

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

**CIV-2012-409-001761
[2012] NZHC 3045**

BETWEEN THE GREAT CHRISTCHURCH
 BUILDINGS TRUST
 Applicant

AND CHURCH PROPERTY TRUSTEES
 First Respondent

AND CANTERBURY EARTHQUAKE
 RECOVERY AUTHORITY
 Second Respondent

Hearing: 3 and 4 October 2012

Appearances: FMR Cooke QC, A V Foote and J A Leam for Applicant
 J V Ormsby, JWA Johnson and J-L Day for First Respondent
 G Gardner for Second Respondent

Judgment: 15 November 2012

INTERIM JUDGMENT OF CHISHOLM J

- A The application for judicial review is granted and implementation of the decision of the Church Property Trustees made on 1 March 2012 is stayed until further order of the Court.**
- B This proceeding is adjourned to a date to be fixed after memoranda have been provided by counsel in accordance with [183].**
- C It is declared that while the Cathedral trust requires there to be a Cathedral on the site, the building does not necessarily have to replicate the Cathedral as it stood before the earthquakes.**
- D Leave is reserved to apply further.**

E **Costs are deferred in terms of [186].**

REASONS

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Introduction

[1] A series of earthquakes between September 2010 and December 2011 severely damaged the Christchurch Cathedral which is held in a trust capacity by the

Church Property Trustees (CPT). The CPT, a statutory body, is the first respondent in this proceeding.

[2] On 1 March 2012 the CPT resolved:

Further to the receipt of the Section 38 Notice from CERA,¹ the 23 December events and subsequent assessments and review, it is with great regret and sadness that the Church Property Trustees resolve that the Christ Church Cathedral is to be partially deconstructed and partially demolished with great care and respect down to a level of approximately 2 – 3 metres to meet the required safety standards for an un-propped site. This will allow safe retrieval of taonga and heritage items to the extent possible [the decision].

Apart from deconstruction of what remained of the tower during April and May 2012, no major steps have been taken to implement the decision.

[3] This proceeding challenging the lawfulness of the decision was issued by the applicant (BT), an incorporated charitable trust, on 15 August 2012. The objectives of the BT include the preservation of buildings damaged in the Canterbury earthquakes. It is alleged by the BT that the decision was in breach of statutory requirements, ultra vires (beyond) the CPT's powers, and in breach of the trusts upon which it holds the Cathedral.

[4] The core of the BT's argument is captured by the following passage in the submissions presented on its behalf:

....the purpose of the trusts is to maintain and repair the Cathedral at Cathedral square in order that it continues to be a place for church services and other activities. The decision of the trustees to deconstruct the Cathedral defeats that central purpose of the trusts. It is accordingly unlawful.

On the BT's case the Cathedral can be repaired safely and relief should be granted under the Judicature Amendment Act 1972, Declaratory Judgments Act 1908, or, in the event that relief is not available under those Acts, by way of orders for breach of trust.

¹ This notice was issued under s 38 of the Canterbury Earthquake Recovery Act 2011 by the Canterbury Earthquake Recovery Authority, the second respondent.

[5] Those allegations are strongly denied by the CPT. In the words of its counsel, the CPT has:

... done its utmost to act as a responsible trustee having received a notice from CERA requiring the demolition of the Cathedral building to the extent necessary to make the building safe. Furthermore, the CPT understands its duties as trustee of the Cathedral to use the property as a wise and faithful steward in furthering the purposes of the ecclesiastical institution.

Counsel for the CPT submitted that the primary duty of the CPT is to use the property for the ecclesiastical institution, not to maintain the building in its exact form; it is under a mandatory legal obligation to deconstruct the building to the extent necessary to make it safe; and it is factually and legally impracticable for the CPT to commit to maximum retention.

[6] The second respondent (CERA) abides the decision of the Court.

[7] Depending on the outcome of particular issues, the following matters need to be determined by the Court:

- (a) Whether the BT has the necessary standing to bring this proceeding;
- (b) Whether the decision is amenable to judicial review;
- (c) The terms of the trust on which the Cathedral is held by the CPT;
- (d) Whether the decision is in accordance with that trust;
- (e) The significance (if any) of CERA's intervention;
- (f) The relief, if any, that should be granted.

These are mostly sensitive and difficult issues and I am grateful to counsel for the thorough and constructive way they have been argued.

[8] Before addressing those specific matters it is helpful to summarise the history of the Cathedral and the legislative framework against which the issues before the Court will have to be decided.

History of the Cathedral

[9] Evidence about the early history of the Cathedral comes from Ian Lochhead and Richard Gray. Dr Lochhead, an associate professor of art history at the University of Canterbury, specialises in the history of New Zealand architecture. His publications include material about the history of the Christchurch Cathedral. Mr Gray is a lawyer, one of the CPT, and Chancellor of the Diocese of Christchurch.

From inception to construction

[10] The idea of a cathedral in Christchurch was conceived by the Canterbury Association which was created in 1849 to establish a settlement in New Zealand. One of the Association's purposes was to establish and maintain ecclesiastical and educational institutions in connection with the Church of England. On instructions from the Association Edward Jollie prepared a town plan in 1850 which attached the expression "Cathedral Square" to the area currently known as Cathedral Square.

[11] Having acquired lands in Canterbury, the Association declared by deed dated 9 September 1851 that specified lands, including Cathedral Square,² were reserved and appropriated:

...to the intent and purport that the same may be used for the establishment and maintenance of Ecclesiastical and Educational Institutions in connection with the Church of England...to the intent that such Lands may be held by the said Association in trust for the said Ecclesiastical and Educational purposes with such power of Sale alienation Mortgage charge or any other disposition and of general management as the said Association are by the said Letters Patent³ declared capable of having and enjoying.

According to the CPT this "founding document" settled Cathedral Square on the trust (for the establishment and maintenance of ecclesiastical institutions) upon

² The deed recorded that the Cathedral Square land comprised 3 acres, 1 rood and 10 perches.

³ These are the 1849 Letters Patent establishing the Canterbury Association.

which it is held by the CPT today.

[12] During the mid 1850's the Association transferred its functions to other entities. As part of that process the Canterbury Provincial Council passed the Church Property Trust Ordinance 1854(C) which established the CPT as a body corporate with perpetual succession. Subject to later statutory recognition,⁴ that body has existed ever since and is now the first respondent in this proceeding.

[13] The following year the functions of the Canterbury Association were transferred to the Provincial Council, and the Association effectively went out of existence. Lands held by the Association for ecclesiastical and educational purposes (including the land in Cathedral Square) were transferred to the Provincial Council on trust for those purposes.⁵

[14] Although the Provincial Council initially transferred Cathedral Square to Christ's College, it was surrendered back to the Council within a short time pursuant to the Cathedral Square Ordinance 1858. In terms of that Ordinance, Cathedral Square was then held by the Council:

...as a site for the erection of a Cathedral in connection with the Church of England, which site shall be conveyed to the Bishop of Christchurch and his Successors, to be held, in trust, for the uses as aforesaid of the Church of England in the said Province ...

According to the BT the acquisition of the Cathedral land by the Bishop was a "key moment" marking the creation of the trust for the erection of the Cathedral upon which the CPT currently hold the property.

[15] Official records as to the transfer of the land from the Bishop to the CPT have not been located. However, it is common ground that the land was vested in the CPT, although the precise timing is uncertain. Nothing turns on that. The description of the Cathedral land was slightly modified by Ordinances in 1859 and 1864. Again, nothing turns on those modifications.

⁴ In the Church Property Trust (Canterbury) Act 1879 and the Anglican (Diocese of Christchurch) Church Property Trust Act 2003.

⁵ Section 6 of the Canterbury Association Ordinance 1855 confirmed that trusts for Ecclesiastical and Educational purposes survived.

[16] In the meantime a Cathedral Commission had been appointed by the Synod of the Diocese of Christchurch to oversee the building of the Cathedral. George (later Sir George) Gilbert Scott, one of the leading Gothic Revival architects of the day, was commissioned in 1861 to prepare plans for the Cathedral and in 1863 the Cathedral Commission launched a public appeal for funds through *The Press*.

[17] The foundation stone was laid on 16 December 1864 and by the following year the foundations had been completed. However, lack of funds led to the suspension of work in 1866. Work recommenced in 1873 with Benjamin Mountfort as supervising architect. Some design changes followed. Construction of the nave⁶ and tower was completed in 1881 and the building was consecrated as the Cathedral Church of Christ on 1 November that year.

[18] Further changes to the Cathedral building occurred in 1894, with the addition of the west porch to Benjamin Mountfort's design. Following the death of Benjamin Mountfort and a public appeal by Bishop Julius for £12,000 to complete the Cathedral, Cyril Mountfort was appointed resident architect. Further work on the Cathedral commenced with the laying of the foundation stone for the transepts⁷ in 1900, and the Cathedral was finally completed in 1904.

[19] While Mr Gray takes issue with some of Dr Lochhead's statements about the funding of the Cathedral, he accepts that private donations were received in response to public appeals for funds between 1857 and 1881. Further evidence about funding was provided by Dr Lochhead in his reply affidavit. For present purposes I accept that construction of the Cathedral involved significant funding from private donations. The precise amount is not critical.

Following construction

[20] Aside from changes to the furnishing of the interior of the building and some reordering to meet evolving liturgical requirements, there were no major changes to the Cathedral until the choir vestries were added in 1963. The crypt was also

⁶ Main body of the church building.

⁷ The section of the building that lies across the main body of the building.

enlarged at the time. The last major change to the Cathedral occurred between 1992 and 1995 when the visitors' centre on the north side of the building was built. Between 2006 and 2007 seismic strengthening of the Cathedral took place.

[21] Evidence about the funding of the Cathedral over recent times comes primarily from Mr Gray and Graeme Brady, a trustee of the BT and a former Canon of the Cathedral. Mr Brady was heavily involved in fundraising for the 125th anniversary of the Cathedral. The purpose of the campaign was to restore the Cathedral and ensure survival of the choir. A total of \$8 million was raised, of which \$4 million was applied towards restoration of the Cathedral.

[22] Over recent times the day to day running costs of the Cathedral have come from a variety of sources. For example, for the year ended 31 December 2011 the total income was in the region of \$1.1 million of which about \$215,000 came from offertories and donations and \$120,000 came from the Christchurch City Council by way of a grant. The Dean and Chapter Estate, which will be discussed shortly, also supplied regular income. A similar pattern can be seen in earlier years.

[23] The Cathedral is registered as a Category 1 heritage building by the New Zealand Historic Places Trust. Category 1, which is the highest listing available, is described in s 22(3) of the Historic Places Act 1993 as:

... Places of special or outstanding historical or cultural heritage significance or value.

The building is also listed as a Group 1 building in the Christchurch City Council's District Plan. This listing recognises the significance of the Cathedral to the Christchurch community.

[24] Dr Lochhead notes that the Cathedral was the first Anglican Cathedral to be completed in New Zealand and that it remains the oldest Anglican Cathedral in the country. He also comments:

15. Aside from the fact that Christ Church houses the *cathedra* of the Bishop of Christchurch and is the principal church of the Diocese, it has, from its completion, performed a quasi-civic role that has given it an importance to the wider community. As early as 1883 the

Christchurch Musical Society performed Handel's *Messiah* in the cathedral and it has been, ever since, the venue for concerts, public lectures and addresses, interdenominational services and floral festivals among other events.

16. As the most prominent Gothic Revival building in Christchurch, Christ Church Cathedral also functions as a lynch pin for the city's larger grouping of Gothic Revival buildings. These include the contemporaneous Canterbury Museum, strategically sited at the western end of Worcester Street on the axis of the Cathedral, and reflecting the Cathedral's western rose window in its own facade, the buildings of Canterbury College (now the Arts Centre of Christchurch), Christ's College, the Canterbury Provincial Council Buildings and St Michael and All Angels Church.
17. Christchurch was unique among nineteenth-century cities in the close connection between the founders' concepts of social reform, religious belief and architectural aesthetics, which was given expression through the use of the Gothic Revival style in all the city's key religious and public buildings. This combination of factors caused Dr Timothy Barringer, Paul Mellon Professor of British Art at Yale University to describe Christchurch as 'in many ways the most telling product of British culture in the 1850s'. As the symbolic heart of the city, Christchurch Cathedral is essential to the integrity of this grouping of Gothic Revival Buildings. Demolition of Christ Church Cathedral would entail more than the loss of a building of enormous heritage significance in its own right, but would greatly diminish the cumulative heritage value of the [sic] Christchurch's entire collection of surviving Gothic Revival buildings.

The earthquakes

[25] Extensive engineering and other evidence is before the Court about the impact of the earthquakes and the events that followed. What follows is a heavily abbreviated version of that evidence.

[26] Following the magnitude 7.1 earthquake on 4 September 2010 the Cathedral closed to enable an engineering assessment to be undertaken by Holmes Consulting Group Limited (Holmes Consulting), the engineers appointed by the CPT. Although there was damage, no major structural damage was identified. Further damage was caused by the earthquake on 26 December 2010, but again no major structural damage.

[27] Severe damage, particularly at the western end of the building, was caused by the 6.3 magnitude earthquake that struck the central business district on 22 February

2011. The upper part of the tower collapsed, and other parts of the building collapsed or sustained damage. Over the following days a temporary support frame was installed at the western end of the building. Engineering reports were provided by Holmes Consulting. Later Resource Co-ordination Partnership New Zealand Limited (Resource Co-ordination) was engaged to provide project management services to the CPT. In due course heritage consultants, quantity surveyors, and architects were also engaged.

[28] Two significant earthquakes on 13 June 2011 caused more structural and cosmetic damage to many parts of the building. Further engineering surveys were carried out. By this time CERA engineers had already inspected the Cathedral on a number of occasions and they, like Holmes Consulting, were concerned about the safety of the building. CERA advised the CPT that it would probably use its powers under s 38 of the Canterbury Earthquake Recovery Act 2011 to require the Cathedral to be demolished to the extent necessary to make it safe.

[29] In October 2011 a collaborative working group was formed to assist the CPT in developing “make-safe” options. This group included Holmes Consulting, Resource Co-ordination, a Christchurch City Council heritage team, representatives of the Historic Places Trust, and CERA. It met on a number of occasions during October.

[30] On 28 October 2011 CERA issued the CPT with a s 38 notice advising that CERA had determined that the Cathedral was dangerous in terms of the Canterbury Earthquake Recovery Act 2011. Under s 38(4) of that Act notice was given that the building was to be demolished to the extent necessary to remove the hazards and the CPT had 10 calendar days from the date of receipt of the notice to advise CERA whether it intended to undertake the demolition of the building and, if so, when it intended to undertake and complete the work.

[31] Following discussions with CERA the CPT gave notice to CERA in early November 2011 that it would undertake the work necessary to make the Cathedral safe itself. An interim “make-safe” methodology was forwarded to CERA for consideration. The following day the Cathedral was de-consecrated.

[32] Two further significant earthquakes on 23 December 2011 caused further damage. Henry Hare, an experienced structural engineer and principal of Holmes Consulting, considers that events on that day represented a turning point. In his view the building went from “a severely damaged structure to a critically damaged structure”. CERA then advised that further consideration of the “make-safe” methodology had been put on hold, and that issue was referred back to Holmes Consulting for further consideration.

[33] At a meeting between engineers from Holmes Consulting, Historic Places Trust, and CERA on 20 February 2012 three “make-safe” options were considered:⁸

- (a) Maximum retention (Option 1). This option would retain most of the walls in place by the insertion of interior steel shoring systems. In broad terms this is the option favoured by the BT.
- (b) Deconstruction of the building to sill level which is about two to three metres above the ground (Option 2). This option took into account that virtually all the walls had some degree of offset above sill level. The CPT ultimately adopted this option.
- (c) An intermediate option involving stabilising the eastern end and deconstructing the western end (Option 3).

These three options were then put into a decision matrix by Holmes Consulting and others for consideration by the CPT and the other church groups associated with the decision-making process. This matrix indicated what each possible option would involve if put into effect and the various considerations attaching to each option.

[34] Although CERA expressed reservations about Options 1 and 3, it considered that Option 2 was “a feasible option and could be done safely”. In its letter of 23 February 2012 explaining its position, CERA told the CPT that it was crucial to the recovery of the central city that a decision was made by 1 March 2012.

⁸ Two further options had been discarded.

[35] The Historic Places Trust favoured Option 1 on the basis that it was the most compatible with the Historic Places Act 1993 because it involved the least possible alteration or loss of material having cultural heritage value. The Historic Places Trust also suggested that all national or international opportunities to obtain financial support should be explored.

[36] Over several days, including 27 February and 1 March 2012, the CPT and other groups associated with the decision-making process met to review options and consider the way forward. Material for their consideration indicated that the “likely insurance money remaining” would be in the order of \$28.5 million.⁹ Whereas at that time the cost of reinstating the Cathedral using Option 1 appears to have been estimated at almost \$100 million (excluding GST), the cost of deconstructing under Option 2 and erecting a new cathedral seems to have been in the range of \$66 - \$76 million (excluding GST).

[37] On 1 March 2012 the CPT made the decision set out at the beginning of this judgment.

Events following the decision

[38] Immediately after the decision was announced the BT decided to approach the CPT. Mr Burdon, co-chair of the BT (the other co-chair is Jim Anderton, a former Member of Parliament), explains that its trustees wanted the CPT to understand:

- 18.1 We were a group of concerned, well resourced individuals with wide ranging connections;
- 18.2 Collectively, we had considerable contacts with expertise in the [sic] engineering, fund raising, architecture, heritage and public relations;
- 18.3 We were available to put these not inconsiderable resources at the disposal of the CPT to assist with the repair of the Cathedral;
- 18.4 The Trust was willing to resource stabilisation of the Cathedral in the interim, to enable the retrieval of significant items and to then enable time for a more complete review of the position.

⁹ See [152] below for further information about the insurance cover.

A letter explaining these matters was forwarded to the CPT and the BT assembled a network of engineers and other advisors who were willing to work with the CPT towards restoration of the Cathedral.

[39] On 15 May 2012 Peter Graham, a trustee of the BT, wrote to the CPT complaining about its lack of response to the BT's letters. Mr Graham said:

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

The letter recorded that rather than being a "private matter" for the Anglican Church to decide, the future of the Cathedral was a public issue.

[40] In June 2012 the CPT's engineers (Holmes Consulting) met with the trustees of the BT and the following month the Holmes Consulting deconstruction methodology (including supporting drawings and programmes) was supplied to an Independent Engineering Review Panel (the Review Panel) commissioned by the BT. This panel comprised three experienced structural engineers: Andrew Thornton of Dunning Thornton Consultants; Robert Davey of Opus International Consultants; and Dr Stefano Pampanin, an Associate Professor at the University of Canterbury College of Engineering.

[41] It was the unanimous view of the Review Panel that the Cathedral could be restored without the proposed deconstruction down to two to three metres (Option 2) having to take place. The Review Panel considered that once the Cathedral was reinstated by means of the maximum retention option (Option 1) it would meet or exceed the New Zealand Building Code requirements for a building of Importance Level 3.

[42] On the key issue of whether the repair work could be undertaken safely, it was the view of the Review Panel that there were methodologies available to allow that to be achieved. As described in Mr Thornton's affidavit, the method favoured by the Panel:

... essentially involves the progressive insertion of a temporary inner steel building into the Cathedral which would provide safe shelter for workers

while work was being carried out. Work would be undertaken under cover of the shelter, not outside of it. The steel building-within-a-building would also form the stabilisation of the cathedral itself by independently supporting the roof and bracing the walls and columns.

The main difference between this method and the Option 1 considered by Holmes Consulting lies in the means by which the shoring system would be installed.

[43] A copy of the Review Panel's report was provided to the CPT on 6 July 2012. It seems that a copy was also supplied to the Minister for Canterbury Earthquake Recovery, the Honourable Gerry Brownlee. The BT urged the CPT to work with the BT towards finalising a stabilisation plan.

[44] Having reviewed the Review Panel's report, Holmes Consulting did not accept that the Review Panel's method of shoring could be achieved without workers being exposed to risk, at least for short times. However, Mr Hare acknowledges in his affidavit:

... there has been no suggestion from [Holmes Consulting] that this option¹⁰ is not achievable and it would not have been put forward if ... that were the case.

But it was, and remains, the view of Holmes Consulting that Option 1 was not the preferred engineering option, and the CPT was advised accordingly.

[45] The evidence before the Court does not include any specific information about CERA's attitude or, indeed, whether the Review Panel's methodology was considered by CERA. As already mentioned, CERA abides the decision of the Court and its counsel did not take any active part in the hearing.

[46] David Doherr, the quantity surveyor who had been involved from an early stage, was asked by the CPT to estimate the cost of reconstruction using the Review Panel's methodology. He estimated approximately \$95 million (excluding GST). This compared with his estimate for Option 2 of around \$80 million (excluding GST). Thus the reported difference was around \$15 million. Mr Doherr warned that there would be a very steep escalation in cost if work was delayed.

¹⁰ The maximum retention option, being Option 1.

[47] In early August 2012 the CPT informed the BT that it was not prepared to adopt the full retention option advocated by the Review Panel. Although discussions followed, there was no resolution and this proceeding was issued on 15 August 2012.

The legislative framework

Church Property Trust (Canterbury) Act 1879

[48] Given that the Church Property Trust (Canterbury) Act 1879 (the 1879 Act) was repealed in 2003, it only requires brief comment.

[49] Section 5 recorded that all the powers and authorities conferred on the CPT by various Ordinances (including the Church Property Trust Ordinance 1854(C)) remained in full force and effect to the extent that they were not “affected, altered, or amended” by the Act. The most significant change brought about by the Act was the termination of all trusts relating to lands specified in Schedule A (the Bishopric Estate) and Schedule B (the Dean and Chapter Estate): s 6. It is common ground that the Cathedral land is not included in those estates.

[50] Without going into detail, the Act required the CPT to hold the lands in the Bishopric Estate for purposes associated with the Bishop. Lands in the Dean and Chapter Estate were to be held in the first place for purposes associated with the Dean and Chapter and in the second place for a variety of purposes, including purposes associated with the Christchurch Cathedral.

[51] A series of amending Acts between 1889 and 1990 modified the powers of the CPT.

Anglican (Diocese of Christchurch) Church Property Trust Act 2003

[52] As expressed in s 3, the purpose of this Act (the 2003 Act) is to:

...

- (a) consolidate and amend the Church Property Trust Ordinance 1854 (C) and the Church Property Trust (Canterbury) Act 1879 and their amendments; and
- (b) widen the investment powers of trustees who hold real and personal property on trusts relating to the Anglican Diocese of Christchurch; and
- (c) apply the variation of trusts provisions in the Anglican Church Trusts Act 1981 to trusts under this Act.

Historical ordinances and legislation, including both the Church Property Trust Ordinance 1854(C) and the 1879 Act, were repealed.¹¹

[53] Part 2 of the 2003 Act comprising ss 5 – 13 covers a variety of matters concerning the CPT. Of those sections only ss 5 – 7 and 9 need to be specifically mentioned. The remaining sections in Part 2 concern membership of the CPT, financial records and accounts, members' liabilities and indemnities, protection of persons dealing with the CPT, and other matters relating to the CPT.

[54] Section 5 provides:

5 Church Property Trustees

- (1) There continues to be a body called the Church Property Trustees.
- (2) The Church Property Trustees continues to be a body corporate with perpetual succession and a common seal.
- (3) The Church Property Trustees is the same body of that name existing immediately before the commencement of this Act under the Church Property Trust Ordinance 1854(C).

Clearly Parliament wanted to put it beyond doubt that the statutory body created by the Act was a continuation of the body that originally came into existence in 1854.

[55] The function of the CPT is described in s 6:

6 Function of Church Property Trustees

- (1) The function of the Church Property Trustees is to hold and administer trust property in accordance with this Act.

¹¹ Section 54 and Schedule 3.

- (2) Subsection (1) applies despite anything in any other Act or in any instrument creating or relating to the trusts on which trust property is held.

When this section is read in conjunction with the s 4 definition of “trust property”¹² it is beyond argument that the Cathedral land comes within this purpose even though it does not form part of the Bishopric or Dean and Chapter Estates.

[56] Powers available to the CPT when carrying out its s 6 function are described in s 7:

7 Powers of Church Property Trustees

- (1) For the purpose of carrying out its function, the Church Property Trustees may exercise the powers set out in Schedule 1 and in the Trustee Act 1956.
- (2) The Church Property Trustees must exercise its powers subject to any authorisations that this Act requires to be given by the Synod or other body or person.

While the powers in the Trustee Act are of no immediate significance, there are two powers in Schedule 1 that are potentially relevant: the power to “build on or develop any property whatsoever”¹³ and the power to “enter into such contracts and do or perform such things as in the opinion of the [CPT] will be for the benefit of any trust administered by it”.¹⁴ These will be discussed later.¹⁵

[57] Section 9 directs that in carrying out its function the CPT must comply with all canon and ecclesiastical laws and regulations that, under the authority of the Synod, apply to the administration of trust property. Apart from a requirement for a consecrated cathedral to be debt free, no such laws have been specifically drawn to the attention of the Court.

¹² **Trust fund** or **trust property** means money or property held on trust by the Church Property Trustees or appointed trustees for any object or purpose –

- (a) relating to the Anglican Church in the diocese or a parish; or
- (b) of furthering social services, hospital or residential care, or educational needs relating to the Anglican Church.

¹³ Schedule 1, cl 14.

¹⁴ Schedule 1, cl 17.

¹⁵ See [130] – [132] below.

[58] Part 3 of the Act contains detailed provisions relating to the Bishopric Estate, Dean and Chapter Estate, and local endowments. In general terms the provisions in the 1879 Act are carried forward in relation to those matters. In the case of the Dean and Chapter Estate there are the following secondary trusts:

19 Secondary trusts

The secondary trusts are to hold the capital and the income of the Dean and Chapter estate on trust—

...

(e) to keep the Cathedral and its precincts in good repair:

...

(h) to maintain and repair the Cathedral:

...

By definition in s 4 “Cathedral” means “Christchurch Cathedral in Cathedral Square in Christchurch”. In due course s 19 will be discussed in detail.¹⁶

[59] Finally, given that one of the purposes of the Act is to apply the variation provisions of the Anglican Church Trusts Act 1981,¹⁷ it is appropriate to mention s 52:

52 Variation of trusts under Anglican Church Trusts Act 1981

Part 3 of the Anglican Church Trusts Act 1981 applies to the trust funds and trust property as if the funds and property were trust property as defined in section 2 of that Act.

Part 3 of the Anglican Church Trusts Act provides for the variation of trusts in respect of any trust property where it has become “impossible or impracticable or inexpedient to carry out the object or purpose of the trust, or the amount available is inadequate to carry it out...”

[60] I round off this outline of the 2003 Act by summarising the competing interpretations that have been advanced by the parties. According to the BT, the CPT have held the Cathedral property in accordance with the 2003 Act since it came into

¹⁶ See [125] – [128] below.

¹⁷ See [51] above.

force, and the Act takes priority over all earlier trust instruments. For its part the CPT considers that the 2003 Act did not alter the terms of the Trust on which the Cathedral is held, namely, “maintaining the ecclesiastical institution”.

[61] Obviously this different approach to the implications of the 2003 Act will have to be resolved in due course. I will return to the topic when discussing the terms of the Cathedral Trust.¹⁸

Standing

[62] While technically this matter might be more appropriately addressed at the end of the judgment after all matters have been determined, I find it convenient to resolve it now. However, my decision on this topic takes into account the conclusions I reach later in the judgment.

The CPT challenge to standing

[63] According to the CPT the BT has no standing to bring the application for judicial review because the Cathedral trust is a private charitable trust and the BT is not a member or beneficiary. Moreover, the CPT is not discharging “overtly public functions” and there is no justification for “strangers to the trust” to be accorded standing. If there is to be a challenge to the CPT’s decision, that step should be taken by the Attorney-General.

[64] To the extent that the BT relies on a breach of trust at common law, the CPT contends that the BT cannot show any beneficial interest in the trust property and is effectively a stranger. Furthermore, the BT is not a member of, or affiliated with, the Anglican Church and has no concern for the religious functions the Church performs. And, given that the trust is a charitable trust, any application should be brought by the Attorney-General.

[65] In her affidavit the Right Reverend Victoria Matthews, Bishop of Christchurch, comments on the issue of standing:

¹⁸ See [118] – [133] below.

Standing

31. Having defined the role and purpose of a cathedral, it is important to note that, to my knowledge, none of the trustees of the GCBT regularly participate in the worship, ministry and mission of the ChristChurch Cathedral. I consider there is a distinct lack of engagement on the part of the trustees to engage with the worship and mission of the ChristChurch Cathedral.
32. Similarly, the GCBT as an entity in itself has never been involved in any ministry or mission partnership with the Anglican Church.

The Bishop's evidence is supplemented by evidence from Mr Gray about lists of "Cathedral regulars" and "Friends of the Cathedral". None of the BT trustees feature in those lists.

The BT response

[66] Even if this proceeding is to be construed as a purely private law claim (which it should not be), the standing rules are still relatively relaxed. In substance, however, this case involves a situation that is quite different from a normal private trust. The beneficiaries of the trust include the residents of Canterbury who benefit from the Cathedral, and over the years the Christchurch City Council and many private donors have provided significant funds for its continued existence and operation.

[67] The BT represents a group of concerned Christchurch residents who have a close association with the Cathedral. They have a legitimate interest in the CPT performing its functions in accordance with the law, and they cannot be categorised as "busybodies". Overall the BT has just as much standing as the plaintiffs in *Finnigan v New Zealand Rugby Football Union Inc.*¹⁹

[68] With reference to the CPT point that neither the BT nor its trustees are registered as "Cathedral regulars" or "Friends of the Cathedral", the BT notes that because of his substantial financial contribution to the Cathedral Mr Burdon is a member of the order of Canons-Almoner at the Cathedral.²⁰ Moreover, Mr Brady

¹⁹ *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA).

²⁰ Mr Burdon explains in his affidavit that the Canons-Almoner group was formed in about the mid 1990's after personal approaches were made to potentially interested people by the then Dean of the

has a very long association with the Cathedral, as both a Canon and fundraiser. Finally, the BT was established for the very purpose of assisting in saving historic buildings such as the Cathedral.

Conclusions

[69] Having noted a liberalising trend in relation to access to the Courts, Tipping J stated in *O’Neill v Otago Area Health Board*:²¹

Any person who shows an honest interest in a public issue may invoke the processes of the Court to have the substantive matter of concern considered. It will usually be necessary to examine the substantive issue or issues before a decision on standing can be made. If the Plaintiff fails on the substantive issues the question of standing will be academic. If the Plaintiff would otherwise succeed it will be an unusual case in which either as a matter of standing or as a matter of discretion the Plaintiff will fail. It is my view that the only circumstance in which a Plaintiff should be shut out in limine for want of standing is where the Defendant can show that the Plaintiff lacks good faith or that the complaint is clearly frivolous, vexatious or otherwise untenable.

That case involved an application for judicial review concerning the validity of an abortion licence. It has, however, been followed in other contexts, for example in *Murray v Whakatane District Council*²² (a resource management case) and *Whanganui District Council v New Zealand Parole Board & Ors*²³ (a Parole Board case).

[70] Whether members of two rugby clubs had standing to bring proceedings to stop a rugby tour to South Africa came before the Court of Appeal in *Finnigan v New Zealand Rugby Football Union Inc*. Delivering the judgment of the Court Cooke J wrote:²⁴

In cases where an incorporated association is alleged to have acted against its objects but the plaintiff cannot show a contract, we think that all the circumstances have to be considered – case by case or category of case by

Cathedral. As part of joining each member was requested to donate \$30,000 to assist with restoration and maintenance work on the Cathedral which at the time needed significant expenditure. Since making that payment Mr Burdon has also donated a further “significant sum” for restoration work.

²¹ *O’Neill v Otago Area Health Board* HC Dunedin CP 50/91, 10 April 1992 at 4.

²² *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC).

²³ *Whanganui District Council v New Zealand Parole Board & Ors* [2012] NZHC 2248.

²⁴ *Finnigan v New Zealand Rugby Football Union Inc*, above n 19, at 178.

category of case – in order to determine as a question of mixed law and fact whether or not he or she has sufficient standing.

After taking into account a wide range of matters the Court of Appeal concluded that the plaintiffs had the necessary standing.

[71] Of particular significance in the present context is the Court of Appeal's approach to the status of the Rugby Union. While it acknowledged that the Rugby Union was technically a private sporting association, the Court was unwilling (because of the importance of the Rugby Union's decision) to apply the narrowest criteria that might be drawn from private law fields. It considered that the case had some analogy with public law litigation. The Court also took into account that unless the plaintiffs were accorded standing there might be no effective way of establishing whether or not the Rugby Union was acting within its lawful powers.²⁵

[72] Professor Joseph explains in *Constitutional and Administrative Law in New Zealand*²⁶ that public interest litigation is wholly concerned with vindicating the rule of law. He notes that the Courts have granted interest groups standing owing to the importance of the issue raised, the effect of the issue on the community, and the likely absence of any other responsible challenger. The Professor also notes that public interest groups may bring actions in their representative capacity and/or on behalf of the public.²⁷

[73] Taking all of the circumstances of this case into account I am satisfied that the BT has the necessary standing to bring this proceeding. This reflects a number of factors.

[74] First, the liberal approach to standing that is adopted these days. Mr Ormsby attempted to distinguish *Finnigan* on the basis that the case now before the Court does not involve human rights issues. I do not accept that distinction has any significance. Issues of genuine public concern can arise in a variety of situations

²⁵ Ibid, at 179.

²⁶ Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007).

²⁷ Ibid, at 1131.

with reference to a variety of topics. In my view, the principles underlying *Finnigan* are applicable here.

[75] Secondly, any attempt to portray the Cathedral trust as a purely private charitable trust fails to take into account the context indicated by the evidence before the Court. The Cathedral began life as the spiritual and geographical heart of the Canterbury Association's New Zealand settlement. It is the most prominent Gothic Revival building in Christchurch and has been accorded the highest historic ranking by the Historic Places Trust and the District Plan. Indeed, the minutes of a meeting of the Cathedral Chapter on 25 May 2011 record a "brainstorm" session during which the Cathedral was described as "more than just a building – really is the heart and soul of the city".

[76] From a very early stage the Cathedral has performed a "quasi-civic" role as a venue for concerts, public lectures and so on. Over the years substantial public and private funds have been contributed towards the building. And, as Mr Burdon pointed out in his affidavit, the image of the Cathedral is used by the Christchurch City Council as its logo. These observations are not intended to suggest that the Cathedral could properly be categorised as primarily a civil utility. As Bishop Matthews observes in her affidavit, it is first and foremost a place of worship. But when it comes to standing all dimensions need to be taken into account.

[77] Thirdly, apart from those considerations, the future of the Cathedral is legitimately in the public arena and is plainly a matter of intense public interest.

[78] Fourthly, this is not a situation where the BT is meddling in matters that should not concern it or its trustees. To the contrary, the very purpose of the BT is to protect heritage buildings. Apart from that, two of its trustees have demonstrated an extremely strong personal connection with the Cathedral. In my view it would be contrary to legal principle for standing to be determined on the narrow basis suggested by Bishop Matthews.

[79] Finally, a genuine issue about the lawfulness of the decision has arisen. Without the intervention of the BT it is virtually inevitable that the issue will not be

tested before the Courts. 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, and the Court should be slow to close its door to those genuinely seeking its assistance.

[80] In my view the CPT has fallen well short of showing that the BT lacks good faith or that the complaint it seeks to bring before the Court is frivolous, vexatious or otherwise untenable. Its challenge to the standing of the applicant fails.

Amenability to judicial review

[81] To some extent the matters just discussed in relation to standing carry over to this issue.

The CPT challenge to jurisdiction

[82] Three primary reasons are advanced by the CPT to support its proposition that the decision is not amenable to judicial review:

- (a) There has been no “statutory power of decision” as defined in the Judicature Amendment Act because the terms of the trust on which the Cathedral property is held are not contained solely within the 2003 Act. The trust on which the Cathedral is held arose from the 1851 deed and not all the terms of the trust or powers available to the CPT are recorded in the 2003 Act.
- (b) Nor has the decision affected any person’s “rights” in terms of s 4 of the Act. No other person’s legal, economic or proprietary rights have been affected and the ability to “enjoy the Cathedral” relied on by the BT is insufficient. In any event any such right depends on the CPT keeping the building open to the public.
- (c) The CPT was under a mandatory legal duty to make the decision. In effect the decision was made by CERA, and the purposes of the

Canterbury Earthquake Recovery Act would be frustrated if decisions of this nature were amenable to judicial review.

The BT response

[83] When making the decision the CPT were exercising statutory powers to deconstruct a Cathedral which is used by the wider community of Canterbury not only as a place of religious worship, but also as a place for civic activities of general significance to the community. Therefore the decision involved a statutory power of decision and comes within s 4 of the Judicature Amendment Act.

[84] In any event, judicial review extends to situations where the exercise of powers involves a public institution. The Cathedral is such an institution. It is symbolic of Christchurch itself. Over recent years public funds have been provided and there is a genuine public interest in decisions concerning its future. In many ways it symbolises recovery from the earthquakes.

[85] The position is even clearer in the context of interpreting the rights and obligations of the CPT under the Declaratory Judgments Act. In terms of s 3 of that Act the BT is interested in the construction of the statutes or instruments under which the CPT operate and there is clearly jurisdiction for the Court to issue a declaratory judgment.

[86] Finally, even if, somewhat artificially, this case is treated as a private law claim, the Court has the function of interpreting the meaning to be given to the 2003 Act. If the CPT is not fulfilling its obligations as trustee the Court should intervene.

Conclusions

[87] Section 4 of the Judicature Amendment Act 1972 empowers the Court to review any “exercise ... by any person of a statutory power of decision”. The expression “statutory power of decision” is defined in s 3:

Statutory power of decision means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation,

rules, or bylaws of any body corporate, *to make a decision* deciding or prescribing or *affecting* –

- (a) *The rights, powers, privileges, immunities, duties, or liabilities of any person; ...*

[Emphasis added.]

The emphasis has been added to highlight the parts of the definition relied on by the BT to establish jurisdiction.

[88] The first question is whether power for the CPT to make the decision was conferred by or under the 2003 Act. I am satisfied that it was. Following repeal of the Church Property Trust Ordinance 1854(C) by the 2003 Act, the CPT became a statutory body under that Act with the function described in s 6(1), namely, to “hold and administer trust property in accordance with this Act”. As noted earlier, the definition of “trust property” in s 4 includes the Cathedral. Moreover, s 6(2) makes it clear that s 6(1) applies despite anything in any instrument creating or relating to the Cathedral trust.

[89] It might also be added that to the extent that the CPT relies on the origins of the trust by virtue of the 1851 deed, the Court of Appeal stated in *Wilson v White*:²⁸

[21] ... the Courts, in considering the amenability of administrative action to judicial review, are less concerned with the source of the power exercised by decision makers (and in particular whether or not it was statutory) and [are] now more ready than in the past to treat as reviewable the exercise of any power having public consequences. This is so even if the power is exercised by a private organisation. In all such cases the power must be exercised on public law principles.

For the reasons already given in relation to standing, I am satisfied that the decision of the CPT about the future of the Cathedral will have very significant public consequences.

[90] The next question is whether the decision affects the “rights” of any person. When delivering an oral judgment in *Love v Attorney-General*²⁹ Ellis J concluded that only legal rights – that is rights recognised by the law – are envisaged by the

²⁸ *Wilson v White* [2005] 1 NZLR 189 (CA).

²⁹ *Love v Attorney-General* HC Wellington CP135/88, 17 March 1988.

word “rights” in the Judicature Amendment Act. While Mr Ormsby acknowledged that this authority has been questioned, he asked the Court to take into account that it had not been overruled.

[91] In *CMP v Director General of Social Welfare*³⁰ Elias J declined to follow *Love*. She commented that the remedy of judicial review was intended by Parliament to be “a flexible and broad one”.³¹ She also noted that a wide interpretation of the word “rights” is consistent with the modern relaxation of impediments to standing which recognises the principle that an interested party should be able to apply to the Courts to have the law enforced.³²

[92] Like Elias J, I decline to follow *Love* and prefer a broad interpretation of the word “rights”. Once the true public nature of the Cathedral trust³³ 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. The second ground advanced by the CPT also fails.

[93] The final point taken by the CPT is that it was under a mandatory legal duty to make the decision which was effectively CERA’s decision. As I will explain later,³⁴ I find that proposition untenable.

[94] All the challenges concerning jurisdiction to hear the application for judicial review having failed, I will now briefly consider jurisdiction under the Declaratory Judgments Act. Section 3 of that Act relevantly provides:

3 Declaratory orders on originating summons

...

Where any person claims to have acquired any right under any ... statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—

³⁰ *CMP v Director General of Social Welfare* (1996) 15 FRNZ 40 (HC).

³¹ *Ibid*, at 75.

³² *Ibid*, at 76.

³³ As described earlier at [75] – [76].

³⁴ See [166] below.

such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[Emphasis added.]

It is unnecessary for an applicant under s 3 to establish that a private right or tangible interest has been affected: *Turner v Pickering*.³⁵

[95] Clearly the applicant has a genuine interest in the construction of the 2003 Act and any earlier instrument/s giving rise to the Cathedral trust. It follows that jurisdiction to make a declaratory order under the Declaratory Judgments Act is not a problem.

[96] Given those conclusions I do not find it necessary to consider whether jurisdiction exists to pursue a purely private law claim for breach of trust.

Terms of the trust

[97] While the parties agree that under trust law a fundamental obligation rests on the trustee/s to adhere to the terms of the trust, they are wide apart about the terms on which the Cathedral is held by the CPT. For its part the BT considers that the Cathedral is held by the CPT upon a trust to preserve and maintain the Cathedral as built. On the other hand, the CPT believe that “first and foremost, the trust on which the Cathedral is held is for the advancement of religion rather than for the advancement of a building”.

[98] To a large extent this divergence of view reflects a different interpretation of some historical events. It is therefore necessary to retrace those events to see what they can tell us about the terms of the trust upon which the Cathedral is currently held by the CPT.

³⁵ *Turner v Pickering* [1976] 1 NZLR 129 at 135.

The 1851 deed

[99] In 1851 the Canterbury Association declared that specified lands, including Cathedral Square, were to be held on trust for the establishment and maintenance of ecclesiastical and educational institutions. The ecclesiastical institution was, of course, the Church of England. Of the approximately 42 acres declared by the deed to be held on that trust, the Cathedral Square land comprised about three acres.

[100] The parties disagree about the significance of this trust. In essence the BT's position is that this deed was overtaken in 1858 by a specific trust and is therefore largely irrelevant. However, the CPT interpret this deed as the founding document of the trust for ecclesiastical purposes upon which the Cathedral is held today.

[101] I agree with the CPT that the trust created by the 1851 deed was for the broad purpose of establishing and maintaining ecclesiastical and educational institutions, not for particular buildings. While it was anticipated even at that early stage that there would be a Cathedral on the site in due course (hence the reference to "Cathedral Square" in Edward Jollie's plan and identification of "The Cathedral Square" land in the 1851 deed) this did not give rise to any binding obligation to build a Cathedral.

[102] But, as I will explain in a moment, I do not accept that the trust created in 1851 reflects the trust on which the Cathedral is held by the CPT today.

The Cathedral Square Ordinance 1858

[103] Because of the importance of this Ordinance in the present context it is helpful to repeat the critical parts of the instrument. Clause 4 records that the Cathedral site was reserved by the Provincial Council:

... as a site for the erection of a Cathedral in connection with the Church of England, which site shall be conveyed to the Bishop of Christchurch and his Successors, to be held, in trust, for the uses as aforesaid, of the Church of England in the said province: and the said Superintendant, upon commencement of the said Cathedral, is hereby empowered and required to convey the aforesaid site accordingly...

Although the reference to “the uses as aforesaid” is loose to the extent that the plural is used, once the Ordinance is read as a whole it is apparent that those words refer back to the use of the site “for the erection of a Cathedral”. That interpretation is also consistent with the 1864 Ordinance.³⁶

[104] Having discussed the ecclesiastical definition of a Cathedral in her affidavit, Bishop Matthews concludes:

17. ... it becomes apparent that a cathedral is not necessarily tied to a particular physical building. The cathedral is any consecrated place that:

- a. the Bishop chooses to house his or her cathedra; and
- b. the church so chooses to name a cathedral.

...

19. A cathedral does not therefore consist of certain bricks and mortar. A cathedral is separable from a particular architectural integrity. A cathedral does not take a certain iconic image. A cathedral is a resource which the church must use with wise stewardship for the mission and purposes of the living God.

20. I believe that this is what the early settlers had in mind when the Christchurch settlement was conceived by the Canterbury Association. It is telling that the Canterbury Association had in its Letters Patent the express mission of establishing “ecclesiastical and educational institutions”. The objects and purposes of the Canterbury Association were not to establish ecclesiastical buildings...

Later Bishop Matthews notes that the language “ecclesiastical institutions” is constantly echoed throughout the instruments and documents relating to the Cathedral.

[105] While I respect Bishop Matthews’ ecclesiastical analysis, for present purposes a purely legal analysis is required. The wording of the 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). Had a purely abstract dimension been intended it is unlikely that the Ordinance would have referred to the “erection” and “commencement” of the Cathedral.

³⁶ See [106] below.

[106] Any doubt about what the Provincial Council meant is dispelled by the Cathedral Square Ordinance 1864. Amongst other things that Ordinance slightly amended the description of the Cathedral land.³⁷ Having done so it repeated that the land was to be held by the Superintendent of the Province and his successors:

... as a site for the erection of a Cathedral ... and upon trust as soon as *the building* of the said cathedral shall be commenced to convey the fee simple and inheritance in the same by deed unto the then Bishop of Christchurch and his successors to be held in trust for the purpose aforesaid. [Emphasis added].

Thus it is clear that the grantor of the trust (the Provincial Council) contemplated that a Cathedral, in the sense of bricks and mortar (with a spiritual dimension), would be erected on the land.

[107] It follows that an express trust for the erection of a Cathedral was declared in 1858. The language used in the Ordinance, and later confirmed in the 1864 Ordinance, makes it clear that a trust was intended. The purpose of the trust was certain: the erection of a Cathedral on the land designated for that purpose. This was reinforced by the stipulation that the land was only to be transferred to the Bishop when the building was commenced. The trust was complete when the land was transferred to the Bishop (which I will take as being synonymous with the transfer to the CPT). It is inherent in the arrangement that the land was to be held by the CPT on that trust indefinitely.³⁸

[108] The CPT's proposition that the Cathedral land is held today for ecclesiastical purposes fails to take proper account of this express trust. While the Cathedral Square land was originally part of a wider trust for ecclesiastical and educational purposes, that trust was overtaken in relation to the Cathedral Square land by the trust declared in 1858.

³⁷ Whereas the 1851 deed identified the Cathedral land as 3 acres, 1 rood, 10 perches, the area in the 1858 Ordinance is 3 acres, 1 rood, 37 perches.

³⁸ Mr Ormsby submitted that the trust could not be charitable if its primary purpose was to preserve a building. I do not accept that wide proposition. The upkeep of the whole or part of a church, including a memorial window, is charitable: see *Snell's Equity* (32nd ed, 2010, John McGhee QC ed) at 690 – 691. It is also stated in *Equity and Trusts in New Zealand* (2nd ed, 2009, Andrew Butler ed) at 282 that provision of buildings for worship is a valid purpose for a charitable trust. And in *Re Tennant* [1996] 2 NZLR 633 (HC) at 637, Hammond J accepted that a trust for the establishment of a church was charitable.

Erection of the Cathedral

[109] According to the BT further trust obligations arose as a result of public fundraising before construction of the Cathedral began, this fundraising being for the erection of a specific building of a particular design. Underpinning this argument is an article in *The Press* on 3 January 1863 stating that complete plans by Gilbert Scott were in the hands of the Cathedral Commission who had determined to adhere to that design.

[110] In response the CPT make two main points: any funds that were raised were donated by way of gift and could not have created a trust or further trustee obligations in themselves; and the 1864 Ordinance which was passed after the fundraising had been completed does not make specific reference to “the Cathedral” or to a specific design. Thus, submits the CPT, any suggestion that further trusts or obligations arose as a result of the fundraising is misconceived.

[111] I agree with the CPT. Except to the extent that the fundraising at that early stage (or later) is relevant to the issues of standing, amenability to judicial review or relief, I do not accept that it altered the fundamental terms of the trust upon which the land was held.

[112] The trust remained a trust for the erection of “a Cathedral”. No term requiring a particular style, for example Gothic, was imposed on the trustee. Had there been such a requirement it might be expected that this requirement would have been spelled out in the Ordinance creating the trust or at least in some other instrument produced by the grantor around the time the trust was being created. Certainly there was an opportunity to specify a particular style when the Provincial Council revisited the Cathedral issue in 1864.

[113] In any event, the evidence reveals that the Gilbert Scott design was in fact modified during the course of construction. This undermines the BT's proposition and reinforces my view that the fundraising did not give rise to any further trust obligations.

Following completion

[114] It has not been suggested by either side that the Cathedral trust came to an end when the Cathedral was completed. Obviously that could not have been intended. What is in issue, however, is whether, following completion of the Cathedral, the trust only required there to be *a* Cathedral on the site or whether it required *the Cathedral as erected* to be preserved indefinitely.

[115] According to the BT an obligation rests on the CPT to maintain and repair *the* Cathedral. Thus, in a situation like the present where the Cathedral can be repaired (and, leaving aside cost and other non engineering considerations, that is not disputed), the CPT is obliged to return the Cathedral to its state before the earthquakes occurred. If the CPT consider that this cannot be achieved, it will have to persuade Parliament to alter the terms of the trust.

[116] The accuracy of that analysis is questioned by the CPT. On its analysis the proposed deconstruction is within the powers conferred by statute and/or law and equity, and there is no obligation to reinstate the Cathedral to its former state. Any suggestion that the purpose of the trust is to preserve *the* Cathedral indefinitely is inaccurate and unrealistic.

[117] When resolving that issue it will be necessary to take into account any modification to the terms of the trust that might have flowed from the 2003 Act. I therefore turn to that Act. Once I have determined the implications (if any) of that Act I will return to the issue posed at [114] above.

The 2003 Act

[118] For the BT Mr Cooke QC submitted:

None of the provisions of the Act ... create express obligations in relation to the Cathedral itself as trust property, notwithstanding that it was part of the property held by the Trustees on trust. But that is not surprising. By this stage the Cathedral was the fixed centre piece of the operation of the Church in Canterbury, and of the broader Christchurch community. Its existence as the central asset of the Trustees is essentially a given. It was unnecessary for

Parliament to spell out specific obligations of the Trustees. The continuation of the existing Cathedral was self evident.

Having analysed the Act, particularly s 19 which permits capital and income from the Dean and Chapter Estate to be used for the repair and maintenance of the Cathedral, Mr Cooke concluded that the Act does not contain any power to demolish or deconstruct the Cathedral: to the contrary, he submitted, it supports the proposition that the Cathedral must be preserved.

[119] In response Mr Ormsby claimed that the BT had been forced to rely on the repair and maintenance provisions in s 19 because no obligation to repair and maintain the building could be found elsewhere in the Act or in the instrument creating the trust. He emphasised that s 19 relates to a separate trust (the Dean and Chapter Estate); it involves secondary trusts; the repair and maintenance of the Cathedral is only one of a number of potential purposes; and the Estate only has limited resources. Under those circumstances, he submitted, the repair and maintenance provisions in s 19 should not be construed in a way that imposes an obligation on the CPT to use Dean and Chapter funds for the Cathedral to the exclusion of other potential purposes. Thus the secondary trusts in s 19 are incapable of either altering the fundamental terms of the Cathedral trust or imposing additional obligations on the CPT.

[120] Mr Ormsby also submitted that the powers in Schedule 1 to “build on or develop any property whatsoever” and 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” are wide enough to authorise deconstruction of the Cathedral; this recognises the need to adapt and alter the property to suit the needs of the ecclesiastical institutions in different contexts and changing circumstances over an indefinite period; these powers are wide enough to include partial deconstruction and rebuilding post earthquake; and the words “build” and “develop” should be interpreted by reference to the needs of the Church.

[121] With the benefit of those arguments I now examine the implications, if any, of the 2003 Act.

[122] Upon commencement of the Act the CPT became a statutory body under that Act. However, given the express statement in s 5(3)³⁹ that the statutory body is the same body that existed under the 1854 Ordinance, I do not consider that, of itself, the step of creating a statutory body under the Act has any particular significance in the present context (except, of course, in relation to the amenability of this proceeding to judicial review).

[123] Under s 6⁴⁰ the statutory function of the CPT is to hold and administer trust property, including the Cathedral, in accordance with the Act. But whereas the Act contains detailed provisions for the administration of the Bishopric Estate, the Dean and Chapter Estate and local endowments, no corresponding provisions are included for the administration of other assets held by the CPT. Thus, except to the extent that the general provisions in the Act are relevant to those other assets, they need to be administered in accordance with the terms of the particular trust.

[124] In the case of the Cathedral trust this statutory policy can be seen as having particular force. It is implicit in the definition of “Cathedral” in s 4 and the references to the Cathedral in s 19 that Parliament was well aware that the Cathedral existed. As Mr Cooke put the matter, it was essentially “a given”.⁴¹ However, despite having expressly turned its mind to the Cathedral, Parliament refrained from modifying the terms of the Cathedral trust.

[125] On the BT's argument s 19 is a “key” provision because it reveals a statutory intention for the Cathedral to be preserved. The section provides:

19 Secondary trusts

The secondary trusts are to hold the capital and the income of the Dean and Chapter estate on trust—

(a) to augment the annual income of the Dean:

(b) to maintain a fund to be applied to—

³⁹ Quoted at [54].

⁴⁰ Quoted at [55].

⁴¹ I should add, however, that to the extent the Cathedral is described by Counsel for the applicant as the “central asset of the Trustees”, counsel for the CPT make the valid point that it is only one of many properties held and administered by that body.

(i) building, maintaining, enlarging, or replacing the residence for the Dean; or

(ii) providing the Dean with a housing allowance as determined under section 18(c)(ii):

(c) to maintain the services in, and activities of, the Cathedral:

(d) to employ such persons (including choristers) as are required to assist in the preparation and conduct of services:

(e) *to keep the Cathedral and its precincts in good repair:*

(f) to maintain a person or persons (other than the Dean), whether in holy orders or not, appointed as Cathedral staff for any work undertaken in the Cathedral or the Cathedral Chapter:

(g) to provide, maintain, repair, renew, or replace all or any of the furniture or fittings for use in the Cathedral or its associated buildings or its precincts:

(h) *to maintain and repair the Cathedral:*

(i) to erect and maintain a chapter house or other buildings for the Cathedral Chapter:

(j) to erect and maintain 1 or more schools in connection with the Cathedral.

[Emphasis added.]

Amongst other things, Mr Cooke submitted that (h) involves a more extensive trust purpose than (e) and that the word “maintain” means “to keep its existence going”.

[126] I agree with Mr Ormsby, however, that it is important to assess the significance of s 19 within the context of the Act as a whole. The powers listed in s 19 arise from *secondary* trusts which might or might not come into play. In legal terms they could probably be accurately described as “mere powers”. Even if they do come into play, the CPT has a discretion whether to choose the repair or maintenance of the Cathedral in preference to the other purposes listed in the section. Mr Ormsby is clearly right when he says that there is no *obligation* on the CPT to make all or any of the funds available under s 19 for the repair or maintenance of the Cathedral.

[127] Once the significance of s 19(e) and (h) is assessed in that way, I cannot accept that those provisions (and also the references in the section to *the* Cathedral) reveal a statutory intention that the Cathedral is to be preserved in its current form

indefinitely. On my analysis those powers simply reflect Parliament's recognition that it would be sensible for funds that might become available under the trusts referred to in s 19 to be used for the maintenance or repair of the Cathedral *if the CPT so decided*.

[128] Reduced to basics the BT argument seems to convert the *powers* under s 19(e) and (h), and secondary powers at that, into *obligations* to be performed by the CPT. I do not think that was the statutory intention. Had that been the intended outcome I am sure Parliament would have modified the terms of the Cathedral trust in a clear and precise fashion.

[129] For the sake of completeness I should make brief reference to s 15 of the Trustee Act which relevantly provides:

15 Miscellaneous powers in respect of property

- (1) Every trustee *may* exercise the following powers in respect of any property for the time being vested in him:
 - (a) expend money subject to the same trusts for the repair, maintenance, upkeep, or renovation of the property, ...

...

[Emphasis added.]

Although the powers in this section are expressly available to the CPT by virtue of s 7(1) of the 2003 Act, I do not believe that they advance the matter any further. Given the discretionary nature of the s 15 powers, it is clear that this section was not intended to impose an *obligation* on the CPT to act in a particular way.

[130] Finally, I turn to the CPT proposition that Schedule 1 of the 2003 Act confers power for the deconstruction of the Cathedral in accordance with its decision. That Schedule provides:

Schedule 1

Powers of the Church Property Trustees

- 1 Power of sale by public auction, tender, or private contract, except where a sale is expressly forbidden by the terms of the trust; but

subject to the express terms (if any) of the exercise of a power of sale.

- 2 Power of exchange for any other property, whether real or personal, with power to pay or to receive any money for equality of exchange.
- 3 Power to lend money with or without security, and without limitation, and in whatever manner the Church Property Trustees thinks fit; including power to lend without limitation, whether by contributory mortgage or not, on freehold or leasehold land or land held under the Unit Titles Act 2010, despite any enactment to the contrary.
- 4 Power to lease in such manner and on such terms or conditions as the Church Property Trustees thinks fit for any term of years not exceeding 21 years.
- 5 Power to accept, on such terms and conditions as the Church Property Trustees thinks fit, a surrender of any lease, whether with respect to the whole or to any part of the land comprised in the lease; with power if it thinks fit to expend trust funds in the purchase of any improvements of any such land.
- 6 Power to invest in any manner authorised under Part 2 of the Trustee Act 1956.
- 7 Power to borrow, with or without security, and without limitation, and in whatever manner the Trustees thinks fit.
- 8 Power to combine or intermingle trusts funds, including power to form common funds or unit trusts, despite any rule of law or practice to the contrary.
- 9 Power to lend money to the Church Property Trustees on mortgage, in its capacity as trustee of any other trust property.
- 10 Power to lease, grant licences over, or let any land vested in the Church Property Trustees to itself in its capacity as trustee of any other trust property.
- 11 Power to enter into bailments.
- 12 Power to purchase or acquire any real or personal property; including power to take up and hold, subscribe for, or acquire shares in a company either with or without liability for uncalled capital.
- 13 Power to join with any other person, company, corporation, or body of persons in purchasing, acquiring, or erecting buildings or other improvements on or developing any real or personal property.
- 14 *Power to build on or develop any property whatsoever.*
- 15 Power in the Church Property Trustees' absolute discretion to receive from any person who is a trustee any money or investment held by

that person on trust for any Anglican religious, educational, or other charitable trust.

- 16 Power to carry on farming, agriculture, horticulture, or silviculture in all or any of their aspects.
- 17 *Power 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.*
- 18 Power to act as an advisory trustee in accordance with section 49 of the Trustee Act 1956.
- 19 Power to charge fees, including a percentage commission, on all assets administered and on income received.

[Emphasis added.]

Initially the argument for the CPT relied on clause 14 only. However, during the course of argument the possibility that clause 17 might also avail the CPT argument was discussed.

[131] In my view the CPT has overstated the reach of these powers. Clearly they cannot be exercised in a way that would breach the fundamental terms of the trust. To take an obvious example, the CPT could not exercise the apparently wide power in clause 2 to exchange the Cathedral land for another property because that would defeat the site-specific purpose of the Cathedral trust. Similarly, clauses 14 and/or 17 could not authorise the deconstruction of the Cathedral if that would defeat the whole purpose of the trust.

[132] Assuming for the moment that at the very least the Cathedral trust requires there to be *a* Cathedral on the site, it is difficult to see how either clause could authorise deconstruction of the Cathedral in the absence of any commitment to rebuild. On the other hand, partial (or even total) deconstruction *for the ultimate purpose of rebuilding a Cathedral* would be an entirely different matter because the fundamental purpose of the trust would still be honoured.

[133] To sum up: the 2003 Act does not alter the fundamental terms of the Cathedral trust; in particular it does not reflect a legislative intention that the Cathedral as it stood before the earthquakes must be preserved indefinitely; nor does

it authorise deconstruction of the Cathedral other than for the purpose of repair or rebuilding.

Terms of the Cathedral trust: conclusions

[134] I have rejected the CPT proposition that the Cathedral is currently held on an open-ended trust for the advancement of religion or, as it was also put, for the maintenance of the ecclesiastical institution. On the other hand, I accept, first, that the trust was established for the purpose of erecting a Cathedral on the site and, secondly, that following erection there was a continuing obligation on the CPT to ensure that there is *a* Cathedral on the site.

[135] But the unresolved issue remains. Was there a subtle change to the trust after the Cathedral was erected so that it effectively became a trust for the preservation of *the Cathedral as erected*?

[136] Given the parallels with *In the Matter of the Trusts of the Church of Saint Jude, Brighton*,⁴² it is scarcely surprising that counsel for the BT placed considerable reliance on that decision. The land in that case was conveyed to trustees in 1854:

Upon trust to permit and suffer to be erected and built upon the said piece of land ... a church or building ... to be called “the Church of Saint Jude”... and from time to time to permit and suffer such buildings⁴³ to be enlarged altered repaired and reinstated when necessary or expedient ...

A church built on the land in 1854 was damaged and became unsafe as the result of an earthquake in 1954.

[137] The trustees presented a petition to the Supreme Court of South Australia seeking an order that they be empowered to completely demolish the existing church and erect a new and larger church in its stead. Hannan AJ held that the power given by the trust deed to enlarge, alter, repair and reinstate the church did not authorise the demolition of the church and the erection of a new and larger church. The order sought by the trustees was refused.

⁴² *In the Matter of the Trusts of the Church of Saint Jude, Brighton* [1956] SASR 46.

⁴³ The reference to buildings reflects that other buildings were also to be constructed.

[138] In reaching that conclusion the Judge concluded that once the church had been erected the legal powers of the trustees for dealing with it were strictly limited to those expressed in the instrument creating the trust. While the trustees could lawfully enlarge, alter, repair or reinstate the church, any other mode of dealing with it was excluded by the rule of statutory construction *expressio unius est exclusio alterius*.⁴⁴

[139] More specifically, having examined the ordinary and natural meaning of the words enlarged, altered, repaired, and reinstated, Hannan AJ explained:⁴⁵

...To reinstate the Church of Saint Jude therefore means to build it up again when it has collapsed or become ruinous or dilapidated past repair, so that it has to be demolished; to put it back as it was before, not necessarily of the same materials, but according to the same design, so as to be easily recognisable by those who knew the fallen or ruined church when it was stable and standing firmly upright.

What the trustees desire to do is none of these things. If they pulled down the existing building and proceeded to erect another larger building, of different design and different appearance, but of course for the same purpose, could they fairly be said, according to the ordinary meaning of the words of authority, to have enlarged, altered, repaired and reinstated the Church of Saint Jude? I do not think so; they would have erected a new Church of Saint Jude on the old site, but it would be not only a substantially bigger church but quite a different church architecturally...

He decided, first, the trustees had no power to completely demolish the existing church building unless the existing structure had become “ruinous and dilapidated beyond repair” and, secondly, if that situation arose the trustees could only demolish the building for the purpose of reinstating it by way of a substantially identical structure on the same site.

[140] Mr Ormsby argued that this case can be distinguished for a number of reasons: the Cathedral trust does not include the same restrictions as the *Saint Jude* trust; the purpose of the Cathedral trust of maintaining the ecclesiastical institution is not aimed at a building; the building in *Saint Jude* was not in a ruinous or dilapidated condition beyond repair; and there was no s 38 notice under the CER Act. While I

⁴⁴ Which means “the mention of one is the exclusion of another”.

⁴⁵ *In the Matter of the Trusts of the Church of Saint Jude, Brighton*, above n 42, at 53.

do not accept all those distinctions, I agree that there are valid grounds for distinguishing that decision.

[141] It is clear that the decision to decline the order sought was fact specific: the trust defined the legal powers of the trustees after the church had been erected; the church could only be enlarged, altered, repaired or reinstated; and, importantly, the proposed work did not come within those words. Given that the *Saint Jude* decision turned on words that do not appear in the Cathedral trust, the conclusions reached in that decision are of limited assistance.

[142] Although several other cases were cited by counsel, none appear to have a direct bearing on the issue I am attempting to resolve. I will therefore go back to first principles.

[143] As Weigall AJ, sitting in the Supreme Court of Victoria, observed *In re The Church of England Trusts Corporation (Wangaratta)*:⁴⁶

As to any trust, whether charitable or non-charitable, the duty to effect, so far as possible, the purpose of the trust as originally created, and as closely as possible in the manner then prescribed, and to avoid any unnecessary departure from the terms of the trust, must always be the dominant consideration as well for the Court as for the trustee.

Observations to the same effect can be found in numerous decisions and texts. In short, trustees, and also this Court in its supervisory jurisdiction, must comply with the terms of the trust.

[144] Once a trust has been created its terms will continue to apply until the trust reaches the end of its life or is earlier varied. Depending on the nature of the trust, there are several paths by which a trust can be varied: Section 64 of the Trustee Act 1956; Part 3 of the Charitable Trusts Act 1957; and Part 3 of the Anglican Church Trusts Act 1981. Given that there has been no variation of the Cathedral trust, its original terms must stand.

⁴⁶ *In re The Church of England Trusts Corporation (Wangaratta)* [1924] VLR 201 at 206.

[145] We therefore come full circle. The 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.⁴⁷

[146] 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. Any necessary deconstruction and/or demolition would come within the terms of the trust *provided* such deconstruction or demolition is for the purpose of repairing or replacing the existing structure.

[147] While the timeframe for repair or replacement would be for the CPT to determine, its obligations as trustee require it to honour the spirit of the trust. Thus it would not be in the spirit of the trust for the repair or reconstruction to be unnecessarily deferred. When determining the timeframe the CPT would be entitled to take into account the practical realities of the situation it faces.

[148] Finally, unlike the *Saint Jude* case, the terms of the Cathedral trust do not require a replacement Cathedral (if that is the option decided upon) to be identical to the Cathedral that existed before the earthquakes occurred. But the structure would, of course, have to qualify as “a Cathedral” in terms of the trust.

The CPT decision

[149] Before discussing the decision itself, it is helpful to provide some further background information.

⁴⁷ See [134] above.

From the perspective of the CPT

[150] In his affidavit Gavin Holley, trust manager of the CPT and chief operations officer of the Anglican Diocese of Christchurch, discusses a number of issues that were facing the CPT.

[151] Following the earthquakes the CPT was left in a precarious financial position. Seventeen churches and other parish buildings needed to be demolished and possibly rebuilt in the future. A further 194 diocesan buildings were destroyed or damaged (two thirds of all the diocesan buildings).

[152] The Cathedral itself was insured on a “functional replacement value basis” and the insurer has agreed to settle by paying the CPT approximately \$39 million, but no formal document has been signed. Negotiations are continuing.

[153] Having traversed the interaction between the BT and CPT since the BT became involved, Mr Holley concludes that the dialogue was unhelpful for three reasons:

- (a) The BT trustees constantly ignored that the CPT was obliged to comply with the s 38 notice as a matter of urgency.
- (b) The BT was “unhelpfully aggressive”. This is primarily a reference to the letter from Mr Graham.⁴⁸
- (c) At no time did the BT recognise the ministry and mission the Cathedral performed.

It is Mr Holley’s view that there was a distinct lack of engagement or understanding that the Cathedral “served an ecclesiastical purpose” and the BT seemed to be only interested in architecture and heritage.

⁴⁸ See [39] above.

[154] Financial considerations were also discussed. Mr Holley notes that the report from the quantity surveyors indicates that the cost of Option 1 could be as high as \$187 million plus GST if the project was delayed, and:

... the CPT simply do not have the funds available to commit to the maximum retention option proposed in the [Independent Engineering Review report]. In my role as trust manager for the CPT, I could not recommend to the CPT that it assumes the risk of a project which could blow out so significantly. This is even before considering the need to provide a building that can function for the purposes for which the Cathedral was originally constructed.

Mr Holley goes on to say that the CPT is not in a position to borrow because (he is advised) under ecclesiastical law a Cathedral building must be debt and mortgage free.

[155] Finally, Mr Holley discusses safety concerns and the need to comply with the s 38 notice issued by CERA. He explains that the CPT understood that the only option that could adequately meet the requirement for safety was deconstruction to a level of approximately two to three metres (Option 2).

From the perspective of the BT

[156] The BT considers that the Cathedral can be reinstated, and reminds the Court that from an engineering perspective this is not disputed by the CPT.⁴⁹ The Review Panel also considers that it is likely to be cheaper to repair the Cathedral in-situ rather than deconstructing the building to sill level and then reconstructing. Its method includes base isolation. The quantity surveyor's comparative costs are questioned.

[157] Three of the trustees of the BT (Mr Burdon, Mr Anderton and Mr Brady) have deposed that they are confident funds for restoration could be found within New Zealand and abroad. Mr Brady is a former managing director (initially for Australasia and then for Europe) of a multi-national company, Everalld Compton International, which specialises in capital fundraising for "not-for-profit" clients. As mentioned earlier, he has been involved in fundraising for the Christchurch

⁴⁹ See [44] above.

Cathedral.⁵⁰ He has also been involved in fundraising for cathedrals in Wellington, Australia and England. He returned to New Zealand in 1995.

The decision

[158] Everyone agrees that the decision facing the CPT was difficult: the timeframe was tight (this is not a criticism of CERA); complex engineering and other issues needed to be assessed; there were many competing considerations; and whatever option was chosen, a large shortfall in the funds required to complete the project seemed to be inevitable.

[159] Submissions presented on behalf of the BT voiced concerns about the process leading to the decision, including: criticism of the involvement of other church groups in the decision-making process; allegations that from an early stage (mid 2011) those involved in the decision-making process were working towards a new Cathedral rather than keeping open the possibility of reinstating the existing structure; and the lack of explanation about the reasons underpinning the decision (and for) later rejecting the BT counter-proposal.

[160] Rather than become involved in those matters, I will go straight to the decision. This approach reflects three matters: first, it is not disputed that the decision I am about to discuss was made by the CPT on 1 March 2012; secondly, it is the lawfulness or otherwise of the decision that needs to be resolved; thirdly, the lead-up to the decision is unlikely to assist in resolving that issue.

[161] As it stands at the moment the decision involves deconstructing the Cathedral down to a level of two to three metres. Bishop Matthews confirms in her affidavit that this is the only decision that has been made by the CPT to date. Mr Ormsby began his oral submissions by saying that the CPT intends to rebuild the Cathedral on the same site, but has not yet determined what it would look like or the timing. However, no formal resolution by the CPT is before the Court.

⁵⁰ See [21] above.

[162] As already noted,⁵¹ 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. However, that would not be the case if it was in the context of a decision to repair or replace the existing structure as discussed at [146] above.

[163] It seems to me that the decision made by the CPT on 1 March 2012 is susceptible to two possible interpretations. One is that it defeats the central purpose of the trust, constitutes a breach of trust accordingly, and is thereby unlawful. The other is that it would be premature to reach that conclusion because the CPT intends to rebuild the Cathedral on the same site. Had it not been for Mr Ormsby's indication from the bar that the CPT intends to rebuild the Cathedral I would probably have adopted the first interpretation. However, given the indication from the bar, I have concluded that the better interpretation at this juncture is that the decision is incomplete.

The s 38 notice issued by CERA

[164] The s 38 notice issued by CERA stated:

The purpose of this letter is to:

- Advise you that I have determined that your building is dangerous in terms of the Canterbury Earthquake Recovery Act 2011 (CER Act), in particular there is a risk that the building could collapse or otherwise cause injury or death to any person in the building as a result of an earthquake that generates shaking that is less than or [sic] moderate earthquake; and
- Give you notice under in accordance with Section 38(4) of the CER Act that your building is to be demolished to the extent necessary to remove the hazards.

...

The CPT was given 10 calendar days to advise whether it intended to undertake the demolition of the building and, if so, when it was intended to undertake and

⁵¹ At [143] above.

complete the work.

[165] According to the CPT they had no option other than to comply with the notice; the only way they can do so was by adopting Option 2 which had been approved by CERA; complying with a s 38 notice could not constitute a breach of trust; and the purposes of the CER Act would be frustrated if decisions building owners took in response to a s 38 notice were amenable to judicial review.

[166] Those points are rejected by the BT. It submits that the notice only required the Cathedral to be partly demolished to the extent necessary to make it safe; while the option adopted by the CPT had been endorsed by CERA, the maximum retention option advanced by the Review Panel needs to be fully explored; CERA has not, and has not been asked to, make any decisions on the engineering proposals that have been put forward by the BT; and this is reflected by the stance of CERA to abide the decision of the Court.

[167] The short answer is that the problem I have identified lies in the absence of any formal commitment by the CPT to repair or replace the Cathedral. This omission cannot be attributed to the CERA notice. In any event I have not been persuaded that the CERA notice meant that the CPT *had* to make the decision that it did.

Relief

[168] Having decided that at this stage the decision is incomplete rather than unlawful, it is necessary to decide whether the Court should exercise its discretion in favour of granting relief and, if so, the nature of that relief.

[169] After giving the matter considerable thought I have concluded that the Court should intervene and that it would be inappropriate to refuse relief altogether. In reaching that conclusion I have been influenced by the following matters.

[170] First, given the intense and legitimate public interest in the matter, the Court would be falling short in its duty if it failed to ensure that the decision-making

process is properly completed. Apart from anything else, another round of litigation would probably follow and this would not be in the public interest.

[171] Secondly, the evidence and submissions on behalf of the CPT indicate that when it made its decision that body was under a misapprehension about the purpose, in legal terms, of the Cathedral trust. Instead of applying the purposes I have described, the CPT appears to have proceeded on the basis that the purpose of the trust is the advancement of religion and the maintenance of the ecclesiastical institution, not particular buildings. While it is not for the Court to become involved in the merits of the decision, it has a responsibility to ensure that the purposes of the trust are honoured.

[172] Thirdly, the evidence of Mr Holley suggests that there will probably be an insurance recovery in the vicinity of \$39 million. But there are indications that when the decision was made the CPT did not appreciate that the proceeds of any insurance cover over the Cathedral must be held on the same trusts. For example, the minutes of a meeting on 27 February 2012 record:

While it is not confirmed, his [Mr Holley's] best assessment of a conservative insurance position, after deductions of excess, settlement negotiations, Transitional Cathedral costs and spending to date is that there is in the order of \$28.5 million dollars remaining.

There is also a document relating to “key goals” which appears to have been presented at a meeting on 22 March 2012. This document records the goal of retaining “at least \$20 million of insurance funds for the construction of the future Cathedral”.

[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.⁵² Under s 25(4) any such money may be applied by the trustee in rebuilding, 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.

⁵² See also Garrow and Kelly *Law of Trust and Trustees* (6th ed, 2005) at 23.14.5.

[174] While it is not entirely clear whether the CPT actually misdirected itself when arriving at its 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.

[175] Fourthly, and this is really an extension of the first point, while the current trustees of the CPT might at this stage *informally* intend to rebuild the Cathedral on the site, I do not think that that is enough in the circumstances that have arisen. An informal intention can be overtaken by events. For example, the evidence suggests that delay in arriving at a decision about the type of building is likely to count against raising the necessary funds. It is also possible that the project will lose impetus once the transitional Cathedral has been built. And the composition of the trustees might change. Hence the importance of a *formal* commitment at this stage.

[176] Fifthly, this proceeding has exposed contestable issues about engineering, cost, and other aspects that were not before the CPT when it made its decision (at least in the detail now available). Given the importance of the decision, the CPT should have the benefit of considering those matters.

[177] Sixthly, CERA's approach of abiding the decision of this Court might suggest that it does not currently have a view about the Review Panel's alternative method of achieving Option 1. If this is so, it would be desirable for CERA's view to be ascertained and taken into account as part of the final decision-making process.

[178] Seventhly, while unnecessary delays in finalising the future of the Cathedral are obviously undesirable, any further delays that arise from deferring a final decision in this case would not appear to expose people to risk of harm. This reflects that the Cathedral and its immediate surrounds are securely fenced.

[179] In my view these matters provide a compelling case for the Court to intervene and grant relief. The next issue is the form that the relief should take.

[180] While I accept that the application for judicial review should be granted, I do not consider that it would be appropriate to set aside the decision at this stage. Rather, the CPT should have an opportunity to reconsider and complete its decision having regard to this judgment. The fact that I have not set aside the decision at this stage is not intended to suggest that the CPT should necessarily, as part of its overall decision to rebuild, arrive at the same decision as it reached on 1 March 2012. As I have already said, the merits are for the CPT, not the Court. Once the final CPT decision is available, the Court will be in a position to complete its determination. In the meantime, implementation of the decision made on 1 March 2012 will be stayed.

[181] Given that one of the central issues in this case has revolved around whether the replacement structure has to replicate the Cathedral as it stood before the earthquakes, it is appropriate for a declaration to be made in that regard. The declaration is that while there must be a Cathedral on the site, it does not necessarily have to replicate the Cathedral as it stood before the earthquakes occurred.

[182] One final matter. There was debate about whether, if financial or other considerations prove to be an insurmountable obstacle to performing the Cathedral trust, the appropriate course would be for the CPT to seek legislative amendment or whether Part 3 of the Anglican Church Trust 1981 would provide an available option. Given the conclusions I have reached, it is unnecessary to resolve that issue.

Result

[183] The application for judicial review is granted and the decision of the CPT made on 1 March 2012 is stayed until further order of the Court. This proceeding will be adjourned to a date to be fixed after counsel have submitted a memorandum or memoranda as to an appropriate timeframe within which the CPT should reconsider the matter in terms of [180] above. While I am not setting any timeframe, such memorandum or memoranda should be lodged as soon as possible. Depending on the content of the response received from counsel it might be necessary to convene a telephone conference or reconvene the hearing.

[184] I declare 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.

[185] Leave is reserved for the parties to apply further should the need arise.

[186] Given the outcome at this point, I will defer considering the question of costs until a final decision is issued by this Court.

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