

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2012-409-001761
[2014] NZHC 1182**

BETWEEN THE GREAT CHRISTCHURCH
BUILDINGS TRUST
Applicant

AND THE CHURCH PROPERTY TRUSTEES
First Respondent

AND CANTERBURY EARTHQUAKE
RECOVERY AUTHORITY
Second Respondent

CIV-2012-409-002745

BETWEEN THE CHURCH PROPERTY TRUSTEES
Plaintiff

AND ATTORNEY-GENERAL
First Defendant

AND THE GREAT CHRISTCHURCH
BUILDINGS TRUST
Second Defendant

Hearing: 29 April 2014

Appearances: F M R Cooke QC, A V Foote and B D A Collins for
The Great Christchurch Buildings Trust
J W A Johnson and J-L Day for The Church Property Trustees
P J Gunn for the Attorney-General
No appearance for CERA

Judgment: 30 May 2014

JUDGMENT OF PANCKHURST J

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Introduction: two applications

[1] These two proceedings have been consolidated. The first proceeding was a judicial review in which The Great Christchurch Buildings Trust (The Buildings Trust) challenged a decision of the Church Property Trustees (the Trustees or CPT) that Christchurch Cathedral would be deconstructed to a height of two to three metres so that it no longer constituted a public hazard. The Buildings Trust asserted that the Trustees' decision was in breach of trust, because the Trustees held the Cathedral land and buildings on trust and were bound to restore the Cathedral to its pre-earthquake condition. In the end result Chisholm J upheld the challenge in part, and ordered a stay upon deconstruction of the Cathedral.

[2] The Trustees, for reasons to which I will refer shortly, consider that the stay is no longer required. Accordingly, they have applied to lift the stay so that demolition of the Cathedral may proceed. The Buildings Trust is adamantly opposed to demolition. It opposes removal of the stay on multiple grounds.

[3] The second proceeding was issued by the Trustees. They sought directions confirming that insurance monies received for the earthquake damage to the Cathedral could be applied in part to the construction of a transitional cathedral offsite. If the application of the money for this purpose was in breach of trust, the Trustees sought relief against personal liability for the breach. I heard that proceeding and found that expenditure of the insurance monies on the Transitional Cathedral was contrary to the terms of the Cathedral Trust. However, the application for relief from personal liability was not finally determined, rather reserved for consideration at a further hearing.

[4] The Trustees subsequently applied for leave to amend the statement of claim, in particular to remove the application for relief against personal liability for breach of trust. Over four million dollars has already been repaid to the Cathedral Trust, and the Trustees anticipate the payment of a further smaller sum, sufficient to restore the total amount diverted to the construction of the Transitional Cathedral. The Trustees maintain that thereby the breach will be repaired and any need for relief against personal liability obviated.

[5] The Buildings Trust, however, is opposed to amendment of the statement of claim. It considers that the proposed reformulation of the part-heard claim is an abuse of process and is not to be permitted. Moreover, it contends that the Trustees' recent decision to demolish the Cathedral, and replace it with a contemporary building, was at least in part motivated by concerns arising from misapplication of the insurance monies. It says that the application for relief from personal liability should be heard, not shelved by my granting leave to amend the claim.

The issues

[6] There are two main issues requiring determination. These are:

- (a) whether an order should be made lifting the stay on deconstruction of the Cathedral, and
- (b) whether the Trustees should be granted leave to amend the statement of claim in the second proceeding, in particular abandon a claim for relief against personal liability for breach of trust.

At first sight these appear to be narrow issues. However, as will become evident, the arguments advanced were wide ranging and a significant number of considerations were advanced in opposition to lifting the stay in particular.

Some further background

[7] The Church Property Trustees are a corporate trustee, recognised by statute¹, who own much of the church property in the Anglican diocese of Canterbury. They hold the land, and the damaged Cathedral, upon the terms of the Cathedral Trust. These terms were closely analysed by Chisholm J in the earlier proceeding. I need not repeat that analysis, nor detail the terms of trust, save for reference to the key finding in Chisholm J's judgment.

[8] The Great Christchurch Buildings Trust was formed in August 2012 as an incorporated charitable trust. A group of prominent Christchurch citizens established

¹ Anglican (Diocese of Christchurch) Church Property Trust Act 2003.

the Buildings Trust with the principal objective of promoting the preservation of heritage buildings damaged in the earthquakes. Preservation of the Cathedral remains at the heart of their concerns.

[9] The Buildings Trust issued their judicial review proceeding in August 2012 seeking a declaration that the Trustees not implement their decision to deconstruct the Cathedral down to a level of two to three metres. That decision was taken on 1 March 2012, in response to a Canterbury Earthquake Recovery Authority (CERA) notice which required the Trustees to make the Cathedral safe. Although within the central business district red zone, the Cathedral nonetheless constituted a public hazard. CERA therefore invoked its special powers to require that the building be made safe, not that it be demolished.

Chisholm J's judgment

[10] Chisholm J gave judgment in mid-November 2012. Central to his decision was the issue of whether the terms of the Cathedral Trust required that the Cathedral, as it was before the earthquake sequence, be restored; or whether the Trustees were at liberty to erect a modern building of contemporary design. Put simply, was the purpose of the Trust to ensure the ongoing existence of *the* Cathedral, or *a* cathedral? Chisholm J concluded that the purpose was to ensure the existence of *a* cathedral. His finding was upheld in the Court of Appeal,² and leave for a second appeal was declined by the Supreme Court.³

[11] Despite this finding, Chisholm J concluded that the partial deconstruction of the Cathedral should be stayed. He explained why in these terms:⁴

[161] As it stands at the moment the decision involves deconstructing the Cathedral down to a level of two to three metres. Bishop Matthews confirms in her affidavit that this is the only decision that has been made by the CPT to date. Mr Ormsby began his oral submissions by saying that the CPT intends to rebuild the Cathedral on the same site, but has not yet determined what it would look like or the timing. However, no formal resolution by the CPT is before the Court.

² *Great Christchurch Buildings Trust v Church Property Trustees* [2013] NZCA 331.

³ *Great Christchurch Buildings Trust v Church Property Trustees* [2013] NZSC 132.

⁴ *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045.

[162] As already noted, it is a fundamental tenet of trust law that trustees must administer the trust property in accordance with the purposes of the trust. The purpose of the Cathedral trust is to have a Cathedral on the site. Standing alone a decision to deconstruct the Cathedral would defeat the central purpose of the trust. However, that would not be the case if it was in the context of a decision to repair or replace the existing structure as discussed at [146] above.

[12] Earlier the Judge held that the Trustees must commit to either the repair, or the replacement, of the Cathedral. He said:⁵

In the absence of one of those steps the whole purpose of the trust would be defeated. Any necessary deconstruction and/or demolition would come within the terms of the trust *provided* such deconstruction or demolition is for the purpose of repairing or replacing the existing structure.

In the next paragraph he added this:

[147] While the timeframe for repair or replacement would be for the CPT to determine, its obligations as trustee require it to honour the spirit of the trust. Thus it would not be in the spirit of the trust for the repair or reconstruction to be unnecessarily deferred. When determining the timeframe the CPT would be entitled to take into account the practical realities of the situation it faces.

[13] In ordering the stay Chisholm J reasoned that the Trustees' decision to partially deconstruct the Cathedral was "incomplete", not unlawful. This reflected the concerns identified in the passages quoted above. The 1 March 2012 resolution recorded that the Cathedral would be partially deconstructed, but not that the Cathedral would be repaired, or replaced. A stay was necessary to enable the Trustees to perfect, or complete, the decision-making process.

[14] However, Chisholm J also recorded various further matters which influenced his conclusion. These included:

- There was "intense and legitimate public interest in the matter", such that the Court should ensure that the decision-making process was properly completed and thereby another round of litigation averted.⁶
- The original decision was made under "a misapprehension" concerning the purpose of the Cathedral Trust, in that the Trustees seemed to think that the trust purpose was the advancement of religion and the maintenance of

⁵ At [146].

⁶ At [170].

ecclesiastical institutions, not specifically the provision of a cathedral on the designated site.⁷

- There were also indications that the Trustees did not appreciate that the insurance proceeds of \$39 m received on account of the damage to the Cathedral must be used for the purpose of the Cathedral Trust, not on an offsite building.⁸
- A formal commitment to rebuild the Cathedral was required, as “an informal intention can be overtaken by events”, for example were delay to inhibit the raising of necessary funds, or were a loss of impetus to occur as a result of the construction of the Transitional Cathedral or from a change in the composition of the Trustees.⁹
- “Contestable issues” about engineering, cost and other aspects existed, and the Trustees should have the “benefit of considering these matters” by reference to the detailed materials now available.¹⁰
- It would be desirable for CERA to express a view concerning “maximum retention” of the existing Cathedral so that the Trustees could take this into account in their final decision-making.¹¹
- Finally, the delay occasioned by granting a stay did not raise safety concerns because the Cathedral had been securely fenced, although unnecessary delay in finalising the future of the Cathedral was considered to be obviously undesirable.¹²

I note that the merits of the stay were not challenged on appeal and were not therefore discussed by the Court of Appeal.

CPT’s resolution

[15] The application to lift the stay follows a CPT resolution passed at a board meeting on 5 September 2013. The minutes of the meeting refer to a “draft resolution” reached following discussion based on a decision paper and the various

⁷ At [171].

⁸ At [172]-[174].

⁹ At [175].

¹⁰ At [176].

¹¹ At [177].

¹² At [178].

design concepts, culminating in an agreement “in principle” with the wording to be confirmed next day by email. The full terms of the resolution are:¹³

RESOLUTION – CHRISTCHURCH CATHEDRAL

The Church Property Trustees (“CPT”) having:

1. commissioned the development of detailed concepts that could be used primarily to compare restoration (Option 1), traditional (Option 2) and contemporary (Option 3) designs for a cathedral in terms of indicative costs, feasibility, risks and public and stakeholder views, and to assist in its decision-making;
2. reviewed the ‘ChristChurch Cathedral Future Options Decision Paper – June 2013’ and supporting information;
3. had the members of CPT meet with CPT’s expert advisors on Thursday 16 May 2013 for a workshop and question and answer session;
4. had its members meet for an internal workshop regarding the ChristChurch Cathedral and the options;
5. received and reviewed the public feedback from the ‘Cathedral Conversations’ website;
6. reviewed the ‘ChristChurch Cathedral Future Options Decision Paper – August 2013’ and supporting information;
7. received the recommendation from the Cathedral Project Group to CPT;
8. reviewed the proposal from the Great Christchurch Buildings Trust dated 22 August 2013;
9. received the statement of account of funds available in the Cathedral Trust as set out in the statement of account reviewed by BDO;
10. been made aware of alternative contemporary designs for the Cathedral;

the CPT:

- a. acknowledges the level of funds currently available in the Cathedral Trust as set out in the statement of account reviewed by BDO and the financial constraints in the Cathedral Trust;
- b. notes the classification of the existing Cathedral building as a Category One building on the register of historic places;
- c. notes that the litigation risk of choosing Options 2 and 3 is likely to be higher than of choosing Option 1 but that its obligations are to

¹³ Bundle of relevant affidavits, volume 3, 22 April 2014, at 259 and 260.

make the decision in accordance with the trust terms, make a prudent decision, and to act in a manner that it sees as in the best interests of the Cathedral Trust;

- d. notes the cost differential between Options 1, 2 and 3, with Option 1 carrying the most financial risk and Option 3 carrying the least;
- e. notes that difference in the likely time required to complete construction of the respective options with Option 1 likely to have the longest potential construction period and Option 3 likely to have the least period required to construct;
- f. notes the differing ability of Options 1, 2 and 3 to service the needs of the Cathedral Congregation and, in particular, the difficulties with the provisions in each option for supporting spaces;
- g. notes the difference in building resilience between Options 1, 2, and 3 and the difference in risk to those Options from future seismic events, with Option 1 having the least building resilience and Option 3 been [sic] the most resilient against future events;
- h. notes the on-going concerns of CPT's advisors as to the viability of maximum retention;
- i. notes the continuing safety concerns held by CPT's advisors in relation to the implementation of maximum retention under Option 1 and neither the Holmes Consulting Group nor the Great Christchurch Buildings Trust maximum retention methodologies have been approved as safe by the Canterbury Earthquake Recovery Authority although, with further development, the Great Christchurch Buildings Trust methodology could be approved;
- j. notes the differing outcomes in terms of heritage values for each of Options 1, 2 and 3;
- k. notes the professional fundraising advice as to the likelihood of raising the required funds for each of the three Options and *reaffirms its commitment to having the majority of funds for project completion in hand before significant reconstruction work commences*; (emphasis added)
- l. notes the apparent public preference for a contemporary design like Option 3 as shown by the feedback received during the 'Cathedral Conversations' process;
- m. notes that the preference of Cathedral Chapter and the Diocesan Synod is for a contemporary design of the nature contemplated under Option 3, but with a desire for other design possibilities to be contemplated;
- n. notes the terms of the Cathedral Trust and the extent of CPT's powers as a trustee as found by the Court of Appeal and, in particular, CPT's power to, pursuant to the Anglican (Diocese of Christchurch) Church Property Trusts Act 2003, "*deconstruct the current Cathedral and construct a new cathedral, if the CPT*

considered that in light of the damage to the current Cathedral this would best serve the spiritual dimensions of the Cathedral and the uses of the Church”; (emphasis in original)

accordingly, the Church Property Trustees resolves to:

- a. *confirm its prior decisions to deconstruct the existing Cathedral and construct a new Cathedral* (emphasis added)
- b. *commit to a contemporary design for a Cathedral that is represented by the Option 3 design concept in the analysis and high level design work performed:* (emphasis added)
 - i. subject to the budget constraints of the Cathedral Trust;
 - ii. while remaining open to contemporary design alternatives or design adjustments that meet the criteria noted above, and which are covered in the supporting decision material, and which mean the contemporary design will best serve the spiritual dimensions of the Cathedral and the uses of the Church;
- c. refer this decision to a meeting of the Church Property Trustees to be held after the Diocesan Synod on September 6 and 7 for further consideration;
- d. instruct the Chair to announce this as a decision of CPT to the Diocesan Synod on September 6 and 7; and
- e. instruct its counsel to inform the Court of this resolution.

[16] Following the Diocesan Synod there were changes to the membership of the CPT. As resolved in para c of the resolution, the decisions taken were referred to the next CPT meeting to enable new members of the board to consider the resolution. This meeting occurred on 3 October 2013. The minutes record the following:

The new members having reviewed the relevant material, and the members present having discussed the various Options, the Trustees agreed to ratify the resolution made at the 5th September 2013 CPT Board meeting relating to the ChristChurch Cathedral.

Should the stay be lifted?

A procedural issue

[17] Following the passing and ratification of the resolution, it was publicly announced. In a subsequent telephone conference with myself concerning both sets of proceedings, counsel for CPT made a verbal request to lift the stay. There was opposition. Finalisation of the second proceeding was also discussed, including

CPT's wish to amend its claim by deleting the Trustees' claim for relief from personal liability. This was also opposed. This resulted in my making directions on 4 February 2014 that the two proceedings be consolidated, and that formal applications to lift the stay, and to amend the statement of claim, be filed. A timetable was prescribed and time allocated for a joint hearing of the two applications.

[18] These directions gave rise to the present situation. The Buildings Trust filed a detailed notice of opposition to the lifting of the stay. It asserted that, despite the 5 September 2013 resolution, the Trustees had still not completed the decision-making process in compliance with Chisholm J's judgment. Further, the notice claimed that various of the further matters identified by Chisholm J as supporting the need for a stay still applied, or remained unresolved. The Buildings Trust also advanced new concerns, which had surfaced in the context of the second proceeding, as supportive of maintaining the stay.

[19] Certainly, I did not anticipate the breadth of the intended opposition when I made directions in February. Nor, I think, did counsel for the Trustees. At the hearing Mr Johnson made the point that the extensive grounds of opposition advanced against lifting the stay were not pleaded in a conventional manner and in the context of an identifiable cause of action. This resulted in divergent approaches adopted by counsel. Mr Johnson framed the Trustees' submissions in terms of the trust law principles applicable to when a trustee's exercise of discretion may be disturbed, whereas Mr Cooke QC said this approach was "misplaced". He advanced the Buildings Trust's case on the footing that the Trustees' decisions were amenable to judicial review because of their "public nature".

[20] In my view it is appropriate to treat the grounds of challenge as raised in a judicial review context. This was how Chisholm J assessed the Trustees' 1 March 2012 decision-making. The Judge had the benefit of argument concerning whether the Trustees' decision to deconstruct the Cathedral was amenable to judicial review, or not. He found that it was, for reasons set out in some detail.¹⁴ The Court of Appeal recorded that this issue was not raised before it and, accordingly, the Court

¹⁴ *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [81]-[93].

accepted that the Trustees' decision was amenable to review, but without actually deciding the point.¹⁵

[21] I am not disposed to differ from Chisholm J's approach, particularly in the absence of proper argument. If anything, this approach may be favourable to the Buildings Trust, but it has the advantage of consistency. Although the application is brought by the Trustees, an onus rests upon the Buildings Trust to establish grounds for this Court's intervention on public law grounds. It will also be necessary to assess the grounds of review in the context of the principles applicable to trustee decision-making.

Have the Trustees made a valid decision to deconstruct and rebuild the Cathedral?

[22] The first, and major, argument advanced by Mr Cooke was that the 5 September 2013 resolution did not meet the concerns which previously prompted the imposition of a stay. In essence, counsel contended that the new resolution did not evince a settled commitment to build a new Cathedral and, hence, the Trustees' resolve to deconstruct the existing Cathedral was not a valid trustee decision. As Chisholm J found, deconstruction or demolition of the old Cathedral was only within the terms of trust if it was for the purpose of repairing, or replacing, the existing structure. Counsel submitted that, upon analysis, the decision-making process was flawed and the real purpose behind the application was to enable demolition to occur and thereby take the Buildings Trust's preferred option of restoration "off the table".

[23] The argument included a close focus on the terms of the 5 September resolution. It was recorded as a resolution "agreed to in principle", although subsequently ratified by the Trustees at their next board meeting. Although the key resolution was to deconstruct and "construct a new Cathedral", the second element was said to be effectively conditional, being "subject to the budget constraints of the Cathedral Trust". Moreover, recital k. to the resolution contained a reaffirmation of the Trustees' "commitment to have the majority of [the] funds for project completion in hand before significant construction work commences". Given the advice received by the Trustees concerning the risks surrounding fundraising, including the

¹⁵ *Great Christchurch Buildings Trust v Church Property Trustees* [2013] NZCA 331 at [43].

likely timeline to raise sufficient funds, counsel submitted there could be no assurance that a new cathedral will in fact be constructed on the designated site.

[24] Moving beyond the terms of the resolution, Mr Cooke further developed the argument by reference to a raft of considerations:

- (a) the Trustees' resolution to adopt Option 3, a contemporary design for the Cathedral, was based on no more than a design concept for which no high level design work had been undertaken. Further, the resolution contemplated that other contemporary design alternatives, or design adjustments, remained open, provided they met the criteria listed earlier in the resolution,
- (b) the cost projections, \$55 to 136 m for Option 3, are only indicative in the absence of an actual building proposal, as opposed to a design concept. Yet, it is apparent from the terms of the resolution that cost was an influential factor in the decision process,
- (c) the Trustees have approximately \$39 m in hand to fund the construction of the new Cathedral. The Trustees' commitment to have "the majority of the funds for project completion in hand before significant reconstruction work commences" means that fundraising will be required before work can begin,
- (d) expert advice obtained concerning the risk of a fundraising shortfall showed that fundraising for a contemporary design stood a "very good chance of success" under a 7.5 year timeframe, but only a "low to fair" chance under a 22 year timeframe. Moreover, the building design would need to be "spectacular" to secure financial support over the longer term,
- (e) advice received concerning financial risk generally included assessments that it was "likely" that the fundraising requirements "would exceed the resources of the charitable market", and also that

the risk of “project funding shortfalls” was within a range between “likely” and “almost certain”.

[25] Drawing these various threads together, Mr Cooke submitted that the resolution was not a committed decision to proceed with the construction of a new cathedral. He said the Trustees “are waiting to see if they can raise the money to commence a rebuild of the Cathedral, which will be at least seven years away, and on the basis of some of the advice it has received [fundraising] is unlikely to be successful”. The decision was also characterised as conditional at best and compromised by the existence of the Transitional Cathedral, which by its very existence undermined the Cathedral Trust. Viewed in the round, the present position was such as to call in question the Trustees’ motivation. Counsel questioned whether the true purpose of the 5 September resolution was to secure the lifting of the stay, so that the Cathedral could be demolished and the option of restoration extinguished.

Other reasons supporting retention of the stay

[26] The Buildings Trust also contends that there are surrounding, or other, reasons which require that the stay remains in place. Some aspects were anticipated and raised in Chisholm J’s judgments. And, some of these concerns were considered in the context of the second proceeding where the focus was upon the diversion of insurance proceeds to the construction of the Transitional Cathedral. Counsel in submissions raised five topics under the category of other reasons. The first topic was the application of over \$4 m to fund construction of the Transitional Cathedral. Chisholm J concluded that given the site-specific purpose of the Cathedral Trust it was difficult to see how the Cathedral insurance proceeds could be used offsite in building another cathedral. He thought the Trustees had possibly misdirected themselves in diverting the money in this way. In the second proceeding I found that a breach of trust had occurred because expenditure of the insurance proceeds on the Transitional Cathedral was contrary to the terms of trust upon which the money was held.

[27] Mr Cooke submitted that the breach was committed in bad faith. One of the Buildings Trust trustees wrote to the CPT in May 2012 stating that the insurance proceeds must be earmarked for the Cathedral repairs. In November 2012 Chisholm J tentatively expressed a similar viewpoint. Nonetheless, the Trustees determined that the Transitional Cathedral expenditure was for the benefit of the Cathedral Trust, and therefore permissible, because of the pressing need for the Cathedral congregation to have a place of worship. Also, contracts for the construction of the Transitional Cathedral had already been signed, and construction had commenced. These issues remain unresolved, as the result of the delivery of an interim judgment. They are also relevant to the second application by which the Trustees seek to change tack and abandon their claim for relief against personal liability.

[28] The second topic concerns the possible use of other Trust monies to make good the shortfall in the Cathedral Trust account following the Transitional Cathedral expenditure. The sum of \$4 m has already been repaid to the Cathedral Trust, but about \$700,000 is outstanding. Mr Cooke, by reference to affidavit evidence from the Trust manager of CPT, noted that in December 2012 it was stated that funds from other parish trusts could not be applied to the construction of the Transitional Cathedral because this would potentially breach those trusts, whereas the present proposal is to meet the \$700,000 shortfall from trust funds held on behalf of the St John's Latimer Square Church, or alternatively from the general trust estate. This is a fund held by CPT on trust for the general purposes of the diocese. Counsel submitted that the alternative proposals represented an unexplained and significant change in stance on the part of CPT. Further, it was suggested that these proposals showed that funds could be found by the Trustees "to protect themselves from liability" and that this called in question whether other trusts were being administered in good faith by the Trustees.

[29] The third topic concerns the insurance cover taken out for the Cathedral prior to the earthquakes. As discussed in the insurance/personal liability judgment, the Anglican Insurance Board was required to take replacement value cover for the Cathedral unless there was a specific agreement to the contrary with CPT. In fact, the material damage policy provided cover for about \$39 m, a sum now known to be

inadequate to replace the Cathedral. How, and why, this occurred was identified as an issue potentially relevant to the Trustees' application for relief against personal liability. It remained unresolved following the first hearing and will require assessment if the application for relief remains alive. Counsel submitted that regardless of the outcome of any further inquiry, the Trustees laboured under a conflict of interest when the September 2013 resolution was passed because they were potentially exposed to a misfeasance finding for underinsuring the Cathedral. The conflict was said to be aggravated, given the actual finding that expenditure on the Transitional Cathedral represented a breach of trust.

[30] The fourth matter concerns the need for consents to be obtained before the Cathedral may be demolished. Both an archaeological consent and a resource consent are required. With reference to the latter, Mr Cooke made submissions directed to s 38 of the Canterbury Earthquake Recovery Act 2011. The section contemplates that the normal requirements to obtain resource and building consents may be waived by an Order in Council made under the Act. This has occurred and the District Plan exempts works carried out under the control of CERA from the need to obtain a resource consent. The legal position is not disputed, but it also seemed to be accepted that demolition of the Cathedral would not be under the control of CERA, so that a resource consent would be required. Mr Johnson did not suggest otherwise, and also recognised that obtaining such consents may not be straightforward. However, he viewed the need to obtain the consents as a step to be taken once the stay was lifted.

[31] The final matter raised by Mr Cooke is a related theme; that there is considerable potential for a change of thinking to occur as a result of the various uncertainties which presently exist. Chisholm J recognised this factor when imposing the stay. It is common ground that there will be significant delay, particularly before construction of a new Cathedral can commence. There are numerous unknowns, including in relation to fundraising, the final design of the building, cost escalation, the consenting process and so on. Hence, counsel argued it was premature to lift the stay and it would serve no useful purpose to do so, given the prevailing level of uncertainty.

Two questions of legal principle

[32] At various points in the course of argument Mr Cooke made submissions concerning the absence of affidavit evidence from the Trustees and the correct approach to the Trustees' decision-making in the context of this case. It is convenient to deal with these questions now, before I turn to an overall evaluation of the competing arguments.

[33] Counsel suggested it was a striking feature that no affidavit evidence was provided by any of the Trustees. This was said to be an acute problem, because the legitimacy of the decisions taken on 5 September 2013 turned on the thinking of the Trustees and, in particular, the purpose, or motivation, behind the chosen course of action.

[34] Principal reliance was placed upon the leading case of *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries*.¹⁶ The case concerned a challenge to increased rentals payable by commercial fishermen in respect of fishing quotas held by them. The increase was made on the recommendation of the Minister of Fisheries. The recommendation was made under a statutory provision, whereby only the Minister could initiate an increase and only after he had had regard to the statutory criteria; one of which was any submissions made to him by interested parties. An application for judicial review was successfully resisted in the High Court on the basis of an affidavit sworn by an official.

[35] In the Court of Appeal and in response to a submission that the Minister's failure to swear an affidavit was a serious deficiency, Cooke P said:¹⁷

Ultimately the choice is the Minister's. No one can force him to give evidence. But of course our system of government involves the rule of law. When a Minister's handling of a particular matter has naturally given rise to serious doubts about whether he has had regard to the obligations placed on him by Parliament, refraining from being prepared to justify himself in court can serve to strengthen misgivings, as well as rendering the Court's task more difficult. As this case should demonstrate yet again, the Courts recognise that they should not trespass into the legitimate policy sphere of

¹⁶ *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

¹⁷ At 554.

Ministers. The constitutional corollary should be Ministerial candour with the Courts about their policy. This does not seem too much to ask.

With reference to when these observations are most apposite, the separate judgment of McMullin J is helpful.¹⁸

Where judicial review is sought of a decision which is required to be made by a specified person and based on matters detailed in a statute, it is as well that the person upon whom the decision-making duty is placed ... should make an affidavit ...

[36] I do not regard the present case to be in the class where it is desirable for the decision-maker to make an affidavit and outline the decision-making process. Here, the decision lay with a corporate trustee, the CPT. There are nine trustees, who must decide matters “by consensus, if possible”, or by a majority of the members present.¹⁹ It is not sensible to suggest that one or more trustees can depose to the reasoning of the group as a whole. Indeed, it is likely that the Trustees voted as they did for a variety of reasons. Secondly, the decision-making of trustees is not governed by statutory criteria, as in the case of the *Minister of Fisheries*. Trustees’ decisions typically represent an exercise of discretion. The requirements to which they are subject, and the intensity of any subsequent scrutiny of their decisions, is governed by the applicable common law principles, to which I now turn.

[37] In developing a submission that the merits of the Trustees’ decision were not reviewable in this proceeding, Mr Johnson submitted that the decision-making process fell to be assessed by reference to the general principles of trust law. This Court’s role was to ensure that the decision did not constitute a breach of trust, or a breach of duty. Otherwise, the exercise of a trustee’s discretion could not be challenged. Counsel cited authorities in support of these propositions, including *Futter v Commissioners for Her Majesty’s Revenues and Customs*,²⁰ a recent decision of the United Kingdom Supreme Court.

[38] Mr Cooke, however, criticised the reliance on *Futter* as “misplaced”. Although discretionary decisions by trustees are not normally reviewed with

¹⁸ At 568.

¹⁹ Anglican (Diocese of Christchurch) Church Property Trust Act 2003, schedule 2, clause 1(5).

²⁰ *Futter v Commissioners for Her Majesty’s Revenues and Customs* [2013] 2 AC 108.

intensity by the courts, here the decision was subject to judicial review because of its “public nature”. Reliance was placed upon Chisholm J’s observations in which he accepted that the Buildings Trust had standing to bring its judicial review application because the Cathedral, although primarily a place of worship, was also a civic building and also part of the heart and soul of the city, so that its future was a matter of intense public interest. Chisholm J also noted under the heading “Amenability to judicial review” that “to some extent the matters just discussed in relation to standing carry over to this issue.”²¹

[39] I do not accept the argument that the tests normally applied in a judicial review context apply to the exclusion of relevant trust principles. Elsewhere in his judgment Chisholm J plainly emphasised that the merits of decisions concerning the Cathedral lay with the Trustees, not the Court. This is clearly the case and a touchstone which must be borne in mind at all times in assessing the decisions taken by the Trustees. While, as I said earlier,²² this is in effect an application to judicially review the 5 September 2013 decision, the review must nonetheless proceed with regard to the principles applicable to trustee decision-making.

[40] In making decisions concerning the Cathedral the Trustees exercised a discretionary power. The obligations to which trustees generally are subject are well settled. In 1851 they were outlined as follows:²³

... it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court would thus be confined to the question of honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases.

Hence, decisions must be reached with an absence of indirect motive, with honesty of intention and with a fair consideration of the issues, including knowledge of the matters relevant to the decision. It is not for this Court to endeavour to evaluate the correctness, or merit, of the decision reached.

²¹ *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [81].

²² At [21].

²³ *In Re Beloved Wilkes’s Charity* (1851) 3 Mac & G 440 at 448.

[41] I need not consider the particular reasoning in *Futter*. The case concerned a situation where trustees had made a mistake when entering into a transaction, as a result of receiving incorrect advice, and this gave rise to a significant taxation disadvantage. The Supreme Court's judgment is directed to that situation, whereas reference to well-settled general principles is sufficient for the purposes of this case.

Evaluation

[42] In broad terms I consider there are two questions which require evaluation. The first is whether the Trustees in passing, and ratifying, the 5 September 2013 resolution have indeed committed to the construction of a new cathedral. If not, the situation now is unchanged from that in 2012 when Chisholm J held that the then-resolution was incomplete and not within the terms of the Cathedral Trust. The Trustees had not properly informed themselves of the terms of trust and as a result had resolved to deconstruct the Cathedral without committing themselves to restore or replace it. The argument remains that there is still no sufficient commitment to replace the old with a new Cathedral of contemporary design.

[43] The second question concerns motive and honesty of intention. Several of the arguments advanced on behalf of the Buildings Trust challenged the situation in which the Trustees were placed in making the decision and assert that there was no honest intention to commit to the construction of a contemporary cathedral. The high point of the argument was that their indirect motive was to secure the lifting of the stay and deconstruct the Cathedral, so that the option of restoration was taken off the table.

[44] Returning to the first question, the resolution on its face contains a commitment to "construct a new cathedral". It therefore addresses the deficiency from which the 2012 resolution suffered. But, do the funding deficiency, the projected fundraising difficulties, the absence of anything other than a design concept, the commitment to have the majority of the funds in hand before significant work commences, the reservation that adherence to option 3 is subject to budget constraints, the uncertainty in relation to the construction timeframe and the need to

obtain consents mean that the commitment to construct a new cathedral is conditional at best?

[45] I do not accept the argument that the terms of the resolution, coupled with the various contingences and uncertainties, mean that the Trustees have not committed to construction and are therefore in breach of their duty. The resolution is expressed in measured terms. Importantly, it confronts the major controversy concerning the design concept. I think the resolution also confronts the lessons of history. The construction of many cathedrals has proved to be protracted, typically because of a shortage of funding, and often resulting in a need to revise the building design. This resolution is prudent, but not compromised to the point that it should be characterised as conditional in nature, and not therefore a commitment of the nature required.

[46] These conclusions respect that it is to the Trustees that execution of the Trust is confided. They must grapple with the complexities of fundraising, settling the design of the building, obtaining the required consents and deciding when it is prudent to commence construction. The fact that there is so much to be done, and that there will be inevitable delay before construction commences, does not to my mind show that the Trustees have not entered into a commitment to construct a new cathedral. Rather, they have assumed that commitment, but on terms that enable them to adapt to situations with which they may well be confronted. For these brief reasons, I do not accept the first argument.

[47] I turn to the second question. Is it shown that the Trustees' decision was reached with an indirect, or ulterior motive; or that it lacked honesty of intention? I consider that such contentions are of a serious nature. They concern the bona fides of trustees required to make decisions in relation to the ChristChurch Cathedral, an issue of intense public interest. In my view contentions of improper motive or intention affect reputation and, accordingly, proof should be approached with this in mind. This is not to say that a standard of proof higher than the civil standard, the balance of probabilities, must be met. Rather, it reflects the reality that when judges are considering the nature and the quality of evidence, and deciding whether an issue

has been proved on balance, an inherent aspect in that assessment is the seriousness of the matters to be proved and the consequences of their being proved.²⁴

[48] If indirect motive, or an improper intention, are shown to exist this would engage the Court's duty of supervision. Equally, it would show an abuse of discretionary power sufficient to establish illegality in a public law sense.²⁵

[49] The starting point is the decision-making process. This is described in the affidavit of Mr Gavin Holley, the trust manager of CPT and chief operations officer of the Diocese.²⁶ A working group named the Cathedral Project Group (CPG) was established to evaluate the options for the repair or redevelopment of the Cathedral. Following the release of Chisholm J's decision in November 2012 legal advice was taken and a process settled for evaluating the options. Architects, Warren and Mahoney, were engaged to develop design options. These were available within a few months, being:

- (a) Option 1 – maximum retention, reconstruction using new materials and building systems and strengthening;
- (b) Option 2 – initial deconstruction to sill level and a rebuild in a traditional form in new materials; and
- (c) Option 3 – deconstruct the entire building and a rebuild to a new design.

In broad terms, the process from then included obtaining expert advice on building aspects, construction costs and fundraising; followed by consultation with interested parties and members of the public.

[50] In August 2013 Mr Holley prepared a discussion paper to assist the Trustees in making a decision on the design options. The paper was reviewed by the CPG

²⁴ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [105] and [112].

²⁵ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 23.2.

²⁶ Affidavit of Gavin Edward Holley, 6 December 2013.

and certain of the expert advisors. It covered a range of topics, including the terms of trust which must guide the decision-making (as found by Chisholm J and confirmed by the Court of Appeal), building resilience and safety, the construction timeframe and risks, construction costs, fundraising and risks, feedback from the public and stakeholders, and heritage values. The discussion of each topic was framed by reference to the three options.

[51] Prior to the CPT meeting on 5 September 2013 the Trustees were provided with the discussion paper and many of the reports obtained during the course of the process. It is neither necessary, nor possible, to describe the detail of the information contained in the discussion paper and the supporting documents in this judgment. Generally, option 3, based on a contemporary concept design, was the cheapest option and received the most public support on a website which invited feedback from the public. Option 2 was the less favoured option, while there was significant support for restoration, option 1, including from the New Zealand Historic Places Trust and the Buildings Trust.

[52] Perhaps the best indication of the likely persuasive factors is contained in the “notes”, listed as a. to n. in the body of the resolution (see [15]). My sense of these is that a contemporary concept design found favour with the Trustees because of the cost, resilience and safety advantages of a new building, as well as the preference of the Cathedral community and the public for a modern design. Rightly, in my view, unreasonableness was not suggested as a ground of review. Nor is there anything in the resolution to suggest that the Trustees did not give fair consideration to all the relevant issues.

[53] I am not persuaded that there is anything to show that the Trustees were actuated by improper motive, or dishonesty of intention, in relation to their decision-making. Mr Cooke skilfully marshalled every available criticism he could find of the Trustees’ actions in the period since the earthquakes. Mistakes had been made, particularly the diversion of over \$4 m from insurance proceeds to the construction of the Transitional Cathedral. The proposals to make good this breach and the inquiry into the level of the insurance cover arranged for the Cathedral remain for this Court’s consideration. But, these aspects either singly, or in

combination, do not in my view provide evidence that the Trustees' resolution was afflicted by improper motive or dishonest intention.

[54] I do not overlook Mr Cooke's submission that conflict of interest can be a ground of judicial review in some cases, nor his reliance upon *Lab Tests Auckland Ltd v Auckland District Health Board*.²⁷ That, however, was a very different case. It concerned a decision of a district health board, a public body making a decision in a commercial context, which was subject to statutory obligations governing the disclosure and management of conflicts of interest. I do not find the case of present assistance. Put simply, the contention that a conflict of interest arose because at least some of the Trustees were subject to the diversion and under-insurance criticisms is, I think, untenable. Whilst a contemporary design was the cheapest option, there is little logic to the suggestion that opting for it would somehow assist in the resolution of issues of potential personal liability.

[55] I have also considered whether the decision to lift the stay should be deferred until the insurance/personal liability proceeding is finally determined. But, for similar reasons, I conclude that a deferment is not necessary. Accordingly, I make an order that the stay in relation to deconstruction of the Cathedral is lifted.

Leave to file an amended statement of claim

[56] CPT seeks leave to file an amended statement of claim in what I have termed the insurance/personal liability proceeding. The first statement of claim filed in December 2012 contained three causes of action. The first two concerned whether the insurance proceeds received on account of the damage to the Cathedral could be applied to construction of the Transitional Cathedral. These claims were determined in the first judgment. A third cause of action, however, sought relief against liability pursuant to s 73 of the Trustee Act 1956 in the event that application of the monies to the Transitional Cathedral was in breach of trust. For reasons set out in the judgment, I reserved this claim for further evidence to be provided and for further consideration.

²⁷ *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA).

[57] CPT applied in December 2013 for leave to file an amended statement of claim confined to one cause of action. The claim is new, in that directions are sought that the insurance monies received, or to be received, by CPT under the Cathedral contents insurance policy are held on trust for the Cathedral community, not the Cathedral Trust; and that \$4 m of the insurance monies may be used to replenish the sum taken from the Cathedral Trust for construction of the Transitional Cathedral. The claim for trustee relief has been removed, on the basis that CPT one way or another is in a position to repair the breach by repaying the sum taken, plus interest, to the Cathedral Trust.

[58] The Buildings Trust has filed a notice of opposition claiming that the relief against liability claim is part-heard, that its abandonment is designed to avoid a final judgment and is, on this basis, an abuse of the Court's process. It further maintains that discovery should be provided relating to the relief claim.

[59] Mr Gunn appeared for the Attorney-General, as the protector of charities. The Attorney does not formally oppose the leave application, but Mr Gunn said that the "preferable" course was to continue with the claim for relief, because the Court was already seized of the matter and the decision reached would "inform" any inquiry required on the Attorney-General's part after the Court's final decision.

Evaluation

[60] Although counsel for the two principal parties made various submissions directed particularly to the issue of abandonment and also cited authorities relevant to abuse of process, I intend to deal with the matter quite briefly. To my mind the salient features are these. The claim for relief is part-heard. Significant factual issues require further elucidation. The proposed abandonment is predicated on the assumption that CPT can make good the deficiency in the Cathedral Trust using other monies. To that end, CPT seeks directions that the Cathedral contents insurance monies may be used to help restore the deficiency. The Buildings Trust doubts that this is appropriate. It follows, I think, that the proposed abandonment of the claim for relief is premature.

[61] In any event I am not comfortable with the notion that restoration of the Cathedral Trust is an automatic and complete answer to the original breach of trust. This matter needs to be viewed in its particular context. The claim for relief is part-heard and already in the public domain. As noted, issues relating to the Cathedral are of intense public interest in the city. It is, therefore, appropriate for the claim to be resolved in open Court – even if the outcome proves to be straightforward as CPT anticipates. Finally, I am also influenced by Mr Gunn’s submission.

[62] In the event that I reached this conclusion CPT sought an order that a “preliminary hearing” be held on CPT’s application for a direction concerning use of the contents insurance proceeds. I understand that a ruling is sought on this aspect so that, if there is a favourable direction, restoration will be complete and the claim for relief will be rendered redundant. As already explained, I am of the view that the claim for relief should be finally determined. I decline to order a preliminary hearing.

[63] The Buildings Trust seeks discovery, or better discovery. So far as I can tell, there has been no formal discovery to date, although I understand that documentation was disclosed by arrangement between counsel. If further discovery cannot occur in that manner, counsel may revert to the Court. Whether tailored discovery pursuant to rule 8.8, or particular discovery after a proceeding has commenced pursuant to rule 8.19, is appropriate, I am unsure.

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