IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2020-409-461
[2021] NZHC 1130

BETWEEN	CHURCH PROPERTY TRUSTEES Plaintiff
AND	RIGHT REVEREND PETER RUANE CARRELL First Defendant
	ATTORNEY-GENERAL Second Defendant

Hearing:	On the Papers
Appearances:	J W A Johnson, S D Campbell and W L Porter for Plaintiff K J May and A J Summerlee for First Defendant D Jones and C N Tocher for Second Defendant
Judgment:	20 May 2021

JUDGMENT OF MANDER J

This judgment was delivered by me on 20 May 2021 at 4 pm pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

[1] The plaintiff, Church Property Trustees (CPT),[1] is a body corporate whose function is to hold and administer various properties held on trust that are associated with the Anglican Diocese of Christchurch (the Diocese), in accordance with the Anglican (Diocese of Christchurch) Property Trust Act 2003 (CPT Act) and relevant trust instruments. In that capacity it arranged insurance for these properties.

[2] Following the Canterbury earthquakes, CPT reached a global settlement with its insurer and carried out an extensive repair programme. CPT is now nearing the completion of that programme and, for a variety of reasons, it is estimated there will be surplus funds of around $9.8 million (the surplus).

[3] CPT is uncertain in a number of respects as to how the surplus should be treated. After much consideration, CPT has reached its preferred view as to how to proceed. The Diocese agrees with the approach proposed by CPT. However, because of the legal and factual complexities involved, CPT seeks directions pursuant to s 66 of the Trustee Act 1956 (the Act) and/or to the Court's inherent jurisdiction as to the treatment of the surplus.

Background

[4] CPT is empowered to hold and administer property in accordance with the CPT Act. It is also the corporate trustee of various charitable trusts associated with the Diocese. It is a charity registered under the Charities Act 2005. The Right Reverend Peter Ruane Carrell is the Bishop of Christchurch (the Bishop) and the head of the Diocese, which comprises 59 "ministry units" within the Canterbury and Westland area, made up of local church parishes, certain Anglican schools and the Christ Church Cathedral Chapter. The Bishop is named as the first defendant. The second defendant is the Attorney-General, being the officer of the Crown who exercises supervisory jurisdiction over charitable trusts.

[5] CPT holds property, including a significant amount of real property, on trust for purposes and organisations associated with the Diocese (the property trusts),

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[1] Church Property Trustees is a body politic and corporate with perpetual succession constituted under s 2 of the Church Property Trust Ordinance 1854 (C), and which continues in existence by s 5(3) of the Anglican (Diocese of Christchurch) Church Property Trust Act 2003.

including land and buildings that are used by the various ministry units of the Diocese for religious purposes. Because the Diocese is an unincorporated body it cannot directly own properties and funds. In addition to the various properties CPT holds and administers, it also is responsible for various trusts established or acknowledged by the CPT Act. These include the Bishopric Estate, the Dean and Chapter Estate, and, importantly for the purposes of the CPT's application, the General Trust Estate (the GTE). The GTE is a trust fund held by CPT for general purposes associated with the Diocese.

[6] CPT arranged insurance cover for the properties it held on trust. At the time of the Canterbury earthquakes in 2010 and 2011, an insurance policy had been obtained with the assistance of the Anglican Insurance Board from Ansvar Insurance Ltd (now known as ACS (NZ) Ltd) (ACS). The insurance policy provided cover for the properties CPT held on trust and included material damage and contents insurance. For the purposes of the land and buildings owned by CPT, it was the insured party. The insured properties were listed in a schedule to the insurance policy that included the type of cover for each property, the sum each property was insured for, and the sum insured for contents. The schedule was prepared by CPT in accordance with the terms of the insurance policy and sent to ACS which calculated the premiums. The level of cover for each property was agreed in consultation with the ministry units that had the use of each property. Because CPT did not have access to funds to pay premiums itself, the practice of the Diocese was to have the insurance premiums paid upfront by the GTE and then be reimbursed by the ministry units.

[7] Many of the insured properties suffered extensive damage in the Canterbury earthquakes, with the Christ Church Cathedral being the highest profile victim of the 2011 earthquake. CPT ultimately entered into a global settlement with ACS, pursuant to which it received around $128 million, less the deductible of around $750,000 and prior payments of around $55 million (the settlement funds). With these settlement funds, CPT undertook an extensive earthquake repair programme. CPT is nearing completion of that repair programme and there is likely to be a surplus of around $9.8 million. The main reason for the surplus is that the agreement with ACS was negotiated on the basis that GST would be payable on the settlement funds when that

was not, in fact, the case. ACS itself has no contractual entitlement to the surplus and CPT is now faced with the decision of how to treat that money.

[8] A further issue that arises is that, following the earthquakes, CPT and the Diocese faced a decision as to whether to obtain further insurance cover and, if so, to what level. It was a difficult decision because the cost of insurance had increased substantially and many ministry units could not afford the premiums associated with their land and buildings. CPT itself had no ability to fund the premiums without recourse to other trust funds. As a result, it was decided that the issue would be taken to the Diocesan Synod (the Synod), being the primary governing body of the diocese. In September 2012, the Synod resolved that cover was to be placed for the 2012/2013 year, with the premiums to be paid out of the settlement funds, together with a goodwill offering from the ministry units that use the properties.

[9] Ultimately only a small number of ministry units contributed to the 2012/2013 premiums. After the Synod's September 2012 resolution, CPT became involved in contentious litigation relating to the Christ Church Cathedral. Because of that litigation, and other reasons, CPT did not pay the 2012/2013 premiums out of the settlement funds. Instead, the difference between the premiums and the amount received from ministry units was paid for out of the GTE. This arrangement was not formally documented at the time, although the CPT accounts recorded the amount as an advance on the balance sheet (that is, as an asset of the GTE). The issue that arises for CPT is whether it was entitled to reimburse the GTE from the surplus and, if so, whether interest was payable.

[10] After much consideration, CPT has formed a view as to the appropriate way to resolve the surplus and reimbursement issues. It has consulted with the Diocese, which represents the interests of the ministry units, and has sought feedback from the Christ Church Cathedral Reinstatement Trust and Christ Church Cathedral Reinstatement Ltd, which are both entities that may be impacted by the outcome of the surplus issue. CPT has also approached the Attorney-General seeking comment on these issues, to which I refer later in the judgment.

Directions in respect of the surplus issue

[11] Because CPT is not the beneficial owner of the insured properties and did not itself pay the premiums, it has expressed uncertainty as to how the surplus should be treated. In particular, the following issues have been identified:

(a) *How should the surplus be held?* Is it to be held for the purposes of the ministry units that paid the premiums, or on the same trusts as the property trusts?

(b) *How is the surplus to be allocated?* Should it be allocated to every ministry unit/property trust that contributed to the premiums, or only to those ministry units/property trusts where a claim arose under the insurance policy?

(c) *How should the surplus be divided?* Should it be pro-rata based on contributions to the premiums, or pro-rata based on the value of each claim under the insurance policy?

[12] CPT proposes the surplus be:

(a) held:

(i) as it relates to the insured properties, on the same trusts as the property trusts (as opposed to the ministry units);

(ii) as it relates to contents, for the purposes of the ministry units that own the contents (as opposed to the property trusts);

(b) allocated to all insured properties (and contents) in respect of which claims arose (as opposed to which trusts and ministry units paid the insurance premiums); and

(c) divided proportionally on the basis of the value of the insurance policy entitlements of each claim. Where there has been a total loss, the

entitlement calculation will be the amount paid out (which will have been the sum insured). For repairs, the entitlement calculation will be the final cost of repair.

[13] Directions are sought that these proposals are an appropriate way to deal with the surplus.

Directions sought in respect of the reimbursement issue

[14] CPT has reimbursed the GTE for the 2012/2013 premiums and paid interest of 4.3 per cent per annum to compensate the GTE for lost investment earnings. It has also reimbursed the ministry units that contributed to the 2012/2013 premiums so that they are not disadvantaged vis-à-vis those who did not. It seeks directions that it was appropriate to make the payment to GTE and reimburse the contributing ministry units.

Relevant legal principles

[15] Trustees are able to apply under the Act for directions. Section 66(1) provides:

> **66 Right of trustee to apply to court for directions**
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> (1) Any trustee may apply to the court for directions concerning any property subject to a trust, or respecting the management or administration of any such property, or respecting the exercise of any power or discretion vested in the trustee.

[16] In *Re PV Trust Services Ltd*, Fitzgerald J confirmed that it was not necessary that a trustee be in "genuine doubt" about a contemplated course of action before making an application under s 66.[2] The present application falls into the second of four categories of directions identified by Robert Walker J (as he then was) which the Chancery Division of the English High Court could provide to trustees. Those categories were repeated in *Public Trustee v Cooper* and endorsed by the Court of Appeal in *Chambers v S R Hamilton Corporate Trustee Ltd*.[3] The second category was described in the following way:[4]

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2 *Re PV Trust Services Ltd* [2017] NZHC 2957, [2018] 3 NZLR 160 at [47].

3 *Public Trustee v Cooper* [2001] WTLR 901 (Ch D); *Chambers v S R Hamilton Corporate Trustee Ltd* [2017] NZCA 131, [2017] NZAR 882 at [32].

4 *Re PV Trust Services Ltd*, above n 2, at [42].

> (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.

[17] In *Public Trustee v Cooper*, Hart J identified that when considering an application for blessing orders, the Court should consider three matters:[5]

> …
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> (a) First, has the trustee in fact formed the opinion which the court is asked to bless?
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> (b) Second, is the opinion formed one at which a reasonable body of trustees, properly instructed as to the proper meaning of any relevant provisions of the trust deed, could properly have arrived?
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> (c) Third, is the opinion vitiated by any conflict of interest under which any of the trustees might have been labouring?

Respondents' positions

[18] The first defendant, the Bishop, who represents the interests of the ministry units that make up the Diocese, supports CPT's application for directions and consents to the orders sought. The Bishop has been involved in discussions in relation to the application since its inception, and has taken independent advice on behalf of the Diocese and instructed independent counsel. He advises the directions sought by CPT were unanimously endorsed by the Synod on 11 September 2020, at which time the various ministry units were themselves represented.

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5 *Public Trustee v Cooper*, above n 3, at 925, cited with approval by Fitzgerald J in *Re PV Trust Services Ltd*, above n 2, at [56].

[19] The second defendant, the Attorney-General, does not oppose the making of the directions that are sought but notes it remains for CPT to satisfy the Court that those directions should be made. Because of the difficulty of some of the issues to which the application gives rise, the significant amounts involved, the fact the application is not opposed, and the fact the Attorney-General does not agree with all of the submissions advanced by CPT in support of its application, the Attorney-General obtained leave to file written submissions. These submissions briefly set out what he submits are the legal and factual issues relevant to the determination of each of the directions sought. The Attorney-General had no objection to the application being determined on the papers.

The surplus issue

[20] The concern that arises in relation to the distribution of the surplus relates to questions as to who is entitled to benefit from that sum.

Proposed disposal of the building insurance surplus

[21] The first issue is whether the surplus should be held for the benefit of the property trusts or for the ministry units that paid the premiums. CPT submits that the surplus should be held for the benefit of the property trusts. It refers to s 25 of the Act, which relevantly provides:

> **25 Application of insurance money where policy kept up under any trust, power, or obligation**
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> (1) Money receivable by a trustee or any beneficiary under a policy of insurance against the loss of or damage to any property subject to a trust, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf or under any power, statutory or otherwise, or in performance of any covenant or of any obligation, statutory or otherwise, or by a tenant for life impeachable for waste, be capital for the purposes of the trust, except so far as it would be regarded as income under any rule of law.
>
> (2) If any such money is receivable by any person other than the trustee of the trust, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustee of the trust, or, if there is no trustee capable of giving a discharge therefor, to the Crown under section 77.
>
> (3) Any such money,—

> (a) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust:
>
> (b) *in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.*
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> ...
>
> (emphasis added)

[22] CPT notes that, in the ordinary course, s 25 would govern the distribution of the settlement funds. The insurance monies received would be "held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable". However, CPT is unsure whether s 25 governs entitlement to the surplus. It notes that while the use of the words "any such money" suggest the provision should be interpreted broadly, the situation with the surplus is unique in that it represents an amount in excess of the entitlement under the insurance policy. In CPT's submission, regardless of whether or not s 25 strictly applies, as a general rule funds received under policies of insurance are to be held on trusts corresponding with the trusts affecting the properties involved. In the absence of some other factor justifying a departure from that general rule, the actual source of funds for the insurance premiums will not be considered relevant. It suggests that it is therefore the property trusts and not the ministry units that should be beneficially entitled to the surplus.

[23] In assessing this issue, CPT considered how the ministry units might possibly be entitled to the surplus, noting that any such entitlement would presumably have to arise pursuant to a resulting trust traced into the surplus. Reference was made to *Chang v Lee* where the Court of Appeal explained how a resulting trust arises:[6]

> [20] The rationale for a resulting trust is that, absent evidence to the contrary, the law presumes a person intends to retain the beneficial ownership of funds which he or she advances towards the purchase price of a property. The legal owner holds title to the property subject to the payer's equitable interest. In this way a trust results to the payer to the extent of his or her contribution. Evidence which might contradict or rebut the presumption is traditionally of an intention to gift or of consideration in the nature of satisfaction of independent indebtedness, …

[6] *Chang v Lee* [2017] NZCA 308, [2017] NZAR 1223.

[24] CPT observed that, while these principles have primarily been applied in cases relating to the acquisition of real property, they potentially also have a more general application.[7] It was contended the same principles could feasibly apply to the acquisition of insurance policies. However, having raised this possibility, CPT submitted that for the ministry units to have a beneficial interest in the surplus, it would have to have been their intention (actual or presumed) to retain a beneficial interest in the premiums, and that was clearly not the case. CPT submitted, and I accept, that it is apparent that when the ministry units paid those funds, they intended to benefit the property trusts by way of protecting the insured properties against damage, and did not intend to retain any beneficial interest in the funds. It follows that if the ministry units do not have a beneficial interest in the surplus it must be that the property trusts do.

[25] CPT submitted that its analysis is supported by Panckhurst J's decision in *Church Property Trustees v Attorney-General*.[8] In that case, CPT argued that a separate insurance trust existed over the insurance proceeds received in respect of the Christ Church Cathedral's proportion of the settlement fund. That argument was made partially on the basis that the Christ Church Cathedral Chapter (an individual ministry unit) had ultimately paid the premiums in respect of the property. However, that submission was rejected by this Court.[9] Panckhurst J found as follows:

> [43] But, I do not accept that the insurance arrangements gave rise to a resulting trust, much less an express trust, upon terms wider than Chisholm J found to apply in relation to the Cathedral. In short, any beneficial interest which the Cathedral community, represented by the Chapter, has in the material damage insurance proceeds is subject to the terms of trust applicable to the Cathedral Trust. And, I agree with Mr Gunn's submission that this conclusion is reinforced by s 25 of the Trustee Act.

[26] In summary, therefore, CPT submitted that both s 25 of the Act and general equitable principles support the surplus being held for the property trusts rather than the ministry units that paid the premiums.

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[7] See *Li v 110 Formosa (NZ) Ltd* [2018] NZHC 3418 at [221].
[8] *Church Property Trustees v Attorney-General* [2013] NZHC 678, [2013] 2 NZLR 428.
[9] At [43].

[27] I accept that s 25 of the Act applies to the surplus. Notwithstanding the funds in question were surplus to the programme of reconstruction for which the bulk of money paid under the insurance was used, it was money received "under a policy of insurance against the loss of or damage to any property subject to a trust" as per s 25(1). The Attorney-General acknowledged that this indeed was the case. In coming to that conclusion, the Attorney-General also considered the possibility that the general rule under s 25(3) could be displaced by evidence that, when paying the premiums, the ministry units intended to retain an interest in the money paid, or that the money was advanced as a loan. However, it is apparent from the evidence filed that the ministry units made the payments as a goodwill gesture and did not seek to retain any beneficial interest in the premiums. The Bishop makes it clear that the money advanced by the ministry units was done so on the basis of goodwill and without expectation of recovery. As a result, the Attorney-General supports CPT's proposal.

[28] In any event, even if s 25 does not have application in this situation, as the Attorney-General notes, there is no rival claim to the surplus. Regardless of whether CPT is correct in its submission that as a general rule the funds received under policies of insurance are to be held on trust corresponding with the trusts affecting the properties involved, the proposed disposal appears unobjectionable in the circumstances of this case.

[29] On the basis of the available evidence, I therefore accept the course sought to be followed by CPT is proper and a direction to that effect is appropriate. The surplus as it relates to the insured properties is to be held on the same trusts as the property trusts.

Proposed disposal of the contents insurance surplus

[30] CPT acknowledges the position with respect to contents is "slightly different". The insurance policy covered both the insured properties and the contents inside of them. The settlement funds included an amount for contents claims and, while a relatively small proportion of the surplus, there is a component sum that corresponds

with those contents claims. CPT referred to the earlier decision of *Church Property Trustees v Attorney-General*, where it was observed:[10]

> [92] While CPT has received the payment, its obligations will differ depending on whether it, or the Chapter, owned the contents. If CPT owned the contents as trustee then, by virtue of s 25(3) of the Trustee Act, it is obliged to hold the proceeds on equivalent trusts. For example, if contents were held by CPT under the Cathedral Trust, then CPT would be obliged to use the proceeds for the same purpose, being to replace the contents of a Cathedral on Cathedral Square. If it did not hold the contents as trustee, then it holds the proceeds as bare trustee for the actual owner of the insured items, and s 25 of the Trustee Act does not govern their use.

[31] Dunningham J held that the proceeds of the contents insurance relating to the contents of the Christ Church Cathedral were held on trust for and thus owned by its community rather than by the Cathedral itself. As a result s 25(3) did not apply and it was determined that the proceeds of the contents insurance should be held by the Cathedral Chapter on behalf of the community.[11]

[32] Following that decision, CPT wrote to the ministry units asking them to check their records and advertise within their communities to ascertain whether the contents of the insured properties were held on trust. No notifications were received, which suggested that the contents were beneficially owned by the ministry units themselves. Accordingly, CPT submitted that to the extent the surplus relates to contents related claims under the insurance policy, those amounts should be held for the ministry units rather than the property trusts. An order is therefore sought that the surplus from the contents insurance should be held for the benefit of the ministry units, rather than for the benefit of the property trusts. In that regard, CPT relies upon the evidence of Mr Gavin Holley, the General Manager of CPT, that the contents are owned by the ministry units, which is supported by the Bishop's evidence on behalf of the Diocese.

[33] The Attorney-General considered that it was unclear whether CPT's case was that the money paid on behalf of the ministry units was subject to s 25(3), or whether it simply relied on the general rule that funds received under policies of insurance are to be held on trusts corresponding with the trusts affecting the properties involved. In

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10 *Church Property Trustees v Attorney-General* [2015] NZHC 1843.
11 At [103]–[104].

supplementary submissions, CPT clarified that it relies on *Church Property Trustees*,[12] and does not dispute the application of that case to the present circumstances. It confirmed that, in accordance with that decision, the proportion of the surplus which relates to contents is to be held for the ministry units (which beneficially own the contents). There can be no objection to that approach. Accordingly, on the basis of the available evidence, I consider the direction sought by CPT in respect of the disposal of the surplus, insofar as it relates to the contents insurance, is appropriate.

Proposed allocation of surplus

[34] The next issue is whether the surplus should be allocated to those property trusts or ministry units that paid the premiums or to those that had valid claims under the insurance policy. CPT submitted the latter course is appropriate despite the paucity of guidance in the case law. It invited the Court to direct the surplus be allocated amongst the property trusts and ministry units in accordance with the insurance claims made, rather than in accordance with which property trusts or ministry units paid premiums.

[35] Although there was a single insurance policy in respect of all church properties, only some of those properties suffered damage and it was therefore only in respect of some properties that claims were made. The payment of premiums did not of itself give rise to any entitlements under the insurance policy. It was the occurrence of damage to the insured properties that gave rise to an entitlement and which led to the global settlement agreement, which in turn led to the surplus. Because the settlement agreement was negotiated, and money paid under that agreement on the basis of the loss or damage suffered by those properties, CPT submitted that it is logical that an entitlement to a proportion of the surplus should be based on whether the property trusts had a claim under the insurance policy, rather than whether a premium had been paid.

[36] CPT also submitted that such an approach is more equitable because it recognises and gives benefit to those property trusts (and their corresponding ministry units) that suffered during the Canterbury earthquakes. It observed that it would be a

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12 Above n 9.

strange outcome if ministry units that suffered no loss, and therefore had no claims under the insurance policy, received a windfall because of the loss suffered by other ministry units.

[37] For its part, the Attorney-General agreed that the same reasoning that underpins the first two directions is consistent with the surplus being allocated in accordance with the claims made, rather than in accordance with premiums paid. I agree. On the basis of the evidence, I accept that the directions sought in relation to the allocation of the surplus to the property trusts or ministry units that incurred damage and made claims under the insurance policy is appropriate.

Division of premiums

[38] The final question raised in relation to the distribution of the surplus is how it should be divided between the various ministry units — whether it should be divided on a pro-rata basis in proportion to the premiums paid, or be based on the value of the claims made under the insurance policy. CPT submits the latter approach should be taken.

[39] CPT argued that the division of the surplus in accordance with the contractual entitlements of each claim reflects the origins of the surplus. It is noted that the surplus arose as a result of claims made under the insurance policy and that the value of each ministry unit's claim was based on the damage it suffered, rather than the amount of the premium it paid. CPT submitted, and I accept, that a more reasonable and realistic approach to the division of the surplus is one based upon the value of the claim made, rather than the premiums paid. The ministry units, including those which could be adversely affected by such an approach, have collectively agreed to the proposed course through the Diocese. I accept such a direction is appropriate.

The reimbursement issue

[40] The 2012/2013 insurance premiums increased significantly following the Christchurch earthquakes. Various ways were considered to fund these increased premiums. Ultimately, they were paid in large part by the GTE ($860,634.48) and by a smaller offering from some ministry units ($241,242). CPT has now reimbursed

both the GTE and the contributing ministry units from the surplus on the basis that these contributions were advanced as loans. It seeks the Court's validation of its reimbursement of the GTE and those ministry units which contributed to the premium.

[41] Mr Holley set out in evidence why CPT's actions were appropriate. He deposed that the reimbursement of the GTE was consistent with the Synod's resolution of September 2012, when it was resolved that the 2012/2013 premiums would be paid out of settlement funds, together with a goodwill offering to be sought from ministry units that use the trust properties, and that the reimbursement reflected the accounting treatment of the advance from the GTE. Mr Holley observed that in retrospect CPT could have entered into a formal loan agreement until the process was complete and it was clear whether or not there was any surplus available. It was suggested that it would be "unfair", given the existence of the surplus and the fact that all ministry units benefited from having the insurance cover in place, if the GTE and certain parishes were left out of pocket, with the effect being that the available surplus increased. Mr Holley was also of the understanding that CPT had a right to repayment arising from its trustee indemnity, which was a matter developed further in CPT's written submissions.

[42] CPT submitted that it was entitled, as a matter of law, to be indemnified for the costs that it incurred in its capacity as trustee of the property trusts, which extended to the 2012/2013 premium. It submitted the fact CPT paid the premium from GTE funds is not strictly relevant to its rights in respect of the property trusts, being an issue between itself and the GTE. CPT submitted that, to the extent it had not been reimbursed, it had a lien over trust property.[13] On the basis the property trusts are beneficially entitled to the surplus funds, CPT argued it had a lien over those funds until the 2012/2013 premiums had been repaid. In support of its argument, CPT sought to draw an analogy with the principles set out in s 34A of the Act, which provides that where a trustee pays any premiums in respect of any policy of insurance it will have a lien on the policy money for the amount of the premiums it paid, in addition to interest on that sum. CPT acknowledges that the section is not directly applicable because the 2012/2013 premiums do not arise from the same policy of insurance as that to which

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[13] Andrew Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [62.5.3.1(6)(g)].

the surplus relates. Nevertheless, it submitted the principle set out in that section reflects the general rules regarding equitable liens over trust property.

[43] CPT maintained that the position is the same as it relates to the repayment of the ministry units that contributed to the 2012/2013 premium. It submitted the fact that CPT was subsequently reimbursed on an ex-gratia basis by third parties for a small proportion of the premium did not lessen CPT's right to an indemnity and that it was open to it, once it exercised that indemnity, to repay the ministry units.

[44] As a secondary argument, CPT, relying on the evidence of Mr Holley and the Bishop, emphasised the longstanding practice of CPT and the Diocese to have CPT meet the upfront cost of insurance premiums on behalf of the property trusts and corresponding ministry units who invariably paid the insurance premiums on behalf of the trusts. CPT would subsequently be repaid by the ministry units upfront or across the year of the policy. On that basis, it was submitted the repayment to the GTE was consistent with both that general practice, albeit in a more factually complicated setting, and, as previously noted, with what had originally been decided by the Synod in 2012.

[45] The Attorney-General took a different approach and focused on whether or not the payment to the GTE constituted the repayment of a loan. He submitted the starting point must be s 25(3) of the Act, which he accepted applied to that portion of the surplus representing building insurance. However, the Attorney-General queried whether s 25(3) could apply in relation to the contents component of the insurance. That issue is discussed shortly.

[46] Insofar as the surplus related to building insurance, the Attorney-General considered that s 25 must take effect subject to the repayment of any loans which CPT had taken out on behalf of the property trusts. The Attorney-General referred to Mr Holley's evidence of CPT's longstanding practice of paying insurance premiums from available funds, including from the GTE and contributions from ministry units, and to then reimburse the fund from which the payment was taken. Those advances were not formally recorded as loans but it was accepted that they were understood by all involved to be a loan and that, from the time payment was made until CPT was

reimbursed, interest was charged. As noted, these advances were treated as loans for accounting purposes.

[47] The Attorney-General accepted that insofar as the surplus must be applied to the property trusts under s 25(3), there is no reason why CPT as trustee of the property trusts could not apply the money received to pay the loans taken out on behalf of the property trusts. For those reasons, the Attorney-General was of the view that, insofar as the Court could be satisfied the payments from the GTE represented a loan, a direction that the decision to repay the GTE with interest for its contributions to the 2012/2013 premiums from the surplus would be unobjectionable.

[48] It follows from the foregoing that whichever analysis is adopted, the CPT's course of action should be viewed as legitimate and proper. I am therefore satisfied that it was appropriate for CPT to compensate the GTE in the way it did and that there should be directions consistent with that course of action.

Payment to the parishes

[49] The Attorney-General raised an issue as to whether its conceptualisation of the repayment arrangement can extend to repayments to the contributing ministry units. He acknowledges that there may, in any event, be no difficulty in CPT accepting money from the parishes for the purpose of paying the premium, but observes that there are "real questions" as to whether it constituted a loan and, if it was, whether CPT was entitled to repay the loan with interest from the settlement agreement surplus.

[50] The Attorney-General notes that Mr Holley and the Bishop provided evidence in relation to the payments being a loan, but their focus was more on the position of the GTE. It was also noted that the suggestion the payment from the parishes was a loan is difficult to reconcile with the minutes of the Synod meeting in which the decision of how the premiums were to be paid were set out. That minute provided:

> … directs the Church Property Trustees to pay the premiums for Mission and Ministry Units and other Diocesan entities for the remaining eight months of 2012; such premiums to be paid out of insurance proceeds received by the Church Property Trustees *after a free will offering* has been asked for and

> received from the parishes of the diocese to assist with the cost of insurance for the Diocese.
>
> (emphasis added)

[51] CPT, for its part, however, maintains that it is not reliant upon establishing that the payments from the ministry units were loans. It acknowledges that the payments from the parishes were in the nature of goodwill offerings and not loans, as Mr Holley himself explained in his evidence. Instead CPT relies, insofar as it relates to the ministry units, on it being entitled to a full indemnity for the costs of the 2012/2013 premium. CPT reiterates that the fact it was for a small proportion of the premiums subsequently reimbursed on an ex gratia basis from third parties, does not lessen CPT's right to an indemnity, and that it was open to it, once it had exercised its indemnity, to repay the ministry units.

[52] I am prepared to proceed on that basis. It would clearly be wrong for a trustee to exercise its indemnity and also retain the goodwill offering. Furthermore, as noted by CPT, the ministry units should not be disadvantaged as a result of having made payments in good faith during the difficult period in the aftermath of the Christchurch earthquakes. Failure to reimburse these parishes would result in an inequitable outcome as between the various ministry units. I therefore accept that CPT's approach is an equitable one that was legitimately open to it. A direction in the terms sought will extend to these payments.

The payment of interest

[53] With respect to the payment of interest on the 2012/2013 premiums, CPT justifies the payment of interest to the GTE on three bases. First, it is noted that the Diocese, which represents the interests of the ministry units and which could be adversely affected if the payment of interest were considered to be an unjustifiable expense, has agreed that interest should be paid to the GTE. Second, while not directly applicable, s 34A of the Act demonstrates that in a situation akin to the present circumstances interest is contemplated to be payable. Third, the payment of interest at the prevailing rates reflects the actual loss incurred by CPT in its capacity as trustee of the GTE from having paid the 2012/2013 premium. In order to fully reimburse

CPT, interest should be paid. I accept those reasons support the payment of interest. The Attorney-General does not contend otherwise.

Orders

[54] The following directions are made pursuant to s 66 of the Act and/or the Court's inherent jurisdiction:

(a) CPT may hold the surplus funds:

(i) as they relate to insured properties, on the same trusts as the particular insured property is held;

(ii) as they relate to contents, for the purposes of the ministry units that own the contents;

(b) CPT may allocate the surplus funds to all insured properties and contents where entitlements arose under the insurance policy;

(c) CPT may divide the surplus funds proportionately on the basis of the value of the policy entitlements of each claim under the insurance policy; and

(d) CPT's refunding of the advances made by the GTE and from ministry units to pay for the 2012/2013 premium including interest was lawful.

[55] In addition, the following orders are made:

(a) CPT may recover its indemnity costs of, and incidental to, this proceeding from the surplus funds, pursuant to its indemnity;

(b) The costs of the Bishop, in his capacity as representative of the Anglican Diocese of Christchurch, of and incidental to this proceeding may be met from the surplus funds on an indemnity basis.

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