IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009-409-002813

BETWEEN	SAVE OUR ARTS CENTRE SOCIETY INCORPORATED Plaintiff
AND	THE ARTS CENTRE OF CHRISTCHURCH TRUST BOARD First Defendant
AND	CHRISTCHURCH CITY COUNCIL Second Defendant
AND	NATIONAL CONSERVATORIUM OF MUSIC JOINT VENTURE LTD Third Defendant
AND	UNIVERSITY OF CANTERBURY Fourth Defendant

Hearing: 21 and 22 December 2009

Counsel: J V Ormsby, M Perpick and JWA Johnson for Plaintiff
R B Lange and M J Simes for First Defendant
K Smith and KMM Foley for Second Defendant
F B Barton and J M Crawford for Third and Fourth Defendants

Judgment: 23 December 2009

JUDGMENT OF FOGARTY J

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[1] The subject of these proceedings is a block of land in the centre of the city of Christchurch known as the Arts Centre. This site was originally occupied by the Canterbury College of the University of New Zealand and by the Christchurch Boys' High School. In the 19th century the early European settlers built a University College of stone buildings and quadrangles in what is now called the 19th century

Gothic Revival style. The architect was Benjamin Woolfield Mountfort. He was responsible for other distinguished buildings in the city, including the original part of the Museum, Christchurch Cathedral, the Canterbury Provincial buildings and the Trinity Congregational Church. Together these buildings have been and are considered by the people of Christchurch as a heritage. In the early 1970s the University of Canterbury finally removed itself to Ilam. In 1978 a charitable trust was established with the agreement of the University and of the Government of the day to provide a cultural centre for the people of Christchurch and elsewhere in New Zealand on the site formerly occupied by the University of Canterbury and for the preservation of the architectural character and integrity of the historic stone buildings presently on that site.

[2] The current Trust Board has developed a proposal with the support of the Christchurch City Council and the University of Canterbury to construct a large building and a new quadrangle at the eastern end of the site of what is now largely a car park, to be the home of the University School of Music and to be called the National Conservatorium of Music. This project is controversial in Christchurch, as it is a large scale building which will be a close neighbour to the historic stone buildings on the site.

[3] The plaintiff in these proceedings is a society incorporated by opponents to the project. It has commenced proceedings in this Court contending that it is a breach of the Trust for the trustees to pursue this proposal. It has also joined the University of Canterbury, the Christchurch City Council, and the National Conservatorium of Music Joint Venture Ltd (the joint venture company), a company incorporated by the University to be the entity to pursue and hold the University's interests in the project.

[4] The plaintiff is also opposing a notified application for a land resource consent to build the conservatorium by the joint venture company. This application is pending before the Christchurch City Council as the consent authority under the Resource Management Act 1991.

[5] The plaintiff would also like to be able to oppose an application by the Trust Board, also under the Resource Management Act to subdivide the site. This application has currently not been notified.

[6] The Council has appointed two Commissioners to hear both applications. In the week of 18 January next the Commissioners have advised this Court that they are going to consider the plaintiff's argument that the subdivision application be notified. I expect, if notified, that that application be heard within the same period of time as the hearings on the land use application being lodged by the joint venture company. The land use application hearings are due to start on 15 February and are currently estimated to take four weeks.

[7] The plaintiff seeks interim relief from this Court. It seeks a direction as to the conduct of this case. It seeks to restrain the Trust Board from entering into any further arrangements with the University of Canterbury for the purpose of building the School of Music. It seeks to restrain the Board from spending any more money on the project in the meantime. It seeks to restrain the Council from funding or proceeding with the building in the meantime and it seeks to restrain the Christchurch City Council as consent authority from continuing the hearings under the Resource Management Act.

[8] The University of Canterbury, the City Council, the Trust Board and the joint venture company have all reacted to this application for interim injunction by offering various undertakings in response. This is intended to be a summary of those. The City Council has agreed not to proceed with funding the building in the meantime. The University of Canterbury and the joint venture company have offered undertakings not to enter into any further arrangements with the Trust Board pending a decision of the High Court on the plaintiff's claims. Nor would they exercise any resource consent until a substantive decision in this proceeding has been given by the High Court. The Trust Board has made a conditional proposal that it would request the subdivision application to be publicly notified and seek its hearings to be integrated into the latter stages of the land use hearing provided the plaintiff abandoned this application for interim relief.

[9] The joint venture company as applicant has confirmed that it will accommodate the Resource Management land use application be considered as an application to add a building to the whole Arts Centre site thereby bringing into play different provisions of the City Plan than might otherwise be considered if the site of the application is defined more restrictively.

[10] This Court has the power to make interim orders where justice requires it or to preserve the rights of plaintiffs where those rights might be lost if no restraining orders are made, before the claims of plaintiffs are tried and a decision is given. To examine whether justice requires this step the Courts have an accepted framework of analysis. It is a three step analysis. First, the Court examines whether there is a serious question to be tried; second, where the balance of convenience falls if interim orders were made. Finally, but most importantly of all, the Court steps back and asks itself where the overall justice lies.

[11] The plaintiff argues there are no serious questions to be tried. These arguments fall essentially into two parts. First, they say that various amendments made by the Trust Board at the time and particularly amendments made in 2007 are invalid and they have a serious argument in that respect. Secondly, they have an argument that if these variations are invalid as they argue then the proposal can also not be justified under the original deed's objects and purpose.

[12] In reply the Trust Board contends that there are no serious issues to be tried. It has two arguments. The first is that none of the variations to the deed contravene the power in cl 10 of the Trust deed to alter the terms of the Trust. Second, that in any event, the proposal is enabled by the terms of the original deed. Both of these issues are now before the Attorney-General. He will be relying on advice from the Solicitor-General. Mr Gunn from the Crown Law Office has advised this Court that the Attorney-General's response will likely appear in January.

[13] I have heard argument on these legal issues over the previous two days. I find myself in a similar position to that the Court of Appeal found itself in, after several days of argument, in the case of *Klissers Farmhouse Bakeries Ltd v Harvest*

Bakeries Ltd [1985] 2 NZLR 129. In the judgment of that Court, Cooke P for the Court said:

> We granted an urgent fixture for the appeal and heard it on the first two days of this week. The arguments ranged widely but in the end we think that the appeal should be disposed of quite simply. Not merely because the matter is of some urgency, but also because on an interim ruling such as this any expression of views on matters better decided at a trial should be avoided as far as reasonably possible, we set out our reasons briefly.
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> (At 140-141)

[14] In my view there is a serious argument that some of the amendments to the deed may be invalid. Second, there is an argument that the trustees may have failed to adequately keep a balance between protecting the historic stone buildings while developing part of the unbuilt site to ensure a stream of net income to fund the preservation of the buildings. It is not possible, however, for me to judge whether this second argument is a serious argument, for that depends on consideration of expert opinion. That is in truth a matter that can only be explored at trial with the benefit of hearing from witnesses.

[15] I move on then to consider the second stage of analysis.

The balance of convenience

[16] There are differences in the criteria contained in the deeds to protect the heritage buildings and the criteria with a similar goal in the City's plan. These are textual differences. The terms of the Trust and the terms of the plan pursue a similar goal but have different origins. The City Plan is a product of the Resource Management Act which allows constraints to be placed on the use of private property where the property is a heritage building or is the neighbour of one. Such constraints on private use of property are constrained by the limits of the statute set by Parliament. On the other hand the Trust deed provides for the preservation of the heritage buildings for the people of Christchurch and elsewhere in New Zealand.

[17] The terms of the Trust are not constrained by the private property interests being balanced in the Resource Management Act. The Trust is a charitable trust.

The beneficiaries are essentially the people of Christchurch and elsewhere in New Zealand. It follows that a decision under the Resource Management Act to grant consent to construct a conservatorium cannot be a resolution of the question of whether the trustees have over-stepped their powers in pursuing the proposal. It follows that both streams of litigation examine different issues. The resolution of the Resource Management Act applications will not resolve the resolution of the extent of power and exercise of power by the trustees.

[18] If this Court holds that the trustees have exceed their powers or otherwise should be restrained from pursuing the proposal then the project will stop, at least until the trustees' powers might be extended by Court order. That is a process possible under the Charitable Trusts Act 1957. It will not matter to the Court whether or not the RMA consents have been obtained.

[19] The plaintiff argues that the question of the trustees' powers and conduct should be examined first and in the meantime the Resource Management application should be halted by order of this Court.

[20] The defendants argue that this Court has no power to restrain the progress of the application for land use consent by the joint venture company as it is distinct from the Trust. For reasons which will appear it is not necessary for me to decide that question. Secondly, and more practically, the defendants argue that if the RMA consent process is stopped there is likely to be at least a year's delay on the commencement of the process. If that happens then the University of Canterbury may well walk from the project. The University has a music school. It is an ongoing facility. The demand for new facilities is present and will not go away. The University does have an alternative option to rebuild on its own campus.

[21] The plaintiff argues that it is unjust that it faces the cost burden of a resource management litigation while they also pursue their argument that the Trustees are acting beyond their powers in pursuing this proposal.

[22] This Court takes notice of the considerable public interest in the merits of this proposal. The issues are important. It is desirable that they are examined thoroughly

but also efficiently to avoid the risk of delay bringing the project to an end whether it is meritorious or not. Granting an injunction to stop the RMA process would reduce the plaintiff's costs but overall could threaten, I am satisfied, the future of the project.

[23] It is my judgment that the savings to the plaintiff's costs could cause a greater injustice of bringing this proposal to an end because of delay and not because it may be beyond the powers of the trustees or because the proponents may not obtain resource management consents.

[24] For these reasons I am not persuaded that this Court should intervene at this stage by stopping the resource management process. However, I do reserve leave to the plaintiff to seek ancillary relief should the defendants and the plaintiff not resolve adjustment of the various undertakings offered and assurances given following consideration of the reasoning in this judgment. Rather more positively I think the appropriate response to this Court is to return to the first request for relief in the interim injunction which is to give directions as to the conduct of these proceedings and to do this in order to ensure a swift passage of the litigation in this Court.

[25] On 30 June this year the Chief Judge of the High Court, Randerson J, issued a fast track Practice Note. It was designed for this sort of litigation, with the qualification it was not intended to include judicial review, and there is an aspect of these proceedings that is judicial review. I am satisfied, however, that the fast track Practice Note applies. It depends on co-operation of the parties to progress the dispute swiftly. It is best suited to cases where the issues are confined, where there is little need for interlocutory applications. That applies here. It depends principally on the parties agreeing to fast track a case although there is a reserve power on a Judge to move a case to the fast track in any event. I am satisfied from these two days of hearing so far this week that there is a common interest on all the parties here to fast track these proceedings.

[26] The plaintiff wants to get a High Court ruling at least cost and swiftly. So do the defendants, for essentially commercial reasons. Therefore, I am invoking the fast track procedure. The goal of this procedure is to have the trial between two and six

months after the first conference and whoever is the trial Judge is expected to use best endeavours to deliver a prompt judgment.

[27] As I am familiar with the issues I will manage the preparations of this case for trial. The first case conference will take place by telephone on Monday, 8 February, at 9.30 am. Before then I expect the Attorney-General to have delivered his opinion on the issues. As I think I have mentioned Mr Gunn expects that step to take place before the end of January. I am allowing the parties at least one week to consider the opinion of the Attorney-General.

[28] As the fast track Practice Note requires, at the conference on 8 February and thereafter, senior counsel must be present. I will leave it to counsel to study the Practice Note and familiarise themselves with its contents. Mr Registrar can make copies available to counsel at the end of this judgment.

[29] During argument I have heard and discussed various procedural options which might promote the speedy passage of the Resource Management Act proceedings. I do not record these in this judgment. It is sufficient to say that this Court will try to adjust its High Court processes so that they do not clash with the Resource Management Act hearings. Rather, it will endeavour to save costs by ensuring that a High Court trial is as close as possible to the RMA hearings in order to achieve common cost efficiencies as the experts are likely to be the same persons and their briefs of evidence similar. I will rely on counsel before this Court to be the liaison between this Court and the Commissioners.

Costs

[30] I turn to the question of costs in these proceedings. Many of the costs that have been incurred by the parties in the proceedings to date will not be wasted. The affidavit material is needed for the trial. Counsel for both parties have had the benefit of testing their propositions. As a result, the trial should be shorter than it would have been had there been no application for an interim injunction.

[31] If costs were imposed on the plaintiff at this stage there is also a risk that this public interest litigation would be brought to an end without the merits of the application being decided. It is likely that this hearing will have also assisted counsel to formulate ways to focus the arguments in the RMA processes, at least at first instance. Therefore, I am reserving costs to date in these proceedings but I am also reserving leave to the defendants to apply for costs. The formal result of this hearing is that the application for interim injunction is refused in the meantime but the proceedings have been placed on the fast track and costs are reserved.

Solicitors:
Wynn Williams & Co, Christchurch, for Plaintiff
Simpson Grierson, Auckland, for First Defendant
Buddle Findlay, Christchurch, for Second Defendant