

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

**CIV-2012-409-002745
[2015] NZHC 1843**

BETWEEN CHURCH PROPERTY TRUSTEES
Plaintiff

AND ATTORNEY-GENERAL
First Defendant

THE GREAT CHRISTCHURCH
BUILDINGS TRUST
Second Defendant

Hearing: 22 April 2015

Counsel: JWA Johnson for Plaintiff Trustees
P J Gunn for First Defendant
FMR Cooke QC, A Foote for Second Defendant

Judgment: 5 August 2015

JUDGMENT OF DUNNINGHAM J

Summary of findings

- A. The restitution of the funds expended on the Transitional Cathedral, to the Cathedral Trust, plus interest, means there is no requirement for CPT to seek relief from liability under s 73 of the Trustee Act 1956.
- B. If an application for relief under s 73 was live, there is insufficient information to conclude that relief should be granted.
- C. CPT is not in breach of trust for failing to insure the Cathedral for full replacement value.
- D. The insurance moneys received in respect of the claim under the insurance policy that insured the Cathedral contents are not held on the Cathedral trust, but are the property of the Chapter and declarations are made accordingly.

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Introduction

[1] This decision represents a further chapter in the litigation which has ensued over the fate of the Christchurch Cathedral after it suffered significant damage in the Canterbury Earthquakes of 2010 and 2011. The full background to the litigation is traversed in previous decisions, and will not be repeated here except where directly relevant to the issues in dispute.¹

[2] The Great Christchurch Buildings Trust (GCBT) is concerned to see the reinstatement of the existing Christchurch Cathedral, which it says (and this Court has accepted) has social, cultural and heritage values beyond its role as a key place of worship for the Anglican Church.

[3] The Church Property Trustees (CPT) is a statutory body, recognised in the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 (the CPT Act) as holding property on various trusts for the Anglican Diocese of Christchurch. It is undisputed that it holds the Christchurch Cathedral on trust. There was, however, a dispute over whether the terms of that trust required CPT to repair or reinstate the existing Cathedral.

[4] In 2012 GCBT initiated judicial review proceedings challenging the legitimacy of CPT's decision to deconstruct the Christchurch Cathedral as being in breach of the central purpose of the trust the Cathedral was held on. In the decision to those proceedings which was issued on 15 November 2012 (Chisholm J's Decision) Chisholm J declared that CPT was trustee of the Cathedral Trust which required there to be a Cathedral on the Cathedral Square site in central Christchurch, but it did not have to replicate the Cathedral as it stood before the earthquakes.² His Honour also signalled, but did not determine, that the insurance proceeds for the material damage to the Cathedral were held for the same site-specific purpose.³

¹ See in particular *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045, [2013] 2 NZLR 230 [Chisholm J's Decision]; *Church Property Trustees v Attorney-General* [2013] NZHC 678, [2013] 2 NZLR 428 [Panckhurst J's First Decision]; *Great Christchurch Buildings Trust v Church Property Trustees* [2014] NZHC 1182, [2014] 3 NZLR 236 [Panckhurst J's Second Decision].

² Chisholm J's Decision, above n 1.

³ At [173].

[5] Because of issues that arose in those proceedings, CPT applied for orders that its decision to spend a portion of the Cathedral's material damage insurance proceeds on the Transitional Cathedral in Latimer Square was not in breach of trust, but alternatively, seeking relief from liability should a breach of trust be found.⁴

[6] In a decision dated 8 April 2013, (Panckhurst J's First Decision) Panckhurst J found that the proceeds of the material damage insurance policy were subject to the terms of trust applicable to the Cathedral Trust⁵ and it followed it was in breach of that Trust to use approximately \$4,500,000 of those funds to construct the Transitional Cathedral at an alternate site.⁶

[7] CPT has since resolved to restore the funds available from the insurance claim for the damage to the Christchurch Cathedral by:

- (a) transferring up to \$4,000,000 from the general trust estate to repay the Cathedral Trust funds used to construct the Transitional Cathedral;⁷
- (b) subject to approval from the parish of St John's in Latimer Square (which is where the Transitional Cathedral stands), reallocating \$700,000 from the insurance proceeds for its building to meet the construction costs of the Transitional Cathedral; and
- (c) if St John's does not agree to that allocation, to transfer a further \$700,000 from the general trust estate to meet the construction costs of the Transitional Cathedral.

The issues for determination in this case

[8] The issues for determination in this case have their genesis, in Panckhurst J's First Decision, where he found that spending part of the Cathedral insurance

⁴ The Transitional Cathedral is an innovative structure designed by the Japanese architect Shigeru Ban, and built of recyclable materials, to provide a temporary cathedral in the inner city.

⁵ Being the Trust identified by Chisholm J in 15 November 2012 decision at [145] for the purposes of erecting and ensuring the continued existence of a Cathedral at Cathedral Square.

⁶ Panckhurst J's First Decision, above n 1.

⁷ The general trust estate is defined in the CPT Act as "property held by the Church Property Trustees on trust for the general purposes of the Church in the diocese".

proceeds on the Transitional Cathedral was in breach of trust.⁸ While he was also seized of an application to absolve CPT from liability under s 73 of the Trustee Act 1956 (Trustee Act) if a breach of trust was found, he declined to finally determine that matter in the proceeding. Specifically he held that:

- (a) in his provisional view, s 11(1) of the CPT Act was the appropriate relief provision in the circumstances before him, but was “doubtful whether it is appropriate to consider relief from personal liability in existing circumstances, unless the issue is clear cut”;⁹ and
- (b) there were factual matters that raised concerns in relation to liability including:
 - (i) the adequacy of the level of insurance that had been taken out by CPT over the Cathedral;¹⁰
 - (ii) the timing of the decisions by CPT to spend the insurance proceeds on the Transitional Cathedral in light of steps taken by the GCBT before Chisholm J’s judgment and the decisions made by CPT after the judgment;¹¹ and
 - (iii) the question over whether the insurance proceeds relating to St John’s Church in Latimer Square should have been used to fund the construction of the Transitional Cathedral at that site rather than the insurance proceeds for the Cathedral.¹²

[9] In these circumstances, Panckhurst J decided he could not reach a final view on these matters saying:

[70] Reluctantly, I have reached the view that I am not in a position to finally determine the Trustees’ claim for relief. This proceeding was accorded urgency in the aftermath of Chisholm J’s judgment. The Trustees faced the prospect that expenditure of insurance proceeds on the transitional

⁸ Panckhurst J’s First Decision, above n 1 at [33]-[35].

⁹ At [50].

¹⁰ At [55].

¹¹ At [56]-[67].

¹² At [68]-[69].

Cathedral was in breach of trust on the one hand, and the circumstance that construction of the transitional building was underway on the other. The hearing on 27 February 2013 was allocated on the basis that only legal argument was required. The contentions that the terms of the Cathedral Trust permitted expenditure on the transitional Cathedral or that a separate insurance trust existed received most prominence. The Trustees claim for relief was advanced in the alternative should the other claims fail.

[71] In addition, the submissions directed to relief against personal liability have raised complications. These include the test to be applied, its interpretation and the adequacy of the evidence absent cross-examination to elucidate some of the concerns identified in the analysis.

[72] I am satisfied it would be unfair to the Trustees to determine the issue of relief on the basis of the evidence and submissions to date. Equally, I consider that counsel opposing relief should be heard particularly given my provisional finding that relief is to be considered under s 11(1).

[10] Shortly after this judgment was delivered, CPT resolved to make repayment of the insurance funds which had been diverted to construct the Transitional Cathedral. CPT then sought, among other things, to file an amended statement of claim abandoning its claim for relief under s 73 of the Trustee Act and, instead, advancing a new application for directions under s 66 over the appropriate treatment and use of the insurance proceeds for the Cathedral contents. The directions were sought because, at that stage, CPT proposed using some of these proceeds to reimburse the expenditure on the Transitional Cathedral.

[11] In his further judgment dated 30 May 2014 (Panckhurst J's Second Decision), Panckhurst J declined leave to amend the statement of claim to abandon the application for relief from personal liability, but allowed, by consent, the addition of the application for directions in relation to the use of the Cathedral contents insurance.¹³

[12] In declining leave to amend the statement of claim to abandon the application for relief from personal liability, Panckhurst J said:¹⁴

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 and 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

¹³ Panckhurst J's Second Decision, above n 1.

¹⁴ At [60].

Trust doubts that this is appropriate. It follows, I think, that the proposed abandonment of the claim for relief is premature.

[13] Panckhurst J also declined to deal with the application for directions concerning the use of the contents insurance proceeds in advance of dealing with the claim for relief as proposed by CPT. Although noting CPT's submission that if there was a favourable direction, restoration would be complete and the claim for relief rendered redundant, he nevertheless maintained the view that the claim for relief from breach of trust should be finally determined in open Court.

[14] It is against that background, and in light of the further affidavits filed by CPT, that the matters which were part heard by Panckhurst J now need to be addressed, and the applications made by CPT determined.

[15] Setting the issues out in the order they will be dealt with, they are:

- (a) Is the application for relief to be addressed under s 73 of the Trustee Act 1956 or s 11 of the CPT Act?
- (b) Does repayment of the monies spent in breach of trust eliminate any issue of liability?
- (c) If not, should CPT be relieved of liability taking into account the following issues:
 - (i) Whether CPT was put on notice that it was using funds in breach of trust and continued to take steps in breach of that trust without first seeking the Court's guidance or approval?
 - (ii) CPT's decision to gift to St John's parish the Transitional Cathedral and not to seek restitution from the insurance proceeds for St John's?
 - (iii) The fact that CPT did not insure the Cathedral for full replacement value.

- (d) Are the proceeds of the Cathedral contents insurance claim held on trust for the Cathedral community, as represented by the Chapter, or are they held on the Cathedral Trust?¹⁵
- (e) If they are held on trust for the Cathedral community, is it appropriate to declare that CPT can apply those funds to be used as directed by the Chapter?

[16] I add, at this juncture, that while these issues are essentially disputes involving CPT and GCBT, the Attorney-General is named as a defendant and appeared at the hearing as *parens patriae* to ensure the due administration of established charities and the proper application of funds devoted to charitable purposes. In that role, counsel for the Attorney-General assisted the Court by identifying legal issues arising, and relevant legal authority on those issues. While I do not expressly refer to his submissions in the following discussion, they are taken into account, and have assisted in my deliberation.

Is the application for relief to be addressed under s 73 of the Trustee Act 1956 or s 11 of the CPT Act?

[17] In the last stage of these proceedings there was some uncertainty identified as to whether CPT should be seeking relief from breach of trust under s 73 of the Trustee Act or under s 11(1) of the CPT Act and at an earlier stage, both defendants had suggested s 11(1) of the CPT Act was relevant. That section provides:

No member of the Church Property Trustees is personally liable for any act or omission of the Church Property Trustees, or of any officer or employee of the Church Property Trustees, done or omitted in good faith in the course of the operations of the Church Property Trustees.

[18] The parties are now in agreement, and I concur, that the claim for relief is made on behalf of the plaintiff, the statutory corporate trustee, and therefore the correct approach is, as pleaded, under s 73. Furthermore, s 11(1) of the CPT Act operates as a defence for individual members of the corporate trustee, and not as a

¹⁵ The term ‘Chapter’ describes the administrative unit that represents, in terms of canon law, the Cathedral congregation, and the day to day running of the Cathedral is in the Dean and the Chapter’s hands.

power for the Court to grant relief from liability, so is not relevant in the present circumstances. I therefore proceed on the basis that this is an application under s 73.

Does repayment of the monies spent in breach of trust eliminate any issue of liability?

CPT's position

[19] CPT says that, given their 4 April 2014 decision to “make good” the Cathedral Trust, there is no longer any breach for which CPT can be liable because the Cathedral Trust has suffered no loss. It says that neither it, nor the defendants, have been able to identify what further liability there might be.

[20] CPT rejects any suggestion that it could somehow be liable because the use of the Cathedral’s insurance proceeds by CPT impaired the Cathedral rebuild. It says that point has already been decided upon by Panckhurst J in the context of the challenge to CPT’s September 2013 decision to deconstruct the Cathedral building and is *res judicata*.¹⁶ In any event, it cannot be shown that the temporary use of the funds in that way impaired restoration given:

- (a) the overall cost of restoring the Cathedral; and
- (b) the other factors that still need to be resolved in respect of rebuilding the Cathedral, including engineering issues and safety concerns.

GCBT's position

[21] GCBT says that repayment does not eliminate any issue of liability because:

- (a) the “repayment” is not truly a repayment, but rather involves the use of other funds held on trust by CPT to compensate the Cathedral Trust and that, while this may be “both desirable and appropriate”, the decision to do this because of liability rather than because of the best interests of the general trust estate, “raises as many questions as it answers”; and

¹⁶ Panckhurst J’s Second Decision, above n 1 at [31] and [53].

- (b) the factual matters identified by Panckhurst J remain, even if it is said there is no loss to the Cathedral Trust.

Discussion

[22] It is clear that the obligation of a defaulting trustee is essentially one of effecting restitution to the estate.¹⁷ What comprises restitution in a particular case will depend on the facts. In *Re Mulligan*, the measure of damages was held to be the difference between the existing value of the trust assets and the value which they would have achieved had a prudent trustee used the best form of available investment.¹⁸ However, in other cases the question is simpler and restitution is effected by the trustee restoring to the trust the assets that have been lost to the estate by reasons of the breach, or by paying compensation for such loss.

[23] In this case the evidence is that the Cathedral insurance funds expended on the Transitional Cathedral have been fully restored, including interest. It is appropriate that interest is paid to fully restore the Cathedral Trust as it compensates for the loss of interest which would have been earned by that Trust during the period the amount was removed from the trust fund. There is also no suggestion that there has been any form of “profit” by CPT which must be accounted for, so the only residual issue is whether there has been any other loss suffered by the trust estate which must be compensated for.

[24] The submissions of GCBT do not go so far as to suggest that there is any such residual liability. It also acknowledges, and I agree, that the terms of the general trust estate (which is held for the “general purposes of the Church in the diocese”) are broad enough to encompass its funds being used for providing such a building. While GCBT says that use of the general trust estate in this way “raises as many questions as it answers”, that is not relevant to the issue of whether CPT has made good its breach of trust to the Cathedral estate, which is the issue before this Court. In any event, I have been provided with ample evidence about the benefits, both for the Cathedral congregation and for the wider Anglican Church, of establishing a temporary Cathedral. If the general trust estate had been used for this

¹⁷ *Re Mulligan (Deceased)* [1998] 1 NZLR 481 (HC).

¹⁸ At 509.

purpose at the outset I am satisfied there could have been no criticism of CPT's decision. I do not think the position is different simply because it has been made retrospectively.

[25] In the absence of any evidence to suggest there is some residual shortfall or loss to the Cathedral Trust estate which has not been made good by CPT, I consider any question of liability has been fully addressed. There is no identified loss to the Cathedral Trust which CPT could now be held liable for. A release from liability is only required where the trustee is not proposing to effect full restitution, which is not the case here.

[26] That makes it strictly unnecessary to consider the issue of relief and the subset of issues raised in conjunction with that. However, if I am wrong in that conclusion, and also noting that those are issues of concern to GCBT and to some of the wider public, I go on to consider them insofar as I am able on the evidence before the Court.

Relief under s 73

[27] If I had held that CPT had not effected full restitution and faced residual liability, CPT sought relief from that liability under s 73 of the Trustee Act 1956. Section 73 provides:

If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for the same.

[28] All parties accepted that the decision of the Court of Appeal in *Wong v Burt* sets out the appropriate approach to applications under s 73.¹⁹ Section 73 requires that:

- (a) the trustee has acted honestly;

¹⁹ *Wong v Burt* [2005] 1 NZLR 91 (CA).

- (b) the trustee has acted reasonably;
- (c) it is fair for the trustee to be excused for the breach of trust; and
- (d) it is fair for the trustee to be excused for not seeking directions from the Court.

[29] All four of these requirements must be met.²⁰ In establishing these requirements, CPT has the burden of proof. As Panckhurst J said in *Re Mulligan*:²¹

The onus is upon the trustee who seeks relief to establish that he or she has acted honestly and reasonably. The obligation is to show that not only should the trustee fairly be excused for the breach but also for omitting to obtain the directions of the Court.

[30] Furthermore, even where these factors are satisfied, the Court must decide, as a matter of discretion, whether it is a case for relief.

CPT's position

[31] CPT says that in determining whether the terms of s 73 have been met, there are a number of factors to be considered. These include:

- (a) No member of CPT ever personally benefited from the decision to use the Cathedral insurance proceeds to build the Transitional Cathedral. It was a decision made in good faith to assist a charitable entity to continue functioning out of funds that CPT, at the time, thought were available.
- (b) The decision was made at a time of crisis with the best interests of the Cathedral and the Anglican community at heart. There was considerable time pressure to establish an alternative place of worship for the congregation and there was simply no time to seek directions prior to the relevant decision.

²⁰ *National Trustees Company of Australasia v General Finance Company of Australasia* [1905] AC 373 (PC).

²¹ *Re Mulligan*, above n 17 at 506.

- (c) CPT acted in good faith on the basis of legal advice received at the time which is also why directions were not sought.
- (d) The Transitional Cathedral was necessary in order to keep the Cathedral congregation alive.
- (e) The Transitional Cathedral has ultimately had a positive outcome for the Cathedral community, the wider Anglican community and Christchurch more generally.

GCBT's position

[32] GCBT says that the onus is on CPT to establish the threshold tests for relief are met and it has not discharged that onus, even with the additional affidavit evidence provided. It says a belief that CPT's actions were "morally justified" does not equate to acting honestly for the purposes of relief. *Wong v Burt* requires that a trustee seeking relief to have acted as "an honest person would in the circumstance", which GCBT says would require CPT to have sought to seek the Court's directions as soon as it was on notice that there was a dispute over the proper use of the insurance proceeds.²²

[33] The same issue impacts on whether CPT acted reasonably, and on that issue I should also have regard to issues of underinsurance and CPT's explanation for not requiring St Johns to contribute from its own insurance settlement to the Transitional Cathedral given that it would ultimately vest in St Johns.

[34] In all the circumstances, GCBT says CPT has not discharged the onus of demonstrating why relief should be granted.

[35] In light of these competing views I go on to consider the specific issues identified as bearing on the test for relief.

²² *Wong v Burt*, above n 19 at [58].

When was CPT “on notice” of the potential breach and was its decision not to seek directions from the Court at that stage, honest and reasonable, and would it be fair to excuse?

CPT’s position

[36] A key criticism GCBT has of CPT is that CPT continued to act in breach of trust and delayed in seeking directions when it was on notice of a potential breach. CPT, however, says the decision to fund the Transitional Cathedral was in place by 22 February 2012, and some related contracts were entered into between February and April 2012, prior to any communication being received by GCBT in relation to the use of the Cathedral insurance proceeds. GCBT first raised the issue with CPT in May 2012 by which time CPT says initial work had commenced on the Transitional Cathedral. Furthermore, throughout this period CPT was seeking legal advice on the decisions it was making which advised CPT it had a wide discretion relating to trust property. It understood its decisions were both lawful and supported by the Chapter, and it had no reason to think it was acting in breach of trust during this period.

[37] CPT also asserts that GCBT took an entrenched position and the relationship between the parties has been fractious throughout, which has meant that CPT reasonably considered any position put forward by GCBT with a “grain of salt”. Furthermore, GCBT’s understanding of the terms of the Cathedral Trust has itself been shown to be wrong so it was not unreasonable of CPT to continue with the construction of the Transitional Cathedral after GCBT had given an incorrect statement to CPT of what its obligations were.

[38] While CPT accepts that further contracts were entered into after receiving GCBT’s letter of 15 May 2012, it says it would not have been commercially prudent to cease work while the issue was determined, nor would it have been in the best interests of the Cathedral congregation. Importantly, it says none of the contracts were entered into after Chisholm J’s Decision on 15 November 2012 which concluded that, “[g]iven the site-specific purpose of the Cathedral Trust, it [is] difficult to see how any insurance proceeds arising from the insurance over the Cathedral could be used off-site”.²³

²³ Chisholm J’s Decision, above n 1 at [173].

[39] CPT emphasises that its members acted honestly and in good faith and did the best they could in very difficult circumstances. If a mistake was made in not recognising it was acting in breach of trust and seeking directions sooner, it is excusable given the complexity of the issues that faced CPT and the advice it received on those issues.

GCBT's position

[40] GCBT questions whether CPT acted honestly and reasonably in failing to seek directions from the Court before proceeding to commit some of the Cathedral insurance proceeds to the Transitional Cathedral.

[41] It says that CPT was made aware that payment of the insurance monies towards the Transitional Cathedral could be a breach of the Cathedral Trust before it had fully committed to the Transitional Cathedral. GCBT identifies that Panckhurst J, in his First Decision, thought that the trustees should have been aware early on “that the insurance proceeds were a bone of contention”,²⁴ as the issue was squarely raised in GCBT’s letter of 15 May 2012 which said:

We give notice to the Church Property Trustees that they as a body, and as individuals are under legal duties to maintain and repair the Cathedral and to apply the proceeds of insurances on the building to that purpose.

[42] Panckhurst J also observed that, because of the issues raised in the pleadings for the judicial review proceedings:²⁵

Even following receipt of Mr Graham’s letter the Trustees were on notice that they were at risk and bound to reconsider the transitional Cathedral expenditure, unless it was already too late.

[43] Furthermore, after the release of Chisholm J’s Decision where he had expressed reservations about the proposed application of the insurance proceeds, CPT made a decision affirming the use of the insurance proceeds on the design and construction of the Transitional Cathedral as being “consistent with and for the benefit of the Cathedral Trust”.

²⁴ At [62].

²⁵ At [62].

[44] For these reasons, GCBT considers that the CPT was on notice of the risk it faced in using the insurance proceeds on the Transitional Cathedral from 15 May 2012 onwards. In deciding whether it was reasonable to proceed in light of that risk it says:

- (a) the affidavits subsequently filed show that the legal advice CPT received also identified that the position was not straight forward and that there was a degree of controversy and dispute during the relevant period in 2012;
- (b) it was not too late to stop construction when it was on notice, noting that CPT did not enter the main construction contract for the Transitional Cathedral until 29 September 2012, only four days before the judicial review hearing; and
- (c) it remains unclear on the affidavit evidence why both the initial entry of the contracts and then the performance of those contracts were not delayed until the Court had resolved the issues that were alive, saying, “even at November 2012 the most appropriate course would have been to suspend the process of using the insurance proceeds, and if necessary suspend work, until the issue was resolved”.

Discussion

[45] I start by observing that there can be no doubt CPT was confronted with “extraordinary issues in extraordinary times”.²⁶ There was a pressing need to provide a venue for the Cathedral congregation while decisions were made about the future of the Cathedral. Nothing was placed before the Court which would suggest the decision to erect the Transitional Cathedral was not a necessary and positive decision for CPT to make. As Panckhurst J concluded, “the Trustees genuinely believed that it was in the best interests of the Cathedral to expend part of the insurance proceeds on a Transitional Cathedral”.²⁷

²⁶ Panckhurst J’s First Decision, above n 1 at [56].

²⁷ At [33].

[46] The real question is whether, from the point it received GCBT's letter on 15 May 2012 to when it sought and subsequently obtained the Court's directions in Chisholm J's Decision, it acted honestly and reasonably and ought fairly to be excused from not seeking directions sooner. In this regard, CPT acknowledges that the question of whether it could use the insurance proceeds was a "complex issue". The fact the Chapter approved the use of the insurance proceeds does not resolve the issue, as the onus was always on CPT to ensure it operated within the terms of the trust.

[47] The letter of 15 May 2012 was sufficient to identify that CPT's understanding of how it could use the insurance proceeds might be wrong. I do not consider that the fact that GCBT's understanding of the terms of the Cathedral Trust was also incorrect, is sufficient to negate the effect of that letter. At the very least, it identified that there was an alternative view from that adopted by CPT and it was one which was not so untenable that it could be dismissed perfunctorily.²⁸ Indeed, as early as July, CPT's lawyer also identified that "issues have now arisen regarding the treatment of funds that had been received from the insurance company for destroyed and damaged buildings" and regarding the "accountability of the Church Property Trustees (CPT) in respect of the management of those funds". Furthermore, Chisholm J's Decision on 15 November 2012 endorsed some aspects of GCBT's position.

[48] Of more concern was the fact that on 19 November 2012, CPT resolved to continue to apply the insurance proceeds to the Transitional Cathedral when the lawfulness of that had clearly been put in doubt by Chisholm J's Decision. CPT clearly recognised there was doubt about the position by this stage, as it also resolved to seek directions from this Court. However, it nevertheless prioritised the construction of the Transitional Cathedral as being the more important outcome. In my view it knowingly took what it perceived to be a small risk, that it would be held to be inappropriate to use the insurance proceeds in that way.

[49] The question is whether this reaches the level of "not acting as an honest person would in the circumstances" or whether there were circumstances which

²⁸ A possibility recognised in *Wong v Burt*, above n 19 at [57].

justified CPT proceeding without the authority of the Court, in a situation where there was doubt as to the appropriateness of that action.

[50] It is not sufficient that a trustee believes its actions to be in the best interests of the beneficiaries to be entitled to protection.²⁹ Nor will the fact that CPT acted throughout on a solicitor's advice automatically result in relief being given.³⁰ However, where the trustee was committed to a course of action before it was put on notice of the contrary view, as CPT says is the case here, then that may excuse the trustee's error.

[51] On the question of whether CPT was committed to a course of action before the contrary view was raised, GCBT correctly points out that:

- (a) the assertion that it would not have been commercially prudent to have ceased work while the issue was determined does not appear to be a consideration recorded in the relevant CPT minutes at the time; and
- (b) it is not construction of the Transitional Cathedral that involved a breach of trust, but the use of the insurance proceeds from the Cathedral for that purpose, so suspension of the entry into contracts, and of the construction of the Transitional Cathedral, would only have been required if there was no other way of paying for it and CPT has not demonstrated that.

[52] In the present case, I accept that the initial commitment to construct the Transitional Cathedral with the insurance funds was made before any notice was received. This is not a case, as in *Wong v Burt*, where CPT knew it was seeking to achieve something which was outside the terms of the trust. I also accept that in the initial stages it acted honestly and reasonably, taking into account what it perceived to be relevant considerations; the survival of the Cathedral congregation, the views of Chapter, and its legal advice.

²⁹ *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190.

³⁰ *Marsden v Regan* [1954] 1 WLR 423 at 435.

[53] The real issue is whether, once it was on notice that there was a possible breach of trust, it was “too late” to halt the process, or impracticable to fund it from an alternate source in the interim.

[54] I take as the critical time point, the receipt of the 15 May letter, given Panckhurst J’s finding that, after that, “the trustees were on notice that they were at risk and bound to reconsider the Transitional Cathedral expenditure, unless it was already too late”.³¹ While the main construction contract had still not been entered into at this stage, but only contracts for project management and structural engineering, I accept Mr Holley’s statement that it “would not have been commercially prudent to have ceased work ... while this issue was determined”. As a matter of common sense, CPT was by that point sufficiently contractually committed to the project that there would inevitably have been significant wasted costs had it not proceeded.

[55] What is less clear is why CPT did not, at least provisionally, commit to another source of funding at that stage. Mr Holley’s evidence says that CPT decided not to use the capital of the general trust estate because it would “significantly deplete the capital of that trust, greatly reducing the income available from it which would, in turn, have a significant negative impact on the operations and mission of the Diocese”. However, by early 2014 a revaluation of assets had seen the amount in the general trust estate increase from \$11,150,000 to \$13,370,000 and, with that information, he says it was decided CPT could fund the \$4,000,000 advance for the Transitional Cathedral from the general trust estate. It is not explained why that level of increase in assets, which was insufficient to fund the project while leaving the income stream for other activities of the Diocese intact, so fundamentally changed CPT’s view about using these funds.

[56] Instead, given the importance that has been placed on the provision of the temporary Cathedral, such that CPT prioritised completion of it despite legal challenges, the more reasonable course of action would have been to, notionally at least, fund the project from the general trust estate and revert to use of the Cathedral insurance proceeds if the Court had upheld CPT’s position.

³¹ Panckhurst J’s First Decision, above n 1 at [62].

[57] Accordingly, I am not satisfied that when CPT was put on notice it was too late to change tack and proceed without using the insurance funds until it had directions from the Court confirming that was appropriate. That leaves in doubt whether CPT would have been found to have acted reasonably if I was in the position of determining relief from liability.

Should CPT’s decision not to insure the Cathedral for full replacement value tell against relief?

[58] In earlier submissions, GCBT has raised questions regarding the adequacy of insurance cover that CPT had in place and Panckhurst J’s First Decision observed that:

[55] Chronologically the first consideration is the circumstance that the Cathedral did not have material damage insurance cover for replacement value as envisaged by r 13.2 of the Financial Regulations of the Diocese. This requirement, however, is subject to a proviso, namely “unless specifically agreed otherwise with the Church Property Trustees”. I take this to mean that the Anglican Insurance Board is to take cover for replacement value unless the Board and the Trustees agree otherwise. There is no evidence of any such agreement, nor any explanation concerning how the level of insurance cover for the Cathedral was assessed. This aspect impresses me as relevant to a s 73 evaluation where negligence would be relevant to assessing reasonableness, but perhaps less relevant to a good faith evaluation under s 11.

CPT’s position

[59] CPT states that this consideration is irrelevant in the context of the issues before the Court, which is the use of insurance funds for the building of the Transitional Cathedral. However, if it is held to be relevant to any issue the Court has to determine, then CPT says:

- (a) the “under-insurance” was, in part, caused by a valuation of the Cathedral which was negligent (which is a matter that CPT cannot be held responsible for); and
- (b) the decision to place insurance cover is ultimately taken by the responsible parish in light of what it can afford in respect of

premiums. CPT, as a trustee, should not have to act as funder for parishes which cannot afford ‘gold-plated’ insurance cover.

GCBT's position

[60] GCBT accepts that CPT has now filed more extensive evidence on why it was under insured. It accepts that one of the key reasons for the under insurance was negligent valuation advice received from an Australian company, Gleeds. However, it says this is not a complete answer to the issue of under-insurance as a decision was made by CPT to insure on a “functional replacement value” only. GCBT points out that CPT’s insurer, Ecclesiastical Insurance Group (EIG) Ansvar, advised that it was prudent to insure for earthquake on a full insurable basis and, when CPT then decided to insure on a functional replacement basis only, Ansvar expressed disappointment that this had been done after it had obtained the advice from Gleeds on a full replacement value.

[61] GCBT says that the decision of CPT to only insure at 70 per cent of the Gleeds’ valuation was not a reasonable one, given the “centrality and importance of Christchurch Cathedral to the community, the extensive public funds devoted to its construction and maintenance, its architectural and historical significance and its centrality to CPT’s activities”. While it acknowledges that the reason for the decision is stated to be the affordability of insurance cover given that it is the particular parish (here, the Cathedral Chapter) which is obliged to pay for the insurance, it nevertheless says “the other fund administered by CPT should have been available to ensure that the Cathedral was fully insured”, particularly having regard to s 19(h) of the CPT Act, which refers to trusts to “maintain and repair” the Cathedral.

Discussion

[62] I begin by observing that the level of insurance cover taken out by CPT for material damage to the Cathedral has no obvious relationship with, or bearing on, the decision to fund the Transitional Cathedral. Even if CPT held full replacement cover it would have faced the issue of how to provide a place of worship for the Cathedral congregation in the interim and how to fund that. However, to the extent the issue is

raised as a criticism of CPT, including as a failure of its requirement to act as a prudent trustee would, I address it.

[63] The evidence before the Court explains that Gleeds 2008 valuation calculated the replacement value of the Cathedral, including its visitors centre and church offices, at \$40,133,110, whereas, in fact, rebuild costs are estimated as being between \$104,000,000 and \$220,000,000 depending on timing, fundraising and the building design adopted.

[64] However, I can find no reason to criticise CPT for its reliance on the Gleeds' valuation. Gleeds was engaged by CPT's insurers on the recommendation of the senior surveyor of EIG UK, the parent body of Ansvar, and when the valuation firm CPT usually used acknowledged it did not have the expertise to undertake the valuation of a specialist building such as the Cathedral.

[65] The only real issue in contention is whether it was reasonable for the trustees to adopt a level of insurance which was less than the replacement value, as they were permitted to do by the proviso in r 13.3 of the Financial Regulations of the Diocese of Christchurch 2007 (the Regulations).

[66] When the relevant insurance came up for renewal at the beginning of April 2009, Ansvar, in their proposal, took the Gleeds valuation and proposed a functional replacement value of 70 per cent of the full replacement cost, plus 80 per cent of the difference, which would have more than doubled the existing premium taking it up to \$56,950 plus GST and before fire service levies and the Anglican Insurance Board (AIB) fee were added on. Mr Hales, the insurance and claims adviser for AIB, went back to Ansvar in order to get a better quote, and it was through these discussions that a decision to insure to 70 per cent of the Gleeds replacement valuation was made because "the Chapter simply could not afford to fund the premiums for a full RV sum insured". The annual premiums would have increased from \$22,118 to \$58,162 if the full sum insured outlined in the Gleeds valuation was adopted before adding the AIB fee. After deciding to insure at 70 per cent of valuation, the premiums nevertheless increased to \$40,713 which was an 84 per cent increase.

[67] As Ms Clarke, the CPT property manager explains, while CPT organises insurance cover for the Cathedral, it is the Cathedral Chapter which funds the premiums. Although CPT recommended that all buildings had full replacement cover, there were instances where the parish could not afford the premiums, and either indemnity or functional replacement cover was put in place.

[68] Affordability was an issue for the Cathedral Chapter. As early as 2006, there was a tension between being able to replace the Cathedral in a catastrophic event over the parish's ability to afford the premiums that it would require. Mr Hales, in a report dated 7 November 2006 regarding the insurance of Christchurch Cathedral, observed; "I believe that the main reason for not insuring the Cathedral for its full replacement value is the annual burden of the cost of the premium".

[69] The issue of meeting the premium was still critical in 2009 when reinsurance was being considered in light of the Gleeds valuation, with Mr Hales noting in one email to Ansvar:

Could you please take another look as I know that it is going to be very difficult for the Cathedral to swallow any increase at all so I hope you will agree to making it the lowest possible.

[70] Affordability of premiums continues to feature in both correspondence with the insurer and in the minutes of the CPT Building and Property committee meetings. It is clear that there was intense debate over what level of cover should be adopted and the affordability of it.

[71] I accept from the affidavit evidence that there was a considered decision made to select cover which was less than full replacement value. The factors which drove this decision were the significant increase in premiums already referred to, and the fact that, in most foreseeable circumstances, there would not be a total loss. It was also noted that in the material damage policy CPT had with Ansvar, there was a margin clause whereby if the insured property had a declared value and suffered damage, and where the cost to replace or repair the damage exceeded the declared value, then an additional margin of up to 15 per cent of the declared value would be payable on top of the declared value for that property. This built in a safety margin in the event of a degree of underinsurance.

[72] While GCBT referred to CPT’s statutory powers under s 19 of the CPT Act to “maintain and repair” the Cathedral, that, as the Court of Appeal found, did not amount to an obligation to do so, so has no obvious bearing on the obligation to insure.³² In addition, the terms of the Cathedral Trust have been held to do no more than require “a Cathedral” on the site. As the insurance cover selected was intended to be sufficient to do this, CPT cannot be criticised for failing to comply with its obligations as trustee.

[73] This view is reinforced by case law on the extent of a trustee’s duty to insure. That indicates that there is no presumption that trust property should be insured for full replacement value and that the ability to pay the premium is relevant to the question of what insurance a prudent trustee should hold.³³

[74] Overall, given the express flexibility in the Regulations to insure for less than full replacement value, and the conscientious way in which CPT considered the need to balance the risks and costs involved in selecting less than full replacement cover, I do not consider that CPT breached its obligations as a trustee by selecting less than full insurance cover or could be otherwise criticised. This is not a factor which would tell against the trustee acting reasonably for the purpose of relief under s 73.

Was it reasonable to decide to gift to St John’s church the Transitional Cathedral and not seek restitution from the St John’s insurance proceeds?

[75] The next issue which is raised by GCBT as relevant to whether s 73 relief would have been granted, is the decision to enter a memorandum of understanding (MOU) with the parish of Christchurch St John’s, which allowed the Transitional Cathedral to be constructed on the Latimer Square site where the St John’s church had stood, and to vest in St John’s after the exclusive use period of 10 years from the date of practical completion. The MOU required no financial contribution from St John’s, either at the time of construction, or at the point when it reverts to St John’s for St John’s own purposes.

³² *Great Christchurch Buildings Trust v Church Property Trustees* [2013] NZCA 331, [2013] 3 NZLR 597 at [105].

³³ *Pateman v Heyen* (1993) 33 NSWLR 188 at 197-198.

[76] That decision was queried by Panckhurst J in his First Decision and remained unexplained by any further affidavit evidence for this hearing. In the absence of an explanation, it appears to have benefited the St John's parish at the Cathedral Trust's expense, with no obvious rational explanation for that benefit.

[77] CPT did not directly address this issue in written submissions and only in passing in oral submissions where it simply pointed out that the terms of the MOU bound CPT and it doubted it could have evaded its obligations under it. What that does not address is why CPT entered the MOU at the outset on terms which seemed to disproportionately benefit St Johns at the expense of the Cathedral Trust. While I accept it was not recognised by CPT at that point that a Cathedral Trust on the terms subsequently identified was in existence, it nevertheless had a duty to act reasonably. It remains unexplained why, at the very least, some contribution was not sought from St Johns for an asset that would vest in St Johns after just 10 years, or why the proceeds of the St Johns' insurance policies were not used for this building. I am unable, therefore, to make any finding on the appropriateness of this decision.

Conclusion on relief under s 73

[78] The above issues have been discussed notwithstanding my finding that relief from liability is not required. However, it will be apparent from my conclusions that I accept that there remain issues on which the evidence does not provide a clear answer to the concerns originally raised by GCBT in the Court.

Use of the Cathedral contents policy proceeds

[79] The last issue for determination relates to the use of the Cathedral contents insurance policy and is an issue which was added to CPT's amended statement of claim as a consequence of Panckhurst J's Second Decision. In its amended statement of claim, CPT applied for directions (albeit expressed as declarations) that:

- (a) any insurance moneys received in respect of the insurance claim under the insurance policy that insured the Cathedral contents are held by CPT on trust for the Cathedral Community as represented by Chapter and are not held on the Cathedral Trust; and

- (b) a declaration that CPT can apply the insurance moneys received in respect of the insurance policy that insured the Cathedral contents as directed by the Chapter.

[80] At the time it sought to amend its claim, CPT proposed to use the contents insurance policy to restore the sum taken from the Cathedral Trust for construction of the Transitional Cathedral. However, subsequent affidavit evidence confirms that, instead, it has been restored from the general trust estate. Despite that development, it is clearly of interest to CPT to ensure that the contents insurance policy is used appropriately.

CPT's position

[81] CPT's position is that the contents insurance proceeds are not subject to the Cathedral Trust but are held for the benefit of the Chapter which it says owns the contents. It notes that the decision will have important precedential value for the contents insurance proceeds held for other parishes in the Diocese which are held on similar understandings as to ownership of the contents.

[82] It says that Panckhurst J, in his First Decision, recognised a possible difference between material damage insurance and content/business interruption insurance in respect of how each might be used, when he said:³⁴

I also accept that the Cathedral community had an insurable interest arising from its use and enjoyment of the Cathedral. This may be more meaningful in relation to the contents, and business interruptions policies, but a beneficial interest in the material damage policy and its proceeds also exist.

[83] As a consequence, CPT's view is that the Cathedral Trust is concerned with the "bricks and mortar" of the Cathedral and not the contents. CPT notes the fundamental rule distinguishing between fixtures and chattels, with fixtures forming part of the real property, and chattels comprising personal property.³⁵ CPT says all of the insured contents are items that can be removed "without causing irreparable

³⁴ At [41].

³⁵ *Holland v Hogson* (1872) LR 7 CP 328 applied in *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22 (CA).

injury to the premises”³⁶ and supplies affidavit evidence listing the insured contents for the Cathedral and explaining why all those items are chattels and not fixtures, including the Cathedral organ.

[84] CPT relies on affidavit evidence which confirms that the insured contents have either been directly gifted or have been purchased from monetary gifts made by members of the Cathedral congregation, or they have been purchased directly by the Chapter. It asserts, therefore, that all these items are owned by the Chapter, in accordance with its role under the Diocesan statute, rather than owned by CPT as trustee and thus not held on the Cathedral Trust or, indeed, on any trust. As the Chapter funded the premiums and owned the contents, the insurance proceeds must be held for the benefit of the Chapter. It is the Chapter itself then which dictates how the proceeds are used (subject to any contractual constraints under the insurance policy) and the requirements of the Trustee Act are irrelevant to those decisions.

[85] In support of this it says the CPT Act itself does not make all property used for the purposes of the Anglican Church trust property as defined in the Act. Regulation 13.6 recognises that individual parishes own a range of contents because it provides that:

Parishes/local ministry and mission units shall maintain a schedule of all property owned, and this will be updated as items are purchased or disposed of. This will form the basis of establishing the level of contents cover required.

[86] CPT therefore asserts that the earlier provision at reg 13.1 which says that, “all church property shall be held in the name of the Church Property Trustees”, does not extend to such chattels.

[87] As none of the insured contents were in existence at the time the Cathedral Trust was formed and they are not fixtures, the proceeds of the insurance policy are held by CPT for the benefit of the Chapter.

³⁶ *Short v Kilpatrick* [1982] 2 NZLR 358 (HC) at 362.

GCBT's position

[88] GCBT opposes the directions sought by CPT in relation to the use of the Cathedral contents insurance. While acknowledging the distinction between real and personal property made by CPT, it says it is not relevant when seeking to identify the terms on which the contents of the Cathedral were held. It asserts that the contents themselves were owned by CPT and were held on trust and the real issue is whether they were held on a separate trust or trusts from the Cathedral Trust.

[89] GCBT says that there was an express trust existing in the form of the Cathedral Trust and that property gifted to the Cathedral was used in order to undertake the activities contemplated by the Cathedral Trust. As the contents were used in the Cathedral which itself was the subject of the Cathedral Trust, the contents too, are subject to the Cathedral Trust. As s 25(3)(b) of the Trustee Act requires insurance proceeds to be held on trust “corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable”, GCBT says CPT must use the contents insurance solely for the purpose of replacing contents in the Cathedral Square building.

[90] In support of its view that the contents of the Cathedral were subject to the same trust as the Cathedral itself, GCBT relies on the following:

- (a) The terms of the Cathedral Square Ordinance 1858, which was the genesis of the Cathedral Trust, conveyed the land to the Bishop for “the erection of a Cathedral ... for the uses ... of the Church of England”. This meant the Trust was not simply for the erection of a building but for the establishment of a Cathedral to be used for that purpose. To do so, the Cathedral needed contents to function as a Cathedral as well as the bricks and mortar of the building.
- (b) The Cathedral at Cathedral Square still requires contents whether it is restored or a new Cathedral built. The whole point of insuring the contents at the Cathedral was to allow a fund to repair or replace the contents if they were lost or damaged. Section 25(3)(b) of the Trustee Act applies in its terms.

- (c) The use of the contents insurance proceeds so that the Cathedral congregation can worship elsewhere is as inconsistent with the Cathedral Trust's purpose as it was to use material damage insurance proceeds for that purpose.
- (d) CPT is presumably arguing that an implied or resulting trust, that was separate from the Cathedral Trust, arose from donations that were used for acquiring the contents. However, as there was an express trust in existence, and its objects contemplated a Cathedral with the required contents, this excludes the possibility of an implied or resulting trust arising.

[91] In short, GCBT says that when CPT acquired the contents, from whatever source, a new and distinct trust was not created that is severable from the Cathedral Trust itself. The relevant trust is the Cathedral Trust and the contents are an inextricable part of it, so the insurance proceeds must be used for the same purpose.

Discussion

[92] While CPT has received the payment, its obligations will differ depending on whether it, or the Chapter, owned the contents. If CPT owned the contents as trustee then, by virtue of s 25(3) of the Trustee Act, it is obliged to hold the proceeds on equivalent trusts. For example, if contents were held by CPT under the Cathedral Trust, then CPT would be obliged to use the proceeds for the same purpose, being to replace the contents of a Cathedral on Cathedral Square. If it did not hold the contents as trustee, then it holds the proceeds as bare trustee for the actual owner of the insured items, and s 25 of the Trustee Act does not govern their use.

[93] The fact that not all the insured property is owned by CPT is recognised in the insurance policy itself. It describes "the insured" as "all entities and persons that are part of the Anglican Church in Aotearoa New Zealand that have appointed the Anglican Insurance Board to act as their insurance agents". Furthermore, the insurance schedule refers to the assets belonging to "The Church Property Trustees and others", in recognition that CPT does not own all the insured church property.

[94] The first issue to determine is whether, as GCBT says, it is accepted that the contents themselves are trust property, and therefore the insurance proceeds are impressed with whatever terms of trust apply to the contents because of s 25, or whether, as asserted by CPT through the evidence of Mr Holley, they are legally and beneficially owned by the Cathedral Chapter.

[95] The CPT Act does not dictate the position. Under this Act, CPT continues to administer three main trust estates: the general trust estate, the Dean and Chapter estate; and the Bishopric estate, plus other property given to the church on trust including endowments on behalf of individual parishes. It also, as Chisholm J found, holds the Cathedral on terms of the Cathedral Trust identified in these proceedings. However, it does not mean CPT holds all property that might be in the possession of, or used by individual parishes. The definition in the CPT Act is circular; “trust property” is “property held on trust”,³⁷ so it must be established that the property is held on trust by CPT before s 25(3) applies.

[96] Confusingly though, while the CPT Act does not provide that all church property is trust property held by CPT, reg 13.1 of the Financial Regulations appears to do so stating: “All Church property shall be held in the name of the Church Property Trustees”. However, the language of reg 13.6 appears to contradict reg 13.1. It assumes the parishes themselves will own the contents which are to be insured, along with CPT-owned property, saying “Parishes/local ministry and mission units shall maintain a schedule of all property owned. ... This will form the basis of establishing the level of contents cover required”.

[97] I accept, therefore, that the issue of ownership of the contents is a factual enquiry as not all church property is owned by CPT. The only evidence before the Court regarding ownership was the unchallenged affidavit evidence of Mr Oldham, the administrator for the Cathedral and Mr Holley, the General Manager of CPT.

³⁷ Section 4.

[98] Mr Oldham set out a complete list of the Cathedral contents with what was known of each item's history and mode of acquisition. His evidence is that the various items were either paid for from Cathedral operating funds, which the Cathedral Statute authorises the Chapter to administer under clauses 3.7 and 3.8, or they were gifted to the Cathedral congregation at some point in the Cathedral's history.

[99] Mr Holley confirmed that the contents which are insured are not owned by CPT, but were either gifted directly to the Cathedral Chapter or purchased out of the operating funds of the Chapter or from funds the Chapter had raised.

[100] The GCBT submission assumes that the contents are held by the CPT, so the only live issue is whether they are held on the terms of the Cathedral Trust. However, that assumption cannot be sustained on the uncontradicted evidence of Mr Holley and Mr Oldham. This is despite the apparent logic that items which were especially purchased or donated as part of the fit-out during the original Cathedral construction, should be held on the terms of the Cathedral Trust.

[101] Such items include the main organ, the 13 bells, the oak arch-deacon stalls, the stone and wrought iron pulpit, the carved oak angels, the kauri and rimu choir stalls and the two carved reredos. These are clearly items which contribute to the overall physical presence of the Cathedral, and which were considered sufficiently integral to its function as a Cathedral to be incorporated in the original construction and fit-out of the Cathedral. Equivalent items will therefore have to be provided in a rebuilt Cathedral whatever form it takes.

[102] Given CPT is satisfied it does not hold any of these items on trust then, when a Cathedral is rebuilt on Cathedral Square, CPT will need to:

- (a) fund such items out of the general trust estate; or
- (b) fund such items out of the Dean and Chapter estate; or

- (c) rely on the co-operation of the Cathedral Chapter to use the proceeds of the contents insurance to replace such items;

so that the replacement Cathedral, whatever form it takes, is a fully functioning Cathedral. It is important that consideration is given to that issue before the contents insurance proceeds are dissipated.

[103] That said, on the evidence before me, the position is that the proceeds of the contents insurance policy which have been paid to CPT are simply held on a bare trust for the legal and beneficial owner of the contents, the Cathedral congregation as represented by Chapter.

[104] Because the contents were not owned by CPT, the obligations under s 25 of the Trustee Act do not apply to constrain CPT in how those funds are applied. Accordingly, CPT is obliged to do no more than pay over the insurance monies received in respect of the insurance claim for the Cathedral contents to the Chapter, or to apply them as directed by Chapter.

[105] I therefore make the following declarations as sought by CPT:

- (a) any insurance monies received in respect of the insurance claim under the insurance policy that insured the Cathedral contents are held by the Church Property Trustees on trust for the Cathedral community as represented by Chapter and are not held on the Cathedral Trust; and
- (b) the Church Property Trustees can apply the insurance monies received in respect of the insurance claim under the insurance policy that insured the Cathedral contents as directed by the Chapter.

[106] Finally though, I express a caution. This judgment does not determine whether any of the contents which have been transferred to the Cathedral Chapter from third parties are held on trust. The evidence as to the circumstances in which the Cathedral Chapter took ownership of some of the items is scanty. A number of items are described as being “donated” and yet are also said to be held for a specified

purpose such as “for use in worship within the Cathedral”, or for “use as a feature within the Cathedral”. This may or may not point to the item being held on trust by the Cathedral Chapter for the benefit of the congregation worshipping in the Cathedral on Cathedral Square. If so, the obligations under s 25(3) of the Trustee Act would simply fall to the Chapter, rather than CPT, requiring the Chapter to use the insurance process for the corresponding trust purpose.

[107] Where the Cathedral Chapter proposes using the insurance proceeds for purposes other than replacing the insured contents, then it will need to be satisfied that the funds did not relate to insured property which is held on trust.

Costs

[108] The issue of costs was not traversed at hearing. My preliminary view, given the mixed success the parties have had, and the public interest nature of the proceeding, is that costs should lie where they fall. Nevertheless, I reserve the issue of costs, and if they are sought, memoranda may be filed.

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