

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## SMOLONOGOV V OUR LADY OF KAZAN RUSSIAN COMMUNITY OF LIDCOMBE INC [2020] NSWSC 1484

Supreme Court of New South Wales, Rein J, 30 September 2020

A Cy-près scheme approved in settlement of a Church dispute.

**Key words:** Charity, New South Wales, Cy-près, Church, Schism, Incorporated Association, Beneficiary

1. In 2008, the Cathedral of Our Lady of Kazan in Lidcombe New South Wales was established by those aligned with the Russian True Orthodox Church Abroad (“RTOCA”), the original pre-Soviet era Church. Church property was held in the name of a trust, subject to a trust deed.
2. In 2009 the congregation set up an incorporated association called Our Lady of Kazan Russian Community of Lidcombe Inc (“the Incorporated Association”).
3. In 2019 a church member sought an injunction to stop an annual general meeting (“AGM”) of the Incorporated Association from taking place on various grounds including breach of the parish by-laws and a proposal to change the congregation’s denominational alignment from the RTOCA to Russian Orthodox Church Abroad (“ROCA”), the successor to the Soviet-era Russian Orthodox Church. At a preliminary hearing, the Court encouraged the parties to mediate, and joined the Attorney-General to the action.
4. After mediation, the parties signed a deed of settlement subject to a cy-près scheme being approved by the Attorney-General and the Court for the administration of the trust property by the congregation under its new denominational alignment. The RTOCA were to receive \$200,000 and a further \$50,000 for legal costs in exchange for relinquishing any claim to the properties, or against the RTOCA.
5. The parties together with the Attorney-General applied for approval of a cy-près scheme pursuant to section 9 of the *Charitable Trusts Act 1993* (NSW). The scheme provided for:
  - stating the purpose broadly without necessarily linking it to a particular faction or denomination within the wider Russian Orthodox tradition so that if in future the congregation wishes to adopt a different alignment it will be able to do so without necessarily having to revise the scheme;

- correcting the Trust Deed which stated that the “Parish of Our Lady of Kazan” is the beneficiary of the trust, whereas the parties now agree that the trust is a charitable trust which has a charitable purpose instead of a specific beneficiary in the way non-charitable trusts have;
- the trustee appointing the Incorporated Association to manage the trust property.
- the trustee accepting the appointment or termination of a Bishop by the Incorporated Association provided certain procedural matters were adhered to; and
- any amendment of the terms of the trust to include submitting proposed amendments to the Attorney-General for consideration.

6. The Court approved the scheme, noting that (at [28]):

The Scheme is not a radical re-working of the original charitable intention – rather, it rephrases the trust’s stated purpose slightly and refines the means of administering the trust property in a way that I consider suitable and effective. I take comfort from the fact that the parties consent to the Scheme and that the Attorney-General has approved it.

## IMPLICATIONS



It is not uncommon for churches to be established as an unincorporated association of members. To hold property, a legal entity is required, and traditionally this has been a trustee appointed pursuant to a trust deed. Often the trust is charitable, and the trustees are obliged to act on the instructions of the unincorporated association. In recent time often an incorporated association serves as the trustee, or in fact is the embodiment of the whole church. It is critical that expert legal advice is sought on the establishment of the appropriate legal structures to avoid future difficulties.

## VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2020/1484.html>

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