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Judicial review of charitable trusts

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discusses the mixing of public and private law

The successful application for judicial review in *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 ought to give charitable trusts some pause for thought.

THE FACTS

Christchurch Cathedral suffered significant damage in the earthquakes that struck Canterbury in 2010 and 2011. In October 2011, the Canterbury Earthquake Recovery Authority (CERA) decided that the building was "dangerous" for the purposes of the Canterbury Earthquake Recovery Act 2011 (the CERA Act). Accordingly, CERA gave notice to the Church Property Trustees (CPT) who held the Cathedral in trust, that the Cathedral was to be demolished to the extent necessary to make it safe, and that CPT should indicate to CERA whether it would prefer to undertake that work itself.

Following further earthquakes in December 2012 and discussions with CERA and engineers, CPT was confronted by a decision either to:

- Option 1: repair the Cathedral to ensure maximum retention of the original structure;
- Option 2: deconstruct the Cathedral to "sill level", two or three metres above the ground; or
- Option 3: select an intermediate option, involving some stabilisation and some deconstruction.

CERA favoured Option 2, and after discussions with various groups, so too did CPT, which made its decision on 1 March 2012. The Great Christchurch Building Trust (BT) took issue with the CPT decision. BT entered into correspondence with CPT and eventually commissioned an independent engineering review panel to review the decision in June 2012. That panel unanimously recommended Option 1, but engineers engaged by CPT still preferred Option 2. In early August 2012, CPT confirmed its earlier decision.

BT filed proceedings against CPT on 15 August 2012. The crux of its argument was that the central purpose of the trust held by CPT was to maintain and repair the Cathedral. In selecting Option 2 and its deconstruction, the decision defeated that central purpose and was accordingly unlawful, both as a breach of trust and a breach of statutory duty. CPT's response was that the main purpose of the trust was to use the property as an ecclesiastical institution, not to maintain the building in its exact form. In any case, CPT argued, CERA's notice imposed a mandatory legal obligation to deconstruct the building and it was factually and legally impracticable for CPT to commit to maximum retention.

Before Chisholm J determined the substantive proceedings, he had to resolve challenges by CPT that BT lacked standing to bring its application and its decision was not amenable to judicial review. It is these two preliminary issues that should catch the attention of charitable trusts, and what this paper will focus upon.

STANDING

CPT argued that the trust it administered was a private charitable trust, and since BT was neither a member nor beneficiary of that trust, the Court should not afford it standing to apply for review. To the extent that BT alleged a breach of trust, CPT's charitable trust status meant that the Attorney-General should bring any proceedings under s 60 of the Charitable Trusts Act 1957. This was, prima facie, an uncontroversial proposition. In *Friends of Bishopscourt Inc v Church Property Trustees* HC Christchurch A 220/83, 14 October 1983 CPT had successfully challenged the standing of a plaintiff who sought declarations that CPT did not have to sell "Bishopscourt" (the residence of the Christchurch Bishop) which they also held in trust. Holland J struck out the plaintiff's application, on the basis that the plaintiff, an incorporated society whose object was to support the Anglican Church in the maintenance of Bishopscourt, could not possibly have an immediate personal interest in the subject matter, since it was neither a beneficiary nor member of CPT, and thus lacked standing to bring the proceedings.

The Court in the current proceedings, however, did not accept that proposition and dismissed the CPT challenge to BT's standing. Without citing *Bishopscourt*, Chisholm J noted a "liberalising trend" in judicial review jurisprudence that meant that "the Court should be slow to close its door to those genuinely seeking its assistance" (at [69] and [79]). The public significance of the Cathedral and its future elevated these proceedings to public interest litigation, and any reliance upon the technicalities of CPT's private charitable status was inappropriate. Relying upon the decision in *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA), Chisholm J held that BT was equivalent to the plaintiffs in that case, who were members of local rugby clubs who sought to challenge the NZRFU over its decision to tour apartheid South Africa, and were thus sufficiently interested in the proceedings.

It is worth noting, however, that the plaintiffs in *Finnigan* were linked to the NZRFU by a chain of contracts, and were part of the structure of the whole organisation, distinguishing them, as club members, "from mere followers of the game or other members of the public" (*Finnigan* at 178). Moreover, the issue in that case was of national importance: judicial notice was taken that "in the view of a significant number of people […] the decision affects the international relations or standing of New Zealand" (*Finnigan* at 179). Lastly, the Court of Appeal in *Finnigan* held that "[u]nless persons such as the plaintiffs are accorded standing, it may well be that in reality there is now no effective way of establishing whether or not the Union is acting within its lawful powers" (*Finnigan* at 179).

Accordingly, whilst *Finnigan* doubtless represents liberalisation in the approach to standing, it was determined on particular facts. The impetus that drove *Finnigan* was lacking in the current proceedings. BT did not have the degree of connection that the plaintiffs possessed in *Finnigan*, and it is doubtful whether the maintenance of Christchurch Cathedral is a matter of national significance. Moreover, as Chisholm J noted, s 60 of the Charitable Trusts Act meant that BT's proceedings were not the only way the Court could have oversight over the decisions of CPT. Accordingly, the equivalence of *Finnigan* is in doubt, especially given the contrary precedent of *Bishopscourt*.

AMENABILITY TO REVIEW

CPT also argued that its decision was not amenable to judicial review, and taking a similar approach as he did to the issue of standing, Chisholm J dismissed the challenge. The main argument by CPT was that it had not exercised a "statutory power of decision" or affected BT's "rights" as defined and required by the Judicature Amendment Act 1972 (JAA) for a decision to be amenable to judicial review. In response, both BT and Chisholm J favoured a more generous approach to the amenability question.

Although CPT had acted in its capacity as trustee, BT argued it was a statutory body acting under the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 (the 2003 Act). Although the 2003 Act did not establish CPT, it does acknowledge its existence (s 5) and outlines its functions (s 6) and powers (s 7). One of CPT's statutory functions is to "to hold and administer trust property in accordance with this Act", which includes the Cathedral. Accordingly, BT argued that in making its decision, CPT met the first part of the JAA's definition of "statutory power of decision" because it was exercising a power to make a decision conferred upon it by the 2003 Act.

However, the second part of the JAA definition requires that decision to "affect the rights" of any person. It is Chisholm J's analysis of this second part that piques interest. Accepting Elias J's (as she then was) broad approach to the definition of "rights" in *CMP v Director General of Social Welfare* (1996) 15 FRNZ 40 (HC), Chisholm J held (at [92]):

> Once the true public nature of the Cathedral trust is taken into account I am satisfied that the decision affects the "rights" of those members of the community, including the trustees of the BT, who wish, for whatever reason, to enjoy the Cathedral.

Just as Chisholm J's reliance upon *Finnigan* was questionable, so too was his reliance upon *CMP*. In that decision, Elias J was satisfied that the decision at issue was "one affecting CMP's fundamental human rights recognised by law" (at 37). Chisholm J was accurate in describing Elias J's interpretation as broadening the definition of "rights", but it still required those rights to be recognised by law, such as those contained in the New Zealand Bill of Rights Act 1990. Whilst no-one can deny that the community enjoyed the Cathedral, and that BT has a genuine interest in its preservation, it is a significant leap for that interest to develop into a right to enjoy the Cathedral. Although it was not discussed, it is difficult to comprehend what human rights or other rights recognised by law were affected by the CPT decision, and thus Chisholm J's classification of such interests as rights, without any further legal analysis or precedent cited, is problematic.

Of course, the JAA is not the only route to judicial review, even if it is the most preferred. Generally, any exercise of power that has public consequences is potentially amenable to judicial review, and the more important the power (or the consequences of its exercise) the higher the susceptibility: (Taylor, GDS *Judicial Review in New Zealand* (Wellington: LexisNexis, 2010) at 25). The key determinant for amenability is the nature of the power, and not the source: *R v Panel on Take-overs and Mergers ex parte Datafin* [1987] 1 QB 815 at 847.

However, as Taylor notes, "public consequences" amounts to "the practical power to determine or affect the rights, broadly defined, of persons that have not consented to that" (at 25). This means that even if the Court looked to the common law for jurisdiction rather than the JAA, it may still have been confronted by the conundrum of whether BT and the community had a legal right to "enjoyment of the Christchurch Cathedral". Accordingly, it might have been inescapable genuinely to question whether BT's interest in the preservation of the Cathedral was sufficient to justify the Court's supervision over a statutory, but essentially private body. In any case, a proper discussion on the topic would have been preferable to the absence of any detailed analysis.

THE COURT'S CONCLUSION

Having decided that the Court had jurisdiction to examine the CPT decision, Chisholm J measured its legality purely against the terms of the trust it administered (at [145]–[146]):

> CPT 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.
>
> What happens in the situation that has arisen where the Cathedral has been severely damaged? The answer is that unless the terms of the Cathedral trust are varied, either the structure that remains will have to be repaired or it will have to be replaced by another Cathedral. In the absence of one of those steps the whole purpose of the trust would be defeated.

Thus, the criteria that Chisholm J used to measure the legality of CPT's decision-making was whether it defeated the purpose of the trust. As he noted (at [162]):

> … it is a fundamental tenet of trust law that trustees must administer the trust property in accordance with the purposes of the trust. The purpose of the Cathedral trust is to have a Cathedral on the site. Standing alone a decision to deconstruct the Cathedral would defeat the central purpose of the trust.

On this measure, by selecting Option 2 (deconstruction of the Cathedral), the CPT decision prima facie defeated the central purpose of the trust. But for counsel indicating from the bar CPT's intention to rebuild the Cathedral, Chisholm J would have accordingly declared the decision illegal (at [163]). Instead, Chisholm J declared the decision "incomplete"; presumably indicating that the decision was a potential, but not yet realised, breach of trust.

On this basis, the Court decided to intervene, staying the CPT decision, directing CPT to reconsider its decision and, finally, making a formal declaration that "while the Cathedral trust requires there to be a Cathedral on the Cathedral Square site, the building does not necessarily have to replicate the Cathedral as it stood before the earthquakes" (at [184]).

A LOGICAL DISJUNCT?

A significant portion of Chisholm J's decision was dedicated to determining whether the Court had a public law jurisdiction to examine the CPT decision. It is thus curious that having decided that it had such a jurisdiction, the Court used orthodox trust principles — private law — to determine the proceedings.

In this regard, it is clear why Chisholm J saw an analogue between the case and that of *Finnigan*, where the plaintiffs argued that the NZRFU's decision was contrary to its object of "controlling, promoting, fostering and developing the game of amateur Rugby Union Football throughout New Zealand" as stated in its rules. Judicial review in that case was used to hold a private organisation to its private law obligations, just as CPT was held to its obligations as trustee. The justification for using a public law mechanism to enforce private law obligations in *Finnigan* was because the case fell "…into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn" (at 179). The question is whether the current case legitimately fell within a similar twilight zone, or, perhaps more importantly, whether the justification used in *Finnigan* is legitimate at all.

CMP, the decision which Chisholm J relied upon to show that the CPT decision was a statutory power of decision, did not fall into this twilight zone. Elias J held that the decision had miscarried on the basis of an agency misinterpreting its statutory powers and taking into account irrelevant considerations (at 43–44). These are classic grounds of judicial review that are absent from the current proceedings. While the distinction between a misinterpretation of a statute and breach of trust may appear semantic — both after all, are unlawful and can involve similar errors — judicial review only has a place in correcting the former; the latter is corrected by the normal tenets of trust law.

A decision only becomes amenable to judicial review if it has a "public law element" (Taylor, at 26). We must be wary when the same measure used to determine this amenability question is not used when actually examining the decision: quite simply, if jurisdiction requires a public law element, so too should the resolution of the proceedings; it should not be decided on private law grounds. Otherwise, we risk the situation which has arisen here: BT, who has no private law standing to challenge CPT, using public law as a back door to gain standing and then proceed to challenge CPT on private law grounds. Experts in both trust and administrative law ought to be worried over this inelegant marriage of their disciplines.

A WORRYING PRECEDENT?

What, if anything, does this mean for other charitable trusts? If *CPT* stands for the precedent that sufficient public interest in a private decision has the alchemic ability to give that decision a public law element, then the answer is "plenty".

Existing precedent, as noted above, did not provide scope for strangers to a charitable trust to directly challenge trustees. Yet as stated in *Napier City Council v Residual Health Management Ltd* HC Napier CIV-2004-441-35, 30 March 2004, even beneficiaries do not have standing to sue for breach of charitable trusts: "the appropriate remedy is for the Attorney-General to sue if at any point the terms of the trust are breached" (at [21]). This conclusion was based on the precedent of *Titchener v Attorney-General* (1990) 3 PRNZ 52 (which itself relied upon the *Bishopscourt* case) and *Kaikoura County v Boyd* [1949] NZLR 233 (CA), all of which stand for the precedent that it "seems generally desirable that the Attorney-General should be a party at least to any action concerning a charitable trust of substantial value for the benefit of the general public" (*Kaikoura County* at 262).

As noted, this argument was brought before the Court by CPT, to which Chisholm J responded that "while in the usual course of events the Attorney-General might have a particular role in relation to charitable trusts, events in Canterbury over recent times have been far from usual" (at [79]).

However admirable, this statement has undertones of the observation made by Oliver Wendell Holmes in *Northern Securities Co v United States* (1904) 193 US 197 (at 400–401):

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Only the Attorney-General has standing to challenge the decisions of trustees of a charitable trust. By giving BT standing — through the back door, using public law principles — the Court's judgment ran against many decades of settled precedent, for seemingly no principled reason beyond the occurrence of the Canterbury earthquakes. It might be that this case is confined to its facts and the "unusual" circumstances caused by the earthquakes may prevent this decision acting as precedent for future cases. Moreover, unlike the CPT, the vast majority of charitable trusts are not creatures of statute, and this is one way of potentially distinguishing the case.

However, the statutory nature of the CPT was only relevant to having its decision being amenable to judicial review. It was simply the public interest in the decision that afforded BT standing to bring the proceedings in the first instance. Accordingly, as many iconic New Zealand buildings are held by charitable trusts, future challenges by community groups against decisions affecting those buildings is not an outlandish prospect. Where hitherto those community groups would need to seek the assistance of the Attorney-General to enable such a challenge, they may now try and circumvent that requirement by applying instead for judicial review.

Such proceedings would place a court in an unenviable position. If it followed the orthodox approach and denied the applicants standing, it would essentially amount to holding that the public interest in the building at issue was of lesser importance than that in the Christchurch Cathedral. If it granted the applicants standing by affirming the approach of Chisholm J, it would cement an extremely liberal approach to standing and put all charitable trusts at risk of the type of proceedings that the Charitable Trusts Act expressly insulates them from by requiring the Attorney-General's involvement in any challenge.

The apparent dichotomy of allowing standing or denying justice was a false one, for the normal course of requiring the Attorney-General to intervene would have provided oversight of the CPT decision. Instead, in holding that sufficient public interest will justify the circumvention of normal legal requirements, the Court has at best, created a lacuna and at worst, put all charitable trusts at risk. ❐