IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-1327
[2022] NZHC 3005

UNDER	the Charitable Trusts Act 1957, the Trusts Act 2019, the Declaratory Judgments Act 1908 and Rule 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: 16 November 2022

Appearances: O Woodroffe for plaintiffs
S O McAnally and A Ho for defendants

Date of judgment: 17 November 2022

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 17 November 2022 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

[1] As duty judge, I have the plaintiffs' application for a freezing order over all the first defendant's bank accounts, "to prevent the [second defendants] using the Trust Funds … to pay for steps they take in response to the [plaintiffs' claims]".

Background

[2] The plaintiffs are members of the Māngere congregation of the Samoan Congregation Church of Jesus.[1] The first defendant (the Board) is incorporated under the Charitable Trusts Act 1957 to hold the Māngere congregation's property and assets; the second defendants (the trustees) are the Board's members.

[3] The plaintiffs allege the Board and the trustees have acted in breach of the 1957 Act and of their powers as trustees in a range of ways contended not to be in the interests of the plaintiffs as beneficiaries. The relief sought on five separate causes of action predominantly is declaratory but includes orders under the Trusts Act 2019 for the trustees' removal (and replacement on conditions) and exemplary damages.

Approach to freezing order applications

[4] Rule 32.2 of the High Court Rules 2016 entitled the Court to make freezing orders, to "restrain a respondent from removing any assets located in or outside New Zealand or from disposing of, dealing with, or diminishing the value of, those assets".

[5] As with other such interim relief, freezing orders are "available to preserve the position so that the plaintiff will not, if successful, be disadvantaged by actions the defendant might take … pending the substantive determination".[2] Freezing orders in particular are "designed to ensure that an eventual judgment can be satisfied".[3]

[6] It is well-established freezing orders require: a good arguable case on the substantive claim; assets to which the order can attach; and a real risk the respondent

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1 I am unclear if — by reference to the first plaintiff as "authorized representative" of various groups — the claim intends to plead the plaintiffs are, or any of them is, suing in a representative capacity (High Court Rules 2016, r 5.35). For present purposes, I assume the first plaintiff to be suing in his capacity as representative of 27 adults contended to form the majority of the congregation, as well as adults and children served with trespass notices in April 2022.

2 *Stafford v Attorney-General* [2022] NZCA 165 at [19].

3 *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559 at [73].

will dissipate or dispose of the assets to render itself "judgment proof".[4] The ultimate assessment is of overall justice, in balancing a need to protect the plaintiff "so as to ensure any judgment is not rendered barren" against any prejudice or hardship to the defendant or third parties.[5]

Assessment

[7] Prior to the one-hour hearing set down immediately after the day's duty judge list, and with registry availability for support affected by industrial action, I read the submissions and other documents filed in support of the plaintiffs' application.

[8] I was satisfied the plaintiffs have a good arguable case the defendants' actions may fall short if required to act in accordance with a Samoan cultural sense of community support to be derived from a congregation's central church as Olinda Woodroffe argues. If that is a characteristic of the charitable trust at issue, and more particularly after incorporation as the Board, is a matter for trial. It may not be established directly by either s 3 of the 1957 Act or the 31 July 1983 deed conveying the initial fund to the original trustees. But it has a "sufficiently plausible foundation" in the third defendant's (Ms Mason) evidence to support the application.[6]

[9] Ms Mason also asserted:

> I believe that the Trustees will continue to act in excess of their authority and without consideration of their duty to the beneficiaries of the trust. It is also my honest belief that the trustees will use trust funds and property to fund the personal defence in this action, should they choose to defend the action. This will be unfair and unjust as the Plaintiffs are paying for our own costs for bringing this action.
>
> I also am concerned that if the Second defendants alone are prevented from using Trust funds and property to fund their defence of this action they will load the expense of the defence onto the First Defendant.
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> Accordingly I seek to have the funds and property under the control of the First Defendant frozen, save for necessary expenses such as payment for utilities and urgent maintenance of the properties owned by the trust.

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4 *Z Ltd v A* [1982] 1 All ER 556 (HL) at 571.

5 *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451 (HC) at 452, endorsed by *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548.

6 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [41].

[10] I was concerned such objective was not consistent with r 32.6's exclusion from any freezing order of dealings with the assets to pay "legal expenses related to the freezing order" or to make payments "in the ordinary course of the respondent's business, including business expenses incurred in good faith". In the hearing, I repeatedly raised my concern with Mrs Woodroffe, who only reinforced — while any freezing order was not to prevent payment of the "necessary expenses" identified by Ms Mason — it was unfair and unjust for the defendants to use funds, contributed by the congregation for its wellbeing, for the purposes of defending the plaintiffs' claim.

[11] As I have explained, that is not the object of freezing orders. They are instead to ensure any ultimate judgment in the plaintiffs' favour is not effectively defeated in whole or in part by the defendants' dealings with the assets.[7] I use 'effectively' deliberately: an applicant must establish not simply a risk assets susceptible to execution of any judgment will be removed, disposed of, dealt with or diminished in value, but a real risk such conduct is to avoid execution of any judgment against the assets. Judgment execution defeated by expenditure on usual expenses is not objectionable in itself.[8]

[12] Nothing in the plaintiffs' evidence comes close to establishing that threshold. Even if contradictory to the plaintiffs' proposition the assets are for the congregation's benefit, only the plaintiffs' claims for exemplary damages might give rise to their execution of any judgment in their favour against the assets. There is no suggestion in the evidence the defendants seek to avoid payment of liability for damages by expending the assets in their defence, even if prospective expenditure from the assets is taken as established. And, even if expenditure was to avoid execution at least to that extent, I should have to assess what hardship or prejudice to the plaintiffs might be

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7 See HCR 32.6(2):

> If the likely maximum amount of the applicant's claim is known, the value of the assets covered by the freezing order must not exceed that amount together with interest on that amount and costs.

8 Mrs Woodroffe sought an adjournment to prepare submissions on a perceived difference between "must not" or 'shall not' in r 32.6(3)'s phrasing, contending 'must not' nonetheless would permit a freezing order's prohibition on dealings with the assets to pay legal expenses. As the point was not central to the issue for my decision (but only if I decided to make a freezing order), and adjournment was opposed as adding further delay and expense, I declined to adjourn.

caused by disallowing it. If the assets otherwise may be expended in defence, the hardship or prejudice may be thought substantial.

[13] However, without evidence of real risk the defendants' dealings with the assets is to avoid execution against them, the plaintiffs' application "technically" is 'an abuse of the Court's process':[9] an "improper use of [the court's] machinery";[10] use of that process "for a purpose or in a way significantly different from its ordinary and proper use".[11] The application will not be allowed.

Result

[14] The plaintiffs' application is dismissed.

Costs

[15] In my preliminary view, from what I presently know, the unsuccessful plaintiffs should have to pay the defendants no more than 2B costs of their steps on the application, in this averagely complex proceeding requiring counsel of average skill and experience, and in which a normal amount of time is considered reasonable for each step, if the defendants' relatively barebones response reasonably incurred legal expenses in excess of that sum.

[16] If my view is not accepted by the parties, or they cannot otherwise agree, I reserve costs for determination on short memoranda each of no more than five pages — annexing a single-page table setting out any contended allowable steps, time allocation and daily recovery rate — to be filed and served by the defendants within ten working days of the date of this judgment, with any response or reply to be filed within five working day intervals after service.

—Jagose J

Counsel/Solicitors:
S O McAnally, Barrister, Auckland
Woodroffe Lawyers, Auckland
Crimson Legal, Auckland
Davies Law, Auckland

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9 *Tranquil Holdings Ltd v Hudson* (1987) 2 PRNZ 551(HC) at 552.

10 Simon Goulding, DB Casson and William Blake Odgers *Odgers on Civil Court Actions* (24th ed, Sweet & Maxwell, London 1996) at [10.15] as cited in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [87].

11 *Attorney-General v Barker* [2000] 1 FLR 759 (QBD) at 764.