

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

**CIV 2012-409-002745
[2013] NZHC 678**

BETWEEN CHURCH PROPERTY TRUSTEES
Plaintiff

AND ATTORNEY-GENERAL
First Respondent

AND THE GREAT CHRISTCHURCH
BUILDINGS TRUST
Second Respondent

Hearing: 27 February 2013

Counsel: J V Ormsby, JWA Johnson, J L Day for Plaintiff
P J Gunn for First Respondent
FMR Cooke QC, A Foote, BDA Collins for Second Respondent

Judgment: 8 April 2013

JUDGMENT OF PANCKHURST J

A diversion of insurance monies

[1] The Trustees of the Christchurch Cathedral have received \$38,898,966 from an insurance claim as a result of the damage sustained by the Cathedral in the disastrous Christchurch earthquakes. A sum \$4.5 m has been earmarked to pay for the so-called transitional Cathedral (sometimes called the cardboard Cathedral) presently under construction on the site of the former St John's Latimer Square Church. The use of the money for this purpose was questioned, on the basis that the Trustees own the Cathedral on terms of trust that do not permit this expenditure. Hence, the Trustees seek directions from the court concerning the legality of their actions. In the alternative, should the expenditure constitute a breach of trust, the Trustees seek an order relieving them from personal liability.

The basis of the Trustees' concern

[2] Church properties in the Anglican Diocese of Christchurch are owned by the Church Property Trustees (the Trustees), a corporate trustee now recognised as such in the Anglican (Diocese of Christchurch) Church Property Trust Act 2003. The Trustees initiated this proceeding and joined the Attorney-General as first respondent on account of his function to ensure the due administration of charities, including the proper application of funds devoted to charitable purposes. The second respondent, The Great Christchurch Buildings Trust (The Buildings Trust), is an incorporated charitable trust established in August 2012 by a group of concerned Christchurch citizens with the principle objective of promoting the preservation of heritage buildings damaged in the earthquakes. The co-chairs of the Buildings Trust are Messrs Jim Anderton and Philip Burdon.

[3] The origins of this proceeding lie in an earlier proceeding issued by the Buildings Trust last year.¹ This was a judicial review in which the Buildings Trust challenged a decision of the Trustees to partially deconstruct the Cathedral to a level of approximately two-three metres in response to a hazard notice issued by the Canterbury Earthquake Recovery Authority. Chisholm J upheld the Buildings Trust challenge and ordered a stay of the Trustees' partial deconstruction decision, pending further orders of the Court. Deconstruction of the Cathedral remains on hold.

[4] The stay granted by Chisholm J reflected a finding that an essential term of the Cathedral Trust requires that there be a Cathedral on the Cathedral Square site, although on repair or reconstruction it need not replicate the previous Cathedral. This finding is of high significance to this proceeding, a point to which I will turn to in due course. The finding also prompted Chisholm J to make observations concerning money received by the Trustees from the insurance claim. He said this:

[173] When insurance money is received by a trustee it should be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable: s 25(3)(b) of the Trustee Act. Under s 25(4) any such money may be applied by the trustee in rebuilding,

¹ *The Great Christchurch Buildings Trust v Church Property Trustees and Canterbury Earthquake Recovery Authority* [2012] NZHC 3045.

reinstating, replacing or repairing the property lost or damaged. Given 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.

[174] While it is not entirely clear whether the [Trustees] actually misdirected [themselves] when arriving at [their] decision about the use that can be made of the insurance money, that possibility certainly seems to exist. Given the overall importance of financial considerations in the context of the decision, the Court cannot ignore the possibility that, at least in part, the decision reflects a misunderstanding on the insurance money issue.

[5] These observations were made when the Judge was considering relief; whether it was appropriate to stay the decision to deconstruct the Cathedral. As is evident from the language used, Chisholm J did not purport to make a binding decision concerning the insurance monies issue.

[6] The Trustees' application, filed in light of the earlier judgment, raises three main issues for determination:

- (i) Is the construction of the transitional Cathedral within the purposes of the Cathedral Trust?
- (ii) If not, is there a separate insurance trust whereby the Trustees hold the insurance claim proceeds on trust for the Cathedral congregation and its purposes?
- (iii) Are the trustees (if in breach of trust) entitled to relief from personal liability?

[7] Although counsel for the Trustees advanced issues (i) and (ii) in reverse order, I think it more convenient to re-order them as shown.

Is construction of the transitional cathedral within the purposes of the Cathedral Trust?

The terms of trust

[8] The general legal position of churches in New Zealand may be summarised in this way:

The constitution of a religious body is regarded as a consensual compact binding on the conscience of the individual members; its provisions are without contractual force and are not justiciable in a civil Court, except to the extent that they may be involved in a matter concerning church property governed by statute.²

Churches are governed by statute if subject to an empowering Act, by their constitution if incorporated, and by their constitution and rules if a voluntary unincorporated organisation.³

[9] The historical background of Christchurch Cathedral is described in Chisholm J's judgment. It need not be repeated here. Two statutes are of relevance, the Anglican Church Trusts Act 1981, to which reference will be made later, and the Anglican (Diocese of Christchurch) Church Property Trust Act 2003. This Act defines the function, powers and administrative obligations of the Trustees, in whose name church properties throughout the Diocese are held, including the Cathedral. Section 6(1) of the Act requires the Trustees 'to hold and administer Trust property in accordance with [the] Act'.

[10] The Cathedral terms of trust are not defined in the Act. They have their origins in an 1851 deed of the Canterbury Association by which the Cathedral Square site was reserved and appropriated for the establishment of ecclesiastical and educational institutions of the Church of England. However, Chisholm J held that the Cathedral Square Ordinance 1858 gave rise to an express trust, the purpose of which was the erection of a Cathedral on the land designated for that purpose. Later in the judgment he summarised the present-day terms of the trust as follows:

The [Trustees] hold the Cathedral property for the purposes of the trust created in 1858. As I have already concluded, those purposes involve, first, the erection of *a* Cathedral on the site and, secondly, the continued existence of *a* Cathedral on the site indefinitely thereafter.⁴ (emphasis added)

² *Laws of New Zealand Religion and Churches* (online ed) at [6].

³ *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705 (HC).

⁴ At [145].

The reference to *a* Cathedral, as opposed to *the* Cathedral, was to convey the Judge's view that a repaired, or replacement, Cathedral need not be identical to that which existed before the earthquakes.

[11] I note that this aspect of the judgment is the subject of appeal. The Buildings Trust contends that the Judge should have found the ongoing purpose of the trust to be for the Trustees to hold 'the Cathedral as erected' in perpetuity. This reflects the aim of the Buildings Trust to preserve iconic Christchurch buildings, rather than see them replaced by lesser substitute structures. The Trustees have not filed a cross-appeal. This distinction, the subject of the appeal, is not material to the present decision. Hence, I can determine the dispute concerning the Trustees' obligation in relation to the insurance proceeds by reference to Chisholm J's findings and without concern as to the outcome of the pending appeal.

The church entities

[12] To appreciate the Trustees' argument it is helpful to have a basic understanding of the Cathedral's governance structure. The Dean, assisted by an Associate Dean, is the religious leader of the Cathedral and is also responsible for its governance and the implementation of decisions of the Cathedral Chapter. The Cathedral Chapter comprises the Bishop, the Dean, his Associate and 14 further members including representatives of the Diocesan clergy and lay persons. The Chapter is responsible for the 'fabric' of the Cathedral and its furnishing and ornamentation, in consultation with the Standing Committee and the Trustees in relation to 'major work'.⁵ In addition, the Chapter has financial responsibility for the running of the Cathedral, including obligations to operate a bank account and keep audited financial statements.

[13] The Standing Committee to which the Chapter reports is a committee of the Diocesan Synod. The Trustees likewise have a Diocesan-wide function: to hold property on behalf of all the parishes within the greater Christchurch area on the Trusts applicable to each particular property.

⁵ The Cathedral Statute, 2002, clause 3.7(a), (this being an ecclesiastical statute).

[14] The Cathedral is not a parish in the ordinary sense, but through its governance structure of the Dean and the Chapter it resembles one. Termed a 'ministry unit', Christchurch Cathedral had a congregation of worshipers catered for by regular church services. In addition, the Cathedral was used regularly by the wider community as a venue for civic events, as a tourist attraction and as a place of hospitality through a cafe and associated amenities included in the Cathedral complex.

The effect of the earthquakes

[15] The Cathedral suffered some damage in the September 2010 earthquake, but major damage in the 22 February 2011 earthquake. The Cathedral has not been used since then. Services for the Cathedral congregation have since been held in the Christ's College Chapel.

[16] A record is kept of attendances at services of worship, and in the 2009 and 2010 calendar years there were well in excess of 50,000 worshipers per annum. In 2011 attendances at services of worship dropped to about 21,000. The Cathedral finances have also been affected to a major degree. In the year to 31 December 2010 the Chapter's income was \$1.3 m including \$294,000 from offertories and donations, civic grants of \$290,000, visitors revenue of \$445,000 and events revenue of \$94,000. In the 2011 financial year income fell to \$1.16 m including a sum of \$372,000 received under a business interruption insurance policy. An affidavit from Antony Wright, the Chair of the Chapter, states that funds from this source 'will not be available in the future'. Income from the visitors centre and from civic grants will not resume until a Cathedral, temporary or permanent, is established.

The Chapter's response to the downturn

[17] By mid 2011 it was apparent to the Chapter that the Cathedral would not be functional for an extended period. A proposal to construct a temporary Cathedral using recyclable materials in the inner city was discussed, and on 25 May 2011 the Chapter resolved to support the temporary Cathedral project.

[18] The minutes of a Chapter meeting on 20 September 2011 recorded that:

Cathedral life is draining away and the Cathedral's fabric and infrastructure must be retained as an important part of the process of rebuilding the Cathedral in the Square.

[19] The need for a temporary building was affirmed and obtaining a suitable site was described as 'pressing'. The Chapter considered it must assume the initiative in relation to the transitional Cathedral, but in partnership with the Trustees and the Standing Committee of the Anglican Diocese.

[20] At a further meeting of the Chapter on 28 September 2011 a resolution was passed to approve in principle the expenditure of \$4 m plus GST from the Cathedral material damage insurance proceeds, for the erection of a transitional Cathedral to be designed by the Japanese architect, Shigeru Ban, using cardboard cones.

[21] On 28 October 2011 the Canterbury Earthquake Recovery Authority (CERA) served a hazard notice upon the Trustees. It classified the Cathedral as a dangerous building and required that it be demolished to the extent necessary to remove the hazard. The same day Mr Brownlee, the Canterbury Earthquake Recovery Minister, and Bishop Victoria Matthews made a joint public announcement that a controlled demolition of the Cathedral sufficient to make the building safe would proceed, that deconsecration of the Cathedral would follow and that the cardboard Cathedral concept was under investigation. By late 2011 the Trustees approved the transitional Cathedral project on the basis it would be built on the site of the St John's Latimer Square Church, Hereford Street. This church was destroyed in the earthquakes, and had subsequently been demolished.

[22] In a further news release on 2 March 2012, the Bishop confirmed that the Trustees and the Standing Committee of the Anglican Diocese had determined that the Cathedral would be deconstructed down to a level of 2-3 metres and that financial constraints ruled out the option of 'a replica Cathedral'. In the meantime the commitment to the development of a transitional Cathedral in the central city remained on track.

[23] On 12 April 2012 the Trustees, the Chapter and the wardens of St John's Latimer Square signed a memorandum of understanding. The memorandum recorded that:

- The development and construction costs for the transitional Cathedral would be funded from 'monies received by [the Trustees] from insurance funds for the benefit of Christchurch Cathedral'.
- The transitional Cathedral would be constructed for the benefit of the Christchurch Cathedral for an 'exclusive use period' of 10 years, during which it would meet outgoings and running costs.
- Thereafter, the transitional Cathedral and associated buildings would revert to St John's for its own purposes.

[24] The memorandum also recorded an agreement that the Trustees would after receipt from the insurer pay to St John's a sum of about \$4.5 m being the proceeds from a policy on the St John's Latimer Square Church. The money was to be applied by St John's to redevelop the Hereford Street site (not the transitional Cathedral), or otherwise as the wardens saw fit.

[25] On 16 April 2012 an official announcement was made concerning construction of the transitional Cathedral on the Latimer Square site. The estimated cost was \$4 to \$5 m, most of which was 'in hand' with further fundraising anticipated to meet the building costs. The statement also recorded:

... the cost of the building will be covered in part from their insurances – mainly from a material damage indemnity payout, also from business interruption contributions.

[26] On 15 May 2012 Mr Peter Graham, a trustee of the Buildings Trust, wrote to the Trustees complaining of a lack of response to various proposals previously raised. The letter included this:

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. (emphasis added)

[27] In mid-August 2012, the Buildings Trust filed its application for judicial review. An affidavit from Mr Anderton dated 17 September 2012 drew attention to insurance funds received in relation to Cathedral being spent on the transitional building, something he deduced from minutes of a meeting of the ‘Christchurch Cathedral design control group’.

[28] In early October 2012 the judicial review application was heard and Chisholm J’s decision was delivered in mid-November. On 28 November 2012 the Chapter wrote to the Trustees concerning the Judge’s observation that the insurance proceeds from the material damage policy should only be used for rebuilding the Cathedral. The Chapter disagreed, stating:

The insurance premiums of the material damage policy were paid by Chapter out of its operating income, and the Chapter believes that the policy was held by Church Property Trustees as Trustee for the purposes of *supporting the Cathedral community, the Dean and Chapter*, replacement of the Cathedral contents and rebuilding a Cathedral on 100 Cathedral Square. (emphasis added).

The letter continued that the Chapter always considered itself the ‘beneficial owner’ of the insurance policy. An assurance was sought that insurance funds would continue to be available for the transitional Cathedral building costs.

[29] The Trustees filed this proceeding on 12 December 2012. They sought an urgent hearing, given that numerous contracts were in place and construction of the transitional Cathedral was underway. Affidavit evidence recorded that the Trustees could only meet their obligations under the contracts from the insurance proceeds; and that halting work and defaulting on the contracts would be ‘highly detrimental’ to the Cathedral Trust.

The Trustees’ contentions

[30] The Trustees consider that the construction of the transitional Cathedral is in accordance with the purposes of the Cathedral Trust, as defined by Chisholm J. In addition to the finding that the purposes of the Trust were the erection of the

Cathedral on the Cathedral Square site and the continued existence of the Cathedral indefinitely thereafter⁶, Chisholm J earlier said that:

The wording of the [1864] Ordinance provides a clear indication that the Trust was to be for “the erection of a Cathedral” in the sense of bricks and mortar (subject, of course, to a spiritual dimension).⁷

[31] This, counsel contended, properly recognised that a Cathedral is not merely a building, but a place dedicated to spiritual use and enjoyment. Recognition of the spiritual element was said to be fundamental, because:

Without the Dean and Chapter, and a worshipping community there would be no Cathedral on the site at Cathedral Square, rather, it would be just a building. The result would be the Cathedral Trust would fail.⁸

[32] Reliance was placed upon cases decided in relation to the Rating Act 1925 under which land occupied by a church was exempt from rates. In *Thames Borough Council v Congregational Church Trustees*⁹, for example, Blair J held that a fire damaged church had lost its character as such because there was no intention to repair the building and the property was for sale. Having observed that it was the active and living spiritual dimension that made a building a church, Blair J found that the rating exemption no longer applied.

Analysis

[33] I agree that a church, equally a Cathedral, requires an active congregation to sustain its spiritual dimension. I also accept that the Chapter and 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. The events, earlier described, demonstrate that the earthquakes have greatly affected the Cathedral congregation and severely impacted the Cathedral’s finances.

[34] This case, however, concerns the terms of trust upon which the Trustees hold the proceeds received from a material damage policy. I am unpersuaded that the

⁶ *The Great Christchurch Building Trust*, above n 1, at [145].

⁷ *Ibid*, at [105].

⁸ Para [108] of the Plaintiff’s submissions.

⁹ *Thames Borough Council v Congregational Church Trustees* [1929] NZLR 525 (SC).

need to sustain the congregation and the present parlous financial situation affect the terms of trust. The argument advanced before me is little more than a variant of the argument considered, and rejected, by Chisholm J. The present focus of the Cathedral Trust is upon the continued existence of the building itself. The material damage insurance policy was effected to ensure its ongoing existence. Other policies, including the business interruption policy, were effected to protect against associated losses. Their existence demonstrates the frailty of the argument.

[35] I have also wondered whether a plea of issue estoppel was not available. Chisholm J's finding was final, within jurisdiction, defined the terms of trust and concerned the same parties. However, estoppel was not raised and I need say no more.

Does an insurance trust, with wider purposes, exist?

The Trustees contentions

[36] Counsel, by reference to the Cathedral governance arrangements, the terms of the material damage policy and trust principles, argued that a separate insurance trust existed whereby the Trustees held the insurance policy and proceeds on trust for the Cathedral community and its purposes. Some of the factual elements of this argument have already been spelt out.

[37] The steps in the argument may be summarised as follows:

- The Cathedral community is identifiable through its regular use of the Cathedral for communion and worship. Indeed, the congregation provides the spiritual life blood of the Cathedral, as well as a significant financial input through offertories. This element was not, I think, disputed.
- The Cathedral community is a voluntary unincorporated group of individuals, of which in canon law terms the Chapter is the representative body. Hence, offertories and other monies received are held by the Chapter to be applied to the Cathedral or its activities as required under the Cathedral Statute, 2002.

To this end the Chapter operates a bank account and keeps audited financial accounts.

- Viewed against this background the Cathedral community has an insurable interest in the Cathedral regardless of whether the test adopted is the existence of an unequivocal interest in the continued preservation of the insured property,¹⁰ or the need for a legal or equitable relationship with the insured property.¹¹ The former is self-evident given the special relationship between the community and the Cathedral, formally recognised in canon law by the obligations upon the Chapter to administer the Cathedral in a prescribed manner. In legal or equitable terms, although a formal lease does not exist, the canon law duties imposed upon the Dean and the Chapter are such that the Cathedral community has at least a licence to possess and occupy the Cathedral. Otherwise the spiritual component, essential to a living Cathedral, would not exist.
- It was common ground that the Chapter paid the material damage insurance policy premiums, albeit through the Trustees. The Financial Regulations of the Diocese of Christchurch, 2007, prescribe that all church property shall be held by the Trustees,¹² buildings and improvements will have material damage insurance cover for replacement value,¹³ and that costs incurred in the management of insurance cover will be recovered equitably from ‘all insured parties’.¹⁴
- The material damage policy was a generic policy arranged through the Anglican Insurance Board,¹⁵ with Ansvar Insurance. The policy defined ‘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 as more fully listed with the insurer. The definition section defines references to ‘we, us or our’ as being Ansvar

¹⁰ *Kosmopoulos v Constitution Insurance Co of Canada* [1987] 1 SCR 2.

¹¹ *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

¹² Financial Regulations of the Diocese of Christchurch 2007, cl 13.1.

¹³ *Ibid*, at cl 13.2.

¹⁴ *Ibid*, at cl 13.7.

¹⁵ *Ibid*, at cl 13.3.

Insurance Limited, while ‘you’ refers to ‘each insured entity named in the policy schedule’. The insurance schedule commences with reference to the Church Property Trustees and Others, a reference to the legal owners of the listed properties since the Trustees do not own all church properties. The insured buildings are then listed over several pages, grouped by reference to their ‘beneficial owner’, being the parish in Christchurch city or elsewhere in the province. Beneficial ownership of the Cathedral is ascribed to ‘Christ Church Cathedral’. This, it was submitted, can only be read as a shorthand for the Cathedral community represented by the Chapter.

- Drawing on these propositions the submission culminated in the contention that the policy insured the Cathedral community’s interest in the Cathedral so that the Trustees held the policy, and now the proceeds, on trust for the Cathedral community and its purposes. This so-called insurance trust was either an express trust or a resulting trust. Either way, just as in better times the Chapter expended available funds for the benefit of the Cathedral, including its congregation and their purposes, so the insurance proceeds could be spent in a similar manner. Unquestionably, money spent on the transitional Cathedral would benefit the Cathedral in the long term by sustaining its congregation, or community, in the meantime.

The contrary arguments

[38] Mr Gunn for the Attorney-General accepted that the Trustees held insurance cover on behalf of the parishes, as beneficial owners, so that the insurance proceeds are now held by the Trustees for the benefit of Christ Church Cathedral parish as joint insured. However, counsel submitted that this made no difference to the terms of trust. The Trustees hold the land in Cathedral Square and the Cathedral building in accordance with the Trust established by the Cathedral Square Ordinance in 1858. The fact that the Cathedral has suffered major damage and requires replacement or repair, means that the insurance proceeds must be used to ensure there is a Cathedral on the designated site. Otherwise, the Cathedral Trust would be defeated.

[39] Counsel pointed out that this interpretation was consistent with s 25 of the Trustee Act 1956 which governs the application of insurance money where a policy is kept up under any trust. In particular, subs (3)(b) provides that insurance money:

shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

Given that the purpose of the Cathedral Trust is to ensure that the Cathedral Square site is used for the ongoing existence of a Cathedral, the Trustees were said to have no power to use the money off-site for the construction of a transitional building.

[40] Mr Cooke QC agreed with this analysis, but also took issue with aspects of the argument advanced by the Trustees. Counsel submitted that the Chapter is not a legal person and could not, therefore, enter into an insurance contract. He also doubted that the Chapter had an insurable interest in the Cathedral, given that the material damage policy insured land and buildings owned by the Trustees and insured pursuant to a duty to hold replacement value cover. The fact that individual parishes were described as the beneficial owner of particular churches and buildings recognised who would benefit from the insurance proceeds. But this did not affect the terms of trust, in this case an express trust as defined by Chisholm J. Hence, the insurance trust contention was characterised as a re-run of the argument that failed in the earlier proceedings.

Analysis

[41] In light of the competing contentions I can record my conclusions quite briefly. I accept Mr Ormsby's submissions that an identifiable regular Cathedral congregation, or community, exists as an unincorporated association of people. I agree that the Chapter is the recognised representative of the Cathedral community, with well defined canonical responsibility for the administration of the Cathedral. 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 exists.

[42] This reflects that the Trustees hold land and buildings as a corporate trustee, with the use and enjoyment of such assets reserved to the beneficial owners, the various parishes and in this case the Cathedral community.

[43] But, I do not accept that the insurance arrangements gave rise to a resulting trust, much less an express trust, upon terms wider than Chisholm J found to apply in relation to the Cathedral. In short, any beneficial interest which the Cathedral community, represented by the Chapter, has in the material damage insurance proceeds is subject to the terms of trust applicable to the Cathedral Trust. And, I agree with Mr Gunn's submission that this conclusion is reinforced by s 25 of the Trustee Act.

[44] For these reasons, the cause of action based on a separate and distinct insurance trust must fail.

Are the Trustees entitled to relief from personal liability?

What section applies?

[45] The statement of claim seeks relief pursuant to s 73 of the Trustee Act 1956. The test under this section is whether the Trustees:

... 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 they committed the breach ...

If met, the Trustees may be relieved from personal liability wholly or in part.

[46] However, as Messrs Gunn and Cooke pointed out, the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 contains its own relief section, being s 11(1):

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

It was not clear to me why this cause of action was not pleaded with reference to s 11(1), a matter to which I shall return shortly.

[47] Section 73 has been considered in a range of cases, including by the Court of Appeal in *Wong v Burt*.¹⁶ There is an onus upon trustees seeking relief to establish honesty, reasonableness, merit (that the breach ought fairly be excused) and why directions of this Court were not obtained in relation to the matter at issue. By contrast, s 11 imposes a lesser onus of simply establishing good faith. As always, the meaning of the words is conditioned by context. In this instance I think that good faith means honesty of intention and purpose. This is essentially a subjective test, but I hesitate to think that some element of reasonableness is not required as well given the context of trustees seeking absolution from personal liability.

[48] In my view there is considerable difference between the two tests, such that which one is applied could lead to a different outcome. Given that the Trustees pleaded reliance on s 73 I convened a conference with counsel to discuss this aspect. Mr Ormsby indicated that because the proceeding was framed as an application for directions under the Trustee Act 1956 requiring directions as to service, it was considered preferable to bring all three claims under the one Act. However, given subsequent developments he did not oppose resort to s 11(1).

[49] Mr Cooke, however, voiced concern in relation to reliance upon s 11(1). He questioned whether it should be belatedly relied upon given the pleading of the claim. The section waives personal liability in *rem* and it was questionable whether the mode of hearing was suited to relief of this kind. Mr Cooke stressed that there are nine Trustees, the Bishop and eight church members elected by Synod, yet the affidavit evidence is general in nature and there has been no cross-examination.

[50] My provisional view is that s 11(1) is the appropriate relief provision as this section is specific to these Trustees. However, I am doubtful whether it is appropriate to consider relief from personal liability in the existing circumstances, unless the issue is clear cut.

The competing contentions

[51] Mr Ormsby raised four main propositions in support of relief:

¹⁶ *Wong v Burt* [2005] 1 NZLR 91 (CA).

- The Trustees acted honestly and in the belief that their actions in expending insurance monies on the transitional building were in the best interests of the Cathedral.
- They also believed, at the time, that the expenditure was within the terms of the Cathedral Trust.
- Chisholm J's judgment in the judicial review proceeding demonstrated that defining the terms of trust was no easy matter, rather an issue about which reasonable minds could differ.
- The Trustees acted openly and transparently in relation to their intentions and by the time expenditure of the money on the transitional building was challenged it was already too late to reverse the intended course of action.

[52] Mr Gunn made relatively brief submissions which covered similar ground to that raised on behalf of Trustees. He raised an additional consideration, namely the difficult nature of the issues posed for the Trustees as a result of the sequence of earthquakes. I think this is a relevant consideration.

[53] Mr Cooke took issue with some of the propositions raised in support of the Trustees' situation. In addition, he raised additional considerations, including that the genesis of the problem appeared to be a decision of the Trustees to underinsure the Cathedral when replacement value cover was the norm. Counsel also questioned whether there was any need for the Trustees to expend the Cathedral insurance proceeds on the transitional building given that St John's Latimer Square is to acquire the building in 10 years time, and the parish was to receive an insurance payout of \$4.5 m (see [24]).

[54] It will be necessary to mention some additional factual matters when considering these competing contentions. It is convenient to do so in the course of the analysis.

Analysis

[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.

[56] I accept the contention that the Trustees viewed the construction of a transitional Cathedral as in the best interests of the Cathedral Trust. Whilst history demonstrated that the Cathedral was vulnerable to earthquake damage, the magnitude of the earthquake sequence in late 2010 and continuing well into 2011 was not anticipated. As Chisholm J noted, the magnitude 7.1 earthquake on 4 September 2010 caused damage, but not major structural damage. It was the 6.3 magnitude earthquake on 22 February 2011 that caused the partial collapse of the building, with further damage occasioned on 13 June 2011¹⁷. The cumulative effect was disastrous, and meant that the Trustees were confronted with extraordinary issues in extraordinary times. Their actions are to be judged with this in mind.

[57] Minutes from the Trustees meetings from August 2011 to March 2012 are in evidence. The topic of a cardboard Cathedral was discussed in August 2011, including a query as to ‘who would be carrying the cost of this project’. Mr Richard Gray attended Trustee meetings and was a member of the transitional Cathedral group responsible for assessing the project. He provided reports at meetings of the Trustees. In October 2011 the minutes recorded that ‘\$4 m is a lot of money to take away from the Cathedral rebuild money but ... a transitional Cathedral seems necessary to continue the life and mission of the Cathedral’. The Trustees resolved

¹⁷

The Great Christchurch Buildings Trust, above n 1, at [26]-[28].

to support the project in principle, but on the understanding that it would cost no more than \$4 m.

[58] In December 2011 the Trustees resolved to gift the \$4 m required to erect a transitional Cathedral at St John's Latimer Square in the knowledge that the building was to vest in that parish after 10 years. On 1 March 2012 the Trustees approved the St John's Latimer Square site at a suitable location and the expenditure of \$4 m 'subject to suitable controls'. On 16 April 2012 it was publicly announced that a \$5 m temporary Cathedral was to be constructed on the St John's Latimer Square site; the cost of the building to be covered in part from insurances 'mainly from a material damage indemnity payout, also from business interruption contributions'.

[59] The excerpts from the minutes provide both a contemporaneous record and, seemingly, confirmation that the Trustees were oblivious to whether expenditure of the insurance proceeds off-site on the transitional Cathedral was within the purposes of the Cathedral Trust. Their assumption seems to have been that the expenditure was within their powers.

[60] Mr Gray, a solicitor and the Chancellor of the Diocese until November 2012, provided affidavits in both the judicial review and in this proceeding. In the former, he explained his view that the Trustees held trust property for the purposes of establishing and maintaining ecclesiastical and educational institutions, an interpretation that Chisholm J rejected. In the second affidavit Mr Gray said that as Chancellor he was the principal legal adviser to the Diocese and also a member of the Chapter and the Board of Trustees. He provided an outline of the history of the transitional Cathedral focused upon practical aspects, why decision makers considered a transitional building was needed. He advised both the Chapter and the Trustees that the Cathedral insurance proceeds could be used to pay for the construction and deposed 'it was also intended that I would provide written advice confirming my view on this point'. However, advice was not provided on account of the distraction of other pressing legal issues.

[61] Importantly, matters changed in mid-May 2012 when Mr Graham wrote on behalf of the Buildings Trust and warned the Trustees they were under a legal duty to

use the insurance proceeds to maintain and repair the Cathedral (see [26]). I infer that Mr Graham's letter was based on supposition, since the public announcement the previous month did not expressly identify that the material damage payout was received in relation to the Cathedral. However, that was an available inference. Given the Trustees' then approach I doubt that the April public announcement was intentionally evasive on this point. Mr Anderton, in his affidavit sworn in mid-September 2012, emphasised the concern earlier raised by Mr Graham, but with the benefit of access to documents discovered in the judicial review proceeding.

[62] These developments emphasise the importance of the timeline relating to construction of the transitional Cathedral. Mr Gavin Holley, the Chief Operations Officer of the Diocese and Manager of the Church Property Trustees, said in a reply affidavit dated 20 February 2013 that the Trustees were unaware prior to Chisholm J's judgment on 15 November 2012 that the insurance proceeds were a bone of contention. I doubt this. Mr Graham's letter was clear and spoke in terms of the legal duties to which the Trustees were subject. Nor can Mr Anderton's affidavit be ignored; and it is no answer that the pleadings in the judicial review proceeding did not specifically address expenditure of the insurance proceeds. It was a downstream issue, about to be clarified in light of terms of trust. 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.

[63] The first agreement is the Memorandum of Understanding dated 12 April 2012 between the Trustees, the Chapter and the wardens of St John's Latimer Square (see [23]). After the background recitals, the memorandum is described as 'intended to be legally binding as an expression of the concepts that had been agreed and (which) may be embodied in further legal documents ...', including an operating agreement. So far as I know the memorandum has not been overtaken by subsequent agreements.

[64] The Trustees subsequently entered into a raft of contracts for the construction of the Transitional Cathedral. The agreements include:

Work	Date of Contract
Project and Cost Management Services	20 April 2012
Structural Engineering Services	26 April 2012
Cardboard Cores Contract	31 May 2012
Main Construction Contract	29 September 2012
Fire Engineering Services	26 October 2012
Architectural Services	26 October 2012
Heating Services	26 October 2012

There were some further smaller contracts for peer review services and for work required as construction proceeded (tree removal, drilling etc.).

[65] To my mind, there are two key dates for present purposes. The first is on or about 15 May 2012 when Mr Graham asserted that the Trustees were legally bound to apply the insurance proceeds to the maintenance and repair of the Cathedral. The second is 15 November 2012 when Chisholm J's judgment was released containing pertinent observations about application of the insurance proceeds. There is no evidence concerning the Trustees response to the Graham letter, but the judgment observations did elicit a response.

[66] On 19 November 2012 a number of resolutions were passed including that the Trustees:

- (a) (affirm) that the insurance proceeds are held for the purpose of having a Cathedral at Cathedral Square and are held as part of the Cathedral Trust;
- (h) (note) the power given to it under clause 17 of Schedule 1 of the Anglican (Diocese of Christchurch) Church Property Trusts Act 2003 to "to enter into such contracts and do or perform such things as in the opinion of the Church Property Trustees will be for the benefit of any trust administered by it".

- (i) (affirm) that the construction of the Transitional Cathedral is, in the opinion of the (Trustees), for the benefit of the Cathedral Trust by allowing for the continuation of the Dean and Chapter and the Cathedral Congregation and Community, and for use as a cathedral by the Diocese, until such time as a building at 100 Cathedral Square is available for use as a cathedral;
- (j) (affirm) its decisions to enter into the contracts for the design and construction of the Transitional Cathedral as trustee of the Cathedral Trust and affirms the use of the insurance proceeds as consistent with and for the benefit of the Cathedral trust for the reasons given at resolution (h).

[67] On 28 November 2012 the Chapter wrote to the Trustees in relation to the High Court decision. It disagreed with the view that the insurance proceeds could only be used to rebuild the Cathedral. The letter stated:

The insurance premiums of the material damage policy were paid by Chapter out of its operating income, and Chapter believes that the policy was held by Church Property Trustees as trustee for the purposes of supporting the Cathedral community, the Dean and Chapter, replacement of the Cathedral contents and rebuilding a cathedral on 100 Cathedral Square. The Chapter did not fund the premiums on the insurance policy for such a restricted purpose. That is why Chapter has always asked Church Property Trustees to be involved in decisions about how those proceeds are spent. It is also why Chapter has always considered itself as the 'beneficial owner' of the policy.

The Chapter fully supports the provision of a cathedral on the site at 100 Cathedral Square and supports the use of the vast majority of the insurance proceeds for the purpose. It is concerned that Church Property Trustees will, in view of the High Court decision, not support the Transitional Cathedral by using the insurance proceeds (including the claim for contents) and will not support the operation of the Cathedral community and the Dean and Chapter out of interest earned on the insurance proceeds while construction of a new cathedral takes place. Decisions to that effect would have a devastating impact on the Cathedral community.

In mid December the Trustees filed this proceeding.

[68] The final matter concerns whether the St John's Latimer Square parish was able to fund the construction of the transitional Cathedral from its own insurance proceeds (see [24]). Mr Holley in his second affidavit referred to this aspect stating

that an insurance settlement had not been concluded as at mid-January 2013 and that application of the proceeds to the transitional Cathedral could ‘conceivably’ involve a breach of the St John’s Latimer Square parish terms of trust.

[69] To my mind this is a serious issue. St John’s has lost its church. The transitional Cathedral is to vest in the St John’s parish at the conclusion of the exclusive use period. Clause 5 of the Memorandum provides that in the meantime St John’s may ‘occasionally’ use the transitional Cathedral for weddings, funerals and other services with the approval of Christchurch Cathedral. Why the Cathedral and the St John’s congregations could not share the transitional building for a decade is not explained. If sharing occurred under St John’s beneficial ownership of the building, it would seem unlikely that a breach of trust would arise. However, the trusts relating to St John’s Latimer Square are not in evidence.

Conclusions

[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 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).

[73] I direct that a telephone conference be convened, in advance of which the Trustees should file a memorandum setting out their views concerning arrangements for the final disposition of the claim in light of these matters. Counsel for the Attorney-General and the Buildings Trust should also file memoranda reflecting their views. I leave it to counsel to within 10 working days agree upon, and advise the Registry of, a suitable timetable for the preparation of memoranda. This will enable a conference date to be set and notified.

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