

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2022-404-1327
[2023] NZHC 3120**

UNDER the Charitable Trusts Act 1957, the Trusts Act 2019, the Declaratory Judgments Act 1908 and r 4.24 of the High Court Rules 2016

BETWEEN AUIMATAGI MOSE AUIMATAGI
First Plaintiff

REVEREND ERIKA SAMU LAFOA'I
Second Plaintiff

ELENI MASON
Third Plaintiff

AND MANGERE CONGREGATIONAL
CHURCH OF JESUS TRUST BOARD
First Defendant

IENI PALELEI, REVEREND TAGATA
ULI, LUISA TUISAULA, VILA
SEUMANU, AILINI NUNN and ALOALI'I
ASAFO
Second Defendants

Hearing: 17 May 2023

Appearances: O Woodroffe for the Plaintiffs
S McAnally and A Ho for the Defendants

Judgment: 3 November 2023

**JUDGMENT OF BECROFT J
[In respect of Defendants' application to strike out the
Plaintiffs' Statement of Claim]**

This judgment was delivered by me on 3 November 2023 at 4pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

The application – introduction

[1] Brotherly and sisterly love seems in short supply at the Mangere Congregational Church of Jesus (MCCJ). The church has divided into two groups. Reconciliation seems far-off.

[2] Issues came to a head over the process apparently used (or rather, not used) by the first defendant, the Mangere Congregational Church of Jesus Trust Board (MCCJ Trust Board), to appoint the current minister of the church. Divisions and disagreements, already evident, deepened during the appointment process amidst allegations of breach of legal duties by the Trust Board and failure to discharge its obligations. These legal proceedings resulted.

[3] The plaintiffs are long-standing members of the congregation of the MCCJ. The first plaintiff says he is the authorised representative in these proceedings of a group of about 27 congregation members. The second plaintiff—a member of the MCCJ congregation since 1999—is himself an ordained church minister (Reverend Samu).

[4] The first defendant, the MCCJ Trust Board, is a charitable trust incorporated under the Charitable Trusts Act 1957 as a charitable trust board.

[5] The various named second defendants are the trustees of the MCCJ Trust Board.

[6] This application is by all the defendants to strike out the plaintiffs' statement of claim on the basis that it discloses no reasonably arguable cause of action.

[7] It is sad and, with respect, unedifying for a church congregation to be in this position. At the beginning of the hearing, I unsuccessfully urged all parties to consider independent mediation as a way forward. I observed that irrespective of this Court's decision, the deep-seated animosity would remain unresolved unless constructive healing action was initiated.

Pleaded and otherwise agreed facts

[8] I take these facts, as I must, from the statement of claim, which sets out the plaintiffs' view of the facts at their highest. Some other facts are also agreed for the purpose of this application.

[9] The precursor to the MCCJ Trust Board was the Otara Congregational Church of Jesus Trust Board, which was incorporated pursuant to the Charitable Trusts Act on 28 September 1983.

[10] In April 1988 the name of the Trust Board was changed to its present name. The Constitution and Rules of the MCCJ Trust Board remain those adopted on 1 June 1983 (the "Constitution and Rules"). It is accepted there was an incomplete and ultimately unsuccessful attempt to update the Constitution and Rules of the MCCJ Trust Board sometime in 2019.

[11] I note that the original (and still operative) list of charitable objects specified at clause 3 of the Constitution and Rules is very brief, probably reflecting the legal practices of the day. It relevantly provides that the objects of the Board are:

- (i) The advancement and promotion of all or any religious charitable benevolent or other work throughout the Dominion of New Zealand and without limiting the foregoing the acquisition, the establishment, construction and maintenance of a site or sites for a Church or Churches, ancillary Church building and manses for the congregation of the Otara Congregational Church of Jesus (hereinafter called "the congregation"), and all other purposes of a religious or charitable nature incidental to the work of the congregation, or the work of persons carrying on religious or other charitable work and adhering to the confession of faith hereinafter set forth.
- (ii) To purchase and acquire real and personal property of all or any sort and to construct houses, churches, buildings, halls and youth camps of any and every sort to assist in the advancement and promotion of the objects to be carried out in terms of subclause (i) hereof.
- (iii) To act as trustees of moneys and property of any and every kind granted donated or settled upon the Board in furtherance of all or any of its objects and to accept transfers from any existing trustees or body of the real or personal property subject to any trusts under which the same may now be held and to act as trustees and administer superannuation funds and insurance schemes to provide retirement or superannuation allowances arising out of any object of the Board.

[12] Clause 10 relevantly provides as follows:

10. FOR the purpose of carrying out the objects hereinbefore set forth the Board shall have full power to administer its finances and affairs and to purchase lease exchange rent acquire mortgage charge or sell or otherwise deal with the assets under its control.

[13] The MCCJ Trust Board owns the property at 2 Waddon Place, Mangere on which a church, a hall and a manse are located.

[14] The MCCJ is said to be under the umbrella of the Congregation Church of Jesus in Samoa, established in 1942. Most of the congregation are migrants from Samoa.

[15] I observe that there is no description of any formal relationship with the “umbrella” organisation. There are no pleaded facts as to how the church is governed or by whom. No means of church administration or leadership is pleaded. The objects, powers and role of the MCCJ Trust Board are set out. The Board is apparently the only governance body for the MCCJ. But the Board is said by the plaintiffs not to have the power to appoint a minister, or if it did, it exercised that power unlawfully.

[16] Nor is there any pleaded description of the process, formal or otherwise, for becoming a member of the church, nor what the members’ rights might be. In fact, Ms Woodroffe for the plaintiffs explained that “membership” is very informal. A member is simply someone who is regularly part of the church congregation. Membership is “formalised” when a regular church attender is welcomed into the congregation at a Sunday service.

[17] The original minister of the MCCJ died in 2019.

[18] At about that time the second plaintiff (a minister himself, as explained at para [3]) made an application to the Department of Internal Affairs (DIA) for a licence as a marriage celebrant. On 29 May 2019 the DIA approved that application. But his status as a celebrant was short-lived. On 26 June 2019 the MCCJ Trust Board wrote, accurately, to the DIA to inform it that the second plaintiff’s application had not been approved by the Trust Board. It also asked that he be removed from the list of

authorised celebrants. The second plaintiff's licence was subsequently revoked by the DIA on 8 July 2019.

[19] In August 2020, following New Zealand's first Covid-19 lockdown, the third plaintiff made an application in the name of the MCCJ Trust Board (without the Board's knowledge) for Covid-related funding support from the Ministry of Pacific Peoples. The application was successful. When the Trust Board discovered that it was to receive funding it had not applied for, it elected to decline the funding and informed the Ministry accordingly. The Trust Board also advised that its name had been "misused" in the original application.

[20] On 24 March 2022 the Trust Board appointed Reverend Tagata Uli as the replacement for the deceased original minister. The appointment is said by the plaintiffs to have been made without any formal notice or consultation with congregation members of the MCCJ.

[21] Furthermore, the Trust Board gave the church manse to Reverend Uli for his use while serving as the church's minister. This is also said by the plaintiffs to be without any formal notice to or consultation with them—as will be seen, the plaintiffs say they are beneficiaries of the MCCJ Trust Board as congregation members of the MCCJ.

[22] Reverend Uli's appointment appears to have polarised members of the congregation.

[23] On about 15 April 2022, a part of the congregation that includes the plaintiffs informed the MCCJ Trust Board that they intended to use the church buildings for their own Sunday services, led by the second plaintiff. It is said that the plaintiffs financially contributed significant capital used to purchase the Waddon Place property and to build the church, hall and manse and had the right to use it.

[24] However, on 16 April 2022 the Trust Board informed the plaintiffs' group that the assets of the church fell within the authority of the Trust Board, and, in these circumstances, it had been decided the plaintiffs' group had no right to use them.

[25] Subsequently, trespass notices were individually served upon 29 members of the congregation, including three children respectively aged 4, 12 and 16 years old.

Causes of action

[26] The plaintiffs commenced this proceeding on or about 9 August 2022. They plead five causes of action. With great respect, the pleadings are discursive, prolix and lack clarity. Nevertheless, they can be understood.

First cause of action

[27] The plaintiffs allege that both the Trust Board and its individual members (the second defendants) had no express or implied power either under the Constitution and Rules of the MCCJ Trust Board, or under the provisions of the Trusts Act 2019, to appoint Reverend Uli and to give him the use of the manse. It is further alleged, and somewhat in contradiction to the first part of this allegation, that the Board breached its fiduciary duties owed to the plaintiffs by not consulting or involving them as congregation members in the appointment process. The plaintiffs seek, amongst other things:

- (a) a declaration that the first and second defendants had no legal power to appoint Reverend Uli and that the appointment was therefore illegal and ultra vires;
- (b) a declaration that Reverend Uli has no right to use the manse of the MCCJ congregation, and that both his appointment and authority to use the manse were in breach of the first and second defendants' fiduciary duties to the plaintiffs as congregation members and as beneficiaries of the MCCJ Trust;
- (c) an order under s 112 of the Trusts Act 2019 to remove all current trustees;
- (d) an order that a new board of trustees be selected by an independent body appointed by the Court for ancillary orders; and

- (e) exemplary damages at a quantum the Court determines is fair and just, to be paid by the second defendants.

Second cause of action

[28] The second cause of action alleges that the Trust Board, as first defendant, breached its duties owed to the plaintiffs under the Trust Act 2019 to act impartially and fairly by issuing trespass notices in respect of the church property, and/or did not have power to issue those trespass notices and that the trespass notices are therefore invalid. The plaintiffs seek:

- (a) a declaration that the trespass notices were invalid ab initio;
- (b) a direction and a declaration under the Declaratory Judgments Act 1908 that the plaintiffs have the right to return to worship at the MCCJ church, and to use the facilities; and
- (c) similar orders to those set out above at [27(c)–(e)] in respect of the first cause of action, including exemplary damages, this time in the sum of \$10,000 or an amount the Court deems fair and just, to be paid to each member of the congregation who was served with the allegedly illegal trespass notices.

Third cause of action

[29] The third cause of action replicates the facts of the second cause of action and alleges that the defendants breached the fiduciary duties owed to the plaintiffs by issuing the trespass notices and, again, were in breach of the Trusts Act 2019 as well as the Constitution and Rules of the Trust. The plaintiffs seek redress as for the second cause of action.

Fourth cause of action

[30] The fourth cause of action alleges that the defendants breached fiduciary duties owed to the second plaintiff, Reverend Samu, by seeking revocation of his marriage licence. The plaintiffs collectively, and the second plaintiff specifically, seek:

- (a) a declaration that the MCCJ Trust Board acted illegally to cancel the second plaintiff's marriage celebrant licence;
- (b) a declaration under s 2 of the Declaratory Judgments Act 1908 of the second plaintiff's right to make his application as a marriage celebrant without the permission of the MCCJ Trust Board;
- (c) a declaration that each of the second defendants had no authority or power to remove the second plaintiff's marriage licence and acted with ulterior motives;
- (d) a declaration that the first and second defendants all acted in breach of their fiduciary duties; and
- (e) similar orders as sought for the previous causes of action, including exemplary damages of \$150,000 or an amount the Court deems fair and just, to be paid by the second plaintiffs for emotional harm, hurt, humiliation and worry.

Fifth cause of action

[31] The fifth cause of action alleges that the defendants breached fiduciary duties owed the third plaintiff by refusing the funding that she applied for in the name of the Trust Board without its consent. The third plaintiff seeks:

- (a) a declaration that cancellation by the first and second defendants of the successful application was void ab initio and unlawful;

- (b) a declaration that the cancellation of the successful application for community funding was in breach of the Trust's fiduciary duty to the plaintiffs;
- (c) a declaration under the Declaratory Judgments Act that the third plaintiff had a right to lodge the application for funding without the permission of the first and second defendants; and
- (d) similar orders as sought for the previous causes of action, including exemplary damages of \$250,000 or an amount the Court deems fair and just, to be paid by the second plaintiffs for emotional harm, hurt, humiliation and shame.

Approach to be taken in this strike-out application

[32] The defendants apply to strike out the statement of claim, in its entirety, on the basis that it discloses no reasonably arguable cause of action.¹ The relevant rule is r 15.1(a) of the High Court Rules 2016. Counsel are agreed on the applicable principles, which are well established:²

- (a) the Court may strike out all or only part of a pleading;
- (b) the facts pleaded (as opposed to allegations) are assumed to be true;
- (c) the causes of action must be so untenable the Court is certain they cannot possibly succeed;
- (d) the jurisdiction is to be exercised sparingly and only in a clear case;
- (e) the jurisdiction is not excluded by the need to decide difficult questions of law; and

¹ Rule 15.1(1)(a) of the High Court Rules 2016.

² *Attorney-General v Prince* [1988] 1 NZLR 262 (CA) at 267, cited approvingly by Elias CJ and Anderson J in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

- (f) particular care is required in areas where the law is confused or developing.

Are the causes of action fundamentally misconceived?

[33] In the defence view there is one fundamental flaw in many of the plaintiffs' claims. It is said to be an insurmountable hurdle. Put simply, the defendants say that charitable trusts such as the MCCJ Trust Board do not have specific beneficiaries to whom they owe a fiduciary duty. In other words, charitable trusts stand apart from other trusts where there are always named or defined beneficiaries.

[34] In Mr McAnally's precise and clearly presented argument for the defendants, charitable trusts exist to further the objects of the trust concerned. The only "duty" owed by the trust, and its trustees, is to the trust's charitable objects. There are also good faith duties owed by trustees in their dealings with each other, but those are not relevant here. Mr McAnally submits that it is conceptually and legally in error to suggest that any individual or individuals are owed a "fiduciary duty" by a charitable trust or its trustees. To the extent that any cause of action depends on an alleged breach by the MCCJ Trust of fiduciary duties owed to the plaintiffs, he submits that none of the causes of action could ever succeed – and the Court can be certain of this.

[35] This submission needs some unpacking.

[36] Mr McAnally emphasised that his submission has a long-established and well-recognised pedigree. He referred to commentary in support, reaching back to the 1906 text *The Law of Charities and Mortmain*³ as follows:⁴

A private trust is one for the benefit of particular individuals who are or will become ascertained. A charitable trust is one for the accomplishment of a purpose charitable within the meaning of the Statute of Elizabeth, which must, as already shown, be a purpose designed to benefit the public, or a section of the public present or future. In the case of a private trust the *cestuis que trustent* are specific individuals, at the suit of any of whom the trust may be enforced; in the case of a charitable trust there are no *cestuis que trustent*,

³ Leonard Syer Bristowe, Cecil Arthur Hunt and Halford Gay Burdett *The Law of Charities and Mortmain: Being the Fourth Edition of Tudor's Charitable Trusts* (Sweet & Maxwell, London, 1906) at 121.

⁴ A "cestuis que trustent" is a formal Latin term referring to a beneficiary having an equitable interest in a trust, with the legal title being vested in the trustee.

unless the abstract charitable purpose can be properly so called, and it is only enforceable at the suit of the Attorney-General, representing the Crown in its capacity of protector of charities.

[37] A more modern formulation of this argument can be found in *Latimer v Commissioner of Inland Revenue*:⁵

[29] Their Lordships would begin by stating some general principles. It is of the essence of a charitable trust that it is a trust for the promotion or advancement of social purposes rather than a trust for individual beneficiaries. Of course, individuals may benefit from the application of trust moneys, but they are not, as individuals, the beneficiaries of the trust and may not enforce its terms. If the purposes of the trust are charitable, they may be enforced by the Attorney-General; if they are not charitable then, with certain anomalous exceptions, they are not enforceable and the trust is not valid. ...

[38] And the following extract from *Tudor on Charities*, now in its 11th edition, is apposite:⁶

In the case of a non-charitable trust the court can only act on the application of an individual or individuals able to establish a claim to be beneficially interested in the subject-matter of the trust or by individuals who are trustees or the governing body of a defined or ascertainable institution which has a defined or ascertainable interest in the subject-matter of the trust. It was with the above considerations in mind that Lord Parker of Waddington, in *Bowman v Secular Society Ltd*, said that a trust to be valid must be for the benefit of individuals or must be charitable. Or, as Viscount Simonds said in *Leahy v Attorney General (NSW)*:

“A gift can be made to persons (including a corporation) but it cannot be made to a purpose or object; so also a trust may be created for the benefit of persons as *cestuis que trust* but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue but, if it be charitable, the Attorney-General can sue to enforce it.”

[39] Indeed, the theme running throughout *Tudor on Charities* is that individuals are not, and cannot be, beneficiaries of a charitable trust and they have no beneficial interest in the property vested in the Trust Board.

[40] While this was not submitted by either counsel, this approach to understanding charitable trusts is consistent with the provisions of the Trusts Act 2019:

⁵ *Latimer v Commissioner of Inland Revenue* [2014] UKPC 13, [2004] 3 NZLR 157 at [29].

⁶ William Henderson and others *Tudor on Charities* (11th ed, Sweet & Maxwell, London, 2022) at 6-017 (footnotes omitted).

- (a) For instance, s 13 of that Act makes plain the distinction between property that is held for beneficiaries *or* for a permitted purpose (emphasis added). A permitted purpose is defined in the Trusts Act at s 9 as meaning a charitable purpose (as well as some other purposes not relevant here). In each case fiduciary relationships are statutorily created but in the case of a charitable trust, those duties seem clearly to refer to furthering the charitable objects.
- (b) Similarly, s 15(1)(b)(ii) sets out that an express trust may be created by a person who clearly and with reasonable certainty identifies the beneficiaries *or* the permitted purpose of the trust (emphasis added). The distinction between beneficiaries in a non-charitable trust and the objects/purposes (and not beneficiaries) of a charitable trust is made crystal clear.
- (c) Finally, amongst other relevant sections, s 26 of the Trusts Act also refers to that distinction. The section makes clear that a trustee must hold and deal with trust property, and otherwise act, for the benefit of the beneficiaries; and, in the case of a trust for a permitted purpose, to further the permitted (here charitable) purpose.

[41] Ms Woodroffe argued strongly that in the circumstances here, the congregation of the MCCJ must be considered to be the beneficiaries of the Trust Board who can individually enforce the Trust Board's Constitution and Rules and its fiduciary duties to the plaintiffs. I can well understand the plaintiffs' concerns but there is no authority for Ms Woodroffe's submission. Indeed, and with great respect, in my view the authorities are all against her argument.

[42] I accept Mr McAnally's argument that all the causes of action alleging a breach of fiduciary duty owed to the plaintiffs by the Board and its trustees are misconceived and could never possibly succeed.

[43] However, that is not to say those concerned with the operation of a charitable trust are without remedy, as Mr McAnally explained. As will be seen from the previous judicial comments at paras [36] to [38], it is the Attorney-General who is responsible for the oversight of charitable trusts,⁷ as the “protector of charities”.⁸ Under s 58 of the Charitable Trusts Act, the Attorney-General could be asked by the plaintiffs to carry out the sort of inquiry into the operation of the MCCJ Trust Board as envisaged by that Act.

[44] Mr McAnally for the defendants also conceded that under s 60 of the Charitable Trusts Act 1957 any person, including the plaintiffs in this case, can take action “in respect of any property or income subject to a trust for a charitable purpose”. Presumably it is s 60(1)(a) and perhaps (b) which would be relevant. Presumably the plaintiffs could apply for an order requiring the trustees to carry out the trusts on which the property is held. But they would have to be able to establish a specified breach of trust:

60 Proceedings to enforce or vary charitable trust or to require a new scheme

- (1) Application may be made to the court by the Attorney-General or any officer of the Government service or person in respect of any property or income subject to a trust for a charitable purpose within the meaning of either Part 3 or Part 4, whether or not a scheme in respect of the property or income or money has been approved by the court under Part 3 or Part 4 or otherwise or by the Attorney-General under Part 4, for an order—
- (a) requiring the trustees to carry out the trusts on which the property or income or money is held, and to comply with the provisions of the scheme (if any):
 - (b) requiring any trustee to meet his liability for any breach of trust affecting the property or income or money as the court may direct:

...

[45] In the defendants’ view, that cause of action has not been pleaded nor made even indirectly clear in the statement of claim. Also, or alternatively, the statutory process envisaged in the Charitable Trusts Act has certainly not been followed and the Attorney-General’s intervention has not been sought. However, this is not an

⁷ Charitable Trusts Act 1957, s 58.

⁸ See, for example, *Presbyterian Support (Upper South Island) v The New Zealand Guardian Trust Company Ltd* [2016] NZCA 556.

insurmountable problem for the plaintiffs. The statutory processes envisaged could be followed; and the statement of claim could be amended accordingly, to the extent that any cause of action concerns any “property or income” subject to the MCCJ Trust.

[46] I understand Ms Woodroffe, who presented the plaintiffs’ case with enthusiasm and determination, accepted that if required to do so she could amend the pleadings to reflect, where necessary, that the cause of action was a claim under s 60 of the Charitable Trusts Act. In her view s 60 certainly could allow for causes of action one, two and three; but she conceded it would not extend to the plaintiffs’ fourth and fifth causes of action, which do not relate to property or income of the Trust but rather to alleged breaches of duties owed to individuals.

[47] In fact, the defendants do not rely on the possible curative powers of s 60 as fatal to any of their arguments to strike out the causes of action. This is because the fundamental reason for the strike-out sought is that the duties claimed by the plaintiffs as owed them by the defendants simply do not exist, and that the Trust has the power to act exactly as it did.

[48] I now analyse the five causes of action separately.

First cause of action

[49] The first half of the plaintiffs’ pleading is that there was no express or implied power for the MCCJ Trust Board to appoint the current minister or install him in the manse. Specifically, that there was no such power in the Constitution and Rules of the MCCJ Trust Board, nor under the Charitable Trusts Act 1957, nor under the Trusts Act 2019.

[50] Ms Woodroffe strongly argues that the Trust Board is no more than a vehicle for owning property and maintaining it for the benefit of the congregation. Her view is that the Trust Board has assumed powers it simply does not have.

[51] Further, Ms Woodroffe contends that the MCCJ 1983 Constitution and Rules are outdated; is a European – a palagi – construct; and fails to take into account Pacific Island churches’ organisational norms. Her view is that the appointment of a minister

is the role of the congregation following full meetings and congregational agreement, and not the role of the Trust Board at all.

[52] I accept that the Trust's Constitution and Rules do not appear to reflect what I am told is the general principle for appointing ministers in Samoan congregational churches. That being so, I can well understand that the plaintiffs, as part of the congregation, feel aggrieved that they were not properly consulted and that their voice was apparently not heard. However, there are no other documents or rules that have been pleaded or referred to in argument that could be relevant. Most churches have such rules. This church only has an apparently very outdated 1983 Constitution as its sole governance document.

[53] The question must therefore be: do the Constitution and Rules give the Trust Board the power to appoint a minister? Whether it should have that power, and whether it is culturally appropriate for it to have that power, are not the point. Whether the Constitution is unfit for purpose and to be considered outdated is not the point either. Ms Woodroffe has made all these points and more. But the Constitution is what it is.

[54] On this point, even given the plaintiffs' genuine concerns, I accept the defence argument. When the Constitution and Rules are properly considered, the MCCJ Trust Board clearly has the powers to appoint a minister and to allow the minister to use the church manse. I point to the following:

- (a) In carrying out the objects of the Trust, clause 10 (set out above at para [12]) gives the Board full power to manage its own finances and affairs in pursuit of the Trust's objects.
- (b) Those objects include the advancement and promotion of "religious charitable benevolent or other work" throughout New Zealand, including, without limitation, the establishment of a church and ancillary "buildings and manses". A manse describes "the house provided for a minister of some Christian denominations".⁹ The trust

⁹ As at fn 51 of the defendants' submissions in support of their interlocutory application.

must therefore have the power to decide who lives in the manse and, at least by inference, the power to appoint a minister.

- (c) Further, the objects extend to "...all other purposes of a religious or charitable nature incidental to the work of the congregation." The appointment of a minister must surely be incidental to the work of the congregation.

[55] In my view, upon a plain reading of the first object (i) of the trust, set out in full at para [11] above, the power to appoint Reverend Uli must exist in the Board's Constitution and Rules.

[56] I add that there is nothing in the plaintiffs' argument that neither the Trusts Act 2019 nor the Charitable Trusts Act 1957 contain any power for a trust board, as here, to appoint a minister. The question is what the Constitution itself says. The two acts relied upon by the plaintiffs are general, enabling and controlling, in the context of a trust's specific powers contained in its constitution/rules.

[57] As an alternative within the first cause of action, the plaintiffs allege that if the Trust Board does have the power to appoint a minister then it has breached its fiduciary duties owed to the plaintiffs and other congregation members as beneficiaries, including the duty to consult. However, as I have concluded earlier in this judgment, as from para [33], this argument is misconceived and cannot succeed. The plaintiffs are not beneficiaries of the Trust Board.

[58] In any case, the MCCJ Constitution and Rules contain no general obligation to consult the congregation. The trustees, consistent with the general obligations imposed on them by trust law, are generally permitted to act absolutely within their own discretion as to how they appoint a minister.

[59] Whether the Trust Board was wise to act in the way it did is an entirely different question. That is where the Attorney-General might come in, and as discussed that would involve a recasting of the first cause of action. Whether the Attorney-General would want to become involved is not a question for this Court.

[60] Finally, as regards the first cause of action, I observe that if I am wrong about the Trust Board’s power to appoint a minister, it is almost certain the courts still would not intervene. Apart from the Trust Board’s Constitution and Rules, the MCCJ church is an otherwise unincorporated group, with no church constitution and no rules. For instance, there is no provision for even becoming a member of the church – apart from an informal welcome. What would the standing of the plaintiffs be in the absence of formal membership or rules? And while it is said that there is an “understanding as to how ministers should be appointed within the Samoan Christian community”, from the facts pleaded, even this church cannot agree on those procedures. It would be impossible for the Court to interfere in the operation of a private voluntary organisation without any rules. In these circumstances, how could a court determine if the minister’s appointment was valid?

[61] As noted by Associate Judge Doogue in *Hanipale-Brady v The Presbyterian Church of Aotearoa New Zealand*,¹⁰ the courts will be cautious if there are church issues before a civil court. The courts have traditionally shown a reluctance to intervene where purely spiritual or religious issues are at stake. Such matters are best left to the church or other religious body in question. However, the authorities show the courts have been prepared to intervene where civil economic or proprietary rights are alleged to have been infringed.¹¹ But even then, the churches and religious bodies involved have, unlike here, operated under a clear set of rules.

[62] The pleadings do advert to the MCCJ Church being under the umbrella of the Congregational Church of Jesus in Samoa, established in 1942. There is no reference as to how this arises, whether there is any formal relationship, or whether the MCCJ is subject to any relevant rules of that “umbrella” church. One would have thought that if any such rules were breached in this appointment process then they would have been pleaded.

[63] In summary, as it is presently pleaded, the first cause of action cannot possibly succeed.

¹⁰ *Hanipale-Brady v Presbyterian Church of Aotearoa New Zealand* [2013] NZHC 29, [2014] NZAR 1167 at [50]–[57].

¹¹ See *Marshall v National Spiritual Assembly of the Baha’is of New Zealand Inc* [2003] 2 NZLR 205 (HC).

[64] I do not see how the first cause of action could ever succeed, even if re-pleaded under s 60. This is because the pleaded facts, as already outlined, do not establish a breach of the trusts on which property and/or income are held by the trust. If the plaintiffs wish to amend the first cause of action, to plead reliance on the rules of the umbrella Congregation Church of Jesus in Samoa, if applicable, then they should have one month from the date of this judgment to do so.

[65] Another option is to seek the formal involvement of the Attorney General, surely akin to using a sledgehammer to crack a nut.

[66] But the best option, surely infinitely preferable, is to put differences aside and together formulate culturally appropriate rules for the church's organisation and administration going forward. That could involve agreed amendments to the relevant clauses in the Constitution and Rules – something which was tried in 2019 but failed. Or the church could take advice about modern, culturally appropriate rules for membership of and decision-making within the church.

Second and third causes of action

[67] These causes of action relate to the Board's decision that the plaintiffs' group had no right to use the church property owned by the Board for their own services led by the second plaintiff; and to the serving of trespass notices on 29 members of the congregation, including three children respectively aged 4, 12 and 16 years old. I infer this group are all aligned with the plaintiffs. Clearly, they have been outraged by this action.

[68] The defendants argue that the focus on the validity of the trespass notices is a red herring. Mr McAnally submits that "no action has been brought [by the defendants] on those notices, or for trespass generally, so whether the notices on their face, are valid or invalid for Trespass Act purposes is not a live issue." He says that if it is assumed the plaintiffs' group had an implied licence to use the church, the sole relevant issue is whether the Trust Board was able to revoke that licence – because, he says, the issuing of the trespass notices unequivocally constitutes the revocation of any such licence. He emphasises that in this way "whether the notices serve any purpose for the purposes of the Trespass Act 1980 is irrelevant."

[69] I add that there is no information before the Court, nor pleaded, as to whether those served with the notices complied with them – but for present purposes I assume that is what happened. Nor does the Court know what further or other action the defendants took in relation to the notices.

[70] It is common ground that the MCCJ Trust Board is the registered proprietor of the land in question and owns the buildings. It is also accepted that members of the congregation can enter the church buildings by virtue of an implied licence. As an application of first principles, it must follow that the Board has the authority to determine who may use the church property and has the power to revoke any implied licence. I do not understand the plaintiffs to dispute these fundamental propositions. The plaintiffs submitted, but faintly, that in the circumstances the issue of the trespass notices did not constitute clear and unequivocal revocation of their implied licence. As the argument developed, however, it seemed the plaintiffs came to accept that it would be hard to see the notices in any other way.

[71] As I understand it, the plaintiffs' real argument is that the Trust Board's revocation of any implied licence was:

- (a) exercised dishonestly, not in good faith, irresponsibly and not in accordance with the purposes of the Trust; and
- (b) compromised by a failure to act in the "best interests of the Trust" and contrary to the fiduciary duty to act impartially and treat all church members fairly.

[72] The fundamental problem with this argument is that, as I have already concluded at para [33] and following, the Trust Board does not and cannot owe the plaintiffs any fiduciary duties as the plaintiffs are not beneficiaries of the Trust. To the extent that these two causes of action are based on that proposition, they cannot succeed.

[73] There is also considerable force in the defendants' arguments that in the context of the Board appointing the Reverend Uli as minister, and the plaintiffs unilaterally announcing their decision to use the church property on Sundays to conduct their own services with their own preferred minister, the Board's response could hardly be considered unreasonable.

[74] Mr McAnally submits, not without basis, that any obligation for the Trust Board to act in the best interests of the congregation, or to treat all members equally, does not require it to permit the plaintiffs to impose their own views, nor to run their own services, over those of the Trust Board or the other members of the congregation.

[75] All that said by the defendants, I must put the plaintiffs' argument at its highest. There is a slim argument that the revocation of the plaintiffs' implied licence and/or the serving of the trespass notices were motivated by the Board's dislike of the plaintiffs – if not malice towards them – and were otherwise not in good faith. This would be in breach of the duties of the trustees and contrary to specific statutory provisions of the Trusts Act which make clear the obligations of trustees. For example:

25 Duty to act honestly and in good faith

A trustee must act honestly and in good faith.

...

27 Duty to exercise powers for proper purpose

A trustee must exercise the trustee's powers for a proper purpose.

[76] If the plaintiffs could establish such breaches, then perhaps pursuant to s 60, at least part of the remedy sought could succeed. That is, a declaration could be issued that the revocation of implied licence was invalid, because the Trust Board was acting contrary to the trusts on which it held the church property – including the general Trusts Act obligations. It would be a stretch and difficult to establish. But as pleaded, it could not be said that this could not possibly succeed. For instance, the decision to serve the trespass notices on three young children is concerning and at best seems inappropriate and misguided. At worst, it might point to the Board's improper motivations. But that remains no more than speculative. Finally, it is not for the Court at this stage, as suggested by the defendants, to determine that the revocation of any

implied licence was a reasonable response to the unilateral statement by the members of the congregation that they would run their own services on the Trust's premises.

[77] Alternatively, the plaintiffs could request an investigation or inquiry by the Attorney-General, as already discussed for the first cause of action, however forlorn such a course may be. Just as for the first cause of action, if the plaintiffs wish to amend the second and third causes of action they should have one month from the date of this judgment to do so.

Fourth cause of action

[78] I do not think this action can possibly succeed as it is presently pleaded.

[79] The defendants did not owe any fiduciary duties to the second plaintiff, for the reasons already outlined. That part of this cause of action is doomed.

[80] In any case the defendants did not (and could not) "revoke" or "cancel" the second plaintiff's marriage celebrant's licence previously issued by the DIA. Such "revocation" or "cancelation" is entirely a matter for the DIA. This court cannot unilaterally reinstate the licence or declare the defendants acted illegally, much less declare that each of the second defendants had no power to remove the second plaintiff's marriage licence. It was the DIA who cancelled the licence – not the defendants.

[81] It is undisputed that the second plaintiff did not seek or obtain the consent or approval of the MCCJ Trust Board before applying for the marriage celebrant's licence. The Trust Board is free to advise the DIA that it did not support or approve of the application. It was argued that the DIA misunderstood that the original application had been made under the auspices of the church's national organisation (not the MCCJ). It was also argued that the DIA did not seek the second plaintiff's views in response to the Trust Board's letter, which might amount to a breach of natural justice. Both are matters for the second plaintiff to pursue independently with the DIA. In short, the second plaintiff's fundamental complaint must be with the DIA, not with the defendants.

[82] On this point I accept Mr McAnally's succinct submission. If the position of the Trust Board was irrelevant to the second plaintiff's DIA application, then the defendants owed him no relevant duties. If the Board's support was relevant, then the second plaintiff should have obtained the Board's approval before making his application.

[83] In argument I raised that there may be some form of tortious liability against the defendants if it could be established that they had acted with malice or bad faith, but this Court cannot say more. Given what is pleaded, it would be a stretch. At its highest, there was a rather vague suggestion during argument, that the MCCJ Trust Board in some way defamed the second plaintiff by diminishing his reputation by informing the DIA that he had failed to obtain the consent of his local church. But I do not see how that could possibly succeed, because what the defendants communicated to the DIA was true; and in any case, the second plaintiff maintains he was not required to obtain the church's consent.

[84] If the second plaintiff believes there is a different and arguable cause of action arising from the Board's dealings with the DIA, then what is currently pleaded should be replaced with a whole new cause of action. Again, the plaintiffs have one month from the date of this judgment to do so.

Fifth cause of action

[85] I immediately accept that the third plaintiff appeared to do a fantastic job in applying for funding for the church in the wake of Covid-19. The application was made in good faith. It was for the benefit of the congregation. And it was successful. I overlook none of those matters. I acknowledge her public-spirited actions for the benefit of the church and its community.

[86] However, she made the application in the name of the MCCJ Trust Board. She had no authority to do that. As pleaded, the first notification to the Board, and then discussion about it, occurred when it became obvious that a \$50,000 grant was approved. At that stage the Trust Board, as pleaded in its statement of defence, informed the relevant Government officials that the church was not prepared to handle

long-term responsibility for the good care and maintenance of the equipment funded by the grant.

[87] I accept that it is entirely open to the MCCJ Trust Board not to take money it did not apply for, and that the third plaintiff had no legal right to apply in the Board's name. That the application was consistent with charitable purposes and objects of the Board is not the point. That it was for the benefit of the church is not the point. Neither that the second plaintiff and apparently others in the church congregation thought it was a great idea and supported it.

[88] The decision-making "buck" starts and stops with the Board: see clause 10 of the Constitution and Rules at para [12] of this judgment. The Board must be entitled to reject the money made available by the Government. As noted, the statement of defence sets out a credible reason for so doing.

[89] This cause of action could never possibly succeed. I can readily understand the concern, even shock, accompanying the Board's decision. But it was open to the MCCJ Trust Board not to accept the grant, especially given it never applied for it in the first place. This cause of action must be struck out.

Conclusion/summary

[90] The first, fourth and fifth causes of action must be struck out as they currently stand as there is no tenable argument that they could ever possibly succeed even taken at their highest.

[91] The fifth cause of action is struck out completely.

[92] As set out in paras [64] and [84] of this judgment there is leave for the plaintiffs to file amended first cause and fourth causes of action. This is on the basis that some other different and arguable cause of action just might exist, though none has been identified or even alluded to in the pleadings.

[93] The second and third causes of action cannot succeed as currently pleaded. However, they could be amended, if the plaintiffs chose, to reflect that the revocation of any implied licence held by the plaintiffs to use the church property was made in bad faith, motivated by dislike and malice towards the plaintiffs and that there were no reasonable grounds for its revocation. As such it could be pleaded that the Trust Board was in breach of its obligations under the trusts by which it held the church property. As with the first and fourth causes of action, the plaintiffs have leave in accordance with para [77] of this judgment to file an amended third cause of action.

[94] I rule accordingly.

A final comment

[95] I urge the parties to consider a more constructive way forward involving mediation and resolution of these deeply felt antagonisms, short of involving the Court. This judgment is long and has taken some time. All the issues have been well ventilated by both sides. I hope it is now clear that most of the claims are futile. Also, I hope it is accepted that there is a better way forward. Modern, fit for purpose church rules could be put in place. And at the same time the somewhat ancient Constitution and Rules of the Trust Board might be amended by agreement.

[96] To the extent it is appropriate for a Court to say this, I hope that brotherly and sisterly love can resume at the Mangere Congregational Church of Jesus.

Becroft J

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