

## **BAPTIST CHURCH PROPERTY AND THE CONCEPT OF A TRUST**

### **WHAT IS A TRUST?**

A “trust” exists when the holder of a legal or equitable interest in property (the holder being called a trustee) is bound by an equitable obligation to hold that interest not for the trustee’s own exclusive benefit, but for the benefit of either:

- (a) another person or persons, or company, or other incorporated entity; or
- (b) some object or purpose permitted by law.

Every “trust” needs a trustee. The trustee must be an individual, a company, an incorporated society, or some other incorporated entity. A local church is generally not (in fact, almost never) incorporated, so a local church cannot be a trustee.

In the case of Baptist churches, the relevant “trust” is type (b) above, namely for an object or purpose permitted by law. In the case of Baptist churches, it is a charitable trust.

The trustee cannot derive personal benefit from the property. The individual members of the church cannot derive personal benefit from the property. The property is for the purposes and objects of the local church as a whole, not the individual members (or its pastor or officers).

This is similar to the situation where a person provides in that person’s Will for some benefit (be it property or cash or income on investments) to be set aside for the work of a local church. The executor would be in breach of his obligations if he used the assets for his own purposes or for the work of another church or denomination. So it is with property which is purchased by a trustee for the benefit of a local church.

When a property is purchased by a local church, it must define the obligations and duties of the trustee. Those obligations and duties continue forever. People give money on the basis that those obligations will be carried out, even after their death. The obligations and duties cannot be changed at the whim of later members.

The obligations and duties which are set out in Baptist Churches of New South Wales Property Trust Act 1984 were settled after long deliberation, and incorporate recent thinking as well as ideas which were first generated in Baptist Union Incorporation Act 1919. They have stood the test of time quite well. That is why most Baptist churches in NSW appoint the Property Trust as trustee upon the trusts set out in the Act.

Section 22 of the Act is quite important. It includes provisions which make it mandatory for the Property Trust to obey the directions of the local congregation (provided only that those directions do not contravene the Act itself or the general law of the land) thus ensuring the autonomy of the local church. Section 22 also imposes limitations upon

who can officiate as pastor in the buildings erected on the land. It also sets out the trust objects.

## **WHAT ARE THE TRUST OBJECTS?**

In accordance with Section 22 (3) of Baptist Churches of New South Wales Property Trust Act 1984, local church property is held for:

- (a) the public worship of God according to the usages of the Baptist denomination;
- (b) the instruction of children or adults, or both;
- (c) the provision of a residence for a pastor of the Baptist denomination or for a person employed in the work of a Baptist Church or other work connected with that denomination;
- (d) the provision of recreational and community welfare services ancillary to the work of a Baptist Church or other work connected with the Baptist denomination;
- (e) the promotion of such religious or philanthropic purposes as the Executive Committee from time to time determines.

## **THE LOCAL CHURCH**

A local Baptist Church is an unincorporated association. It is a gathering of individuals which we generally call a "congregation". The general law of the land says that unincorporated associations have no legal "personality" and for this reason they are incapable of entering into binding legal relations. This means that real estate (i.e. land and buildings) cannot be purchased or registered directly into the name of the local Baptist Church. It needs one or more trustees.

## **THE TRUSTEES**

Prior to the passing of the Baptist Union Incorporation Act 1919, real estate was registered in the names of individuals as trustees for the local congregation. These trustees were usually persons well known in the denomination, and for each congregation they signed a lengthy Trust Deed which set out the trusts upon which the property was to be held. This Trust Deed described the uses to which the property could be put, how the congregation would hold meetings for the purpose of giving directions to the trustees, how the property could be sold, purchased, mortgaged or leased, how new trustees could be appointed, what Baptist doctrines were mandatory to be observed and many similar matters.

## **INDIVIDUALS AS TRUSTEES**

Prior to 1920, this was the only system available, but it had a number of obvious drawbacks. Individuals die eventually, they may move away, they may go bankrupt, they may become ill or perhaps they may become uninterested. It is expensive to set up each Trust Deed, to appoint new trustees and to register them on the title. The exact wording of the Trust Deed is critical and without extreme care can turn out to be deficient. At

times, individuals can become uncooperative. Banks and lending institutions shy away from lending, or if they do lend, it is only on the basis that the individuals personally guarantee the loan. Councils and rating authorities are wary about granting any exemption from rates and Land Tax.

### **THE BAPTIST UNION AS TRUSTEE**

It is still possible even today to appoint individuals as trustees, but the same drawbacks still apply. To overcome these difficulties, the 1919 Act incorporated "The Baptist Union of New South Wales" and gave it power to hold properties on behalf of local churches. The terms of the trusts were set out in a Schedule "B". The fact that the Union was the trustee did not give the Union any right to interfere in the administration of the affairs of the local congregation.

### **THE PROPERTY TRUST AS TRUSTEE**

By 1984 Baptists in NSW had voted to separate the functions of the Union so that the Union could concentrate on its denominational mission. A new Act of the NSW Parliament was passed called the "Baptist Churches of New South Wales Property Trust Act 1984" and immediately the trusteeship of local Baptist Church property passed to the newly incorporated trustee called "Baptist Churches of New South Wales Property Trust" (which we will refer to in this article simply as the "Property Trust"). Substantially the same trusts continue to apply as under the former Schedule B, although some of the wording has been modernised and expanded.

As before, there is nothing in the Act which gives the Property Trust any right to affect the working of the local congregation. It cannot deal with any property on its own initiative. It acts only on the direction of the congregation given at a meeting duly convened and announced on two preceding Sundays. There can be no purchase, sale, mortgage or lease of real estate unless the congregation makes a direction in the manner set out in the Act.

### **SMALL OR DISAPPEARING CHURCHES**

Like its predecessor, the 1984 Act contains a provision that if the local church congregation ceases to exist, or reduces to less than 10 members, then the Executive Committee of the Union has the obligation to give directions to the Property Trust for the purposes of purchase, sale, mortgages, leases and any other property dealings. Note that this still does not give either the Property Trust or the Union the right or power to run the church or to affect its day to day operations.

In May 2013 an amendment was passed to the Act which provides some overview of property matters by the Assembly Council in situations where the church has less than 20 members.

## **BORROWING MONEY**

When money is borrowed and a mortgage is given, the trustee will sign the mortgage documents but the loan is made to the church concerned, not to the Property Trust. The trustee merely executes the mortgage in favour of the lender in order to give the lender security over the assets owned by the church. A clause is inserted to make it clear that the loan is the responsibility of the borrowing church. The lender does not derive any additional personal guarantee from the Property Trust and no property of any other Baptist Church is at risk.

## **ADVANTAGES OF APPOINTING THE PROPERTY TRUST**

The appointment of the Property Trust as trustee does not give it any greater or different powers than that of private individuals acting as trustees in the same circumstances. Compared with individuals, the appointment of the Property Trust has many advantages, some of which have already been referred to. They include:

- (a) The Property Trust is permanent. The trouble and expense of periodically appointing new trustees are avoided. If individual trustees move, die or are incapacitated, it can cause difficulties. Not so with the Property Trust.
- (b) The terms of the trusts are well set out in the Act. They are quite wide and flexible, yet sufficiently certain to ensure that the property will not be lost to the Baptist cause, no matter what changes in circumstances might occur in the future. The trouble and expense of drafting an individual Trust Deed for each property, are avoided.
- (c) The Property Trust has developed experience and expertise as trustee. It is in every way better able to aid and protect the Church in its relation to third parties than any individual trustee. Solicitors who are used by the Property Trust are familiar with the 1984 Act and the necessary requirements for dealing with Church property.
- (d) The Property Trust has access to finance from resources administered by it and by the Baptist Association. These resources may not be available to individual trustees. In suitable cases, the provision of finance for the local church can be of great assistance. Some lending institutions are reluctant to recognize individuals as trustees or might require them to undertake personal responsibility.
- (e) The possibility that an individual trustee might degenerate in character, adopt peculiar views and create difficulties, is avoided.
- (f) The risk of property being lost to the Church or to the Baptist denomination is reduced. The Property Trust has heard of some properties (though not many) held under Baptist trusts being converted to other uses, or given away, because the existing trustees, being private individuals, were either unable or unwilling to take any action.
- (g) The risk of losing sight of the purposes for which property is held, is reduced.
- (h) Title documents are safer because the Property Trust arranges for them to be held securely.

## **LEGAL AND OTHER PROFESSIONAL SERVICES:**

The Honorary Legal Adviser to the Baptist Association gives free legal advice to the Association. The Legal Adviser will generally also be able to give free legal advice to the churches on legal matters, such as the interpretation of church constitutions. This arrangement is, however, limited to the giving of advice. Beyond that, each church will need to give instructions to a lawyer, usually a solicitor. The Property Trust has always instructed its own solicitors to act for it, and its solicitors have made no charge to the Property Trust for their services. However they are not honorary solicitors. When it comes to sales, purchases, dealings with property, appointment of new trustees, claims for compensation, litigation and so on, the solicitors cannot reasonably be expected to carry these through at their own expense. In particular, when acting for local churches, they are entitled to charge for their services.

In all property dealings, the Property Trust must, for its own protection, consult its own solicitors and must look to the local church for payment of professional fees, stamp duty, GST (if any), survey fees, barrister's fees if necessary, Council fees and any out of pocket expenses.

There can usually be no conflict of interest between the Property Trust and the Church and in most cases, the solicitors for the Property Trust have also acted for the Church. However, the Church can, if desired, instruct a separate solicitor, it being understood that any extra fees so incurred will also fall on the Church.

## **MEMBERS OF THE PROPERTY TRUST**

Members are appointed by the Baptist Union Assembly and retire on a rotational basis every 3 years but are eligible for re-election. They are sensitive to their obligations under the provisions of the Property Trust Act. They act in a voluntary capacity as part of their service for the kingdom of God.

## **OTHER RESPONSIBILITIES**

An example of other separate responsibilities of a Church and the Property Trust is seen in the case of *Robinson v. Baptist Churches of New South Wales Property Trust*, where a Baptist Church was sued by a complainant for having been negligent in spilling peas on the floor of the church hall during a church function. The complainant had slipped on the peas, injuring herself. The Court held that the church had been negligent. It had failed in its duty of care to provide a safe environment for its activities at all times. However, the Court also held that the Property Trust had not been negligent, in that the trustee had no control over the daily operations of the church and it was not "in occupation". The care, control and management were in the hands of the minister and the relevant committees of the church. The Property Trust and the Church were insured with different insurers. The complainant was awarded a substantial sum which was met by the Church's insurer.

## **THE PROPERTY TRUST AS EXECUTOR OR PRIVATE TRUSTEE**

Under Section 27 of the Act, the Property Trust can be appointed executor of a person's Will, or trustee of a person's private trust settlement, if a beneficial interest in assets is to be given to a Baptist Church, a District Association, the Baptist Association or any committee or agency of the Baptist Association.

## **PURCHASE, SALE, MORTGAGE, LEASE AND OTHER PROPERTY DEALINGS**

A local church intending to enter into any property dealings should obtain legal advice at the earliest possible time. The calling of a meeting for the purpose of passing resolutions by way of direction to the Property Trust should be given high priority. It would be a good idea to obtain legal advice on the terms of the proposed resolutions, as the terms are important. For more details, please see "Property - Selling, Buying and Borrowing – a Guide for Baptist Churches" which is available on the Association website.

## **DISCLAIMER**

The Property Trust information in this document has been carefully prepared. However it is not intended to be legal advice of itself. It cannot cover the entire field, nor every set of facts. Any liability for any loss of any kind and however sustained, is expressly excluded no matter how it may be caused, even if (without limiting the generality of what is stated above) it might be the result of any act or omission of the author, or of the Association of Baptist Churches or its advisers, committees, servants or agents, or of Baptist Churches of New South Wales Property Trust or its advisers, members, servants or agents, whether negligent or otherwise. Each church should obtain its own legal advice.

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