to the Statement of Claim (Version 8) did not mean that Palmer J had denied procedural fairness to the plaintiffs.

Application for special leave to cross-appeal: privileged opinions

178 The plaintiffs sought special leave to cross-appeal against the failure of the Court of Appeal, in hearing the appeal from the orders made by Palmer J pursuant to Judgment No 3 and Judgment No 4, "to decide that ... the Association's putting the written opinion of counsel before the Court in support of the Association's application for judicial advice ... amounted to a waiver of legal professional privilege in respect of the legal opinion."

179 There are three difficulties in this application.

180 The first difficulty is technical. A cross-appeal, like an appeal, is against orders, not reasoning or particular decisions leading to an order. The orders made by the Court of Appeal on the appeal from the orders made by Palmer J after Judgment No 4 gave the plaintiffs the amplest success they could have hoped for, except as to costs, because the Court of Appeal set aside Palmer J's orders and dismissed the Association's summons for judicial advice. The plaintiffs were not wholly successful in relation to costs, but the question of whether the privilege in the opinions of counsel had been waived was immaterial to costs.

181 A second, and more substantive, difficulty is that the Court of Appeal, while deciding the appeal against Palmer J's orders, could not have held that privilege had been waived without overruling its own earlier decision the previous year that there had not been waiver[178]. The plaintiffs did not invite the Court of Appeal to do this, but merely made a formal submission that the earlier decision was wrong. Since the submission was only formal, the Court of Appeal did not err in rejecting it.

182 The third difficulty is that this part of the application for special leave to cross-appeal against the Court of Appeal's orders made on 22 June 2007 is actually, in substance, an application for special leave to appeal against the Court

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178 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112.

of Appeal's orders made in its decision about waiver the previous year. So viewed, the application is well out of time: it ought to have been made within 28 days of 29 June 2006, but it was not made until 15 April 2008.

183 The plaintiffs submitted that they had been of the view that they did not necessarily have to win on the waiver issue and wanted to get on with the case, but no satisfactory explanation was offered for the delay. They submitted that the waiver decision "was given in an interlocutory appeal and ... the matter has now reached this Court following the making of final orders"; since the plaintiffs had been brought to the High Court by the Association and had raised the point, "the Court ought to deal with it."

184 That call to duty cannot succeed, especially in the context of the enthusiastic course of litigation that marked this case. To hold that the Court of Appeal's decision that there had been no waiver was wrong would not reveal any error by Palmer J, since he was bound by that decision, and would not serve any useful purpose in these proceedings. If events have placed the plaintiffs in difficulty, it is the consequence of their having failed to seek special leave to appeal against the waiver decision within the time provided by the Rules of this Court.

Application for special leave to cross-appeal: orders of Palmer J in relation to Judgment No 1 and Judgment No 2

185 As part of Judgment No 1, Palmer J made two directions, described above as Direction 1 and Direction 2[179]. Further, as part of Judgment No 2, Palmer J made a direction described above as Direction 3[180].

186 During the hearing that led to Judgment No 3, the plaintiffs sought to have Directions 1, 2 and 3 revoked. Palmer J refused that application in Judgment No 4[181].

187 The plaintiffs sought leave to appeal against Directions 1, 2 and 3 in the course of their appeal against the orders made in consequence of Judgment No 3

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179 See [14].

180 See [15].

181 *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254 at [14].

and Judgment No 4. The Court of Appeal refused that leave. It said that by the time the revocation application was made to Palmer J, "the Association had acted upon those orders and had obtained [counsel's] opinions on the strength thereof." It also said that the Association had not previously sought leave to appeal against the three orders. It concluded that it would be unjust to grant leave to appeal so late in the proceedings – a reference to the fact that lengthy extensions of the periods within which to seek leave to appeal would be called for[182].

188 The plaintiffs complain that Palmer J's reasons were "obscure" and that the Court of Appeal's reasons were "irrelevant". The merits of these complaints need not be examined. There would only be utility in the appeal if it could be shown that Non-Schedule A Property had been used in relation to the first two directions. It has not been shown that it has been. The success of the Association's appeal to this Court demonstrates that the cross-appeal would fail, and hence lack utility, in relation to the Schedule A Property. Special leave to cross-appeal should be refused on the grounds that the plaintiffs delayed in approaching both Palmer J and the Court of Appeal, that no point of principle meriting the grant of special leave exists, and that no utility in the cross-appeal has been demonstrated.

Balance of notice of contention and application for special leave to cross-appeal

189 Other points were raised in the notice of contention and the draft notice of cross-appeal, but since no argument was advanced in support of them, it is not necessary to deal with them. Some other arguments were advanced, but since they were related to the notice of appeal, the notice of contention or the draft notice of cross-appeal, it is not necessary to deal with them either.

Conclusions and orders

190 Upon one view, what was involved in these proceedings was the consideration by this Court of little more than the disturbance of orders made in the exercise of discretionary power by a judge empowered to superintend the conduct of a trustee under provisions afforded to him, in that respect, by the Act. We have dealt with the proceedings at some little length for a number of reasons.

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182 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [125]-[126].

They involved a consideration of powers that, despite their long history, rarely reach the consideration of final appellate courts. Those powers are of frequent practical importance in the administration of the Act which has a distinct provenance in legislation first enacted in England and later in Australia. They also find reflection in statutes operating in Australian jurisdictions other than that to which the Act applies. They arise in bitterly contested proceedings between parties who have asserted, and litigated, their legal rights up to this Court by advancing numerous complex and detailed submissions. And they illustrate the particular care that must be taken by appellate courts, in such circumstances, in disturbing the conclusions of a trial judge in arriving at such decisions, except in the limited circumstances explained by this Court in *House v The King*[183]. Unless restraint is employed in cases of the present kind, in disturbing the orders of trial judges, the risk is run that escalating litigation is encouraged; the resolution of the substantive dispute is delayed; legal costs are incurred in disproportion to the value of assets at stake; and other public and private costs are improvidently incurred. Against such outcomes, this Court has frequently expressed, and reasserted, the need for particular appellate restraint[184].

191 The orders of the Court of Appeal which should not be interfered with are order 2 made on 22 June 2007 (refusing the plaintiffs leave to appeal against orders of Palmer J made on 7 May 2004 and 10 June 2005) and order 4 made on 23 October 2007 (ordering the plaintiffs to pay the Association's costs of that leave application). In relation to the remaining orders of the Court of Appeal, the following orders were pronounced on 7 August 2008[185].

1. Appeal allowed.

2. Respondents to pay the appellant's costs of the appeal.

3. Set aside order 1 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 22 June 2007 and, in its place,

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183 (1936) 55 CLR 499 at 505.

184 cf *Singer v Berghouse* (1994) 181 CLR 201 at 212 per Mason CJ, Deane and McHugh JJ applying *Golosky v Golosky* unreported, NSW Court of Appeal, 5 October 1993 at 13-14 per Kirby P; [1994] HCA 40.

185 As to orders 5 and 6, see *Nissen v Grunden* (1912) 14 CLR 297 at 321; [1912] HCA 35.

order that the application for leave to appeal to that Court be dismissed with costs.

4. Application for special leave to cross-appeal dismissed with costs.

5. Set aside orders 1, 2, 3 and 5 of the orders made by the Court of Appeal of the Supreme Court of New South Wales on 23 October 2007 and, in their place, order that the appellant be entitled to be reimbursed out of the Schedule A Property for the balance of its costs, charges and expenses incurred in conducting the proceedings in the Court of Appeal to the extent to which they are not paid by the respondents.

6. Order that the appellant be entitled to be reimbursed out of the Schedule A Property for the balance of its costs, charges and expenses incurred in conducting the proceedings in this Court to the extent to which they are not paid by the respondents.

192 KIEFEL J. The factors which the Court of Appeal of the Supreme Court of New South Wales[186] considered that Palmer J had not taken into account, in deciding to give advice to the Association (the trustee)[187], are identified in the judgment of Gummow ACJ, Kirby, Hayne and Heydon JJ[188]. Principal amongst them is the opinion that it is inappropriate to use proceedings brought under s 63 of the *Trustee Act* 1925 (NSW) for adversarial purposes.

193 The members of the Court of Appeal accepted that a previous decision of that Court[189] holds that an application under s 63 is not to be regarded as adversarial because parties who are served with its process are adversaries and because there is an element of contest concerning the advice sought[190]. Their Honours considered that proceedings may become adversarial and the advice sought inappropriate to be given and that this had occurred in the present case. Their Honours differed somewhat in their reasoning to this conclusion. Ipp JA[191], with whom Giles JA agreed[192], was of the view that the proceedings had been used to determine rights as between the parties and this was reflected in the decision of Palmer J. The advice sought by the Association was of an essentially adversarial nature[193]. The nature of the advice was coloured by the

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186 Giles, Hodgson and Ipp JJA in *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150.

187 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247; *Application of Macedonian Orthodox Community Church St Petka Inc (No 4)* [2007] NSWSC 254.

188 At [25]-[27].

189 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 123 [42], 125-126 [54]-[56] per Beazley and Giles JJA.

190 *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand v The Macedonian Orthodox Community Church St Petka Inc* [2007] NSWCA 150 at [2] per Giles JA, [7] per Hodgson JA, [81] per Ipp JA.

191 [2007] NSWCA 150 at [78].

192 [2007] NSWCA 150 at [2].

193 [2007] NSWCA 150 at [82]; and see at [2] per Giles JA.

issues in the Main Proceedings[194], where an important issue is whether the Association has breached the trust[195]. Hodgson JA was also of the view that the proceedings had been rendered adversarial because the advice concerned the position of the Association as trustee, because it was not disinterested in the advice sought and was seeking to use trust property[196].

194 The views expressed by their Honours in the Court of Appeal might be taken to involve a limitation upon the power given by s 63, which is to say the jurisdiction of the Supreme Court to give advice[197]. However their Honours appear to have dealt with the matter on the basis that Palmer J's discretion miscarried[198] rather than by reference to any jurisdictional bar.

195 Proceedings provided for by s 63 do not involve the determination of a controversy, but rather the giving of advice or direction to a trustee with respect to questions of the kind referred to in the section. Section 63 is an exception to a Court's ordinary practice of deciding disputes between competing litigants, as Palmer J observed[199]. But his Honour's orders were not determinative of the parties' rights. The advice given was as to whether, and upon what terms, proceedings should be pursued in order to finally determine the controversy as to the terms of the trust upon which the Association held property. The advice was advice respecting the interpretation of the trust instrument and was therefore within power. The interests of the parties and the liability of the Association as trustee were to be determined, but in the Main Proceedings.

196 It may be inferred that their Honours in the Court of Appeal considered that the connection of the advice to the pursuit, or defence, of the Main Proceedings to be so important a factor as to foreclose the giving of such advice. I agree with the plurality that the discretion is not to be exercised by reference to some such overriding consideration[200]. In exercising the discretion the Court

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194 The term used in the plurality judgment.

195 [2007] NSWCA 150 at [85].

196 [2007] NSWCA 150 at [7]; and see at [82] per Ipp JA.

197 See *Australian Broadcasting Commission v O'Neill* (2006) 227 CLR 57 at 78-81 [54]-[64] per Gummow and Hayne JJ; [2006] HCA 46.

198 [2007] NSWCA 150 at [78] per Ipp JA, [7] per Hodgson JA.

199 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441 at 445 [23].

200 At [106].

should be guided by the scope and purposes of the section. The principal purpose of the section, and the opinion, advice or direction given under it, is the protection of the interests of the trust. Another purpose is the protection of a trustee who is acting in that regard and upon advice[201]. Securing the latter purpose may ensure the attainment of the principal purpose, by removing the concern of a trustee about exposure beyond their usual indemnity.

197 It is apparent from the reasons of Palmer J that his Honour considered that it was in the interests of the trust that the uncertainty as to the terms of the trust should be resolved, once and for all[202]. The correctness of that view cannot be doubted, particularly given that the trust is for a charitable purpose. The issues relating to the trustee in the Main Proceedings should be seen in this perspective. They assume a lesser importance than the attainment of the principal object of the section. His Honour expressed himself as satisfied that opinions of counsel demonstrated that there were sufficient prospects of success to warrant the Association defending the question of construction.

198 The questions that are identified by s 63 as the subject of the advice of the Court may predictably arise in the context of litigation where a trustee is accused of breach of trust. If the litigation may resolve a question to which s 63 refers, and it is in the interests of the trust estate to do so, the trustee should be protected in achieving that resolution. That the trustee may also benefit from a determination, as would here be the case if the Association's version of the terms of the trust were upheld, is not to the point. It may be appropriate that the Court condition the advice or limit the access to the trust estate to the costs of determination of the dispute in question. It was not necessary in this case to altogether refuse to give the advice or direction sought.

199 I agree that, in determining to give the advice sought, Palmer J did not fail to address relevant questions, for the reasons given by the plurality. His Honour was well aware of the issues relating to the Association in the Main Proceedings and of the impact of orders for costs upon the trust estate, to the extent that the parties contended for. His Honour was entitled to determine the application on facts which had not been tested in litigation. The summary nature of the proceedings under s 63 will often require a Court to proceed in this way. The extent of the information available to the Court and its apparent reliability are factors going to the exercise of the discretion to give the advice. I also agree, notwithstanding the plaintiff's contention to the Court of Appeal, that Order 6 of

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201 See *Trustee Act*, s 85(1) and (2).

202 *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)* [2006] NSWSC 1247 at [50].

Palmer J's orders allows for revocation of his Honour's orders only with respect to their future operation[203].

200 There is no substance to the matters raised in the notice of contention. I agree with the reasons of the plurality in this regard. It was for these reasons that I joined in the orders pronounced by the Court on 7 August 2008.

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203 Reasons of Gummow ACJ, Kirby, Hayne and Heydon JJ at [89]-[96].